WOMEN AND LAW IN ZIMBABWE: ACCESS TO JUSTICE ON DIVORCE

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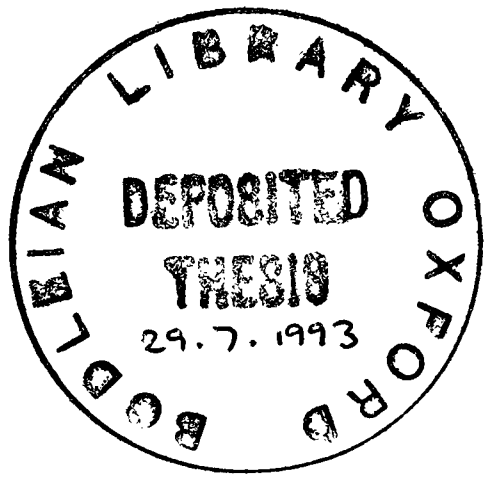

Women and Law in Zimbabwe: Access to Justice on Divorce

Fareda Banda, Somerville College, D.Phil, Michaelmas 1992.

This thesis of approximately 98000 words is an empirically based study of the divorce process and women's experiences of the law. It begins by looking at the historical background of marriage and divorce through the different periods starting with colonization. It then looks at modern marriage and divorce. This is a sociological study of the types of relationships which people have and goes beyond the three state recognised marriages to look at other more informal unions and at the modes of dissolution thereof. It then discusses the research design and relates the study population to the general population before moving on to consider the reasons for the women's dissatisfaction in their relationships and the process of justifying or legitimating their discontent.

The helpseeking careers of the women are examined paying particular attention to the agents consulted and the advice that they received from the various agencies. A theory of disputing which sees the litigation process as being less orderly and more dynamic than that advanced in traditional literature on dispute processing is advanced. The thesis then moves on to look at the women's use of the formal legal system examining barriers to access, the use of lawyers as the agents of transformation of disputes from the informal into the formal sphere and also at the provision of legal aid. The various actions instituted are considered in greater detail as are the difficulties encountered in trying to enforce the judgements obtained in court. The final data based chapter is an examination of the women's post-divorce lives from an economic and social perspective.

Ultimately, it would seem that the problem may not be one of obtaining access to law, but rather of trying to obtain substantive satisfaction of the claim. Methods of enforcement and at state provision of assistance to lone parent families is considered in the light of constraints facing a developing country with limited resources.

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PREFACE

Much used, but little understood, the phrase "access to justice" has remained a nebulous concept. For many, the phrase is synonymous with due process and the ideals behind the rule of law so that the concept is understood to mean:

> "The right to one's day in court, the right to be heard, the right to take part in procedures through which one's fate is determined all provide the basic substance of due process, which is, in turn, at the heart of our conception of fairness and justice."[1]

Rooted in legal ideology, this definition gives primacy to law and legal institutions. However, it has been noted that:

> "The identification of a social problem as a legal need rather than as some other sort of problem altogether is dependant on the place that law occupies in the society concerned and especially the extent to which legalism permeates social consciousness. To identify a problem as a legal need is to make a particular judgement about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution."[2]

The users of the law, the parties, may construct the problem of access to justice differently. Indeed, the women on whom this thesis is based did not see access to justice simply in terms of "having their day in court". Less concerned with procedural issues, their perception of access involved substantive satisfaction of their claims. However, even with this more expanded view of access to justice, law remains a necessary component. In conceptualising the problem, therefore, it becomes important to see what role law plays in trying to obtain access to justice for women at divorce in Zimbabwe. It is this issue which the thesis addresses.

Preface

[1] Sarat, A. (1986) at p.527.
[2] O'Malley, P. (1983) at p.104.

1:1 INTRODUCTION

All research has a stimulus or starting point. For me (the researcher) that stimulus was provided whilst working for the Harare Legal Projects Centre, a non government organisation in Zimbabwe specialising in delivering legal services to the rural areas. It was there that I experienced at first hand the problems encountered by people in trying to vindicate their rights.

> "To obtain the services of a highly trained lawyer for litigation is an expensive proposition, whether the compensation is provided by the client or by the state. In market economies...the inescapable fact is that without adequate compensation, legal services for the poor tend to be poor. Few lawyers will provide such services and those who do tend to perform them in a substandard fashion."[1]

In Zimbabwe, most of the people seen by the researcher at the Legal Projects Centre had problems related to marriage and divorce. The limited exposure to the problems encountered in trying to get access to legal services had shown that women were particularly disadvantaged.[2] Not only did they lack economic resources, but they also did not have legal competence, and appeared not to have the socio-psychological resources needed to pursue a claim to its successful conclusion.[3] It was for this reason that a study of women's access to justice on divorce was undertaken. The researcher wanted to know whether or not women encountered any difficulties in getting to the formal legal system and, if they did, what these difficulties were and how they could be resolved?

A study of divorce necessitates an examination of marriage, maintenance, custody and property when matrimonial assets are re-distributed. It therefore provides one with an opportunity to survey many of the areas which affect women's everyday lives. Moreover, given the researcher's interest in access to legal services, divorce law was a fruitful area to focus on:

> "...because divorce has become so widespread, it is probably the most common occasion for ordinary citizens to interact with courts and the legal system."[4]

Given the researcher's legal background, the research question was grounded in law, so that the primary concern was in looking at ways in which women could get better access to the legal system, the assumption being that this would provide them with an avenue for solving their problems.[5] The issue of access to law is one which has generated extensive literature. However, rich and varied though the information in this literature was, the reasons advanced for access problems still remained inadequate for the purpose of the research, as they were mainly based on research undertaken in Western countries where the provision of legal aid, although by no means adequate to meet the demand, is more comprehensive than that found in Africa, and Zimbabwe in particular.[6]

Moreover, the researcher was wary of transposing Western models and solutions into a context far removed from that in which they were designed to operate.[7] Tied to this was the realisation that these models were designed to be used in countries with unitary systems of law and marriage. The

researcher knew that the situation would be more complicated in Zimbabwe, where two systems of law operate, *viz.* customary and general law, and which has three types of marriage each with different consequences both during the marriage and on breakdown.[8]

Background reading had also shown that even in the United States and Britain where women have access to welfare schemes, they suffered great economic hardship after divorce, hence Weitzman's frightening assertion that:

> "...research has shown that, on average, divorced women and the children in their households experience a 73% decline in their standard of living in the first year after divorce. Their former husbands in contrast experience a 42% rise in their standard of living."[9]

Maclean, although contending that the economic gap between the former spouses decreased over the years, showed that the prognosis was not much better in England.[10]

Finally there was the realisation that, in Zimbabwe, women comprise the majority of petitioners in divorce cases. Since the petitioner commences the action, the implication is that women need, at least in the initial stages, to obtain access to law. This is due to the fact that the woman is usually in a position of financial dependence and is likely to institute an action for divorce in the hope of getting money from her ex-husband in order to look after the family.

It became clear early on that the only way to answer the research question fully was by interviewing the people most

intimately connected with the process of seeking access to legal services, namely the women seeking divorce. This conception led to the adoption of a socio-legal approach and to embarking on the empirical work on which this study is based.

1:2 Shifting Perspectives

During the fieldwork and data analysis, the research question came to be reconceptualized. The original assumption had been that all that was needed to satisfy the problem of access to law was the provision of more lawyers to assist people in getting to court. For the vast majority of women in the sample, however, the court was not simply the place where they sought "law" or "justice" or a resolution of the dispute but the place where they went to get material help. Thus the research question came to be expanded from a study of access to law, to a study of access to justice which led to including a consideration of access to an equitable distribution of resources.

It seemed therefore that simple access to lawyers and courts did not constitute the resolution of the problem. Rather, the data suggested that one should be looking at getting to law not as an end in itself but as a means to an end - the desired end being the actual substantive satisfaction or enforcement of the claim. Cappelletti and Garth note that:

> "Indeed the right of effective access is increasingly recognised as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication."[11]

1:3 The Process of Data Collection

Qualitative rather than quantitative research methods seemed best fitted to collecting the data needed to address the research question. The researcher was not trying to document the statistical frequency of access problems, but was more interested in finding out about women's experiences of the difficulty or otherwise of getting a just allocation of resources. Personal interview as a research instrument seemed to be an appropriate method of data collection. An interview schedule was prepared and the marriage histories of 97 women were collected. In addition, 7 lawyers, a Judge of the High Court and others charged with the administration of law in Zimbabwe were interviewed. The importance of including this latter group is noted by Smart:

> "Solicitors are central to the whole process and operation of matrimonial law. They perform the function of gatekeepers, allowing lay people limited access to law, and they also act as mediators and translators. They mediate between parties and between individuals and the courts, and they translate personal conflicts into legally recognisable categories of dispute."[12]

The interviews were undertaken over two periods of three months each in 1990 and 1991. The women were divided into two groups; those with customary marriages were interviewed in 1990 and those with civil marriages in 1991. The 1990 sample was the larger comprising 76 women of whom two thirds had unregistered customary law unions. 80 of the interviews were conducted in Shona, one of the two vernacular languages and the researcher's mother tongue. The rest were carried out in English. The interviews were taped in the vernacular and

later translated into English by the researcher. As notes were taken during the course of the interview it was possible to cross-check the transcriptions for accuracy.

When preparing to carry out the fieldwork, the researcher expected to find, on the basis of the literature, that there were certain barriers which would preclude people and women in particular from obtaining access to the law. But rather than testing specific hypotheses in this area, the researcher saw the development of grounded theory as described by Glasser and Strauss as being closer to her research needs:

> "Generating a theory from data means that most hypotheses and concepts not only come from the data, but are systematically worked out in relation to the data during the course of the research."[13]

In an area where so little is known, it seemed more important to explore the issues emerging in a relatively flexible way, rather than attempting a full explanation. It was more important to remain open to the possibility of new issues than to answer precisely why so few women acquired legal advice. The data has also been analysed on this basis so that the arguments and presentation of the thesis are grounded in the data collected.

1:4 Re- Re-defining The Research Question

Despite the reconceptualisation of the research question to embrace justice in the allocation of resources, it was recognised that law was still an important component in looking at access to justice. Indeed, Glendon, argues that a

country's law should be seen:

"...as one of the ways that society makes sense of things...Law is part of a distinctive manner of characterising factual situations so that rules can be applied to them, and second, in how they conceive of the rules themselves. It is to be expected that legal systems compared in this manner will differ in the stories they tell, the symbols they deploy and the visions they project."[14]

The research question thus became: What role does law play in women's search for justice at divorce? Eekelaar's model of the role of state intervention or law in family life was found most useful and is adopted for the purpose of this thesis. He sees the law as performing three functions within the family law field:

"The first is to provide mechanisms and rules for *adjusting* the relationships between family members when family units break down. The second is to provide *protection* for individuals from possible harms suffered within the family. The third is to *support* the maintenance of family relationships." [15]

Although touching on the last two functions this thesis is primarily concerned with the first. Eekelaar posits that at the point of divorce the parties can either look back, examining the history of the marriage, or they can look to the future, making plans to ensure that future needs are met. He calls the first approach the method of justice and the second approach he calls the method of welfare.[16] Although based on the concept of irretrievable breakdown, the Zimbabwean system still relies on the old grounds of fault to prove that the marriage has broken down and hence is backward looking and therefore based on the justice principle.

Eekelaar contends that in making adjustments at divorce, the

law should aim to maximise the parties' future opportunities whilst minimising conflict between them.[17] In trying to assess whether the present arrangements encourage or reflect this vision of divorce law he contends that it is necessary to look at the role of lawyers in divorce proceedings which in itself necessitates an examination of whether or not it is efficacious to leave the "settling up" or dispute resolution process entirely in the hands of the legal profession. This in turn leads to a consideration of whether the court system still has a role to play in divorce. This suggests a need to look at the feasibility of using alternative fora including the family; and the role of mediation, conciliation and negotiation in making future arrangements as between the parties. In substantive terms this also involves examining the rules governing the distribution of assets and the determination of maintenance payments after divorce, all of which issues are central to the thesis.

1:5 Structure of the Thesis

The thesis is divided into two parts, each containing five chapters. The first part gives the conceptual framework and provides the substantive background. It describes the research question and the need for empirical investigation and data collection whilst setting the background for a discussion of the historical and current state of marriage and divorce laws in Zimbabwe. Part two presents the empirical data, tracing the lives of divorcing women from the time they complain about problems in their marriage through their contact with legal processes to looking at their lives after

the dissolution of the marriage or union.

1:5(a) Part One

A survey of the literature addressing access to justice, mediation and the role of lawyers in the divorce process follows the introduction. This chapter also surveys studies of marriage and divorce both within the Zimbabwean context and elsewhere. Before analysing the data there is a need to contextualise the subject matter by looking at the history and development of marriage and divorce laws in Zimbabwe. This is done in chapters three and four. Chapter 3 traces the history of marriage laws from the time of British colonisation of the country in 1889 to the present day. Particular emphasis is placed on the changes and development in customary law. Similarly, the bridewealth or *lobolo* institution is explained. Here too, an attempt is made to chart the changes in the popular conceptualisation of *lobolo* from its being regarded as a token payment in the form of hoes and axes to its commercialisation through the introduction of the cash element.

Chapter 4 looks at contemporary marriage and divorce in Zimbabwe. It is a sociological examination of marriage and the various other unions in which people find themselves. It goes beyond the three legally recognised forms of marriage to examine "irregular unions" which are the other types of relationships in which people are found. The three forms of State defined marriages are firstly marriages under the Marriage Act, which are called civil marriages because they

are contracted under the general law. They are monogamous in nature. The second type of marriage is marriage in terms of the African Marriages Act which is a registered customary marriage. Unlike the first type of marriage, a man is permitted to have more than one wife thus making it a potentially polygamous marriage. The third type, which is the most popular, is called a customary law union because it is not registered. However it is recognised as being a formal marriage under customary law. Once some of the *lobolo* has been paid the two are regarded as being married according to custom. This payment of bridewealth is in fact the unifying factor between all three marriage groups, for whilst the payment of bridewealth is not a pre-requisite to entering into a registered marriage, few black women would think of registering their marriage before this customary formality had been completed. What distinguishes the three marriages is that whilst a formal court order of dissolution is required for the first two marriages, it is not necessary for parties with a customary marriage to appear before any formal court of law.

In the fifth chapter a more detailed account of the method of data collection is given together with a description of the sample. The reasons for choosing the interview as a means of data collection over other methods is discussed, as are the politics of interviewing women who were, in educational and socio-economic terms, disadvantaged. The issue of reciprocity in the research setting is considered. The sample is described and placed in the context of women as a whole in

Zimbabwe, using demographic data produced by the Harare Central Statistics Office.

1:5(b) Part Two

The second part of the thesis presents the findings. Chapter 6 addresses the issue of the beginnings of dissatisfaction with the marriage and the realisation of unmet needs. It starts by looking at the women's expectations of marriage, before moving on to look at how they express their discontent when these expectations are not met. In this regard it would appear that most of the women in the sample subscribed to the institutional form of marriage in which the husband is the breadwinner and the wife is the carer. This role socialisation was reflected in the way the women expressed their grievances, for lack of financial support from the partner was the most frequently cited complaint. In other areas, the culturally constructed gender divisions which state that men have certain "privileges" meant that women had to find other ways of "legitimating" their dissatisfaction. This was often done by claiming that innocent third parties, usually the children, were suffering as a direct consequence of the man's "illegitimate" behaviour.

Chapter 7 is an attempt to look at how the women went about seeking help to solve their marital problems. It is an examination of the help-seeking process and looks at the various "pre-legal" agents approached by the women for assistance. Inherent in this discussion is an examination of mediation so that it becomes valuable to explore the problems

that were experienced by women in trying to obtain help in the informal sphere. The politics and assumptions underlying the woman's approach to a particular agent and the agent's reaction and advice are also explored. Some of the criticisms which have been made about the alternative dispute resolution movement are explored here in greater detail, especially having regard to the subordinate position of women in customary law and the weak financial position of the woman vis-a-vis her partner and family.

Chapter 8 returns to the original focus, which is that of obtaining access to formal legal structures. It begins by examining the provisions for legal aid in Zimbabwe and by looking at the role of lawyers in the divorce process. It then proceeds to look at the readjustment process which includes looking at custody arrangements, the redistribution of matrimonial assets, and at provision for maintenance. The women's satisfaction or dissatisfaction with the court's treatment of their claim is an indication of whether or not they perceive that justice has been done. Given the fact that maintenance was the most popular claim, it would appear that non-payment or lack of effective enforcement procedures was the main source of dissatisfaction.

The last substantive chapter is a study of what happens to women after their marriages or unions have been dissolved, that is, the economic and social consequences of divorce. It is at the stage of dissolution that the dependent position of women is revealed. Women without husbands find themselves

without the necessary financial resources to look after themselves and their children. This chapter examines the ways in which women attempt to overcome this problem. At the same time, divorce also brings with it a great deal of social upheaval. The emotional effects of divorce on the woman and her children are examined by charting the changes in her relationships with the children, former spouse, family and friends.

Chapter 10 is the conclusion, drawing together the arguments presented in the thesis. Ultimately the aim is to assess the role of law in attaining justice as between divorcing parties. To discover this one has to look at the divorce process itself, and at the way it handles the distribution of material resources as between the parties. Most importantly, however, and this is at the centre of Eekelaar's thesis, the question becomes how far are children's needs met and interests protected at divorce? If, as the findings presented in the thesis suggest, legal remedies are not in themselves enough, the question becomes how can resources be better distributed so that particular groups, particularly women with children, are not disadvantaged? To answer this question one has first to decide on whom the duty to provide support for women and children lies - the former partner or the State, or should one be looking at ways of getting both parties to assist?

A survey of the literature follows.

[1] Cappelletti, M and Garth, B. (eds) (1978) at p.34.
[2] Cf Burman, S. (1984) at pp.117-139.
[3] Harris, D. et al. (1984) at pp.47-48 identify these as among the reasons why legal needs do not get met.
[4] Mnookin, R. and Kornhauser, L. (1979) at p.990, Cf Ingelby, R. (1992) at p.1.
[5] Cf Norris, P. (1982) at pp.28-37.
[6] See, for example, the four volume survey, Cappelletti, M and Garth, B. (eds) *Access to Justice* (1978) Zander, M. (1978).
[7] Cf Kahn-Freund, O. (1974) pp.1-27, Cf Burman, S. (1992) at pp.367-379.
[8] There is customary and general law which is the Roman -Dutch law. The three types of marriage are; Marriage under the Marriage Act (Chapter 37) open to all Zimbabweans. Marriage under the African Marriages Act (Chapter 238) open only to black Zimbabweans. Unregistered Customary Law Unions open only to black Zimbabweans and given limited legal recognition.
[9] Weitzman, L. (1985) at p.xii.
[10] Maclean, M. (1991) at p.19, Maclean, M. (1987) pp.42-55.
[11] Cappeletti, M. and Garth, B. (1978) vol.1 at p.8.
[12] Smart, C. (1984) at p.160.
[13] Glaser, B. and Strauss, A. (1967) at p.6.
[14] Glendon, M. (1988) at p.4, Cf Eekelaar, J. (1991) at pp.5-6.
[15] Eekelaar, J. (1984) at p.25.
[16] Eekelaar, J. (1984) at p.42.
[17] Eekelaar, J. (1984) at p.54.

CHAPTER 2 - ACCESS TO JUSTICE - THE LITERATURE

2:1 Introduction

Although this study is situated in the context of Zimbabwe, the problem of access to the law is a universal one. The researcher's interest in problems encountered in getting access to law necessitated an examination of the literature dealing with problems of access to law to see how other writers had perceived the problem and the solutions they had devised. This chapter reviews the literature on access to justice as well as looking at the literature on the law relating to marriage and divorce, both in Zimbabwe and also in other jurisdictions.

The chapter begins by looking at barriers to law before examining the responses to the problems of obtaining access to justice. This involves an examination of legal aid and the role of lawyers and courts in the whole access to justice movement. The study then moves to focus on alternative methods of delivering access and more specifically at the informal justice movement concentrating on studies of conciliation and mediation. The chapter closes with a review of previous works on marriage and divorce law.

2:2 Access to Justice: The Literature

Many volumes of work have been written advancing different reasons for the use or non use of formal legal structures in seeking to obtain access to justice.[1] All are based on the assumption that the person seeking access has defined the

problem as being a legal one. The implication therefore is that a failure to perceive injury or to define the unmet need as being a legal one is the reason why many people do not seek access to the law.[2]

In the literature, the barriers to the use of courts are generally divided into two categories: economic and psychological.

2:3 Barriers to the Use of Courts

The cost or expenses argument is frequently advanced as a factor which hinders access to justice.[3] The contention is that if the cost of obtaining legal services is unaffordable, then people without financial resources will not be in a position to use the law. Zander challenges this contention saying that many of the studies advancing this argument have focused on the poor rather than investigating the problem in the whole population.[4] He goes on to note that empirical evidence has shown that even people who could afford to pay for legal services do not seek them, whilst some poor people manage to get assistance, so that lack of money cannot be seen as the sole or main cause of people not using the law.[5]

However, in a country like Zimbabwe where wages are low, it cannot be denied that the issue of cost of legal services weighs heavily on the minds of most potential litigants and is indeed one of the reasons cited by the women in both groups in the study for failure or delay in seeking redress.[6] Johnson introduces a second dimension to the cost or expense argument

noting that, even if the person is able to afford to pay for legal services or if legal aid is available, opportunity costs in the form of lost wages may still render the institution of legal proceedings prohibitive.[7] He also notes that if the stakes are modest then it may not be worth the person's while to institute or defend an action.[8] This argument is particularly pertinent in cases involving on-going relationships for there is a general reluctance to institute proceedings for fear of further straining the relationship.

On the "psychological" front, Galanter, like Carlin and Howard, argues that it is not so much a case of financial poverty as one of a lack of legal competence which hinders access to justice:

> "...lack of capability poses the most fundamental barrier to access, and, correspondingly upgrading of party capacity holds the greatest promise for promoting access to legality. Party capability includes a range of personal capacities which can be summed up in the term "competence" : ability to perceive grievance, information about the availability of remedies, psychic readiness to utilize them, ability to manage claims competently, seek and utilise appropriate help etc."[9]

On the basis of these criteria, women would seem to be particularly disadvantaged, not having the requisite socio-psychological resources needed to both initiate and pursue actions to their successful conclusion. In another article Galanter argued that it was familiarity with the legal system which determined whether or not a party used the legal system.

In a leading article entitled "Why the Haves Have Come out Ahead: Speculations on the Limits of Legal Change" he

propounded the theory that the party who frequently used the legal system (the repeat player) would have an advantage over the party without a history of contact with the law (the one shot player).[10] This, Galanter argued, was because the repeat player would as a general rule have more money, power and experience than the one shot player and would therefore be in a position to mobilise the law more effectively.

For Genn, the major barriers to the use of legal services include: a lack of knowledge about legal rights, fear of costs, problems in locating a solicitor and apprehension about making contact with the solicitor.[11] Zander's thesis is that it is contact with an individual who knows how to utilise the law which determines whether or not someone gets access to law.[12] In a later book, he supports this assertion citing the survey carried out by the Oxford Centre for Socio-Legal Studies on claiming compensation after an accident.[13] That survey concluded:

"The accident victims who do succeed in obtaining damages for their injuries are a strange group. They are not necessarily the most seriously injured, nor those who have suffered the greatest losses. They are not the people with the most wealth or influence. But they do appear to have an important advantage in that they have access to advice without soliciting it."[14]

Other factors which have been advanced for the non use of legal services include ignorance that one has a claim, that it is too much trouble to institute a claim, and that the risk and time involved in prosecuting the action are considered to be too great.[15] There is also the fear of lawyers and their specialist vocabularies, their geographical location and the

disinclination to disturb long term relationships.[16]

A distinction must be drawn between the barriers which prevent people obtaining access to law and the reasons for the use of law. Mayhew and Reiss make an indirect connection between the acquisition and maintenance of property interests and the use of lawyers. Their social organisation theory argues that those with property are more likely to use lawyers than those without.[17] Again Zander challenges this contention pointing out that often, even those with substantial property interests do not use lawyers whilst those without property do.[18] In so far as divorce is now about the division of property (the grounds for the divorce no longer being in issue), it would seem that Mayhew and Reiss's thesis has much to recommend it. It is also supported by empirical data so that, of the two groups, the women in the civil marriage group, who had more property than the customary group, were more likely to use lawyers and courts to try to get property.[19]

Although all the reasons advanced here no doubt play a part in determining whether or not a person obtains access to law, none of them tells us anything about the different problems that are encountered when there is more than one system of law in operation. The literature is all based on the concept of access to the formal legal system as being the ultimate goal. However, in a country like Zimbabwe, where people do not always have to go to court to have their marriages dissolved, it is not enough to talk simply of access to formal legal structures. If anything, the existence of a dual legal system

further disadvantages women, for as Cheater notes:

"Their minor jural status during the colonial period, low educational levels, poverty and lack of experience in either legal system, render women collectively less capable of manipulating and exploiting the ambiguities of dual systems of law to their own advantage than any other category in contemporary society. They lack the necessary money, knowledge, skills and even language."[20]

It is for this reason that there is a discussion in chapter 7 of the helpseeking careers of the women looking at their pre-formal law experiences. Zander's thesis about the role of lay intermediaries in helping people get to law (formal law) would seem to be particularly relevant, for the vast majority of women were guided to the formal law by friends and relatives.

Ultimately it would appear that the main response to the solution of the access problem has been the provision of legal aid to enable the "disadvantaged" to gain access to law.[21]

2:4 Studies of Legal Aid

Once legal aid was identified as the panacea to the problems of access to justice most countries started setting up legal aid agencies, whilst those which already had legal aid looked at ways of improving the services provided.

There were four models of legal aid. The first, the "charitable model", is still found in many parts of Africa including Zimbabwe and some of the Francophone countries such as Niger and Senegal.[22] It involves private legal practitioners giving legal advice or representing clients without charge. The second, the "judicare model" is found in

Britain and Canada. The solicitors are compensated by the state for the services which they provide to non fee-paying members of the public. The "public salaried attorney model" found in the United States of America involves the government in employing the lawyers who do the legal aid work. In this model the lawyers are also expected to provide legal education for the communities and to take on special interest cases. The "combined model" has elements of both the judicare model and the salaried staff attorney model and can be found in Australia and Sweden. Here legal aid is provided through either the public law offices or through firms of private legal practitioners.[23]

The legal aid movement soon ran into difficulties, not least of which was the expense involved.[24] Most countries could not afford the cost of the exercise and began cutting down on the services for which they were prepared to pay. Another related problem was that for the scheme to work effectively there had to be a large number of lawyers to operate it. In developing countries, this poses as great a problem as that of cost. With reference to Zimbabwe Austin observes that:

"...as at 10 March, 1986 there was a total of 261 private practitioners in the country, to be found in 65 separate firms. Of the 261 lawyers 210 were centred in the two main cities, Harare and Bulawayo, two thirds of them being based in the capital - Harare. There are a total of 22 lawyers practising in them. Again 14 of these are in the two large centres of Gweru and Mutare."[25]

A related problem is that of the fluctuating quality of the service provided by legal aid lawyers, so that the legally

aided client might have an inexperienced lawyer who is further disadvantaged by not having access to the same resources as her counterpart. In Zimbabwe law firms use legal aid as a training ground for their new recruits. This means that while the presence of two legal practitioners might indicate formal equality, it does not mean that there is substantive equality between the two parties.

Limitations on the availability of legal aid imposed by limited resources has meant that certain cases have been prioritised over others, so that in Zimbabwe legal aid in criminal cases is only provided where a person has been charged with a capital offence. The legal aid allocated for civil cases is severely limited with most of it going to women seeking divorce.[26] The prioritisation of certain cases in turn affects the use of lawyers so that the more legal aid is granted, the more word appears to get around. On the high incidence of lawyer use in matrimonial actions, Zander has noted that:

"In the matrimonial field a vast number of impecunious abandoned wives have managed to get legal aid, probably because they wanted to take the very serious step of seeking a divorce sufficiently strongly to find out about the possibility of getting help with the costs. Again it would probably be known to social workers, local authority officials and housing managers that legal aid can be obtained by a deserted wife."[27]

In so far as law is central to the whole access to justice debate, an examination of lawyers as agents for delivering legal services becomes essential. In the context of matrimonial law John Dewar has noted that solicitors are:

"...an important source of initial advice and assistance, they are the means of access to legal aid and they may see people whose problems do not come to court at all. Even once court proceedings are invoked, solicitors will retain a central role in determining which of the available procedures are invoked and may influence the atmosphere in which the proceedings and any attendant negotiations are conducted."[28]

2:5 Studies on Lawyers' Activities

Lawyers have been described as gatekeepers who translate personal problems into legally recognisable categories of dispute.[29] Morris, in an early study, saw lawyers as acting as a buffer between society's social norms and those of their clients.[30] Subsequent studies of lawyers have also concentrated on the intermediary role which they play, standing between their clients and the legal system.[31] Studies of matrimonial lawyers have concentrated on the tension between the lawyer's role as transformation agent and the client's expectations of the lawyer in divorce. Sarat and Felstiner discuss how divorce lawyers and their clients have different agenda, with the lawyer concentrating on the legal aspects of the case whilst the client concentrates on the social and emotional aspects of the case.[32] Ellman's study shows how in trying to get a client to agree with their interpretation of the problem and manner of dealing with it, lawyers use a mixture of coercion and manipulation.[33] Sarat and Felstiner suggested that the lawyers effected the most important transformation in the law simply by keeping the client uninformed.[34]

Griffiths notes that it is difficult for clients to feel

satisfied with the whole divorce process for the lawyer's construction of the case leads to a negation of certain parts of themselves or their experiences which they perceive to be important.[35] By contrast Murch's survey of divorce clients found that most of the interviewees were happy with the manner in which their lawyers had handled their cases.[36] Perhaps this is because these clients saw their lawyers as championing their cause and did not necessarily expect emotional support from them. Davis's study of lawyers showed that divorce lawyers were more than litigators, for not only did they negotiate settlements with the solicitors acting for the other party, but they also acted as counsellors.[37]

Similarly, Mnookin and Kornhauser saw the lawyer in divorce as performing five roles: informant, counsellor, clerk, negotiator and litigator.[38] Ingelby, taking up Galanter's lead, noted that negotiation and litigation were not two distinct phases in the performance of lawyers' tasks:

"Rather, there is a continuum of varying degrees to which the court is invoked. The data suggested that the solicitors in this sample preferred to operate on the lower increments of the scale."[39]

In an article Ingelby noted that the perception of solicitors as being adversarial was in fact not supported by empirical evidence.[40] Indeed Smart in her study of divorce lawyers found that:

"...the practice of matrimonial law is primarily about the negotiation between solicitors according to mutually agreed rules."[41]

As well as looking at the role of lawyers in the legal

process, various studies of dispute institutions have been made.

2:6 Studies of Formal Courts

Although concentrating on out of court negotiations Mnookin and Kornhauser's article is important in showing how the spectre of the court and the solution it will impose if a satisfactory settlement is not reached influences parties in the process of negotiation.[42] Similarly Galanter noted that:

> "The principle contribution of courts to divorce resolution is providing a background of norms and procedures against which negotiation in both private and governmental settings can take place...courts communicate not only the rules that would govern the adjudication of the dispute but possible reminder estimates of the difficulty, certainty and costs of particular outcome."[43]

Galanter noted that courts, like lawyers, transformed disputes, reformulating the problems that arrive into appropriate legal categories. In this transformation process the court was also able to make the issues "broader or narrower or different than those initially raised by the disputants".[44]

> "Thus courts not only resolve disputes: they prevent them, mobilise them, displace and transform them."[45]

Galanter also notes that in addition to resolving disputes, courts also provide information or messages about what they do. Lempert noted seven ways in which courts contributed to the settlement of disputes:

1) courts define norms that influence or centre the private

settlement of disputes,

2) courts ratify private settlement, providing guarantees of compliance without which one or both parties might have been unwilling to reach a private settlement,
3) courts enable parties to legitimately escalate the costs of disputing thereby increasing the likelihood of private dispute settlement,
4) courts provide devices that enable parties to learn about each other's cases thus increasing the likelihood of private dispute settlement by decreasing mutual uncertainty,
5) court personnel act as mediators to encourage the consensual settlement of disputes,
6) courts resolve certain issues in the case, leading the parties to agree on the others,
7) courts authoritatively resolve disputes where parties cannot agree on a settlement.[46]

Although performing many of these functions, it would seem that the role of the court in divorce law is dependent on whether or not the action is contested or uncontested. Where the action is contested, there is scope for the court to adjudicate. However, where the action is uncontested the court merely rubber stamps the parties' agreement.
The desire to maximise access resulted in the exploration of other ways of resolving problems. This began what became known as the movement for informal justice or alternative dispute resolution. In so far as the thesis is also concerned with the pre-legal experiences of the women interviewed, a

study of the literature on alternative dispute resolution becomes important.

2:7 Alternative Dispute Resolution

It was thought that if there were fora for dispute resolution which were cheap and which did not have complex rules of procedure, this would result in increased and better access to justice. This would maximise access by removing those barriers traditionally regarded as curtailing the ability of the ordinary person to vindicate his or her rights. Galanter saw the whole informal justice movement as challenging the notion of the centrality of law which masks the plural nature of "real life" social ordering.[47]

In many ways, Galanter's thesis captures the duality of the Zimbabwean situation where customary law, which is defined as "the indigenous law of the people", co-exists with the "formal" Roman-Dutch law with which it is given equal weight.[48] Moreover, as the majority of marriages in Zimbabwe are unregistered, they do not need to be dissolved in a formal court of law. Rather the parties come before "Family Councils" which comprise representatives from the families of both parties and which decide whether or not sufficient grounds have been advanced for them to consent to the dissolution of the union.

As this new movement gained momentum, the dispute-resolving mechanisms of "third world" countries were held up as models worthy of emulation. It was said that in these societies

problems between citizens were resolved amicably and did not involve the use of lawyers or large capital outlay. One such proponent of the benefits of this system of resolving disputes was so impressed by the "simplicity, informality, intelligibility and accessibility" of the African system of justice that he went on to recommend it to Western nations.[49]

However, soon doubts began to be cast on the whole informal justice movement. For many, it seemed that the costs of informal ordering far outweighed the benefits so that questions began to be asked about the efficacy of informal dispute resolution. It was pointed out that a move away from formalised systems of justice might actually be detrimental in failing to redress and indeed reinforcing the inequalities in bargaining power between the disputants.[50] In a comprehensive study, Abel showed how even in traditional societies decisions were not necessarily reached by consensus, but were imposed by those in the community with status and power.[51] Socio-political factors also played a part so that Merry pointed out that:

"The analysis suggests that we have idealized and misunderstood the process of mediation focussing on its consensual and conciliatory qualities and ignoring the very important coercion of power."[52]

Similarly Griffith's study of mediation in a traditional chief's court highlights the problem caused by gender inequalities in a patriarchal society.[53] Within the Zimbabwean context it will be shown how women's interests are often subsumed within those of the family in general. In Britain

and the United States, and particularly in the family law field, the conciliation movement, itself a product of the informal justice movement, came under increasing attack. Mnookin wrote about the necessity of limiting private ordering giving reasons of capacity, inequality of bargaining power and the need to protect unrepresented third parties.[54] Anne Bottomley argued very strongly against conciliation on the basis that it merely covered up the inequalities between the parties, especially between men and women, without doing anything to redress those inequalities:

> "To ignore such structural conflict is merely to re-produce existing power relationships and not in any way to mitigate or challenge it. Women's needs, the consequences of their continuing position of disadvantage in society, their lack of bargaining power vis-a-vis individual men, and the conflation of their role as mothers, make them particularly vulnerable in conciliation proceedings."[55]

However, Davis has countered this argument noting that inequality exists in other spheres so that there is inequality of bargaining power between a claimant and an insurance company or an individual taking on a large corporate employer.[56]

2:8 Studies on Marriage and Divorce in Zimbabwe

Although this thesis focuses on access to law and not on the substantive marriage and divorce laws in Zimbabwe, it is important to look briefly at other studies which have been carried out in the area to help to contextualise the issue. As there are similarities in the laws governing divorce in England with the Zimbabwean matrimonial provisions, English texts are also of relevance to the study of matrimonial law in

Zimbabwe.[57] Cretney's book provides a comprehensive examination of the statutory provisions as well as giving a good historical overview of the divorce law.[58] Gray's work on the re-distribution of property on divorce is particularly useful as is Eekelaar and Maclean's empirically based study of maintenance provision after divorce.[59] Eekelaar uses a contextual approach in his discussion of general social policy issues in family law.[60] "Regulating Divorce" has proved to be important in the conceptualization of the research question and has provided a fuller understanding of the policy considerations which underlie much divorce law.[61] The introduction of no fault divorce to Zimbabwe has also meant that American texts such as Weitzman's study on the consequences of divorce for women and children can be used for comparative purposes.[62]

In the African context, a great deal of work has been done on family law, much of which has its origins in anthropology.[63] Phillips' and Morris' study published in 1971 is a comprehensive survey looking at marriage laws throughout Africa from a legal perspective. Within the Southern African context, Poulter's work on the Basotho is probably one of the first socio-legal texts produced, being based on research undertaken by the author and some of his law students within the Basotho community.[64] In South Africa Hahlo's treatise on "The South African Law of Husband and Wife" has remained the standard family law text for a number of years.[65] As Zimbabwe, in common with South Africa, has a Roman-Dutch legal system, South African texts are still relied upon. Sandra Burman has

proved to be one of South Africa's foremost socio-legal researchers producing several articles on family law related issues within the complex South African context.[66] All of these works provide excellent comparative material.

For a long time after the colonisation of the country the only work done on divorce and family law in Zimbabwe was anthropological in nature, undertaken with the aim of documenting the customs of various tribes.[67] Its primary purpose was to provide a guide to colonial administrators tasked with applying "native law and custom" to the governed people.[68]

Seager's 1976 study of women and divorce in the then Rhodesia is probably the first socio-legal work of its kind to be undertaken.[69] Whilst its contribution as a pioneering work is beyond question, it is, in post independence Zimbabwe, of little more than historical value. A major drawback is that the work limits itself to examining the impact of divorce on the lives of white or European and Asian (then classed as white) population groups. Even in the days preceding independence these two groups jointly comprised less than two per cent of the country's population. (Moreover, this group was governed exclusively by the general law). Being part of the elite and privileged group, the sample was far removed from the rest of the people and this precluded it being representative in any way and also meant that no generalisations about the effect of divorce on black "Rhodesians" could be extrapolated from the data.

With the coming of political independence to Zimbabwe in 1980 there emerged a new school of sociologists interested in seeing how the law in the books translated in the day to day lives of the people.[70] The focus has been on highlighting the need for studying the impact of law on women's lives. May's work *Changing People, Changing Laws* is such a study.[71] It draws heavily on work undertaken by the Fundamental Rights and Personal Law (FRPL) project conducted by the Centre for Applied Social Sciences in the Faculty of Social Science at the University of Zimbabwe between 1981 and 1987, of which Mrs May was a leading member. Commissioned by the Ministry of Justice, the project was entrusted with:

> "...the examination of existing family or personal laws which were discriminatory, the testing of public opinion and public reaction to new legislation and the development of the means whereby new legislation, particularly where it conflicted with traditional norms and customary law, could be made most acceptable to the people."[72]

Lawyers have also started doing socio-legal research. Ncube's M.Phil thesis focuses on women's entitlement to property both during the marriage and on its dissolution.[73] It is based on the fieldwork interviews conducted with women in the Matebeleland area of Zimbabwe. As the first post independence exposé of the reality of black women's proprietary situation both within and outside the marital institution, it is a valuable piece of work. Ncube's 1989 offering is a purely legal text which sets out the substantive family law.[74] It is designed to be a teaching instrument for University students and a reference guide for legal practitioners.

In 1987 the Women and Law in Southern Africa Project was established with the aim of examining the impact of various laws on women's lives in six countries within the central and southern African region, namely Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe. The project started by examining the substantive laws in the different countries to identify areas in which such laws discriminated against women.[75] Having done this, the project is now involved in doing action research into how specific laws affect women's lives.[76] In doing this a socio-legal approach is adopted. The project has just finished a project on maintenance and has now begun laying the groundwork for the next project which will deal with the issue of inheritance.

My own work has been greatly enriched by all the above studies. They have all addressed to differing degrees the issue of obtaining effective access to the law. However, this thesis forms the first post independence socio-legal study which has as its primary aim an examination of black women's access to both formal and informal law in matrimonial actions. Indeed my work goes some way towards meeting some of the research needs identified by the Women and Law in Southern Africa Project, namely:

" (i) Research into the sociology of the legal profession in each country...It would also include a study of the legal delivery system and the number and types of people who have access to and make use of the courts, professional lawyers, legal aid and other legal related services. Financial costs for different types of legal services should also be investigated.

(v) Ethnographic study of marriage systems remains

> fundamental to understanding the legal position of women. The study should include what actually happens and what modern laws and economic realities are involved, as well as what traditional norms, customs and customary laws are invoked. Detailed case studies are vital.
>
> (viii) Case studies of disputes and problems involving women which did not get to the courts should also be studied..."[77]

This chapter has surveyed briefly the existing literature on access to justice, examining studies of lawyers and formal and informal dispute institutions. It concluded by surveying the studies which have as their central concern marriage and divorce. The next chapter provides an historical overview of the development of marriage and divorce laws from the colonisation of the country to the attainment of political independence in 1980. In doing this it looks at the interplay between the two legal systems, the indigenous customary law and the imposed general law. It also examines the changing nature and conceptualization of *lobolo*.

2: The Literature Survey

[1] See for example the four volume survey by Capelletti, M. and Garth, B. (eds) (1978).
[2] Harris, D. et al. (1984) at p.144.
[3] National Consumer Council, (1988) at pp.2,5, Capelletti, M. and Garth, B. (1978) vol.1 at p.10, Harris, D. et al. (1984) at p.73.
[4] Zander, M. (1978) at p.288.
[5] Zander, M. (1978) at p.288.
[6] For a fuller discussion see chapter 8.
[7] Johnson, E. (1978) at p.9.
[8] Johnson, E. (1978) at p.9.
[9] Galanter, M. (1976) at p.230.
[10] Galanter, M. (1974) 95.
[11] Genn, H. (1982) at pp.2,3.
[12] Zander, M. (1978) at pp.292-293.
[13] Harris, D. et al. (1984), Zander, M. (1989) at pp.47-48.
[14] Harris, D. et al. (1984) at p.76.
[15] Tomasic, R. (1978) at p.36.
[16] Macaulay, S. (1977) at p.141.
[17] Mayhew, L. and Reiss, A. (1969) at pp.312-313.
[18] Zander, M. (1978) at p.290.
[19] See Chapter 8.
[20] Cheater, A. (1990) at p.84.
[21] Cappeletti, M. and Garth, B. (1978) say that legal aid formed the first wave in the access to justice movement. vol.1 at pp.21-23.
[22] In Zimbabwe this only applies in civil cases. When legal practitioners are asked to take on legal representation in a criminal case they are remunerated by the state.
[23] Cf Hwacha, H. (1983) at pp.15-28, Cappelletti, M. and Garth, B. (1978) vol.1 at pp.24-33, Bottomley, S. (1990) at pp.74-75.
[24] Cf Cappelletti, M. and Garth, B. (1978) at pp.33-34, Bottomley, S. et al. (1990) at pp.76-81
[25] Austin, R. (1987) at p.175.
[26] The provisions for legal aid in Zimbabwe will be discussed in chapter 8.
[27] Zander, M. (1978) at p.292.
[28] Dewar, J. (1989) at p.14.
[29] Felstiner, W. et al. (1986) at p.125, Griffiths, J. (1986) at p.159.
[30] Morris, P. (1972) at p.67.
[31] Ingelby, R. (1988) at p.47.
[32] Felstiner, W. et al. (1986) at pp.108,112,117,121-124.
[33] Ellman, S. (1987) at pp.723-733.
[34] Sarat, A. and Felstiner, W. (1986) at p.123.
[35] Griffiths, J. (1986) at p.132.
[36] Murch, M. (1980) at p.15.
[37] Davis, G. (1988) at p.123.
[38] Mnookin, R. and Kornhauser, L. (1979) at pp.985-986.
[39] Ingelby, R. (1987) at p.249, Galanter, M. (1984) at p.268.
[40] Ingelby, R. (1988) at p.43.

[41] Smart, C. (1984) at p.162.
[42] Mnookin, R. and Kornhauser, L. (1979) at p.966, Galanter, M. (1981) at p.8.
[43] Galanter, M. (1981/82) at p.6.
[44] Galanter, M. (1981/82) at p.10.
[45] Galanter, M. (1981/82) at p.10.
[46] Lempert, R. (1978) at pp.99-100.
[47] Galanter, M. (1981/82) at pp.7-20.
[48] s.2 of the Customary Law and Primary Court's Act 1981 as amended. (The new Act which is to replace this, the Customary Law and Local Courts Act 1991 has not yet received Presidential assent so that the provisions of the 1981 Act continue to be followed).
[49] Bush, R. (1978) vol,3 at pp.304-306, Cf Ng'maryo, E. (1984) pp.64-69.
[50] Abel, R. (ed) (1982) at p.267, Dingwall, R. (1988) at p.150.
[51] Abel, R. (ed) (1982) at p.6.
[52] Merry, S. (1982) at p.20, Cf Abel, R. (ed) (1982) at p.5.
[53] Griffiths, A. (1988) at pp.140-143, Cf Rwezaura, B. (1984) at pp.63-65, Burman, S. and Rudolph, D. (1990) at pp.251-278.
[54] Mnookin, R. (1984) at p.363.
[55] Bottomley, A. (1984) at p.298, Cf Mnookin, R. (1984) pp.364-383.
[56] Davis, G. (1988) at p.4.
[57] The Zimbabwean Matrimonial Causes Act No 33 of 1985 is similar to the English Matrimonial Causes Act of 1973. The amendments of the 1984 Matrimonial and Family Proceedings Act were not incorporated into the Zimbabwean statute which came into force in February 1986.
[58] Cretney, S. (1984).
[59] Gray, K. (1977), Eekelaar, J. and Maclean, M. (1986).
[60] Eekelaar, J. (1984).
[61] Eekelaar, J. (1991).
[62] Weitzman, L. (1985).
[63] Radcliffe-Brown, A. and Forde, D. (1950), Mair, L. (1969), Harrell-Bond, B. (1975).
[64] Poulter, S. (1976).
[65] Hahlo, H. (1975).
[66] Burman, S. (1983), (1987), Burman, S. and Huvers, M. (1985).
[67] Holleman, J. (1969).
[68] Child, A. (1976), Goldin, B. and Gelfand, M. (1975), Storry, J. (1979).
[69] Seager, D. (1977).
[70] May, J. (1983), Mpofu, J. (1983).
[71] May, J. (1987).
[72] May, J. (1987) at p.1.
[73] Ncube, W. (1987).
[74] Ncube, W. (1989).
[75] Armstrong, A. and Ncube, W. (eds) (1987).
[76] Armstrong, A. and Stewart, J. (eds) (1990).
[77] Gay, J. (1990) at pp.236-37, 239, 240.

CHAPTER 3 - THE DEVELOPMENT OF GENERAL AND CUSTOMARY LAW RELATING TO MARRIAGE AND DIVORCE IN ZIMBABWE

3:1 Introduction

This chapter deals with the historical development of the laws relating to marriage and divorce in Zimbabwe. It also considers the socio-economic and political influences affecting the development of such laws from the time of colonisation of Zimbabwe (then Southern Rhodesia) in 1889, until its independence in 1980.

The chapter contains five sections covering:

a) Direct Control - from the colonisation of the country by the British South Africa Company in 1890 until 1937
b) Indirect Rule - from 1937 to 1962
c) Community Development - from 1962 to 1972
d) The War Years - from 1972 to 1979
e) The advent of Independence in 1980 to the present day.[1]

For each period the official government policy and factors influencing that policy will be examined, emphasising the development of customary law, general law and marriage laws, and the development of the court structure and its role in the administration of justice. But first I look at "customary law", how it came to be construed by the colonial courts, and at the institution of *lobolo* or bridewealth, to understand its role in Shona marriage.

3:2 Conceptualising Customary Law

Bourdillon contends that the words "customary law" can have three distinct meanings, viz:

> "the rules people cite as traditionally governing their behaviour and which have been passed on from previous ages, secondly the decisions of tribal courts which are the contemporary developments of pre-colonial courts, or thirdly the rules and regulations accepted by European courts as constituting "customary law"."[2]

It appears that it is the first meaning which is commonly used when reference to customary law is made. However, implicit in this understanding of customary law is the assumption that the rules which are passed on are immutable and timeless, serving each successive generation in the same manner. This is a false premise, for just as norms change from generation to generation, so it is inevitable that the rules or laws which govern them will also change.[3]

Within the Zimbabwean context, and arguably in other countries which were colonised and in which a new system of law was imposed, the dominant legal system was imposed on the indigenous legal structures. An example of this is given by Chanock when discussing the reconceptualisation of the role and function of chiefs by the colonisers:

> "There seemed to be no way of thinking about Chiefly authority in a way which did not include judicial power...From the British point of view this was how a legal system worked: the customary law would have been what the chiefs did in their courts, while what happened outside the courts was "extra-legal". But in real village life there was no clear cut distinction between the realms of public and private...To the administrators however, and later to the anthropologist, only a model of public power which included a "judicial" and an "executive" function was comprehensible. If there were

chiefs, they must have had judicial powers, if there were laws, there must have had a government to carry them out."[4]

It is however important to acknowledge that changes in the customary law were not only imposed from above. Some came from the people themselves. For example, when witnesses were called to court to give evidence on an aspect of the customary law under dispute, they used the opportunity to give an interpretation which suited themselves and from which they would benefit. As the custodians and repositories of customary law were male, it was the male viewpoint which was represented. From this we can see:

"The mutation of local claims into legal rules took place in the courts through a process not only of selective understanding by colonial officials but also of a selective presentation of claims."[5]

For the indigenous men involved in this process of the interpretation of the customary law, it was a question of an oppressed group using their limited leverage to gain for themselves more rights and privileges. For the colonialists, it was important to try to keep the male indigenous population reasonably happy, for their co-operation was needed in the form of labour to develop the country, and their assistance was sought in developing the personal law to apply to the governed peoples. Not having any economic or political leverage and lacking capacity, African women were left out of this re-definition of customary law.[6]

It seems therefore that, going back to Bourdillon's definitions of customary law, all three meanings which he lists can be said to cover the concept of "customary law" as it is now known and used.

An important aspect of customary law in relation to divorce and marriage concerned the payment of *lobolo*. It is to this concept that attention will now be given.

3:3 *Lobolo*

The concept of *lobolo* has always been understood to mean the transfer of cattle or money by a prospective bridegroom, or his family, to the family of the woman whom he intends to take as his wife. What has changed over time has been the manner of payment. Before colonisation took place, a system of brideservice, whereby the man went to work for his father in law for a number of years, was in operation. Then came the system of payment by means of cattle by the bridegroom's family to the family of the bride. This was in itself an innovation. Previously, small items such as metal bracelets and small livestock such as goats and chickens had been used to effect payment for *lobolo*. Growing urbanisation and the introduction of the cash economy led to a money element creeping into bridewealth negotiations and to charges of commercialisation of the bridewealth institution being made.[7]

The payment of *lobolo* is said to have two functions. The first is that it transfers uxorial rights from the woman's family to the man. Uxorial rights include the man's exclusive sexual rights to the woman whose labour value also vests in him. The second is that it imparts genetrical rights upon the man's family. Genetrical rights highlight the group nature of Shona marriage according to which rights in the children which

are born of a couple "belong" to the entire kin group of the man rather than the individual couple.[8] The *lobolo* institution therefore constructs women in their two roles as wives and mothers.

The *lobolo* debate has always been fashioned in one of two ways. The "traditionalists" hold that *lobolo* is a particularly African tradition, which should be preserved if we are to keep our culture.[9] The payment of *lobolo* is said to bind families and to make marriages "stronger". This is because both parties to the union are loath to let their families down by dissolving the marriage, and therefore work harder towards making the marriage work. Moreover, it is said that women favour having bridewealth paid for them, as indeed the majority do, because it shows a man's commitment and love and also because *lobolo* is said to act as a guarantee against desertion by the husband who stands to lose his investment should he desert.[10] *Lobolo* is therefore seen as an institution worthy of preservation.[11]

The "abolitionists", who are in the minority, see the whole *lobolo* institution as leading to the subordinate status of women and as having no place within a society committed to ideals of equality between the sexes. They argue that to continue with the payment of *lobolo* is to perpetuate and encourage the subjugation of women.[12]

It is now proposed to discuss the changes in the policy and laws as they occurred from 1889 until the attainment of

Independence. The first period considered is that of direct rule.

3:4 DIRECT RULE 1889-1937

3:4(a) British Policy

This period marked the time of the establishment of British rule in the then territory of Southern Rhodesia. British colonial policy for governing the territory called for direct control of the African population. There was a need to keep a tight reign on the Africans whilst trying to consolidate Britain's colonial position. With this aim in mind, chiefs were stripped of their traditional powers, and Native Commissioners were appointed by the Administrators to rule with virtually unlimited powers. By 1902 a Native Affairs Department had been set up and the Native Commissioners were given special powers to adjudicate upon disputes between Africans.

Roman-Dutch law, the law in force in the Cape of Good Hope, was adopted as the official law of the new territory of Southern Rhodesia.[13] This provision was carried forward in subsequent Orders in Council and in the constitutions of the country throughout the years.[14]

3:4(b) The Courts and the Administration of Justice

Under direct rule, the central governmental authority of the Chief was replaced by that of the Magistrate. Chiefs were offered and accepted subsidies in place of the fines which had been customarily levied by them in their courts and they

thereby became dependent on the Government for their income. In essence, the chiefs acted as policemen on behalf of the short-staffed administration.[15] They were responsible for the good conduct of the people under them and for reporting crimes and "suspicious occurrences" to the Native Commissioner.[16]

A number of magistrates were appointed in 1891, with the Administrator holding the position of Chief Magistrate. Initially, the Administrator acted as the main judicial officer with powers to hear both civil and criminal cases. By 1894 the Matebeleland High Court was established and was reconstituted in 1898 as the High Court of Southern Rhodesia under the Southern Rhodesia Order in Council.[17] The High Court and Magistrates Court were set up for the administration of the general law.[18] The judicial powers which had been taken away from the chiefs were given to Native Commissioners and Assistant Native Commissioners, who officially assumed the sole responsibility of administering justice between the Africans. In reality the chiefs continued to adjudicate upon disputes amongst their people.

3:4(c) Customary Law Under Direct Rule

Having conquered the Africans, the colonisers were faced with deciding which system of law, Roman-Dutch or customary, to apply to the indigenous population. Questions of public law were to be decided using the Roman-Dutch law, which was also to be applied in dealing with disputes between the non indigenous group. As it would be unfair and unlikely to work, there seemed to be little point in imposing a foreign personal

law on the governed people, hence the decision to allow personal disputes between the colonial subjects to be determined according to their customs and laws.

Through the ages, a discernible change in official attitude can be seen with respect to the application of customary law. Initially it was provided that in the administration of justice to Africans "careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong".[19] By 1898 it was provided that "in civil cases between natives the High Court and the Magistrates Court shall be guided (my emphasis) by native law".[20] This was reaffirmed in the Native Affairs Act of 1927 where Native Commissioners were enjoined to be "guided by native law" in dealing with civil cases between Africans.[21]

The application of customary law was always subject to the proviso that it was not "repugnant to natural justice and morality". It was obvious that the repugnance referred to customs which offended English notions of justice. The words were interpreted by Chief Justice Tredgold in the High Court of Southern Rhodesia thus:

> "The words "repugnant to natural justice and morality" should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence."[22]

Palley contends that the instances where custom was found to be repugnant have for the most part related to the status of women, particularly if the woman is a party to a Christian marriage, the grounds of divorce and welfare of the children.[23]

3:4(d) Marriage Under Direct Rule

The primary aim of the colonial policy in this regard was to eradicate `child marriages' and marriages contracted for women without their consent.[24] However, throughout the period of British rule, there was a recognition of polygamous marriage between the local subjects.

To the colonisers it seemed that the best way of ensuring that women entered into marriages voluntarily was by demanding that all marriages be registered. A marriage officer could not register a marriage until he had obtained the personal consent of the woman.[25] It also provided for the formal recognition of *lobolo* which was to be paid within the first 12 months of the marriage being contracted.[26] *Lobolo* was fixed at five head of cattle for chiefs' daughters and four head for everyone else.[27] The reason given for the limitation in the rates of *lobolo* was so that impecunious young men would not be barred from marrying. However it was more likely that the policy grew out of a desire to curb the trade in cattle following the devastating effects of the rinderpest a few years before.[28]

The Ordinance requiring the transfer of cattle within a year of the marriage being contracted was generally ignored as it failed to take into account that the obligation to hand over the cattle was not subject to time limits. There was recognition that a marriage between two families created a debt to be paid over the generations, if need be, rather than promptly. For the African there was the realisation that an agreement to pay bridewealth and a handing over of the woman

created a valid customary marriage. There was neither the requirement for formal registration, nor that of full payment of the bridewealth. It was for these reasons that the 1901 Ordinance met with so little success, going largely unheeded.

This led to the Native Marriages Amendment Ordinance being passed in 1905.[29] It was recognised that a customary marriage could come into existence before all the *lobolo* had been paid, and that bridewealth could come in two forms: either as service or as cattle. However, the requirement for registration remained.[30]

By 1913 there had been a marked increase in African cattle holdings which had in turn led to a redefinition of bridewealth relationships whereby cattle and small cash payments became the accepted method of payment of *lobolo*.[31] The official reaction to all this was the abolition, in 1912, of the limit on the amount of *lobolo* that could be paid.[32] Meanwhile, fathers of prospective brides used the registration provision to gain leverage by insisting on the full payment of the *lobolo* before they would agree to the registration of the marriage.[33]

The 1917 Native Marriage Ordinance repealed all previous Native Marriage Ordinances, but continued to demand that all marriages be registered before they could be considered valid. However, there was recognition of the *de facto* position, viz, that *lobolo* did not have to be paid at the time of the

registration of the marriage.

The requirement to register created problems for the administrators for there was an assumption that there was a precise point at which a customary marriage came into existence and therefore required to be registered. The reality was not as simple. In an attempt to resolve this dilemma it was decreed that <u>after</u> the *lobolo* negotiations were complete, but <u>before</u> the marriage had been consummated, registration of the marriage should take place with the Native Commissioner of the district in which the woman was resident. Of this administrative requirement, Jeater notes:

"The concern over registration and forced marriages which informed this Ordinance had produced a "native law" despite itself. The law effectively laid down the processes which had to be carried out for "customary" African marriages to be recognised by the authorities." [34]

Another innovation came in section 7 of the Native Marriage Ordinance, which provided that if the guardian of the woman "unreasonably " withheld his consent, then the parties could appeal to the Administrator of the colony via the Native Commissioner. This was not only an infringement of parental authority which under "traditional law" was absolute, but also part of the re-creation of customary law. It also introduced an element of individualism to the marital contract which had been hitherto unknown, since marriage was always regarded as a group venture.

The outbreak of war in 1914 brought about widespread economic suffering as white farmers became bankrupt and agricultural wages dropped. After the war there was a brief boom period in

which much grain was exported from the colony. The effects of the boom and slump created a demand for cash to enable families to weather the crisis. Waged employment became more attractive than subsistence level farming because it offered access to cash. Increasingly there were requests that the bridewealth should take the form of a large cash payment which could then be used to meet the family's need for cash to buy utilities. This period marked the demise of the "traditional" *lobolo* payments which had gone on for generations.[35] At this time the cash element, known as *rutsambo* in contemporary bridewealth charges, also came into being.[36] Arguably, this period also marked the start of the commercialisation of the *lobolo* institution and the 'commoditisation' of women.

"Even the poorest producer in the rural areas, provided he had control over unmarried women, could use their marriages to extract large cash sums from migrant workers. This was hardly 'tradition' but it was certainly a source of power."[37]

Realising that the Africans were not overly concerned about the consequences of not registering their marriages, in 1929 the sanction of invalidity attaching to non registered marriages was removed, thus taking away the cloud of illegitimacy attaching to the children of couples whose marriages had not been registered.[38]

In the general law domain the Married Persons' Property Act was passed.[39] Until 1929 the proprietary consequences of marriage in Southern Rhodesia were governed by the Roman-Dutch common law, which provided that all marriages were automatically in community of property, unless at the time of

the marriage the parties entered into an ante-nuptial contract creating a different property regime. The Act, which is still on the statute book, reversed the position. Section 2 provided that all marriages would automatically be out of community of property unless the parties executed an ante-nuptial contract creating community of property.

As time passed, the number of Africans contracting civil marriages increased. This was largely due to the influence of Christian missionaries who emphasised the importance of a "church" marriage to their converts. To ensure that Africans who applied for marriage under the statute law knew the consequences of entering into such unions, the legislature stipulated that Africans wishing to marry by non customary rites had to appear before the Registering Officer and obtain a certificate of eligibility and consent. Any marriage contracted without the certificate would be invalid. However, the reality was that many Africans married in terms of the general law continued to contract customary marriages with other women.

3:5 INDIRECT RULE 1937 - 1962

3:5(a) British Policy

The passing of the Native Law and Local Courts Act marked a change in policy for governing the colony.[40] The great depression of the 1930s had a world-wide impact. Tobacco farmers abandoned their farms and when the price of maize fell in the early 1930s maize farmers were similarly affected. In 1936 alone, the number of White owned cattle declined by 25 per cent.[41]

The changed circumstances and the shortage of staff to administer the colony effectively led to changes being made in policy. Lord Lugard, the chief architect of British colonial policy in Africa, had realised earlier the futility of trying to maintain a policy of direct rule and therefore advocated a policy of allowing the Africans to rule themselves via their own administrative bodies.[42] In this instance the old tribal authority was to be that body. The change to the policy of Indirect Rule was in many ways official recognition of the *de facto* position whereby the native peoples had gone about the business of quietly administering their own affairs.[43]

3:5(b) Courts and the Administration of Justice Under Indirect Rule

It is in the re-ordering of the court system that the policy of Indirect Rule can best be seen. The Native Law and Local Courts Act marked the official return of tribal courts run by chiefs and headmen appointed by the government.[44] Although they were reconstituted the Tribal Courts had limited jurisdiction, they could not hear criminal cases. An appeal to the Native Commissioner's Court would result in the case being heard de novo. Finally, the courts could only exercise jurisdiction if all the parties to the case were African and if the action was capable of being decided according to African customary law. This meant that for the most part Chief's Courts operated in civil customary cases concerning family issues.

In 1939 the Court of Appeal for African Civil Cases was established to hear appeals from the Native Commissioners Courts. It was to be presided over by the Chief Native Commissioner sitting with two assessors.[45]

3:5(c) Customary Law Under Indirect Rule

The earlier provision that courts be "guided by" customary law had caused difficulty, being interpreted in different ways. In one case it was interpreted as meaning that customary law should be applied, not as overriding the common law but merely as a guide in determining how the common law was to be applied in settling disputes between the indigenous people.[46] Yet in another case it was held that, as between Africans, African customary law and not the general law should apply.[47] The 1937 statute was designed to remedy the confusion.

The Native Law and Courts Act made the application of customary law between Africans peremptory.[48] As usual this was made subject to the dictates of natural justice and morality. It was further provided that:

"nothing in the statute law of the colony relating to the age of majority, the status of women, the effect of marriage on the property of the spouses, the guardianship of children or the administration of deceased estates should affect the application of native law and custom except in so far as statute law has been specifically applied to natives by statute."[49]

This meant that statutes such as the Married Persons Property Act were no longer applicable to Africans.[50]

3:5(d) Marriage Under Indirect Rule

Large scale urban migration led to a breakdown in "kraal cliques" as cross-tribal marriages took place in urban areas. The pressure of the expanding commercial economy and the need for administrative efficiency led in 1950 to the passing of the African Marriages Act.[51] For the first time it was provided that a customary law marriage was to be valid only if solemnised by a Native Marriage Officer.[52] Solemnisation resulted in legal certainty for inter-marriage between the groups had been taking place so rapidly that given the differing tribal customs it had become difficult to know if a customary law marriage had been contracted or not.

A concession was made for unsolemnised customary unions. They were to be regarded as valid under customary law for purposes of status, guardianship, custody and rights of succession of children.[53] The age of 12 was fixed as the minimum age for marriage. This brought the customary law into line with the common law position and was part of the colonisers' avowed policy aim of eradicating child marriages.

Africans wishing to contract a civil marriage were required to obtain an enabling certificate to present to the Marriage Officer to prove that the woman's guardian had consented to the marriage.[54] Inroads were made into customary law with the requirement that marriage be dissolved by order of a competent court. This was a striking departure from the customary law position, which was severely criticised as undermining the traditional family law dispute-resolving mechanism which was based on conciliation.[55] Moreover, it was provided that

regardless of the type of marriage contracted by the parties, civil or customary, the division of property would be according to customary law.[56]

There had been growing concern about the amounts being charged as *lobolo*. Writing in the Native Affairs Department Annual in 1947, a contributor gave the following rather alarming statistics:

> "As the years go on so the amount of *lobolo* claimed rises, less and less is paid and more remains outstanding... In 1910 (sic 1901?) when marriages were first registered at one station the average amount claimed and paid was £11 10s. In 35 years it has risen, in 1945 to £21 claimed, £7 paid and £14 outstanding."[57]

He went on to say that he had spoken to Africans from all spheres of life and their response had been:

> "With very few exceptions they have said the amounts claimed are far too high and should be reduced by legislation. That it was no longer a token but a purchase price."[58]

Equally concerned, the government reimposed a limit on the amount that could be claimed as *lobolo* (£20).[59] There was much heated debate with some Members of Parliament, Ian Smith the future rebel Prime Minister being one, demanding that it be abolished altogether. He described it as being "a trade in human flesh".[60] They could change the law but they could not change "custom", so that by the early 1960s it was becoming obvious that the maximum limit put on the payment of *lobolo* was being flouted, and so in 1962 it was abolished.[61]

In the general law arena changes were made in the form of the

Matrimonial Causes Act passed in 1943.[62] Three new grounds of divorce were added to the existing two grounds of adultery and malicious desertion. The new grounds were cruelty, incurable insanity and long-term imprisonment. All the grounds except insanity were based on the fault principle.

3:6 COMMUNITY DEVELOPMENT 1962 - 1972

3:5(a) British and Rhodesian Policy

The period following the end of the Second World War saw increased urban migration by the Africans who also began to be influenced by Western culture and ideas. The period also marked the first rumblings of modern African nationalism.[63] All this necessitated a change in policy. The policy of Community Development which followed was based on efforts to persuade local communities to co-operate with the government in inexpensive betterment schemes and was an attempt to diffuse the political situation.

There was also a move towards separation of judicial and administrative authority. It was with this purpose in mind that the Robinson Commission was appointed at the end of 1960.[64] It was charged with enquiring into and reporting on the administration and judicial functions of the Native Affairs and District Courts departments. Its recommendations were to form the basis of future policy.

3:6(b) The Courts and the Administration of Justice Under Community Development

The Robinson Commission expressed support for the tribal courts, recommending that their jurisdiction be extended to include the trial of all civil cases between Africans where the action was capable of being decided by African customary law. However, the dissolution of civil marriages was not to form part of this jurisdiction.[65] The African Law and Tribal Courts Act was passed in 1969.[66]

For the first time in the colony's history, chiefs were given jurisdiction to try petty criminal cases. They were also given authority to dissolve customary marriages. (This had previously been the exclusive preserve of Native Commissioners' Courts). However, the structure of the courts remained the same. Similarly, the appointment of chiefs and headmen remained in the hands of the administration so they remained government creatures. The biggest concession was the removal of the bar against Africans having access to the Magistrates Courts. This was in recognition of:

"...the complex and changing social environment of the African in which his customary law is lacking the precise rules to deal with the situations and contractual arrangements of modern life..."[67]

3:6(c) Customary Law Under Community Development

Introducing the African Law and Tribal Courts Bill, the Minister of Internal Affairs stated that the Bill rested on five principles. The second of these principles was that:

"...in a plural society people should be able to choose between legal systems to give them the justice which they feel meets the norms of their society."[68]

With this in mind, the legislature provided that as between

Africans the cases "may" be decided in accordance with customary law, thus seeming to suggest that the application of customary law in cases between Africans was optional. Again customary law was to be applied in all civil cases between Africans. The proviso to this was that the court was not obliged to apply customary law if the application of customary law would contravene the demands of justice of the case.[69]

Again the courts used the proviso to override aspects of customary law with which they did not agree. In *Jirira v. Jirira* the "justice of the case" clause was interpreted as permitting a court, on the basis of the Europeanised lifestyle of the parties, to apply general law to distribute their matrimonial property on divorce, thus ignoring section 13 of the African Marriages Act which required the application of customary law.[70]

Perhaps one of the interesting things to emerge from this period was the contrast between stated policy with respect to the "advancement" of African women and actual practice. For many years it had been openly stated that there was a need to improve the legal position of African women, yet when in 1969 the suggestion that they be given full legal capacity was raised, it was rejected on the grounds that:

"The present position is that ninety nine per cent of African women would find legal emancipation of that nature quite intolerable. It would be disastrous to do anything too quickly. However the position of the other one per cent has to be considered."[71]

3:6(d) Marriage Under Community Development

The status quo was maintained. However, the requirement that a customary marriage had to be registered before it could be accorded validity continued to cause problems as the following statement from an African Member of Parliament shows:

"When you register, that is definitely a western civilisation custom. You have to have a paper, but in our custom you only pay *lobola*. There is no paper at all in your pocket to show that you have married this particular girl from her parents. I think this is quite clear. Which are we going to follow? Are we going to recognize this because this youngster has already paid certain things to be recognized as the son-in-law, and when it goes to the district commissioner's office, the district commissioner says "Your marriage is not registered here". What is the custom here?"[72]

3:7 THE WAR YEARS 1972 - 1979

3:7(a) Rhodesian Government Policy

The escalation of the civil war, fought mainly in the rural areas, resulted in a breakdown of the tribal court system. Being government appointees, some of the chiefs and headmen were regarded as traitors and were soon unable to operate their courts. In their stead rose an unofficial system of peoples' courts. As their popularity in the urban areas had already begun to wane, the chiefs' courts thus fell into general disuse.

3:7(b) The Courts and the Administration of Justice In the War Years

These peoples' courts which took over from the chiefs and headmen were variously called "kangaroo courts" by the Rhodesian government of Ian Smith, and "village committees" by the people who constituted them. The committee usually

consisted of 12 people. These included the Chairman, Secretary, Political Commissar, Treasurer, Chairman for Welfare and their deputies.[73] After creating the village committees, the organisers called several villages together to form a branch committee, but no system of appeals existed. Village committees became the *de facto* judicial authorities.

By the early 1970s, the tribal courts in the urban areas had lost their credibility. A survey carried out in 1973 showed that among well-to-do and well-educated Africans, only 5.4% preferred the traditional court. Of these 75.6% preferred either a Magistrate's Court or the High Court. Among poorer and less well-educated Africans, however, the preference for the traditional courts seemed only marginally greater, with 17.2% preferring the Traditional Courts, 26.4% the District Officers' Courts and 39.0% the Magistrate's or the High Court.[74]

3:7(c) Customary Law In the War Years

The peoples' courts pledged themselves to settling disputes using the customary law applied by their forefathers, or so it was claimed. Although "traditional" customary law does not favour women, African women were not as prejudiced as might first appear. This is primarily because the new courts were run by guerrillas, many of whom had come into contact with female freedom fighters. As women were also giving up their lives for the cause, they could not be discriminated against on the grounds of sex. This, and the fact that the war was being waged on Marxist principles of equality, would seem to

militate against any outright discrimination.

3:7(d) Marriage in the War Years

Here again the status quo was maintained. The only difference was that disputes about *lobolo* and its payment or return were heard in the Village Committees if the parties lived in a rural area where the chiefs' court system had broken down.

On 19 August 1976, the government set up a Commission of Inquiry to look into divorce laws.[75] It recommended that there be one single uniform law regulating marriage under the Marriage Act for all races.[76] Its recommendations were not followed with racial differences being maintained.

The same Commission of Inquiry was also of the opinion that the divorce law as it stood was unsatisfactory and needed to be changed. Members of the Commission felt that the fault based divorce system caused unnecessary acrimony and made the law hypocritical, as parties seeking divorce often had to manufacture evidence to satisfy the stringent requirements of fault. The Commission recommended that a no fault system of divorce be instituted.[77]

3:8 INDEPENDENCE 1980 -

3:8(a) Zimbabwean Government Policy

Majority rule was finally achieved in 1980 with the coming into being of the new state of Zimbabwe. After independence, the government was faced with the task not only of restructuring the court system to bring it into line with the

new order, but also with dismantling the old choice of law process, based as it was on the application of racial criteria. Having fought against colonial oppression, there was the much romanticised notion of restoring customary law to its former place. At the same time there was the official recognition of the contribution of women towards the liberation of the country and this recognition was to lead to the removal of legal disabilities affecting African women. The principle of sexual equality was also of course one of the corner stones of the Marxist-Leninist rhetoric which was such a prominent feature of politics in early Zimbabwean years.

3:8(b) The Courts and the Administration of Justice At Independence

There was a restructuring of the court system with the abolition of Headmen, Chiefs, Native Commissioners and District Commissioners' Courts. They were replaced by Primary Courts comprising Village Courts and Community Courts both of which had limited jurisdiction in that they could only apply customary law.[78] However, exceptions have been made which enabled them to apply the provisions of certain statutes.[79] The monetary jurisdiction of the Village Court was put at Zim$500 (initially $200) , while that of the Community Court was unlimited.[80] Appeals from the Village Court were to go to the Community Court and those from the Community Court were to go to a District Court, which is essentially a reconstituted Magistrates Court.[81] They were to be presided over by Presiding Officers selected and trained by the Ministry of Justice Legal and Parliamentary Affairs. Proceedings were to

be conducted in a "simple and informal manner".[82] The racial criteria in the choice of law process were removed. New criteria for determining which system of law should be applied were put in place and are reproduced below:

3(1) Subject to the provisions of this section and of any other enactment, unless the justice of the case otherwise requires -

(a) customary law shall be applicable in any civil case where -

(i) the parties have expressly agreed that it should apply; or

(ii) having regard to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply, or

(iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) the general law of Zimbabwe shall be applicable in other cases.[83]

Rapidly losing its urban support base and pressurised by the hereditary chiefs, some of whom were to be found in the Senate, the government gave in to demands to restore to chiefs their former judicial powers. This it did in March 1990 when the Customary Law and Local Courts Bill, which is yet to receive Presidential assent, went through Parliament.

In essence the new Bill seeks to abolish the old Customary Law and Primary Courts Act. The Village and Community Courts are to be replaced by Primary Courts presided over by headmen and having a monetary jurisdiction of $500 and Community Courts to be presided over by chiefs and having a jurisdiction of $1,000. Appeals from the Primary Court would be heard in the Community Court and those from the Community Court would be

heard in the Provincial Magistrate's Court which will also have general supervisory powers over all these courts.[84]

The Local Courts, as they will be known, will only apply customary law. Further limitations are placed in that they will not be able to adjudicate on any family related disputes, so that issues of custody, divorce, guardianship, maintenance and succession, which are currently heard in the Community Courts, will all be heard in the Magistrates' Courts. Of the practical difficulties that this will create, Ncube says:

"The community courts which dealt with the popular cases of maintenance, custody and divorce claims were easily accessible because they were not only spread extensively over the country but the legal costs involved were minimal. Moreover the simplicity and informality of their procedure allowed the poorer sections of society and more particularly women to bring and present their claims without the assistance of lawyers. But the procedure in the Magistrate's Court is more complex and difficult to negotiate without legal assistance. This will reduce access by the less powerful members of society..."[85]

3:8(c) Customary Law at Independence

In many ways, the government's initial desire to give back to customary law its former glory was inconsistent with its stated aim of ending the subjugation of women and creating an egalitarian society. In practice, the second principle won over the first and widespread legislative changes were made which resulted in the emasculation of customary law.

Of all the statutory changes made to date, the Legal Age of Majority Act has had the most far reaching effect.[86] It is responsible for the obliteration of much of the customary law.

Passed in 1982, the Act stated very simply that all Zimbabweans attained majority status on reaching the age of 18.[87] With majority comes legal capacity, something which African women had hitherto been denied. More specifically, the provisions of the Act were to apply "for the purpose of any law including customary law".[88] What changes has the Act brought about?

It took until 1984 before the full effects of the Legal Age of Majority Act were felt. Chief Justice Dumbutshena's decision in *Katekwe v. Muchabaiwa* was the catalyst.[89] The issue was whether the father of an African woman who had attained majority status could still exercise his customary law right to claim seduction damages from his daughter's seducer. The short answer was "No." The reason?

> "The daughter can sue for damages for her seduction and not the father. If the daughter is a minor the right of action remains with her father under the customary law. I believe this was the intention of the Legislature. It accords with both the letter and the spirit of Act 15 of 1982."[90]

And with that the die was cast.

> "In short it can be said that each and every customary law rule based on the minority of women has been superseded by the Legal Age of Majority Act."[91]

Further inroads made by statute include changes in maintenance provisions, so that two of the groups previously not entitled to maintenance under the customary law can claim it. These are women married under the customary law and who have unregistered marriages and illegitimate children.[92] Furthermore, it was also stated that in trying to make a custody determination, the principle to be applied is what

would be in the best interests of the children thus removing the old customary law bias which operated in favour of the father of the children and which was grounded in his having paid *lobolo* for the mother of the children.[93]

For the first time the dissolution of marriages contracted under the African Marriages Act and the distribution of the property as between the spouses was to fall under the general law.[94] This was one of the changes brought about by the Matrimonial Causes Act which I shall discuss in greater detail in the following chapter.

Given all the statutory inroads that have been made, it becomes questionable whether there is a customary law left to speak of. Ironically, Community Courts, which were created with the sole aim of applying customary law, now spend most of their time adjudicating upon cases involving custody, divorce and maintenance, all of which are now governed by general law principles.

3:8(d) Marriage At Independence

Although a more detailed discussion of marriage follows in the next chapter, it is necessary to lay the foundations for this discussion by looking briefly at the changes which have come about either as a result of the Legal Age of Majority Act or the enactment of new laws dealing with marriage and divorce.

One of the results following from the passing of the Legal Age of Majority Act is that a father's entitlement to claim *lobolo*

for his daughter, under pain of withholding his consent to the marriage, has now fallen away. This was highlighted in the *Katekwe* decision where the Chief Justice said:

"As I see it what the Legal Age of Majority Act has done with regard to *roora (lobolo)* is this: The major daughter will say to her father "Father I want to get married. You have no right to stop me. I do not require your consent because I have majority status. But if you want *roora* you are free to negotiate with my prospective husband. If he agrees to pay *roora* that is a contract, an agreement between you and my prospective husband. If he refuses to pay *roora* I shall go ahead with my marriage." That without deciding the effect of Act 15 of 1982 on the customary requirement of the payment of *roora* before marriage, seems to me to be the present position having regard to the consequences flowing from Act 15 of 1982."[95]

Despite the Chief Justice's protestations to the contrary, the effect has been to render the payment of *lobolo (roora)* nugatory. Since the consent of the guardian of a major woman is no longer a requirement to the contracting of a valid customary law marriage, it would appear that the only remaining requirement is that the parties consent to the marriage.

The promulgation of the Matrimonial Causes Act in early 1986 marked the end of the fault based divorce system which had operated in Zimbabwe since the time of colonisation.[96] The new Act provided that there were to be two grounds for divorce, namely irretrievable breakdown and mental illness or continuous unconsciousness.[97]

The court is given discretion in reallocating the property of the spouses. Guidelines are provided for the court to use with domestic contribution being one such factor to be taken into account.[98] The fact that the Act also applies to

registered customary marriages means that African women stand to receive a more equitable distribution of property than has hitherto been the case.[99] Although fault was not supposed to play any part in this reconstituted law, it does, for in dividing the property as between the two spouses the court is enjoined to have regard to the parties' conduct.[100]

3:9 Conclusion

This chapter has looked at the history and development of the laws governing marriage and divorce from the colonisation of the country by the British South Africa Company in 1889 to the present day. Throughout the discussion we have seen how the various interested parties, usually men, constructed and re-structured the traditional law to fit in with the changing order and to protect their individual interests. Similarly, we have seen how the *lobolo* institution changed from being a generational binding of two families, to being a crude contract of purchase and sale with the woman as the "goods" and cash payable in advance of cohabitation, being the consideration.

In the post independence phase we have seen how the government has battled with the problem of trying to advance and improve the status of women without offending the conservative (male) base. The two principles have proved to be mutually incompatible and in some ways the government has tried, with only limited success, to achieve both aims. In fairness, it would appear that until 1989 the principle of the improvement of women's legal position was treated as a priority.

The next chapter is an examination of the modern marriage and divorce laws as they operate in Zimbabwe today. It looks at the impact of political and socio-economic changes on marriage. It tries to move away from rigid legal definitions to look at the range of different relationships within which people find themselves and to document the fluidity of the relationships as they exist in life, if not in law.

[1] Seidman, R. (1982) at p.95.
[2] Bourdillon, M. (1975) at p.140.
[3] Cf Goldin, B. and Gelfand, M. (1975) at pp.70-72.
[4] Chanock, M. (1982) at pp.60, 62.
[5] Chanock, M. supra at p.66.
[6] Cf Chanock, M. supra at p. 66, Chanock, M. (1989) at pp.74-83.
[7] For a description of the various ways in which the bridewealth institution has been analysed and conceptualised see: Jeater, D. (1990) at pp.9-21.
[8] Cf Aquina, M. (1967) at p.31, May, J. (1987) at p.36.
[9] May, J. (1987) at p.41 discusses this contention.
[10] Mair, L. (1969) at p.38.
[11] Chigwedwere, A. (1982).
[12] Chinyenze, M. (1983-84) at pp.229, Ncube, W. (1983-84) at p.228, May, J. (1987) at p.41.
[13] Administrator's Proclamation (No. 1 of 28 September 1890).
[14] Southern Rhodesia Order in Council (1898) s.49 (2).
Southern Rhodesia Constitution (1961) s.56.
Zimbabwe Constitution (1979) s.89.
[15] The chief was to rank as as a constable within his tribal area. Cf Goldin, B. and Gelfand, M. (1975) at p.14.
[16] Southern Rhodesia Native Regulations (No. 55 of 1910) s. 2(1) and s. 31.
Native Affairs Act (Chapter 72) s. 14.
[17] Cf *Report of the Courts Inquiry Commission* (1976) at pp.5-6.
[18] Order in Council 20 October 1898 s.49 and s.64.
[19] Royal Charter of 1890 s.14, Cf Ncube, W. (1989) at p.5.
[20] Order in Council of 20 October 1898 s.50.
[21] Act 14 of 1927 s.14.
[22] *Chiduku v. Chidano* 1922 S.R. 55 at p.58.
[23] Palley, C. (1966) at p.511.
[24] Cf Goldin, B. and Gelfand, M. (1975) at p.12.
[25] Native Marriage Ordinance (No. 2 of 1901) s.5(2).
[26] Native Marriage Ordinance (No. 2 of 1901) s.3.
[27] Native Marriage Ordinance (No 2 of 1901) s.4.
[28] Cf Mittlebeeler, E. (1976) at p.47.
[29] Act No. 11 of 1905.
[30] Cf Mittlebeeler, E. (1976) at p.50.
[31] Cf Jeater, D. (1990) at pp.159-164.
[32] Native Marriages Ordinance (NO. 15 of 1912).
[33] Cf Jeater, D. (1990) at p.165.
[34] Jeater, D. (1990) at p.170.
[35] Cf Jeater, D. (1990) at p.348.
[36] Cf Jeater, D. (1990) at p.350.
[37] Jeater, D. (1990) at p.353.
[38] Native Marriages Act (No.16 of 1929) s.8.
[39] Chapter 38.
[40] Act No. 33 of 1937.
[41] Seidman, R. (1982) at p.101.
[42] Lugard, F. (1922) at p.217.

[43] Southern Rhodesia Legislative Assembly Debates 1937. Native Law Bill, 22 October 1937.
[44] Act No. 33 of 1937, s.5, Cf Mittlebeeler, E. (1976) at p.19.
[45] Native Affairs Act (Chapter 92) s.10.
[46] *Komo Leboho v. Holmes NO* 1935 S.R. 86 at pp.92-93.
[47] *Vela v. Mandinika* (1936) S.R. 171 at p.174.
[48] Cf Goldin, B. and Gelfand, M. (1975) at p.10.
[49] s.2.
[50] *Dokotera v. The Master and Others* 1957 (4) S.A. 468.
[51] Chapter 105.
[52] s.3.
[53] s.3(1).
[54] s.12(1).
[55] Holleman, J. (1969) at p.367.
[56] s.13.
[57] Cripps, H. (1947) at p.43.
[58] Cripps, H. (1947) at p.44.
[59] Native Marriages Act (No. 23 of 1950) s.11.
[60] Southern Rhodesia Legislative Assembly Debates 1950. African Marriages Bill. Ian Smith MP column 1932.
[61] Native Marriages Amendment (Act 11 of 1962) s.2.
[62] Chapter 39.
[63] This was actually the second wave, the first wave having taken place immediately after the colonisation of the country. (The Matebeleland Uprising put down in 1894) It had been unsuccessful hence the Matebeleland Order in Council of 18 July 1894.
[64] The Robinson Commission Report, G.S.R. 22-1961.
[65] The Robinson Commission Report, G.S.R. 22-1961 paragraph 183.
[66] Chapter 237.
[67] The Minister of Internal Affairs as quoted by Seidman, R. (1982) at p.104.
[68] The Minister of Internal Affairs as quoted by Seidman, R. (1982) at p.104.
[69] s.3, Cf Ncube, W. (1989) at p.7.
[70] *Jirira v. Jirira* 1976 R.L.R 7. Ncube, W. (1989) disagrees with the decision arguing (at p.21) that "the justice of the case clause" does not empower a court to use general law and ignore a statute that requires customary law to be applied.
[71] Rhodesia Legislative Assembly Debates 1969 Minister of Internal Affairs Second Reading Column 629.
[72] Rhodesia Legislative Assembly Debates 1969 African Tribal Courts Bill 31st January 1969 Mr Chigogo Column 886.
[73] Seidman, R. (1982) at p.108.
[74] Stopforth, P. (1979) at p.16.
[75] *Report of the Commission of Inquiry into Divorce Laws* (1977).
[76] Divorce Commission at p.4.
[77] Divorce Commission at p.71.
[78] Customary Law and Primary Courts Act (No.6 of 1981) as amended by Customary Law and Primary Courts Amendment Act (No. 21 of 1982).

s.7(1) and s.11.

[79] Customary Law and Primary Courts Amendment Act (No.21 of 1982) s.s.12(3) and (4).
Matrimonial Causes Act (No. 33 of 1985) as amended s.2.

[80] Act No. 33 s.11.

[81] s.s19 and 20.

[82] s.17.

[83] Customary Law and Primary Courts Act (No. 6 of 1981) s.3(1).

[84] Ncube, W. (1991) at pp.65-66.

[85] Ncube, W. (1991) at p.66.

[86] Act No. 15 of 1982.

[87] Act 15 of 1982 s.3 (1).

[88] Act No. 15 of 1982 s.3(3).

[89] SC 87/84.

[90] at pp.20-21 of the cyclostyled judgement.

[91] Ncube, W. (1991) at p.68.

[92] Customary Law and Primary Courts Act (No.21 of 1982) s.12(4)(a) and (b).

[93] Customary Law and Primary Courts Act (No. 6 of 1981) s.3(4).

[94] Matrimonial Causes Act (No. 33 of 1985) as amended s.2.

[95] SC 87/84 at pp.19-20.

[96] Act No. 33 of 1985.

[97] s.4.

[98] s.7.

[99] Ncube, W. (1987) at pp.10-12.

[100] s.7.

CHAPTER 4 - RELATIONSHIPS IN THE NINETIES: MARRIAGE AND DIVORCE IN MODERN ZIMBABWE

4:1 Introduction

The last chapter examined the historical development of laws relating to marriage and divorce in Southern Rhodesia and subsequently Zimbabawe from the time of colonisation in 1889 to the present day. It was shown how through "formalisation" and selective interpretation, the customary law evolved into what it is today. Similarly, the bridewealth institution or *lobolo* underwent transformation, starting off as a token payment between families to its commercialisation with the introduction of the cash element.

This chapter looks at the present state of marriage and divorce in Zimbabwe. This involves moving away from sterile legal definitions of marriage and divorce and looking at the fluid way in which people enter and leave relationships. Clark and Haldane note:

> "...marriage is both institution and relationship, an adequate sociological account of marriage is therefore one which is able to pay attention to both the structure and process, showing how the meaning of marital relationships within society is shaped by a wide range of external and internal factors."[1]

In Zimbabwe today, there is official recognition of three types of marriages - marriages under the Marriage Act, under the African Marriages Act and finally unregistered customary law unions.[2] The chapter starts by looking at how marriage is defined at law and then moves on to consider other "non legal" relationships. The nature of each type of marriage will be considered, as will the legal formalities and consequences

arising from each, together with the procedure for obtaining a dissolution of the marriage. The effects of legal changes and socio-economic influences on these different marriages will also be examined.

4:2 MARRIAGE UNDER THE MARRIAGE ACT

Within the general law context, the "traditional" Western definition of marriage, *viz.* a civil contract entered into between two consenting adults which is monogamous, has survived. The solemnisation of the marriage before a designated Marriage Officer marks the commencement of the "legal" union of the spouses.[3] A "church marriage" is regarded, socially, as being the most prestigious so that there is tremendous pressure put on people, especially in the urban areas, to have a church wedding with "all the trimmings".[4]

4:2(a) Consequences

Marriage under the Marriage Act is meant to be monogamous. However, different proprietary consequences apply depending on whether or not both the parties are African. For non Africans, the general law governs all areas of their marriage. However, different rules apply for Africans so that different systems of law apply to the distribution of their property according to whether the marriage is dissolved by death or divorce. This is because section 13 of the African Marriages Act provides:

> "The solemnisation of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses which shall be held, may be disposed of and unless disposed of by will shall devolve according to African law and custom."[5]

What this means is that during the subsistence of the marriage customary law applies. According to customary law, a woman is entitled to two categories of property. *Mavoko* property is the property which a woman acquires "through the exercise of specialised skills such as acting as a midwife or knitting or pottery".[6] The second category, the *mombe ye umai*, is the cow given to the mother of a woman on her marriage. Any offspring which the cow may have also belong to the woman. On divorce, however, the provisions of the Matrimonial Causes Act apply, so that the distribution of marital property is at the judge's discretion.[7] If the marriage is dissolved by death, then customary law will apply.

4:2(b) Divorce

The High Court of Zimbabwe is vested with original jurisdiction to hear and determine divorce proceedings in all civil marriages.[8] The procedure and time taken to get a divorce varies depending on whether the action is contested or uncontested. Currently the waiting list for dates of set down in contested actions is three years.[9] As the procedure for obtaining a divorce in the High Court is relatively complex, most if not all divorce petitions are presented by legal practitioners.

There are two grounds for divorce, namely irretrievable breakdown and continuous unconsciousness.[10] The factors indicating breakdown are provided for in section 5 (2) of the Act:

"Subject to the provisions of subsection (1) and without derogation from any other facts or circumstances which may show the irretrievable breakdown of a marriage, an appropriate court may have regard to the fact that -

a) the parties have not lived together as husband and wife for a continuous period of at least twelve months immediately preceding the date of the commencement of the divorce action; or

b) the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship; or

c) the defendant has been sentenced by a competent court to imprisonment for a period of at least fifteen years or has, in terms of the law relating to criminal procedure, been declared a habitual criminal or has been sentenced to extended imprisonment and has, in accordance with such declaration or sentence, been detained in prison for a continuous period of, or for interrupted periods which in aggregate amount to, at least five years, within the ten years immediately preceding the date of commencement of the divorce action; or

d) the defendant has, during the subsistence of the marriage -

i) treated the plaintiff with such cruelty, mental or otherwise; or

ii) habitually subjected himself or herself, as the case may be, to the influence of intoxicating liquor or drugs to such an extent;

as is incompatible with the continuation of a normal marriage relationship;

as proof of irretrievable breakdown of marriage."

The maintenance of "facts" evidencing breakdown which are similar to the old grounds of divorce has been much criticised, so that Finlay notes that:

"...the selection of the present criteria is still too much concerned with fault, responsibility or causation."[11]

Far from minimising conflict between the spouses at divorce, the retention of the old fault based grounds as facts evidencing breakdown can in fact exacerbate tension between

the parties. It appears that fault still plays an important part in establishing marital breakdown so that a statistical review by Eekelaar shows that in most countries where the doctrine of irretrievable breakdown operates, parties still choose behaviour as evidencing breakdown rather than the more neutral separation ground.[12] One possible explanation for this is that the choice of a "ground" removes the need to wait for the two years required if one is relying on separation to evidence breakdown, hence divorce can be attained almost instantaneously.

The problem with keeping the behaviour grounds to evidence breakdown is that the parties are not able to distance themselves from the acrimonious feelings engendered by pleadings which advance moral failing by one of the parties as the reason for the breakdown of the marriage. Indeed it often leads to a situation where the "guilty" party, although not disputing that the marriage has irretrievably broken down, wants to defend or counterclaim to prove that they were not the sole cause of the divorce or that the grounds alleged are not in fact correct.[13] Another objection to the fault based grounds is advanced by Eekelaar:

"The major objections to retaining the offence doctrine...are that it can be capricious in operation and damaging to the parties...It is capricious because the doctrine seeks to single out forms of conduct which justify one spouse treating the marriage as ended. Hence it represents an <u>evaluation</u> either by society...or by a judge as to the limits of toleration within the marital partnership. Yet this judgement is bound to vary from spouse to spouse, judge to judge and society to society."[14]

Although emotionally less clouded, the separation ground is

not without its problems.[15] The main difficulty is in trying to define what is meant by the phrase "the parties have not lived together as husband and wife". Does the provision mean that the parties have to have maintained separate households for more than 12 months or is the termination of sexual relations between them sufficient? Ncube suggests that if the parties have continued to live together, then they would be required to prove that `*consortium* had ended and that this termination had lasted for the required period of time'.[16] However, Cretney contends that this is not sufficient proof:

> "The practical test (where parties are still living under one roof) is usually whether one party continues to provide matrimonial services for the other, and whether there is any sharing of domestic life. Thus if a husband shuts himself up in one or two rooms of the house and ceases to have anything to do with the wife there will be a separation of households. If on the other hand, although there is estrangement (including a refusal to have intercourse) the parties still share the same living room, eat at the same table and sit by the same fire (or perhaps watch television together) they are not to be regarded as living apart. They are still living in the same household."[17]

In granting the divorce, the court may make an order with regard to the distribution of the matrimonial property as between the spouses. Section 7(3) of the Act requires the court to consider the following factors in the reallocation of property:

" a) the income, earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;

b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;

c) the standard of living of the family, including the manner in which any child was being educated or

trained or expected to be educated or trained;

d) the age and physical and mental condition of each spouse and child;

e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home, caring for the family and other domestic duties;

f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity which such spouse or child will lose as a result of the dissolution of the marriage;

g) the duration of the marriage;

and in so doing the court shall endeavour as far as it is reasonable and practicable and, having regard to their conduct, is just to do so, to place the parties and the children in the position they would have been in had a normal marriage relationship continued between the spouses."

Although listing the factors to be taken into consideration by the court, the statute is silent on the weight to be put on the various considerations. Examining English cases, Eekelaar reached the conclusion that:

"...the courts have evolved two dominant principles based on the concept of the needs of the children and then the spouses. Concepts of `earned entitlements have played a secondary and uncertain role'.[18]

On the basis of the first two considerations, the judge has to try to strike a balance between the resources and future needs of the parties. Research by Weitzman has shown that career assets in the form of pensions and salary comprise the most substantial property owned by the spouses:

"In just one year, the average divorcing couple can earn more than the value of their total assets. This indicates that the spouse's earning capacity is typically worth much more than the tangible assets of the marriage. Since property is divided once, but earning capacity continues to produce income year after year, the latter is clearly of greater cumulative value in the long run."[19]

Given the fact that at divorce the parties split to form two separate households it is difficult to see how a single family's resources can be divided to support more than one household at the previous standard of living.

Ncube argues that in practice:

> `...the age and physical and mental health of the spouses will be subsumed under the consideration of financial needs, obligations and resources...a young and healthy wife is likely to have less needs and more present and future resources than an old and infirm wife who is unable to secure employment because of her age or poor health. The responsibilities and obligations of the parties are also likely to be influenced by their ages and/ or health, just as much as their present and future financial resources are likely to be affected by these factors"[20]

It could be argued however that a young wife with children may very well find herself in the position of having more needs and fewer resources than an older woman whose children are grown and have left the home. Also, like the older woman her chances of obtaining gainful employment in the future may well be affected by the time spent outside the labour market. This provision is also linked to paragraph g) so that generally an older woman who has been married for a long time will be entitled to more than her younger counterpart in a short marriage.

Of particular note is the inclusion of homemaking as a factor to be taken into account. Although an important innovation, it is difficult to resist the temptation to conclude that domestic work will not be as highly valued as are other forms of employment. Eekelaar notes that:

"The notion of accrual of property interests by evaluation of

contribution is unsound as it is impossible to formulate an acceptable yardstick by which to measure the worth of such contribution."[21]

If a fair evaluation of domestic labour is to be made then it has to be looked at as being different from, but equal in value to, other work which is accorded a financial value. [22] Weitzman sees domestic contribution as being linked to the acquisition of income and argues that:

"If one partner builds his or her earning capacity during the marriage, while the other stays out of the labour force to be a homemaker and parent, the earning party has acquired the major asset of the marriage."[23]

In this case the wife should, therefore be compensated for her domestic contribution, and in dividing the assets of the marriage the husband's income should be taken into consideration.

A related issue is that of the "minimal loss principle", which is the requirement that the parties be placed in the position that they would have been in had the marriage continued to exist.[24] Based on the ideology of marriage as being a lifelong partnership, the minimal loss principle suggests a continuation of the marriage relationship even after the parties have divorced. This view has been described as being `inconsistent with the modern view of divorce as a personal misfortune'.[25] The principle has also been criticised as being unrealistic.[26] In *Masocha v. Masocha* it was held:

"At the same time although the plaintiff earns a very substantial salary he has heavy financial commitments. I cannot order plaintiff to pay maintenance at a level that I consider would place the defendant in the same position she would have been, had the normal marriage continued. I have also to bear in mind that she had improperly associated with other men."[27]

In England, this provision was repealed in the 1984 Matrimonial and Family Proceedings Act.

Another problem is that the division of matrimonial assets is entirely at the judge's discretion which leads to uncertainty in the law. This was acknowledged in an interview with a Judge of the High Court. When asked for his interpretation of this section he responded:

"This means that the judge must divide the property in accordance with his sense of justice. All factors are brought to bear. This means that the division depends on your sense of values which are brought to bear on the facts. It is that sense of justice and personal make-up which determines. Judges here are such different people."

He went on to say:

"The whole system is a lottery depending on which judge you draw. We have people from a broad spectrum, Blacks, Asians, Coloured, Whites, Shona and Ndebele. It is a multi ethnic and cross-cultural judiciary and everybody has their own inherent prejudices. I have been horrified by some of the decisions which have been handed down. I mean recently there was this case of a woman in a 14 year marriage which had broken down because the husband had a lover. She had borne 6 children. She walked out of that marriage with nothing. Not the children. Not the house. No nothing. The judge saw that there was irretrievable breakdown. He said that the children of the marriage could be adequately cared for by the new woman. He said that the husband had bought the house without any contribution from the woman. Yet he forgets - I mean how could he expect her to contribute financially when she was busy having all those babies? So basically all he did was to get rid of the old wife and replace her with a new wife. And he saw nothing wrong with that. I mean absolutely nothing."[28]

I subsequently interviewed a legal practitioner specialising in divorce and he was also of the view that the outcome of the divorce depended very largely on the use made by the judge of his discretion:

"There is a conservative trend in the judiciary. Zimbabwean society is more sexist than most. As you know in New Zealand

the legislature had to intervene because the judiciary was using its discretion any which way it wanted.[29] They weren't considering domestic work although the statute states that it has to be taken account in the distribution of assets. It was just nonsensical. There is the same tendency here. Judges are reluctant to award a reasonable division. Like take one of my cases where a wife of 21 year marriage with six children and a house worth $150 000 was awarded $15000. It was a very unjust decision especially as the husband was so grossly at fault - he was an unmitigated liar. She was awarded $100 maintenance per month for herself. We put in an appeal but with financial constraints... to get the record transcribed and a date for the hearing is another 18 months by which time the lawyer's interest has flagged. It was a shocking decision. Every judge has his own interpretation." Mr Aitken

At this point it must be noted that all but one of Zimbabwe's High Court judges are male, so that the judgements reflect a male ideology about what is an equitable distribution of property at divorce.[30] The cases that have come before the High Court since the passing of the Act show a marked lack of consistency, so that there have been cases where the discretion has been used to make an equitable distribution of property. In this category are cases such as *Khoza v. Khoza* where the woman who had taken care of the children and built a home in the rural areas without any help from the husband during the course of their 23 year marriage was awarded a half share of the total property of the spouses which included a matrimonial home in Bulawayo. The wife was awarded the parties' house in town together with all the furniture therein.[31] In a similar case where the woman had taken care of the children and extended the matrimonial home whilst the husband was away studying in Britain, it was held that she was entitled to a half share of the proceeds of the sale of the house. (In this case the husband had sent money to assist with the extension). Justice Gibson reasoned it thus:

"In my mind this is a proper case in which the defendant should get a 50 per cent share of the sale price of the house, because it is largely her contribution and industry that transformed the property into the state it was in at the time of the sale. The inconvenience she must have suffered during the building works as well as the fact that she was the sole custodian of the children of the marriage entitles her to that share at least."[32]

A similar decision was reached in *Nyathi v. Nyathi* where the husband filed for divorce and whilst conceding that the wife could have custody of the minor child of the marriage, contended that he wanted the house, the car and the furniture because he had contributed more than she had. Challenging the basis of the husband's claim, Muchechetere J. had this to say:

"In this connection I detect, as in this case, that there is a general tendency for husbands to minimise contributions made by their wives to the family expenses and the matrimonial homes in particular, just because the husbands usually elect to pay mortgage instalments for the matrimonial homes while their wives are assigned to pay for consumables such as groceries where there are difficulties in keeping accurate accounts. That can lead to unfairness and the courts should therefore be careful not to be swayed by such tendency. In this case the plaintiff was at pains to show that he had divided their joint property even obligations (dishonoured cheques) equally. Why should it not be the same with the matrimonial home?"[33]

In other cases the judges were shown to be less generous in their interpretation of the statute so that in *Mujati v. Mujati* the parties had been married for 17 years during which time the wife had lived in the rural areas in Wedza whilst the husband worked in town. They had five children. She ploughed maize on a subsistence level, any excess was sold and the money kept by the husband. In 1976 the parties acquired a shop in the communal areas which the wife ran single handed, never drawing a salary for her labours. Again all the proceeds were always handed over to the husband. The total value put on all the property was $23 250.00. On the basis of these facts, this is how the judge divided the property:

"I have decided to award the plaintiff the lump sum of $7750 which is one third of the total value of the joint estate excluding the house in Wedza and the business premises. I have excluded these because the defendant maintains the business premises are being leased and I cannot place a value on the lease. The house appears to have been built with the defendant's salary. I have also decided on the above figure because it would approximate what I would consider to be a reasonable salary or remuneration for the plaintiff for the years she worked in the defendant's shop."[34]

Having awarded the wife a lump sum payment, he then went on to scale down her maintenance from $100 to $65 per month.

In *Masocha v. Masocha* the wife, who was the respondent, claimed for a half share in the house valued at $50,000 on the basis that although she had not made any direct contribution to the purchase of the house, she had contributed indirectly by paying for the groceries and other household necessities. The husband earned a monthly salary of $2,300 while she earned $526 per month. The wife's claim was rejected on the basis that the disparity in their salaries was so great as to suggest that whatever the nature of the wife's contribution, it must have been minimal and did not entitle her to a half share.

In the interview with the High Court judge it was suggested that since the use of discretion led to such uncertainty and discrepancies in judgements, it might be better to have a formula laid down by statute, which the judges would be obliged to follow unless it could be proved that substantial injustice would result from its application. To this he replied:

"I haven't given it much thought. Looking at Section 7, I am not sure what can be done. I am not happy about having

judges' hands tied. The moment a judge's hands are tied greater injustice results."

On the basis of research done into the work of registrars Eekelaar constructed a model showing that the practice of registrars when effecting a divorce settlement divided into two issues, namely settlement and compensation issues. Settlement issues reflect the view that parties should take out of marriage that which they put in. A partner's contribution to the acquisition of assets can be in the form of `money, other commodities or services'.[35] "Compensation" issues are defined as those `claims which one partner (assumed to be the wife) may make against the other for damage to her interests for which the other can properly be held responsible.'[36] This presupposes that two questions have been answered; the first is what losses can a person be held to be responsible for and the second is how should they be compensated? Eekelaar identifies three types of loss deserving of compensation. Opportunity costs are linked to the prejudice suffered by a woman as a result of having to give up her career to bear and rear children. As it is usually the woman who sacrifices her career to look after the children she is deserving of compensation:

"The losses she suffers <u>as a consequence of the breakdown</u> are the benefits which marriage would have given her in place of her career. Loss of the cushioning effects of marriage now expose her to the full consequences of her loss of career."[37]

Compensation over the longer term is rendered problematic by the fact that it is difficult to know the extent of a wife's loss, given the fact that it may be mitigated by her remarriage or by her re-entering employment. Child care costs are usually incorporated in the child support payments.

Tied to the division of property is the issue of maintenance payments and in particular, the question whether a substantial property award should be taken into account in trying to decide whether any maintenance should be awarded. The English approach as laid down by Lord Denning in the Wachtel case was that the two issues could not be divorced from each other so that a maintenance award would depend on the amount of property awarded to the recipient of the maintenance, usually the woman.[38] In Zimbabwe it would appear that a similar approach has been adopted, so that in *Mujati v. Mujati* a wife's maintenance was reduced from $100 to $65 because she had been awarded a third of the matrimonial property.[39]

The Act also states that the court may also order payment of maintenance to either the spouse or the children. It may order that the maintenance be paid in a lump sum or periodically.[40] In making such an order, a court is required to have regard to the guide-lines set out in section 7(3) of the Matrimonial Causes Act which have been discussed above. It is with regard to maintenance that the dichotomy between needs and resources becomes most pronounced for the resources which previously went to look after one family are now required to support two or more families. Moreover, unlike property settlements which are made once at the time of the divorce, maintenance more often than not creates a continuing obligation. Given the fact that the remarriage rate for men is high, additional strains often occur. Zimbabwean courts seem to be divided on the question of whether the fact that a

man has entered into another marriage or has other obligations should be taken into account. In *Chodokufa v. Chodokufa* the court refused to take into account the fact that the man had remarried and now had two other children.[41] However, in *Marufu v. Moyo* the court said that it was not necessary to examine the order of priorities of the man in relation to his children.[42]

Research done in Britain and South Africa shows that orders for spousal support are rare. Where awards are made they are generally for maintenance to be paid to women with young children, thus suggesting that the award is in recognition of the women's role as mothers.[43] The exclusion of women without children would seem to go against the traditional view of marriage as being a lifelong partnership as anticipated by the minimal loss principle. As the interests of children are considered to be paramount on dissolution of the family unit, child support awards are considerably less controversial.[44]

In assessing the amount of maintenance to be payable the Zimbawean courts have adopted an actuarial approach as a guide-line. Using this approach the total available income is divided so that each parent gets two shares and each child receives one share.[45] It will be shown in chapter 8 that this approach is not generally followed by lower courts in assessing the amount of maintenance to be paid.

Custody is decided on the basis of what would be in the best interests of the child.[46] The indeterminacy of the welfare

provision means that each case has to be considered on its merits. Factors which have been considered to be relevant in determining which party should be awarded custody include the child's sex, age, health, its educational and health needs, the social and financial position of each parent and his or her character.[47] Although each case is decided on its merits it seems that generally custody of young or handicapped children and girls of all ages is given to the mother whilst adolescent boys are given to the fathers. Indeed the bias in favour of women is built into the provisions of the Guardianship of Minors' Act, which provides:

"Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made..."[48]

In *Mafara v. Mafara* the parties had two minor children, a boy aged six and a girl aged four. The husband claimed custody saying that he was in formal employment whilst the defendant was not and he was therefore in a better financial position to provide for the children. To this Mtambanengwe J. replied:

"It will be obvious hence that the only thing positive in favour of the petitioner is the accommodation he has for the minor children. Against that are the advantages that the respondent as a parent will be able personally to look after the children, the children are both of tender age needing maternal care and attention that only a mother can give, not only the girl. That love and attention which the children need from the parent cannot be supplied by a domestic worker even if the younger child were to be sent to a creche. In this regard it is pertinent, I believe, to note that the happiness and emotional stability of a child, particularly a child of tender age such as that of the two minor children in this case may not necessarily depend on what one may regard as mere physical provisions."[49]

However, the judge in *Mutamba v. Mutamba* felt that the

respective material conditions of the parties was a consideration which was of greater importance in deciding which of the two parties should have custody of the children.[50]

Delphy has noted that the awarding of custody to mothers merely reflects the pre-divorce situation whereby women are responsible for the day to day care of children.[51] She further notes that women are usually awarded custody when the children are younger when they are more of a financial liability, whereas teenage children are given to the fathers.

The vagueness of the welfare provision has been severely criticised so that Eekelaar notes:

"The concept of welfare of the child conceals very difficult value judgements, both about our ideas about individual happiness and fulfillment and moral character and the organisation of our society. It is therefore a totally inadequate response to pass this judgement on to the judges without further spelling out how this concept is to be understood. This leaves the judges cruelly exposed. It evades the responsibility which the community has towards its children."[52]

However, King disagrees with the idea of limiting judge's discretion or the provision of guide-lines noting that:

"Yardsticks of that kind are no more than "ideals" which take little or no account of the inherent instability and unpredictability of relationships between people in families and the ineffectiveness of the law."[53]

Reviewing custody cases in Zimbabwe, Maboreke notes that judicial discretion has been used, in a number of cases, to deprive women of custody of their children. She has also noted that, if after all the factors have been weighed up the position of the parties is found to be equal, then custody is

more likely to be given to the father than the mother.[54] Where conduct is an issue, a woman's misbehaviour is more censured than that of the husband, so that in the *Masocha* case, the wife's alleged adultery was said to have "obviously impaired her suitability as custodian of the minor children".[55] The implication was that she was a bad wife and therefore she had to be a bad mother.

There is a recognition in law of a non custodial parent's right to access, thus where specific provisions for access are not defined, it is implied that the non custodial parent will have reasonable access.[56]

4:3 MARRIAGE UNDER THE AFRICAN MARRIAGES ACT

This is a traditional customary marriage which is open only to Africans and is potentially polygamous.[57] Formalities pertaining to this type of marriage fall into two categories. These are statutory law formalities and formalities under customary law. Statutory law formalities require that a marriage be solemnised by a Community Court Presiding Officer, who must satisfy himself that:

a) The intending spouses consent to marry each other.
b) The guardian of the woman consents to the marriage.
c) The guardian of the woman and the intending husband have agreed on the *lobolo* payable for the woman.[58]

In the light of the Legal Age of Majority Act, it is submitted that the last two requirements have fallen away. However few women would contemplate marriage without *lobolo*. Although it is the act of registration which gives the marriage legal

validity, some parties let years elapse before they register their marriage and some never do. Often the cause of this is the woman's father who refuses to give his consent until the outstanding *lobolo* has been paid. One of the women in the customary group recounted her story:

"In 1984 we decided to register our marriage...The two of us agreed to do this. Our parents weren't really interested. This is because he had not finished paying the *lobolo*. Under our custom you have to pay the *lobolo* first before you can get married. They said that he should at least pay a substantial amount before they could allow him to marry." Mrs Ncube

This attitude demonstrates a clash of values between customary and general law. Under customary law, payment of *lobolo* validates the marriage and there is no need for registration. Under general law registration provides conclusive evidence of a valid marriage. The reality of the situation is that very few daughters and an equally small number of sons-in-law would think of disobeying the father's wishes for fear of an ill omen befalling them or their children. The woman's position is made perilous by the fact that she knows that it is to her father that she will need to turn should her marriage fail to work, so that it is in her own interests to obey him.[59]

Customary law formalities are rooted in tradition and are more complex.[60] To start with, the prospective groom informs his family that he has found a suitable match. His family engages an emissary called a *munyai* to approach the prospective wife's family. The *munyai*, who is usually somebody known to both parties, initiates contact with a member of her family. This family member then informs the family of the *munyai's* visit

and arranges for the *munyai* to come to the village or family house for talks about the marriage.

The *munyai* brings token gifts, usually money to give to the woman's family. These include a token gift to allow him to enter the village, and another to allow him "to open his mouth". Thereafter, if the woman's family is agreeable to the match, formal negotiations begin, culminating in the father of the woman stating the amount of compensation or *lobolo* he wants for his daughter. The *munyai* then returns to the man's family with the list of demands for their consideration. If they are in agreement, the *munyai* then returns to the woman's family to convey their willingness to pay.

A period of time then elapses during which the prospective husband and his family try to gather as much of the *lobolo* as they can. When a substantial portion has been gathered, the *munyai* is again sent to the prospective bride's family to let them know that the other side is ready to re-convene. When this event takes place, the *lobolo* is formally handed over.

The two families now consider themselves relations. Any remaining formalities, which may vary between different tribal communities, are concluded and festivities held. On the appointed date, the "wife", accompanied by her paternal aunt, is taken to her new home for the formal handing over ceremony which marks the conclusion of the marriage.

4:3(a) Consequences

During its subsistence, aspects of the marriage are governed

concurrently by customary law and general law. Customary law applies to the movable property of the marriage and vests most of it in the husband. Immovable property is governed by general law so that a woman can own property in her own right. Africans married under the African Marriages Act whose marriages are *de facto* monogamous can convert their marriage to civil marriages under the Marriage Act, as indeed one of the women in my sample did. There is no legal bar to them doing that.[61] This move is often necessitated by family, society or religious pressure.[62]

Recent trends suggest that polygamous marriages are declining in number. First, the rising cost of living means that most men cannot afford to keep more than one household. Secondly, society, even Shona society, is increasingly geared towards the nuclear monogamous family. Moreover, services such as Council housing are provided on the assumption that each man has one wife. Finally, the women themselves are increasingly against contracting polygamous marriages.[63]

4:3(b) Divorce

Both the High Court and the Community Court are competent to dissolve this type of marriage. The vast majority of petitioners are women and many would choose to go to the Community Court. This is because proceedings in the primary

courts are simpler, cheaper and more informal than in the High Court. Although desirable, the services of a legal practitioner are not required in the Community Court. But this self-representation has practical drawbacks. The average Shona woman is not accustomed to standing up in front of a man (most Presiding Officers are male) to confront a man and to demand that her rights be vindicated.[64] Problem solving, even when the problem involves her, has always been the preserve of the male members of her family.[65]

Traditionally, a marriage under Shona customary law was dissolved by the two families when they decided that the continuation of marriage relations between them had become impracticable.[66] The informal family dispute resolving mechanism is used to dissolve the traditional part of the marriage. The traditional procedure for obtaining a divorce may vary according to whether it is the wife or the husband who has deserted the other. In the former case, a woman who is unhappy can leave her husband and go to her family who will probably encourage her to return to him. This is because her action places her family in the unfavourable position of being the refusing party and raises a presumption of guilt on her part.[67]

Faced with this situation, the husband has two options open to him. He may either claim his wife back or demand a refund of the *lobolo*. If he chooses the second option, then he may be required to give a rejection token called *gupuro*.[68] In modern times this is often a small amount of money such as 10c. The husband must state the reasons for his dissatisfaction.

Even at this late stage of the marriage, both families will work very hard at reconciling the couple.[69] Only when their efforts fail will they actually sit down to begin negotiations on the terms on which the marriage should be dissolved. The main issue in contention is of course the *lobolo*. The husband's family will demand a refund of the amount it has paid. This is assuming that the total initially demanded has been paid. The reason for demanding a refund is based on the claim that the husband has not yet "used up" the woman's reproductive capacity and labour. The amount of *lobolo* to be returned will depend largely on the number of children borne of the marriage, the age of the woman, the length of the marriage and the reason for the break-up of the marriage.[70] Once this has been done, a refund of the *lobolo* is effected, (this may sometimes take years) and the marriage is regarded as formally dissolved. If the husband had not finished paying the *lobolo* then the father-in-law can sue for the balance. In such cases, a claim for a refund of the *lobolo* can be off-set by the balance outstanding.[71]

Under statutory law the no fault principle of divorce applies so that the same grounds apply to dissolving this marriage as apply to dissolving a marriage under the Marriage Act.[72] Although the proprietary consequences of this marriage are governed by customary law during the subsistence of the marriage, on divorce the court is given power to re-distribute the property as it sees fit.[73] The customary law practice of giving custody and guardianship of children to the father if *lobolo* has been paid has been overridden by statute. The sole

consideration is the best interests of the child.[74]

4:4 CUSTOMARY LAW UNIONS

Prior to the passing of the Legal Age of Majority Act, it was easy to ascertain whether or not the parties had an unregistered customary law union. The requirements were clearly laid down and were similar to those prescribed for marriage under the African Marriages Act, except that the union was not registered thus rendering it legally invalid. This change in the law has resulted in problems for what is now required to be done before parties can be considered to be married under the customary law? The issue was considered in *Karambakuwa v. Mabaya*.[75] The question was whether a man was required to maintain a woman for whom he had not paid *lobolo* in terms of section 12(4)(a) of the Customary Law and Primary Courts Act which says that in trying to decide whether a person is responsible for the maintenance of another, the law should regard:

"the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during the marriage and, after the dissolution of their marriage until her remarriage."

The facts of the case were that the parties had lived together for seven years during which time they had three children. They had never registered the union. More importantly, the man had neither paid nor promised to pay *lobolo* to the woman's family. However, they both knew the respective families and indeed the woman had helped his parents to plough their lands. Dismissing the husband's appeal, the court said:

"The appellant is living in the past. It is settled that the

question of *roora (lobolo)* is no longer an essential element of marriage under customary law: John Katekwe v. Mhondoro Muchabaiwa... It follows that the principle cited by the appellant has ceased to be good law...On that basis, it seems to me that the term "the person who, according to customary law is the husband of a woman...must be construed in a manner which accords with the law as it is today. The question of *roora* must be completely disregarded in determining whether the respondent's relationship with the appellant amounted to a customary law union for the purposes of the Maintenance Act."[76]

However, the court failed to define what it meant by "the law as it is today". It also remained moot on the point of what it is that one had to look at to determine whether or not a customary union was in existence given the fact that the payment of *lobolo* was no longer required to constitute a valid customary marriage.

4:4(a) Consequences

Although legally invalid, a customary law union is treated as a valid marriage for the purposes of status, guardianship and rights of succession of children.[77] It is also regarded as valid for the purposes of maintenance of the wife, as we have just seen. It seems that there has been greater and greater legal recognition given to unregistered customary law unions so that in one case it was decided that the widow of an unregistered customary law union was allowed to claim damages for loss of support from the person who caused his death or from his employers or insurers.[78] Perhaps realising that it had in fact "made law", the court pre-empted criticism by declaring:

"Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law

is to be a living force it must be dynamic and accommodating to change. It must adopt itself to fluid economic and social norms and values."[79]

This type of marriage is potentially polygamous, so that a man may take as many wives as he wishes. If the man only has one woman that he wishes to marry in terms of the statutory law, then there is nothing to prevent the two registering their marriage. Given the new loose definition of customary law union, it becomes interesting to speculate upon what would happen if a man had two or more women with whom he had children and with whom he had settled relationships, and registered his marriage to one of them under the Marriage Act. Would the monogamous nature of that marriage preclude the other women from bringing actions for support for themselves as customary law "wives"? Armstrong contends that other women would be able to claim maintenance, arguing that:

"... it only matters whether the marriage is recognised by the customary law, not whether it is legally valid."[80]

4:4(b) Divorce

There is no need for formal dissolution of the union as only the family is involved. However Galen contends that there is nothing in law to prevent a Village or Community Court from declaring the marriage ended and indeed this is what often happens.[81] Proprietary consequences are governed exclusively by customary law which allows a woman to take two categories of property: her *mombe ye umai* or motherhood beast given on the marriage of her daughter and her *mavoko* (literally "hands") property. Traditionally the second category of

property was said to be that which she acquired as a result of her own labour. In a market-based economy, it is questionable whether the salary of a woman who is engaged in paid work can be considered as hers, being *mavoko* property, or if it belongs to her husband, since by being "allowed" to work, she has been freed from her traditional duties of tilling his land and minding the children? There seem to be two schools of thought, with Bourdillon arguing that traditionally money earned by the woman from exercising her special skills belonged to her personally, and therefore that in modern times a woman should be allowed to keep the money which she makes as her own.[82] Child, however, contends that:

"Should a woman go out to work with the approval of her husband, while under his marital control, any money she earns belongs to him under both Shona and Ndebele law."[83]

One could argue of course that since women are now free from the legal control of both fathers and husbands, they do not need their permission to work and therefore any money which they may earn belongs to them personally. However, if one regards *lobolo* as vesting the woman's labour in her husband, then any woman for whom *lobolo* has been paid receives a salary, not in her own right, but on behalf of her husband. Ncube appears to follow the last line of argument.[84]

Customarily children of the marriage "belong" to the patrilineal line by virtue of *lobolo* having been paid for the mother.[85] The result is that on divorce, the father expects to have both custody and guardianship of the children. If the children are still very young, then they can stay with their mother. The father will then pay his former in-laws *chiredzwa*

or a rearing fee for looking after the children for him. Traditionally, the payment would be in the form of livestock. When they are a little older (the colonial courts prescribed the age of seven for boys) they will be transferred to their father's family. The exception to this rule is that if the father has not yet met his *lobolo* obligations then the children will go to the mother.[86] Although the position has now been changed by statute, which provides that the best interests of the child are always to prevail regardless of the system of law being applied, the reality is that many families, including some in my sample, still follow the traditional customary practice granting custody to the man if he has paid *lobolo* and denying him custody if he has not.[87] It is the fear of losing their children which leads many women to put up with gross ill treatment.[88]

This section has considered the various types of marriage as they exist in Zimbabwe today and the impact of the two systems of law on them. However, not only has there been much re-definition of the legal position of these various marriage, but also the reality is that not all people fit into legally recognisable categories. It is therefore important to discuss the other types of unions which do not fit into either the customary or the general law definitions of marriage and are therefore regarded as irregular.

4:5 IRREGULAR UNIONS

4:5(a) Reasons For Irregular Unions

Various reasons have been advanced for the increase in these unions. Clyde-Mitchell says that demographic features such as the disproportion of the sexes, the tribal heterogeneity of the towns and the relatively high mobility of town dwellers all contribute to lack of marital stability and the creation of irregular unions.[89]

It is generally agreed that the economic changes brought about by the capitalist economic system introduced by colonialism necessitated men entering into waged labour to make money to pay taxes and to acquire other modern conveniences. Men left the rural areas and migrated to the towns to find work. Not only did this necessitate a break with kinship ties, it also led to a break-up of families for more often than not accommodation was provided for the man only.[90] Additionally, women's migration to town was restricted. The women who did get to town were regarded with suspicion, especially if they were unmarried. It was felt that town migration was not suitable for women and would lead to a loosening of morals.[91] With the exception of positions in domestic employment it was difficult for women to get jobs. Some resorted to petty trading but the majority found that their position was worse than it had been in the rural areas for they could not plough and therefore did not have any means of subsistence. As a result they found themselves entirely dependent on men for survival.[92] Many entered into relationships with men who provided them with money and shelter in return for sexual favours. Of this phenomenon Cutrufelli notes:

"A relationship of this sort might well be transformed into a domestic union, after a while the woman started cooking for

the man, and in return the man maintained her."[93]

Although women are now allowed into the formal labour market, they constitute a very small percentage of the total work force.[94] They are therefore still largely reliant on relatives and "husbands" for support. Krige advances other reasons for people entering into irregular unions:

"...such unions may provide a father for the children of a widow, it may be resorted to when young people have difficulties with their parents about their marriage, it may be the easiest method for obtaining support from a seducer when the girl is alone in town and afraid to return home to her parents. By far the greater proportion of loose unions are in cases in which negotiations have taken or are taking place and the boy intends legalising their position by handing over the first instalment of *lobolo* as soon as he has the means to do so."[95]

4:5(b) Defining Irregular Unions

It seems that the only way to define an irregular union is by describing it as Mair does, as one which has "received none of the possible forms of legal sanction".[96] This raises problems with respect to customary law unions, for it is not always easy to check the statement that a couple are married according to customary law. Moreover, given the legal impasse that has been reached, how does one define a customary law union? I would argue strongly that despite legislative and judicial intervention *lobolo* remains a vital part of Shona marriage. This contention is borne out by Ncube's research which shows that:

"...the Legal Age of Majority Act seems to have had virtually no impact on the practice of *lobolo*...Indeed, our research revealed that marrying women and their mothers are the most ardent advocates for the continued payment of *lobolo*. As a result men of all classes - continue to be charged and to pay"[97]

The next problem is ascertaining when a customary law union can be said to have come into existence. Is it one where all the *lobolo* has been paid or only some of it? Can it be considered to be a customary law union where *lobolo* has been promised but none paid? Krige overcomes this definition problem by regarding a couple as married after the first instalment of *lobolo* has been handed over.[98] But Cutrufelli makes the point that due to poverty the absence of payment "can easily be forgotten in the daily flow of village life".[99]

What of the couple who live together in a permanent monogamous union who regard themselves as married and who are regarded as married by members of their community? May is in favour of recognising such "marriages". She suggests that the couple could obtain a sworn affidavit from a prominent member of the community saying that they have been living together "in a manner seen by their community as a socially recognised marriage for a specified number of years and that no impediment to the marriage exists". She goes on to point out that other countries such as Mozambique and Tanzania require two and three-year periods of cohabitation respectively before a couple can be regarded as married.[100] Of the difficulty of defining customary unions, Griffiths notes:

> "Research showed that a significant number had children in relationships categorised as `fleeting' or `brief'. These were of such short duration and without any of the features associated with a customary marriage that had failed. Nor could they be considered more informal unions which were recognised by the community as they did not exhibit any of the features associated with such public acknowledgement."[101]

4:5(c) Types of Irregular Unions

As is to be expected there are numerous types of "arrangements" which qualify as irregular unions.[102] Cutrufelli identifies three types of irregular union.[103] The first, which she calls the "shaky marriage", places itself between a proper marriage and concubinage. Being free of ceremony and bridewealth, its subsistence is dependant largely on the compatibility of the couple and what Cutrufelli calls their "flightiness or litigiousness".[104] The "trial union" is that leading up to the proper marriage and usually lasts up to the first childbirth. This has probably arisen as a result of the decline in polygamy for men can no longer afford to marry more than one wife and therefore seek to ensure that the one that they do choose to marry is fertile. This often leads to the woman being placed in a difficult position, for she must become pregnant to prove her fertility and thus get a husband, but by doing this she runs the risk of being labelled "loose" and therefore not marriageable.[105] As most men are loath to take on another man's child, the unmarried mother is often forced into a life of irregular unions with different men, by whom she may bear still more children "to prove the genuineness of her love" for them.

The third type of union identified by Cutrufelli is the "consensual union" which will probably be open to a barren woman who "will be happy with her status as a concubine with a polygamist".[106] Under this rubric could also be subsumed the independent woman who has either tried and tired of marriage or who has been unlucky in love. Such women look to men for

sexual companionship, male protection and financial assistance. However they enjoy greater autonomy and freedom from the control which the man would otherwise exercise over them in a normal marital relationship. Chavunduka discusses this type of union which in Zimbabwe is known as *mapoto* marriage. He says that they are favoured by divorcees who value their independence.[107] Elsewhere in Africa these women are known as "outside wives".[108] One of the women in the civil marriage group was involved with a man whom she knew to be married:

"Then I met this guy who is married but he is very nice to me and the kids. I try to be considerate because I don't want the other lady to face what I faced. She doesn't know, well at least I don't think she knows. We just go out and enjoy each other's company. I don't want his money." (Ms Ngwenya)

Relationships with married men are not only limited to divorced women. Harrell-Bond notes that in Sierra Leone even unmarried women are willing to have affairs with men whom they know to be married:

"It should also be noted that unmarried women achieve considerable prestige through unions with educated men. Unmarried girls, particularly those who cannot hope to get married to high ranking men in the community, are often quite willing to become their mistresses or outside wives, rather than marry men of their own social position."[109]

There is also the woman who is in a period of transition brought about by death or divorce and who although not self supporting does not wish to return to the family fold. The irregular union acts as a stop gap between a possible second marriage.[110] Perhaps one of the most common types of irregular union is that involving a migrant worker who will live with a

woman whom he meets in town without disclosing the fact that he is already married. With the promise of marriage to sustain her, the woman will stay with the man for an indefinite period.

Griffiths divides relationships into two categories, the fleeting/ brief and intermediate or death groups. She defines the fleeting or brief category as representing those relationships:

"...which have involved only one pregnancy and which have lasted up to a maximum period of two years. They represent those relationships which have not acquired enough features to be considered as a marriage type relationship."[111]

The intermediate or death categories on the other hand represent those relationships which:

"...lasted up until the death of one of the parties which have more of the features which may be associated with a potential customary marriage, although it never took place."[112]

These, then, are just some of the irregular unions which exist in Zimbabwe. Their multiplicity and diversity leads one to question the efficacy of holding on to rigid legalistic definitions of "conventional" marriage and calls for a broader understanding of, appreciation, and recognition for the different relationships within which people are found. Clark and Haldane note:

"In the context of plurality of adult relationships it must be recognised that not only are there many forms of marriage, but also that there are many alternatives to it. Among those who opt for alternatives, it is also significant that there may be a certain amount of movement back and forth between marital and non marital forms of relationship during the life course."[113]

4:6 Conclusion

Besides looking at the three types of marriage which have been accorded legal recognition, this chapter has also attempted to go beyond the black letter law to place relationships within the new social context. We have seen that the diversity of humankind is reflected in some small degree in the multiplicity of the relationships in which people are found.

The next chapter looks at the background to gathering the data on which the second part of the thesis is based. It describes the development of the research instrument and places the study population in the context of the Zimbabwean population at large.

[1] Clark, D. and Haldane, D. (1990) at p.11.
[2] Marriage Act (Chapter 37), African Marriages Act (Chapter 238).
[3] s.4(1) of the Marriage Act.
[4] Cf Weinrich, A. (1982) at p.84.
[5] As rights to immovable property are always governed by general law, it is assumed that this section applies only to moveable property.
[6] Ncube, W. (1991) at p.78 n.77.
[7] s.7 of the Matrimonial Causes Act (No 33 of 1985).
[8] There are two High Courts situated in the two largest cities namely Bulawayo and Harare. However Judges of the High Court also take it in turns to do circuits of the other smaller cities and towns.
[9] Interviews with Mrs Brighton and Mr Arnott, both practising legal practitioners in 1990.
[10] s.4 of Act No. 33 of 1985.
[11] Finlay, H. (1975) at p.173. Cf Eekelaar, J. (1984) at p.41.
[12] Eekelaar, J. (1984) at p.42, Cf Cretney, S. (1984) at pp.219-221.
[13] Empirical evidence to substantiate this assertion will be presented in chapter 8.
[14] Eekelaar, J. (1984) at p.43.
[15] Cf. Eekelaar, J. (1984) at pp.48-51.
[16] Ncube, W. (1989) at p.217.
[17] Cretney, S. (1984) at p.153. In support of this contention, he cites Mouncer v. Mouncer (1972) 1 W.L.R. 321 but then Fuller v. Fuller (1973) 1 W.L.R 730 reached a different conclusion, but perhaps that is because the wife had moved house to set up a new household with her lover before the husband joined them.
[18] Eekelaar, J. (1979) at p.267.
[19] Weitzman, L. (1992) at p.97.
[20] Ncube, W. (1989) at p.177.
[21] Eekelaar, J. (1979) at p.261.
[22] Cf Gray, K. (1977) at p.71, Eekelaar, J. (1991) at p.79.
[23] Wietzman, L. (1992) at p.98.
[24] s. 7(3) of the Matrimonial Causes Act.
[25] Eekelaar, J. (1979) at p.262.
[26] Eekelaar, J. (1984) at p.109.
[27] Masocha v. Masocha HC-H-183-87 at p.11.
[28] Cf Ncube, W. (1989) at pp.185-188.
[29] Cf Eekelaar, J. (1984) at p.105, Matrimonial Property Act 1976 (NZ) as amended by Matrimonial Property (Amendment Act 1980 (NZ).
[30] Cf Eekelaar, J. (1991) at p.6.
[31] Khoza v. Khoza HC-B-106-87.
[32] Muchada v. Muchada HC-H-66-87 at pp.5-6.
[33] HC-B-77-89 at p.17.
[34] HC-H-505-87 at p.5.
[35] Eekelaar, J. (1991) at p.77.

[36] Eekelaar, J. (1991) at p.79.
[37] Eekelaar, J. (1991) at p.80.
[38] Watchel v. Watchel (1973) Fam. 72, Cf Eekelaar, J. (1984) at pp.108-109.
[39] Mujati v. Mujati HC-H-505-87 at p.5.
[40] s. 7(1) of the Matrimonial Causes Act.
[41] Chodokufa v. Chodokufa HC -H- 295-87, Daines v. Daines 1980 ZLR 141.
[42] Marufu v. Moyo 1983 (2) ZLR 386.
[43] Eekelaar, J.(1991) at p.68, Burman, S. (1989) at p.8.
[44] Eekelaar, J. (1979) at p.256.
[45] Gwachiwa v. Gwachiwa SC -134-86.
[46] s.3(1) of the Guardianship of Minors Act (Chapter 34), s.10(1), (2) of the Matrimonial Causes Act.
[47] Ncube, W. (1989) at p.123, Cf Cretney, S. (1984) at pp.329-337.
[48] s. 4(1). However in Marira v. Marira HC-H-167-87 it was noted that this provision was not peremptory.
[49] Mafara v. Mafara HC-H-431-87 at p.4, Cf. Nyathi v. Nyathi HC-B-161-87, Dolby v. Lewis SC-34-87.
[50] Mutamba v. Mutamba HC-H-1-85, Cf Chanetsa v. Chanetsa HC-H-32-85.
[51] Delphy, C. (1984) at p.104, Cf Eekelaar, J. (1991) at p.136.
[52] Eekelaar, J. (1984a) at p.593.
[53] King, M. (1987) as quoted in Eekelaar, J. (1991) at p.131.
[54] Maboreke, M. (1987) at p.158.
[55] Masocha v. Masocha HC-H-183-87 at p.11.
[56] Mutasa v. Mutasa HC-H-40-85.
[57] s.2 of the Act states that "a marriage in this Act means a marriage between Africans".
[58] s.3 of the African Marriages Act.
[59] Cf May, J. (1983) at p.79, May, J. (1987) at p.40.
[60] See Aquina, M. (1967) at pp.28-32.
[61] Chikosi v. Chikosi 1975 (1) RLR 140 at p.143.
[62] Cf Goldin, B. and Gelfand, M. (1975) at p.158.
[63] Cf Poulter, S. (1976) at pp.69-71.
[64] Cf Burman, S. (1990) at p.262.
[65] Cf May, J. (1983) at pp.113-114.
[66] Holleman, J. (1969) at p.267.
[67] May, J. (1987) at p.40, Weinrich, A. (1982) at p.161.
[68] Cf Weinrich, A. (1982) at p.161.
[69] Cf Poulter, S. (1976) at p.41.
[70] Cf Goldin, B. and Gelfand, M. (1975) at p.133.
[71] Jobkekane v. Jakachira 1967 AAC 31.
[72] s.2(1) of the Matrimonial Causes Amendment Act (No. 11 of 1987).
[73] s.7 of the Matrimonial Causes Act.
[74] s.10(1) of the Matrimonial Causes Act, s.3 (4) of the Customary Law and Primary Courts Act (No. 6 of 1981).
[75] SC-158-87.
[76] Karambakuwa v. Mabaya supra at p.4.
[77] s.3(3) of the African Marriages Act.
[78] Zimnat Insurance Company Limited v. Loyce Chawanda SC

-107-90.
[79] Zimnat Insurance Company Limited v. Loyce Chawanda supra at p.12.
[80] Armstrong, A. (1990) at p.136.
[81] Galen, D. (1983-84) at p.28.
[82] Bourdillon, M. (1975) at pp.147-148.
[83] Child, H. (1965) at p.77.
[84] Ncube, W. (1991) at p.72, See also Jenah v. Nyemba SC-49-86 at p.5.
[85] Ben v. Chombe 1947 SRN 151.
[86] Nzira v. Zvinawashe 1947 SRN 161.
[87] s.3(4) of the Customary Law and Primary Courts Act.
[88] May, J. (1983) at p.86.
[89] Clyde-Mitchell, A. (1969) at p.324.
[90] Cf Obbo, C. (1980) at p.22, Southall, A. (1969) at pp.9-10.
[91] Cf Obbo, C. (1980) at p.28.
[92] Cf Cutrufelli, M. (1983) at pp.31,46.
[93] Cutrufelli, M. (1983) at p.31.
[94] Muchena, O. (1984) at p.750 says that in 1979 women were 4.9% of the black industrial force and in 1981 were 6.9% of the total work force in non agricultural activities.
[95] Krige, E. (1936) at p.21.
[96] Mair, L. (1969) at p.44.
[97] Ncube, W. (1991) at pp.68-69.
[98] Krige, E. (1936) at p.12.
[99] Cutrufelli, M. (1983) at p.46.
[100] May, J. (1987) at p.99.
[101] Griffiths, A. (1989) at p.588.
[102] Obbo, C. (1980) identifies five groups of single women all tied in some way or another to the ideal of marriage, but bound by the reality of urban social conditions which may make the ideal difficult to realise and who therefore compromise by entering into informal unions.
[103] Cutrufelli, M. (1983) at p.46.
[104] Cutrufelli, M. supra.
[105] Cf Southall, A. (1969) at p.47.
[106] Cutrufelli, M. (1983) at p.82 n.17.
[107] Chavunduka, G. (1979) at pp.42-56.
[108] Harrell-Bond, B. (1975) at p.98 n.23. Interestingly, Obbo, C. (1980) at pp.103-108 discusses these women in a section entitled "Motherhood and Wifehood as Transactional Tools" thus linking irregular unions with womens' ploys for survival.
[109] Harrell-Bond, B. (1975) at p.229.
[110] Cutrufelli, M. (1983) at p.34.
[111] Griffiths, A. (1989) at p.588.
[112] Griffiths, A. (1989) at p.588.
[113] Clark, D. and Haldane, D. (1990) at p.9.

CHAPTER 5 - RESEARCH DESIGN AND DESCRIPTION OF THE SAMPLE

A thesis such as this which is concerned with the operation of marriage and divorce laws and which is a qualitative study hinges to a large extent on the quality of the data on which it is based. This chapter describes the method of gathering that data. A preliminary analysis of the data is undertaken and the findings are presented in tabular form. The chapter starts by looking at the original idea behind doing the research, moving on to conceptualization of a research problem, the design of a research instrument, access to the sample, the collection of the data and finally the process of analysing the data and writing up the findings.

5:1 The Need for Socio-Legal Research

The researcher's interest in studying the women's journey through the divorce process and in the role and impact of law, both formal and informal, necessitated empirical work which in itself meant doing socio-legal research. This is not to suggest that library based research cannot generate topical relevant data.[1] Rather, it is to acknowledge the limitations of using only library based research in an area which had not been thoroughly and systematically explored before. Discussing some of the disadvantages of relying solely on library based research, Glaser and Strauss note:

> "If the sociologist is interested in a particular group, he may be quite defeated when he tries to gather data about it in the library. Even when the relevant materials exist they may be fragmentary or relatively useless for one's purpose. A related question is whether such data exist in the dense detail (about important issues, relationships, roles, strategies, processes) that interviews and especially fieldwork unearth."[2]

The primary aim of the research was to discover the use of law by the chosen sample of women and its impact on their lives. The research also aimed to discover whether they had encountered any impediments in trying to mobilise the law.

The main constraint in achieving this goal arose as a result of the research being undertaken by a single graduate student with a limited amount of time and funding within which to complete the research. Moreover there was the psychological constraint of being a law graduate new to the social sciences. The first step then was to try to ascertain if the required information could be obtained from existing sources.[3] To enable the researcher to get a feel for the magnitude of the problem, an attempt was made to collect quantitative data.

5:2 The Use of Secondary Sources

5:2(a) Quantitative Data

An attempt was made to obtain quantitative data on the number of divorces granted and the number of people given legal aid in any one year. However, this proved to be difficult. The researcher discovered that the legal aid records were incomplete. The only reliable ones were from 1985 to the present. Moreover the figures only reflect the number of people granted legal aid and not the total number of applicants.

The divorce records were also incomplete. Figures for divorces granted were available from the 1950s until 1982. None could be found for the years 1983, 1984 and 1985.

Technically it would have been possible to get an idea of these figures from the case record book. However, the researcher did not think that this was a practical option. All the civil cases which are heard in the High Court are entered into this book every time the case is heard, so that the name of one case may appear and therefore be counted several times. Moreover cases, particularly contested divorce suits, often take years to resolve so that although a case is commenced in 1985 the final decree may not be granted until 1987. Finally the figures did not seem to reflect changes occasioned by the passing of the Matrimonial Causes Act which came into operation in February 1986.[4]

5:2(b) Court Records

Given the researcher's interest in finding out how women had used the legal system, the use of court records seemed, at first, a real possibility. Obtaining access to them would not be difficult. The researcher had been told that if she could produce a letter from her supervisor she would be allowed to examine the records.[5] However, court records have an administrative and legal bias, that is to say that they constitute a precis of formal court proceedings. In this way they sacrifice depth for the sake of brevity.

Moreover as it is merely a legal record made by and for legal experts, the court record does not reflect the opinions of the parties to the dispute, although it may well reflect their lawyers' construction of the dispute. This legal construct may bear little or no resemblance to the parties' own

perceptions of the matter. Moreover, court records fail to give a full history of the problem, telling the story from the time that the parties first had contact with the formal law and thus ignoring all the negotiations and informal dispute resolution which may have preceded the approach to formal law.[6] The details of the women's pre-formal law experiences were of interest to the researcher. Other examples of the limitations of this type of data are given by Kazembe:

> "...it would have been useful if Presiding Officers, or others who were recording during court proceedings, had included, where applicable, the amount of *lobolo* charged and paid, the duration of the marriage, and the number, age and gender of the children in divorce, custody and maintenance cases. The amount of *lobolo* paid is, according to Shona and Ndebele customary laws a great determinant in the outcome and consequences of divorce, and, subsequently, the custody and maintenance of children."[7]

Moreover the court records to which the researcher had been promised access were in the High Court. Although having jurisdiction to deal with marriages contracted in terms of the African Marriages Act, the High Court deals mainly with the dissolution of marriages contracted under the Marriage Act, but only a very small percentage of people are married under this Act. More cases would have come under the Community Court, but the records of this court are not as comprehensive as those kept at the High Court and are consequently less useful.[8]

The researcher considered using the court records to trace these women for an interview.[9] However not only would this have been time consuming, but it would have involved the researcher in further bureaucracy.[10] Furthermore with the

break-up of families after divorce, it would have been difficult to follow up the women.[11]

The use of lawyer's files to elicit the required information was also considered.

5:2(c) Lawyers' Files

The feasibility of this method of data collection was explored by Ingelby:

"The need for a non-intrusive method of examination led to a consideration of the solicitor's file as a source of data. Files contain both the written elements of their activity, such as letters and court documents and records of the oral element."[12]

This method of data collection did not prove possible. The researcher encountered difficulty in persuading lawyers to allow her access to their clients or the files. The reason advanced was the importance of maintaining lawyer/client privilege.[13] On a balance it was considered that the files, like High Court records were of limited value, concentrating as they did on the purely legal aspects of the case.

With both court records and solicitors' files being considered inadequate to meet the research needs, it became necessary to collect primary data. The cheapest and simplest method was to draw up a questionnaire to be sent through the post.

5:3 Primary Data Collection

5:3(a) Postal Questionnaire

Although a potentially good method of data collection, many factors militated against the use of postal questionnaires for

this particular project. Firstly, given the low level of literacy of many of the women, the language would have to be kept very simple, in fact at primary school level. Secondly, in order to be effective, the questionnaire would have to be translated into the vernacular. This in itself created many problems, not least of which was the researcher's lack of access to another Shona speaker, let alone a Shona dictionary!

It is also generally acknowledged that postal questionnaires have a low response rate.[14] Given the fact that it was important to have rural women in the survey, this problem would be compounded by the erratic postal service to the rural areas. Discussing research undertaken in Botswana, Molokomme notes:

"In our experience, sending a questionnaire through the post yielded few responses, while direct, open ended interviews were more productive."[15]

Given all these considerations it became apparent that the personal interview would be the best method of collecting the required data.

5:3(b) The Personal Interview

Personal interviews can take many forms. They can be structured, semi-structured or open ended. Given the researcher's desire to interview women who had experienced marital breakdown, the life history with a semi-structured agenda seemed to be the best approach. Of this method Stubbs notes:

"Life stories offer a depth and flexibility, richness and

vitality, a feel for the unquantifiable that is often lacking in other research methods. They open up new, more personalised vistas, but they also throw up new challenges of which the researcher should be aware."[16]

However, even when taking a life history, there is still a need for a basic structure so that an interview guide was prepared.

5:4 Designing a Research Instrument

The information required from the women was divided into three categories:

1) a facesheet on the social characteristics of the interviewees
2) the history of the marriage and the problem, how the parties attempted to resolve it and how she came to be at court
3) the post divorce lives of the parties and their children.

On the basis of this information, a structured but unstandardised schedule was developed to be taken into the field. Lofland sees the object of this as being:

"...to elicit from the interviewee what he considers to be important questions relative to a given topic, his descriptions of some situations being explored. Its object is to carry on a guided conversation and to elicit rich detailed materials that can be used in qualitative analysis."[17]

5:5 Sampling Technique

Given the constraints of single handed research, a sample size of 50 women was thought suitable. The researcher hoped to speak to women in all three marriage groups.[18] Ultimately, 76 women who had been in customary marriages, both registered and unregistered, were interviewed; included in this latter group were women in irregular unions. 21 women with civil marriages were also interviewed making a total sample of 97 women.

The fieldwork was undertaken in two phases of three months each. Phase one covered customary law issues whilst phase two dealt with divorces under the Marriage Act.

5:6 Phase 1 - June to September 1990 - The Customary Group

In the customary sample the researcher was able to approach women in both urban and rural settings. For the urban sample, women were interviewed at the Community Court where they were waiting for their cases to be heard. The rural sample was drawn from Murewa which is 87 kilometres east of Harare and Mutoko which is 56 kilometres north east of Murewa.

All but one of the interviews in this first sample were conducted in Shona which is the researcher's mother tongue. One interview was, at the interviewee's request, conducted in English. The interviews were tape recorded and notes made during the course of the interview so that the researcher could refer to both notes and the tape during analysis.

5:7 Phase 2 - June to September 1991 - The Civil Marriage Group

This phase proved to be the most difficult. It was, from the beginning, an uphill struggle trying to find women who had been married under the Marriage Act to interview. Although the researcher had written to ten law firms, before leaving Oxford, access to the firm's clients had been refused. Lawyer/client privilege and the importance of keeping the client's confidence was the main reason given for a refusal to co-operate. The researcher also contacted the local Marriage

Guidance Council.[19] The Chairperson initially expressed interest and a willingness to help, but she then became elusive until she finally told the researcher that she was unable to assist because the organisation gave clients a guarantee of confidentiality. It took six weeks for her to communicate this to the researcher.

The next step was to approach the Registrar of the High Court to ask permission to trace women from the High Court files, particularly the legal aid files. She agreed, but insisted that the researcher first seek the permission of the legal practitioner who had dealt with the case to trace the women.

This impasse led to contact with the Regional Co-ordinator of the Women and Law in Southern Africa Project which in turn led to introductions to two of her colleagues who had done a great deal of legal aid work. Together they provided the researcher with the names of women whom they had assisted and with whom they had remained on friendly terms. It is to these three women that the researcher owes nearly half of the civil marriage sample.

The Citizens' Advice Bureau also proved to be of great assistance in arranging interviews with female clients. As a way of expressing gratitude, the researcher provided legal and administrative assistance to the CAB every Friday morning. Midway through the research one of the law firms furnished the researcher with a list of ten of its legal aid clients. (The researcher had not specified the type of client.)[20] The

researcher wrote to these clients telling them of the research and assuring them of both confidentiality and anonymity. Of the ten, four women were interviewed, one letter was returned and nothing was ever heard of the other five.

5:8 Interviewing the Professionals

Although not a study of professional behaviour, the views of this group were considered to be important. These two groups not only formed the bridge between formal and informal legal institutions translating "personal conflicts into legally recognisable categories" (Smart 1984:160), but also had specialist knowledge about the workings of the law.

The initial contact in all the law firms was with one of the partners. This led to introductions to more junior members of the firm who dealt with most of the matrimonial and legal aid work. This occasion was also used to seek permission to interview the firm's female divorce clients but without much success.

A judge of the High Court was also interviewed. Letters had been written to four judges. Two did not respond whilst one of the two who had agreed to be interviewed was elevated to the Supreme Court and, caught up in the process of winding up his business in the High Court, was unable to offer an appointment before the interviewer's return to Oxford. Interviews were also conducted with the Master of the High Court who facilitated the researcher in obtaining access to

the Judges' library and also to some statistical information on divorce and legal aid. Interviews were also conducted with the Registrar of the High Court who is responsible *inter alia* for running the legal aid office.[21]

It was in speaking to the general office workers and in particular to two clerks in the legal aid office that the researcher learnt the most. As `outsiders' they were not so established within the hierarchy as to have interests to protect. They were able, therefore, to offer a frank appraisal of the way that the system operated.

5:9 Sample Size and Sampling Technique

The sample was small but yielded detailed information. Lofland contends:

> "It is my impression that studies based on intensive interviewing have typically used only from 20 to 50 interviews. Given the material management problem, numbers in that range seem quite reasonable. One legitimately sacrifices breadth for depth."[22]

Anne Oakley makes a spirited defence of her small sample (of forty women) for her study of the sociology of housework. She argues that large samples do not necessarily guarantee accurate, reliable or representative information.[23]

The focus was primarily on the women's experience of the divorce process and how it affected their lives. Speaking to men would, no doubt have thrown light on some interesting insights, but that was not the main focus of the research.[24]

The difficulties of obtaining access to women undergoing divorce meant that there was no way that the researcher could take a random sample. The researcher had therefore to take advantage of available resources, using agencies such as the Citizens Advice Bureau to get a sample of suitable size which would be able to give the detailed information which was needed. Sarat and Felstiner acknowledge the problems inherent in doing this type of research:

> "Neither the lawyers nor the clients that we studied were randomly selected, nor could they have been, given the acknowledged difficulties in securing access."[25]

But despite this, there is no reason to believe that the women in the two groups were biased or unrepresentative in any way. It is the researcher's contention that these women were in no way outstanding or different from their peers and this will be illustrated when comparisons are made with demographic information of the population at large.

5:10 The Pilot Study

The Pre Pilot Interviews

Whilst the importance of piloting cannot be over emphasised, it was difficult for the researcher to do a pilot study when she was so far from the field. It was for this reason that the researcher decided to try out her newly developed research instrument before leaving for Zimbabwe. A proxy survey was therefore undertaken. To do this the help of three Zimbabwean school friends living in London was enlisted. They agreed to act as interviewees. Initially the researcher was simply

going to use the life history method of gathering data. However their criticisms highlighted the need for a more structured format, hence the development of the interview guide.

The actual pilot study (1990) was carried out at the Citizens' Advice Bureau in Harare. The researcher had written a letter in advance asking for permission to do research there. The permission was granted. The voluntary worker on duty, after having interviewed and counselled the caller, would tell her about the project and ask for the woman's permission to be interviewed. Five women were interviewed using this method.

Whilst doing the pilot study, it was noted that the women became uncomfortable when asked for their full addresses. As these were not necessary for the purposes of the study, in the main study the women were merely asked to give the name of the area where they lived. Although some still gave their full addresses, those that did not want to do so simply stated the area if they were from the rural areas and the name of the suburb if they were urban. Once this identifying feature had been removed, the women felt free to talk to the researcher at length, secure in the knowledge that they could not be traced in the future. The researcher, however, gave the women her name, telephone number, home address and the address of the Citizens' Advice Bureau should they wish to contact her. A few contacted the researcher to update her on the progress of their cases and in one instance to seek assistance in processing a maintenance claim.

5:11 In the Field - Data Collection

At the Community Court, women who were waiting to have their cases adjudicated were approached and asked if they would consent to being interviewed. After an exchange of pleasantries, the researcher would introduce herself as a student writing an "essay" on women and the problems which had necessitated their coming to court. Assurances of anonymity and confidentiality were given. To reinforce this point, the women were given the opportunity to select a *nom de plume* of their choice. Half of those in the civil marriage group did, whilst most of those in the customary group entrusted the researcher with the task. The interviewer stressed that it was not compulsory for them to be interviewed if they did not wish to be.[26] She also emphasised her independence and the fact that she was in no way linked to the Community Court apparatus. Most of the women agreed to co-operate.

With the civil marriage sample the initial approach was over the telephone.[27] After introductions were made the researcher would then proceed to ask for an interview, stating when asked the name of the contact person. A more detailed explanation of the objects of the research was provided than that given to the women in the customary group. This was because the women in this group demanded fuller explanations of the objects of the research than did their counterparts in the customary group.

There was a general willingness to assist on the part of both groups of women, which the researcher attributed to the value

placed on education in the community and also to the fact that both groups of women saw themselves as helping the researcher to get along in life.[28] For some the experience was not only novel but also cathartic.

Moreover some of the women, particularly those in the customary group, were astounded that someone could actually think that their lives were worthy of study. Harrell-Bond has in her study of refugees noted:

"Perhaps powerless people everywhere appreciate the personal attention given in an interview."[29]

On average the interviews with women in the customary group lasted between 45 minutes to an hour. Generally the interviews with women in the civil marriage group were longer, lasting from between an hour and four hours. The interviews with the customary group had to be short because the interviews were unscheduled and the researcher was aware of the fact that she should not further inconvenience the women by taking too much of their time. As the majority of interviews with the civil marriage group were by appointment, it meant that the women had allocated time for the interview. Moreover whilst the researcher expressed a wish not to take up too much of their time, the length of the interviews was determined by the women themselves who having warmed to the topic went on at length. The researcher was pleasantly surprised by the openness of most of the respondents.[30] Being of the same race and sex proved to be an advantage.[31] Stubbs has noted:

"The class, sex, race and age of the interviewer *vis a vis* the informants affect the story being told, although in no predictable way. Married women may be best interviewing married informants, but a close similarity in social situation may lead to less inhibition but increased social conformity. An ideal perhaps is that of being close enough to understand and elicit information but not so close as to be unable to step back."[32]

It seemed that the women could relate to the researcher and felt free to share intimate details of their lives. Where the interview was conducted in a group setting as were some of the interviews in the customary group it meant that the researcher could listen in on conversations with other women present. Although of the same age or older than some of the women interviewed, the researcher always used the polite form of address when interviewing them. The women could address the researcher in any manner which they saw fit.[33] As English does not have a way of showing deference in speech, this only applied to those women interviewed in the vernacular. The fact that the researcher was unmarried meant that she was regarded as being somewhat naive, which resulted in her receiving a great deal of unsolicited but generally amusing and helpful advice.

5:12 The Politics of the Interview

Much has been written about the art of interviewing. The problems faced by a female researcher interviewing other women are described by Smart:

"The job of interviewing is intrinsically feminine, because the interviewer's job is to facilitate speech and not to interrupt it. The feminist interviewer can therefore experience the interview as doubly oppressive. Firstly, she is unable to express alternative views and secondly she reconfirms the typical model of male/ female verbal

exchange."[34]

Oakley rejects the notion of the traditional interview with its assumption that there must be a power structure and that there is a giver and a recipient of information and that the two cannot and indeed should not be encouraged to exchange roles. She argues that female researchers must move away from the male dominance model of interviewing to a more participatory and therefore egalitarian exchange of information.[35]

The problem with Oakley's thesis is that it assumes that all women are the same and that there is a unitary feminist methodology. This is a false premise, for as Whitehead points out:

> "...women do not and cannot constitute a homogeneous category. Clearly they are not `all the same' in the first sense that the social relations between the genders may vary for the women of any one society. But furthermore women experience significant variation in their situations in those wider areas of political, economic and social subordination and inequality which are not confined to the social relations of gender. These differences imply that it is critical methodologically to think through quite carefully the basis of women's solidarity and common interests and to do this in such a way as to allow for the possibility of divisions between women. In investigating any given empirical situation we need to ask what it is that unites and what it is that divides these women, and what kind or category of this particular piece of research is concerned with."[36]

There were divisions in the two groups of women interviewed which were dependent on whether they were rural or urban dwellers. [37] There was the further differential of education to which was linked professional status. Interviewing the educated professional women in the civil marriage group proved to be a different experience from interviewing women in the

that might possibly materialise out of the research - a book which many of the women interviewed would not read and none would profit from directly (though they hoped that they would not lose too much)."[45]

5:13 Collecting the Data

All but one of the interviews in the customary group were conducted in the vernacular language, Shona, which is the researcher's mother tongue. The interviews with the professionals and with the women in the civil marriage group were conducted in English. Notes were also taken as the interview progressed.

There are, of course, many divergent views about the use of tape-recorders. Spradley contends that their use may threaten or inhibit the interviewee.[46] Kemp and Ellen warn against the dangers of not transcribing quickly the tapes.[47] On a balance, it was decided to use a tape-recorder for as Marshall points out:

"...so much happens that I'm not able to attend to at the time, and I find that listening to it again brings all sorts of things up."[48]

Given the additional burden of having to translate the interviews it was invaluable to have a record of the interview which could be used to cross-check against the notes.

5:14 Reliability

As stated previously, the work is not intended to be a representative study. Rather, like that done by Eekelaar and Maclean:

In a different context (that of interviewing refugees) Harrell-Bond discusses how power differences can be minimised by engaging in a participatory model of interviewing.[39] Similarly, Kemp and Ellen assert:

"It is also relevant to note that if everything is negotiable, the ethnographer can expect to be questioned himself, and that when this occurs it is important for rapport or even for the very continuation of the interview that he be prepared to *exchange* (authors' emphasis) information."[40]

The issue of reciprocity proved difficult to deal with.[41] Occasionally one of the women would ask a legal or procedural question such as, "how do I go about claiming maintenance?" or "what should I do if he does not pay?" Although she had not told them that she was a lawyer, the researcher found that she could not, in all good conscience, refuse to give them information or plead ignorance.[42] Molokomme argues that:

"...more important for the task at hand, is the realisation that classical `scientific' approaches are not always useful or sufficient for the study of oppressed and marginalised groups such as women and the poor. Aside from the myth of objectivity, the individualistic orientation of classical approaches has also been criticised as being unsuited to African or `third world' societies, which are less individualistic and more group oriented than the Western societies in which these methodologies developed."[43]

The researcher felt that it was important to answer questions particularly in the rural areas where the women did not have ready access to service organisations such as the Citizens' Advice Bureau or the media to which they could address their queries.[44] Finally, like Oakley, the researcher felt heavily indebted to the women for they had given much of themselves:

"And all this in the interests of `science' or for some book

"...it is an exploratory, qualitative study designed to obtain some feel for a particular institutional culture and glean useful insights by discovering how certain individuals (not necessarily representative) react to problems which are of interest to the researcher."[49]

The original purpose of the study then was to get an idea of how the different branches of the law fit together in dispute resolution, and to see the difficulties encountered by the women in trying to mobilise the law as well as examining the role and impact of divorce law in women's lives.

At the back of every researcher's mind is always the fear that the informant is not telling the truth. Often there is very little that the researcher can do to ascertain the veracity of what she has been told for as Harrell-Bond notes:

"It is possible to build a number of checks for consistency into questionnaires but it is never possible for an anthropologist completely to win the confidence of every informant (even if that in itself were an assurance of reliable information). Knowing what areas of the inquiry people are likely to misrepresent (whether deliberately or not) is useful, and provides insight into their values. Discovering these areas requires that the anthropologist should have considerable familiarity with the culture."[50]

The fact that these were one-off interviews makes it difficult to guarantee the reliability of the information given. However, there are certain factors which help to instil confidence in the data obtained. Firstly, the women's stories were often long and complex thus making it difficult for them to misrepresent facts. Secondly, the fact that most of them were approached out of the blue and asked to recount their life stories means that there was no premeditation to lie. Also, an interview takes time. It is highly unlikely that they would have wanted to waste their time telling untruths.

Finally, the fact that the researcher was at University in Britain meant that they felt secure in the knowledge that their anonymity would be preserved, and it removed any threat of exposure or breach of confidence.

Nevertheless the researcher did encounter one lying informant. The incident occurred when a mother and daughter were interviewed separately. They had both indicated that they had 'domestic problems'. The mother who was interviewed first told the researcher that her husband had taken two other wives and that the three of them were happily co-habiting. The daughter was then interviewed and she reported that she was living with her two step mothers, her mother having moved out of the house in 1985. Although the researcher did briefly consider confronting the mother, she decided against this course of action, concentrating instead on trying to think of the reasons as to why this woman should want to lie. Of misrepresentations, Stubbs has noted that:

> "'False' stories, then, may nevertheless be significant ...subjectivity or bias in a life story - what the informant chooses to remember and tell, or not tell, what she believes and why - can be as significant as the facts elicited."[51]

Two inferences were drawn from the woman's misrepresentation. The first was that she was ashamed of being a divorced woman and saw it as a social stigma. The second was that as she was at court accompanying her 19 year old unmarried daughter who was claiming maintenance from the man who had abandoned her, she did not want it to appear as if her daughter's predicament was a consequence of the breakdown of her own marriage and the instability caused thereby.

At the informants' request, some of the interviews took place in a group with other family members or friends present. This meant that there was little scope for the interviewee to embellish the account or omit facts. Hammersley and Atkinson say that group interviews:

"...may be good as informants may prompt each other using information not available to the researcher and in ways which turn out to be productive for the research."[52]

Indeed, in response to the researcher's offer to move to a private place one of the informants said, "Why? There is nothing to hide. We are all here for the same reason. We have problems at home." However, it could be argued that if the interviewee had chosen to go to a private place she could be accused by the other women present of revealing hidden secrets to the interviewer.

5:15 The Analysis of the Data

Mills suggests that the analysis of the data should begin in the field.[53] Brief notes were made on the material being collected whilst the interviewer was still in the field. As the study was merely exploratory the researcher did not have any specific hypotheses to test although she did have insights into potential problems which may be encountered in trying to obtain effective access to the law. Rather, the research proceeded from the opposite direction, that is using the data to generate hypotheses. Hammersley and Atkinson note:

"In ethnography, the analysis of data is not a distinct stage of research. It begins in the pre-field work phase, in the formulation and clarification of research problems, and

continues in the process of writing up... In this way the analysis of the data feeds into the process of research design...Theory building and data collection are dialectically linked."[54]

In analysing the data, the grounded theory propounded by Glaser and Strauss has been used:

"Generating a theory from data means that most hypotheses and concepts not only come from the data, but are systematically worked out in relation to the data during the course of the research. *Generating a theory involves a process of research.*" (authors' emphasis) [55]

The transcription of the tapes and the re-writing of the fieldwork notes into fuller case histories marked the start of the data analysis. It was at this stage that the names of informants who had not already selected their own *noms de plumes* were changed. The case histories were then colour coded for ease of reference. The content analysis of the data was done using spread sheets and index cards.

This content analysis proved to be invaluable when the time came to write the thesis for it produced identifiable categories from which one could work and from which one could build typologies. In building typologies, Lofland contends that the investigator must:

" 1) assemble self-consciously all his materials on how a problem is dealt with by the persons under study

2) tease out the variations among his assembled range of instances of strategies

3) classify them into an articulate set of types of strategies and

4) present them to readers in some orderly and preferably named and numbered manner."[56]

The analysis of the data helped in the development and formulation of a theoretical framework which is grounded in the data itself and which devolves around the role of law in divorce and in obtaining justice at divorce. Glaser and Strauss point out the advantages of this method:

> "Theory based on data can usually not be completely refuted by more data or replaced by another theory. Since it is too intimately linked to data, it is destined to last despite its inevitable modification and reformulation."[57]

Finally, although the conclusions drawn are based solely on the data collected, there is no reason to believe that the sample is unrepresentative in any way which would devalue the inferences drawn.[58] It is hoped that other studies taking different approaches to the present one and with samples biased in different ways from the present one will come up with different hence enriching and alternative views of the role of law in obtaining access to justice on divorce. What follows is a brief analysis of the survey group and its relation to the population at large.

PART 2 Background Characteristics of the Women Surveyed

This part considers the population studied in relation to the wider population.

5:2:1 Background

In 1985, the population of Zimbabwe was estimated at 8.2 million, with women comprising 51% of that total.[59] Statistical

data showed that the black population group was the larger, comprising 98% of the total population.[60] There are two main ethnic groups, the Shona and the Ndebele. Of these, the Shona is the larger. The Shona are composed of various ethnic groups speaking dialects of the same Bantu language, Shona. All of them, except the Karanga, live in the central and eastern half of Zimbabwe. Most of the Ndebele live in Matebeleland which is in the south-western part of the country. They speak Ndebele which is a Nguni language. English is the official language of Zimbabwe.

5:2:2 The urban/rural mix

Table 1 - Breakdown of the Samples By Area Lived

Area	Customary	%	Civil	%
Urban	48	63.16	19	90.48
Rural	26	34.21	-	-
Peri-Urban	2	2.63	2	9.52
TOTALS	76	100%	21	100%

Although the majority of the black population live in the rural areas [77%], they still make up more than 80% of the urban population.[61] Urban women comprised the larger part of both samples. This is because most of the interviews were conducted at the Harare Community Court which acts as a catchment for many of the surrounding areas and is in fact the largest Community Court in the country. The rural sample was smaller because fewer visits were undertaken to the rural areas and because there were not as many rural women visiting

the local Community Court. There are two possible explanations for this - the first is that the close knit nature of many rural communities would dictate that problems be resolved within the confines of the community. As the majority of women in the customary group were in unions which were not registered there was no need for the Community Court to be involved in the dissolution of marriages. Secondly, not having access to the same information resources, it is likely that the rural women were not as well versed as their urban counterparts on the possibility of instituting actions in the Community Courts. All the civil marriage interviews were conducted in Harare, hence the predominance of urban women.

5:2:3 Marital Status

TABLE 2 - Breakdown of Samples According to Type of Marriage

Type	Numbers	%	National % (1982)
Unregistered	44		41%
Registered Customary	18		34%
Civil	21		25%
Irregular Unions	14		
TOTALS	97		100%

With the exception of registered customary marriages, the national marriage pattern is reflected in the data sets with unregistered customary law unions comprising by far the largest group. Irregular unions are classified as being unregistered customary law unions in the national statistics.

In the survey, there was a link between educational

achievements and type of marriage so that it was observed that those with registerd marriages had higher educational attainments than those in unregistered unions. As discussed in the preceding chapter, the question of what constitutes a customary law union is rendered problematic by the fact that sometimes no *lobolo* has changed hands between the families, yet the parties, their families and the community around them regard them as married. Indeed, official statisticians also encounter difficulties defining what constitutes a customary marriage so that in the Zimbabwe Demographic Health Survey (ZDHS):

"In the ZDHS the concern was to identify couples who were cohabiting regardless of whether their unions had been formalised through either a civil/ religious ceremony or through the payment of brideprice. Therefore the category `married' was defined to include cases where a couple was living together intending to have a lasting relationship, regardless of the formal status of the union...Thus in any case where a woman had been married or lived with a man, but the couple was no longer cohabiting, she was assigned to the category divorced/separated."[62]

It is significant that the full *lobolo* demanded had been paid for only six women in the customary group and for five women in the civil marriage group. The majority of women for whom *lobolo* had been demanded said that some of the *lobolo* which had been requested had been paid. The amounts paid varied from the preliminaries to most of the bridewealth cattle. Despite the official practice of defining all unregistered cohabitations as being customary law unions, the researcher decided to further refine the categories so that irregular unions were defined as those where no *lobolo* had been promised or paid. It must be noted that all the women classed as being

in irregular unions had children with the men with whom they were living or whom they were suing.

Although polygamy is becoming socially less acceptable, a substantial number of women with customary marriages were in polygamous unions. It is significant, for example, that 11 of the women with registered customary marriages reported that their husbands were married to, or co-habiting with, other women. Overall 33 of the women reported being in polygamous unions. Of these 22 were first wives thus suggesting that there is a reluctance to enter into polygamous unions. There was a higher incidence of polygamy in the rural areas with 57 per cent of the group being rural dwellers. The fact that the relationship between the wives in a polygamous situation is fraught with tension is borne out by the fact that 16 of the women in polygamous marriages listed tension and inability to co-exist with other wives as one of the reasons for the breakdown of their marriage.

5:2:4 Education

It is a well documented fact that women are not given as many educational opportunities as men.[63] The following table is interesting in showing the disparities inherent in the educational attainments of the boys and girls in Zimbabwe in the years 1981 to 1985.

Table 3- Male/Female Ratio by Grade/Form 1981-1985

	1981	1982	1983	1984	1985
PRIMARY					
Grade 1	1.03	1.01	1.02	1.02	1.02
Grade 2	1.06	1.01	1.02	1.02	1.03
Grade 3	1.13	1.06	1.03	1.02	1.03
Grade 4	1.11	1.12	1.07	1.03	1.02
Grade 5	1.13	1.14	1.17	1.10	1.05
Grade 6	1.18	1.19	1.19	1.21	1.13
Grade 7	1.07	1.31	1.26	1.25	1.27
Special	1.78	1.41	1.90	1.53	1.58
Total ratio	1.09	1.08	1.08	1.07	1.06
SECONDARY					
Form 1	1.45	1.42	1.39	1.35	1.33
Form 2	1.24	1.48	1.47	1.45	1.43
Form 3	1.37	1.30	1.53	1.52	1.53
Form 4	1.30	1.42	1.35	1.64	1.65
Lower 6	1.65	1.73	2.08	2.26	2.72
Upper 6	2.36	2.33	2.09	2.79	2.68
Special	1.62	1.92	1.26	0.94	0.88
Total Ratio	1.39	1.43	1.45	1.47	1.47

Source - 1987 Statistical Year-book

The formal education system begins with a seven year primry cycle followed by a secondary system with three levels: junior; middle/ordinary and upper/advanced. Tertiary education is provided by the two universities and a variety of polytechnics and colleges of further education. Table 3 shows that more boys than girls attend primary school, the difference being small in the lower grades and more pronounced

in grades 5-7. From the table it can be seen that more girls than boys leave school after fourth grade. Correspondingly, there are fewer girls than boys continuing on to secondary school. By the time the cohort reaches the 15-17 age group which is when Ordinary level examinations are taken, 55-60% of the students in form 4 are boys and 40-45% are girls. All this means that the chances of women getting well-paid jobs are considerably decreased. Similarly their chances of going onto tertiary education are also reduced. With so little value being placed on the education of women, it is not surprising that there are so few women in the paid formal employment sector which generally demands as a minimum entry qualification an Ordinary level certificate with five pass grades.

As regards the women in the survey, the figures below indicate that women in both samples had received some formal education and that the disparities between the sexes were not too wide.

Table 4 - Educational Background of the Samples and Their Husbands

Level	Customary	Women	%	Men	%	Civil	Women	%	Men.	%
Primary -		36	47.36	23	30.26		4	19.04	4	19.04
Secondary-		35	46.05	30	39.47		12	57.14	6	28.57
Tertiary-		-	-	2	2.63		4	19.04	8	38.09
*Other-		-	-	-	-		1	4.76	1	9.52
No schooling-		4	5.26	2	2.6		-	-	-	-
Unknown-		1	1.31	19	25.00		-	-	2	4.76
TOTALS -		76	99.98	76	99.99		21	99.98	21	99.98

*Note - "Other" denotes a professional qualification which in

the case of the woman was a nursing qualification and in the case of the man was an electrician's qualification.

It is possible that a sizeable number of the women with secondary school education are the beneficiaries of the post independence education policy which made it mandatory for all children to receive at least four years of secondary education.

5:2:5 Employment

As in most countries, there are substantial differences between men and women with respect to their participation in formal working life. This can readily be seen from the following table in the case of Zimbabwe:

Table 5 - Employment by Sector of the Population of Zimbabwe*

	Men	Women
Formal Sector	47%	8%
Informal Sector	0,7%	5%
Unemployed	9%	5%
Farming	24%	29%
Economically Inactive	20%	53%
	100%	100%

* Source - 1987 Statistical Year-book

Only 8% of all adult women work within the formal sector of the economy and comprise 16% of all the employed in this sector. The high percentage of women who are defined as being economically inactive reflects the fact that their labour is

not valued because it is not quantifiable in monetary terms.

The official definition of work:

"...any activity which is related to the production of goods and services for market (for pay, profit or barter.)"[64]

negates the work done by women rendering it invisible. Of this phenomenon, Marsha Freeman has noted:

"In every culture women's paid and unpaid labour is undervalued or not valued at all. The classic explanation for the lack of valuation of women's labour is that standard economic measures relate only to cash transactions, so that, for example, African women's farm labour which feeds entire nations is not included in gross national product statistics because it is not exchanged for money. A more basic explanation is that women's work is "invisible" not only because women's existence as adults is not fully acknowledged. Thus in every culture, women's contribution to the value of marital property is consistently ignored or undervalued, both during marriage and upon divorce. The value of women's agricultural labour is also consistently discounted."[65]

Leading this group of "economically inactive" women are housewives. The majority of the women interviewed in the customary sample had internalised this official disregard of their value and reported that they were unemployed, meaning that they were not in full-time paid employment. However further questioning revealed that the women were engaged in a variety of activities which included market gardening, vegetable selling, knitting jerseys and crocheting doilies. Of the seven women in the customary sample in formal employment, none earned a salary in excess of Zim.$350.[UK £70 in 1990].[66] In fact most of these women were found in jobs traditionally considered "women's work" which by its nature is undervalued and therefore underpaid. Six women said that they were working or had worked as domestics (housemaids). At

least two worked as child minders in creches, whilst others were involved in semi-skilled factory work. The position of the women in the customary sample is in direct contrast to that of the men, most of whom are in formal employment [67 out of 76]. Their salaries ranged from Zim.$116 to $1200, thus showing that generally the men had more resources than the women. The women's weak economic position leads to their being economically dependant on men.

It was only in the civil marriage sample that one found women who had tertiary education in the professional classes earning salaries in excess of $24000 per annum (two women) or $30000 per annum (three women). The highest paid woman in this sample earned $39000 per annum. The husbands of these women all earned higher salaries than them.

TABLE 6 - The Work Patterns of the Two Groups -Before, During and After the Marriage

Customary Group -

	School	Unemployed	Plough	Informal	Formal	Total
BEFORE	31	9	24	3	9	76
DURING	0	16	33	24	7	80
AFTER	3	12	15	44	8	81

Civil Group -

	School	Unemployed	Plough	Informal	Formal	Total
BEFORE	4	1	2	0	14	21
DURING	1	2	2	5	14	24
AFTER	0	3	1	4	14	22

The variation in the totals is a reflection of the fact that some women reported themselves as being involved in more than one activity and were correspondingly recorded more than once.

One of the most striking things about the customary sample is the high number of women who were in school when they met their husbands. It appears that marriage or motherhood results in all of the women in the customary sample leaving school. Some started helping the husband's family with the ploughing. The increased number of unemployed reflects the women who leave school due to pregnancy and remain in the urban areas, unable to secure employment. The two who were in formal employment and gave up their jobs did so at the husbands' request. There is a significant rise in the number engaged in informal employment which reflects the fact that in addition to ploughing some start growing vegetables for sale. Moreover as the marriage progresses and the husband fails to meet his obligations to the family, the women are left with no option but to start knitting, crocheting, cutting grass and selling fruit and vegetables in an attempt to make ends meet.

The fact that the women in the civil marriage sample were older than those in the customary sample would seem to explain why fewer of them were in school when they met their husbands. Also, being of the older generation, the cultural taboo against pre-marital sex would have been strong, thus the incidence of pregnancy which led to such a high school drop out in the customary sample would have been less.

The fact that the number of women in formal employment remained constant reflects not only the women's independence in refusing to give up their jobs on marriage, but also the fact that their contribution to the family budget was substantial enough as to be indispensable. The two that ploughed lived in the peri-urban areas and had access to land for ploughing.

Overall, the small number of women in formal employment would seem to support the original thesis that the educational discrimination against women is reflected in their absence in the formal sector.

5:2:6 Age at Marriage and Duration of Marriage

The women in the customary sample ranged in age from 18 to 53, with a median age of 28. For women with civil marriages, the median age was 37 years. The marriages varied in length from 4 months to over 20 years. Those marriages of very short duration appeared to be of the young woman who had eloped to the man on discovery of her pregnancy but who had been returned to her parents to have the baby and had not gone back to live with the man. This would seem to fit in with patterns observed in other countries where teenage marriages and marriages following pregnancy have a lower "survival" rate.[67]

5:2:7 Children

On average the women in both samples had three children each. Children were the *raison d'etre* of the marriage and a lack of them was the reason for the men seeking divorce in two out of the three childless marriages in the customary sample. Many

women said that they had stayed in difficult marriages for their children's sake. Indeed it is only when the husband's neglect of family duties began to have an adverse effect on the children's schooling or well-being that most of the women took action and sued their husbands for maintenance or custody. In this regard, it is significant that the largest number of actions brought by the women were for maintenance.

The children, many of whom were of pre-school going age, were the victims of the breakdown of their parents' union. They were sometimes separated from both parents and siblings. This was usually the case where the woman had children from another union. In only 2 of the 11 cases where the women have "outside" children are the children staying with them. In three instances the father has custody. However in the majority of cases the children live with their maternal grandparents.

31 couples had children outside the immediate union. 26 of the men in this number had "outside" children as compared with 11 of the women. On average the women had two children each whilst the men had three.

This chapter has considered the data collection process as well as presenting the background characteristics of the women surveyed and their relation to the population at large. The next chapter, the first of the data based chapters, examines the manner in which the women defined their marriages as being problematic. Felstiner, Abel and Sarat see the articulation

of the dispute as being a process of "naming, blaming and claiming".[68] Chapter six is concerned with the first two of this trio whereby the unperceived injurious experience (UNPIE) is turned into a perceived injurious experience (PIE).

[1] Cf Glaser, B. and Strauss, A. (1967) at pp.176-178.
[2] Glaser, B. and Strauss, A. *supra* at p.180.
[3] Maclean, M. and Genn, H. (1979) at p.2.
[4] Act No. 33 of 1985.
[5] On a visit to the High Court on 27 September 1989.
[6] Cf Rwezaura, B. (1990) at p.10.
[7] Kazembe, J. (1990) at p.63.
[8] Cf Himonga, C. (1990) at pp.30-31.
[9] Casley, D. and Lury, D. (1982) at p.61.
This was also the approach adopted by the Women and Law in Southern Africa Project in their study of maintenance.
[10] An approach to the Head of the Community Court Inspectorate for permission to interview Community Court Presiding Officers had resulted in the researcher being asked to write a letter of application and to submit a letter from the research supervisor. This she did on 10 July. By the time the researcher left Zimbabwe on 2 October 1990, she had still not heard anything. At the time of writing this (December 1990 and December 1991) nothing more had been heard. The researcher was therefore wary of trying to obtain access to more sensitive information.
[11] Eekelaar, J. and Maclean, M. (1986) at p.59.
[12] Ingelby, R. (1987) at p.14.
[13] This was despite the fact that the researcher pointed out that the privelege would not be breached if the lawyers approached the clients and asked for their permission. Cf Ingelby, R. (1987) at p.11.
[14] Maclean, M. and Genn, H. (1979) at p.79.
[15] Molokomme, A. (1990) at p.52.
[16] Stubbs, J. (1984) at p.36.
[17] Lofland, P. (1971) at p.76.
[18] That is those with unregistered customary law unions, those married in terms of the African Marriages Act (Chapter 238) and those married in terms of the Marriage Act (Chapter 37).
[19] Similar to Relate in the UK the organisation retains its old name in Zimbabwe.
[20] Cf Ingelby, R. (1992) at p.17.
[21] This was in 1990. By the time the researcher returned to Zimbabwe for the second phase of interviews in 1991 a new Registrar had been appointed.
[22] Lofland, P. (1971) at p.91.
[23] Oakley, A. (1985) at p.31.
[24] Berg, N. and Gundersen, A. (1990) at p.127.
[25] Sarat, A. and Felstiner, W. (1986) at p.95.
[26] Cf Molokomme, A. (1990) at p.47.
[27] Cf Harrell-Bond, B. (1975) at p.301.
[28] Cf Newby, H. (1977) at p.129.
[29] Harrell-Bond, B. (1986) at p.386.
[30] Newby, H. (1977) at p.119.
[31] Cf Sudarkasa, N. (1985) at p.177.
[32] Stubbs, J. (1984) at p.36.
[33] Cf Sudakarsa, N. (1986) at p.177.

[34] Smart, C. (1984) at p.15.
[35] Oakley, A. (1981) at p.41.
[36] Whitehead, A. (1984) at p.6.
[37] Cf Whitehead, A. supra at pp.9-10.
[38] Berg, N. and Gundersen, A. (1990) at p.128.
[39] Harrell-Bond, B. (1986) at p.21.
[40] Ellen, R. (ed) (1984) at pp.213-232, Cf Berg, N. and Gundersen, A. (1990) at p.129.
[41] Cf Golde, P. (1985) at p.10.
[42] Oakley, A. (1981) faced similar problems. She says at page 43, "It would be the understatement of all time to say that I found it very difficult to avoid answering these questions as honestly and as fully as I could." Cf Molokomme, A. (1990) at p.53.
[43] Molokomme, A. supra at p.54, Cf Gay, J. (1990) at p.241.
[44] Cf Hellum, A. (1990) at pp.94, 108.
[45] Oakley, A. (1981) at p.44.
[46] Spradley, P. (1979) at p.74.
[47] Ellen, R. (ed) (1984) at p.236.
[48] Marshall, J. (1981) at p.375.
[49] Eekelaar, J. and Maclean, M. (1990) at p.623, Cf Glaser, B. and Strauss, A. (1967) at p.235, Oakely, A. (1985) at p.30.
[50] Harrell-Bond, B. (1975) at p.17.
[51] Stubbs, J. (1984) at p.36.
[52] Hammersley, M. and Atkinson, P. (1983) at p.115.
[53] Mills, C. (1959) at pp.195-226.
[54] Hammersley, P. and Atkinson, P. (1981) at p.174.
[55] Glaser, B. and Strauss, A. (1967) at p.6.
[56] Lofland, P. (1971) at pp.22-23.
[57] Glaser, B. and Strauss, A. (1967) at p.4.
[58] Cf Oakley, A. (1985) at pp.34-35.
[59] Quaterly Digest of Statistics, Central Statistcal Office 1988 at p.1.
[60] Demographic and Health Survey, Central Statistics Office 1988 at p.3.
[61] Demographic and Health Survey, Central Statistics Office, 1988 at p.5.
[62] Zimbabwe Demographic Health Survey, Central Statistics Office, (1988) at p.15.
[63] Cf. Stewart, J. et al. (1990) at p.201.
[64] Zimbabwe Labour Force Survey (1986) at p.87.
[65] Freeman, M. (1990) at p.1420.
[66] As at 20 August 1992 the exchange rate was Zim $9.2 to £1.
[67] Eekelaar, J. (1984) at p.28.
[68] Felstiner, W. Abel, R. and Sarat, A. (1981) at p.633.

CHAPTER 6 - ARTICULATING THE DISPUTE

6:1 Introduction

Having seen how the research was undertaken, this, the first of the data based chapters, explores through the statements of the women themselves both their perceptions and expectations of marriage and their dissatisfaction with the state of their union. To understand the nature of the dispute, it is necessary to understand what the parties expectations of marriage were.[1] Bernard has pointed out that the institution of marriage means different things to men and women, hence her discussion of "his" and "her" marriages.[2] This thesis is primarily concerned with "her" marriage, that is with the woman's perception of the problems in her marriage. In concentrating on the woman's account, I am mindful of Clark and Haldane's sanction that these accounts should not be seen as constituting the facts about what is happening in a particular group of marriages:

> " ...Nor should they even be regarded as the "true" experiences of those involved, enabling us categorically to explain the particular details of their situation. Rather they provide us with "texts" from which we should seek to "read off" an understanding of marriage within our culture. They present us with a range of experiences, they offer insights into how these are encountered differently by men and women, they show us that even the innermost feelings of intimate relationships may be signposted or coloured by far wider social agendas and processes."[3]

The woman who expresses dissatisfaction with marriage needs to legitimate that dissatisfaction. That means that the mobilisation of the dispute to achieve the desired end was a process which involved the women articulating their dissatisfaction in a way which would paint the man's

behaviour as being socially unacceptable and therefore illegitimate. The women had been socialised into accepting that men had certain privileges which were denied them. They knew that if they complained they would be told "that is what men do". Over time they developed strategies for "overriding" the system and securing acknowledgement of the behaviour of the spouse as being problematic. They did this by saying that although they acknowledged that the husband had certain rights, he had exceeded legitimate boundaries in exercising those rights.

One of the key strategies employed by women in this regard was the identification of a third party or parties as victims of the spouse's illegitimate behaviour. They knew that the "victims" who would derive the most sympathy and in turn win support for them were the children.[4]

Conversley Vaughan has noted that the initiator or person wanting to leave the relationship also goes through a process of trying to legitimate his decision to leave. This he does by sharing his discontent with people who are sympathetic to him:

"The initiator engages in obsessive review. Parading discontent before self and before others, he or she develops an account of partner and relationship that reorders the history of the relationship...the partner who is left behind must be an undesirable partner. If a partner has erred deeply enough, leaving is socially legitimate. Therefore there is a need to dislike, to find the partner's failing unbearable."[5]

6:2 EXPECTATIONS OF MARRIAGE

The patricentered nature of Shona society means that marriage is often defined in terms of men's rights and women's obligations. By giving *lobolo* for the woman a man becomes entitled to certain services from her. Goody lists these rights as being economic, domestic, ritual and sexual.[6] Sadly for women this contractual analogy does not yield any rights for them, merely duties. As women are neither the buyers (men/husbands) nor the sellers (fathers/male guardians) they find that they constitute the "goods" in the contractual equation.[7] Thus one finds that a woman's entitlement at marriage is defined in relation to the man's right, so that he may beat her, but not excessively, and she may only complain about his extra-marital liaisons if he begins to neglect her.[8] A woman's rights at marriage are not independent of, but rather derived from, the husband's.

This conceptualization of marriage in purely male terms is also present in the literature, thus most discussions of marriage focus on what a man who has paid *lobolo* for a woman may expect of her and not the other way round. Weinrich is one of the few authors who talks of marriage as constituting reciprocal obligations.[9]

Oppong defines women's roles in the family in terms of "openness" and "jointness". Using these two dimensions of classification, she produces four kinds of conjugal family role systems. In the open/joint category the husband and wife share household tasks and child care equally. In the

open/segregated category, prevalent among the women in the civil marriage group, the husband does not share tasks with his wife but there are other sources of help available to the wife. The third category is the closed/joint category where the wife is dependent solely on her husband for help whilst in the closed/segregated category, the wife is expected to do all the chores without any assistance from the husband, kin or domestics.[10]

From the women's complaints emerged two pictures of "her" marriage. Depending on their educational backgrounds the women aspired to either institutional or companionate marriages. Women in the customary group who had a lower standard of education than their civil marriage counterparts aspired to the institutional type of marriage whereby:

"Husbands and wives were assigned specific roles and responsibilities and these obligations were reinforced by law: men remained largely obligated to support wives and children, while women remained responsible first and foremost for the care and custody of the children."[11]

Those in sample two ascribed to the companionate marriage whose norms emphasize that:

"...women should share in decisions affecting the family while men should share in the chores, and both should spend free time together and have friends in common. The correspondence between these norms and joint marital role patterns is clear. Thus particularly for women the norm of joint marital role structure is likely to be a highly valued one"[12]

Using Oppong's analogy what these women wanted was greater openness and greater jointness. What distinguished the two groups from each other was their socio-economic status, so

that those customary group women who were married to low paid workers and peasant farmers saw financial support as being the primary consideration. However, those in the civil marriage group, many of whom were in paid employment and who were more educated, in addition to complaining about inadequate financial contribution from the husband, also complained about what they saw as his personality defects. Of this dichotomy, Levinger notes:

> "In general the evidence indicates that spouses in middle class marriages were more concerned with psychological and emotional interaction, while the lower class partners saw as most salient in their lives financial problems and the unsubtle physical actions of their partner."[13]

Much of the tension in the civil marriage group arose from the fact that whilst their husbands outwardly subscribed to the norms prescribed by companionate marriage, to which was linked greater social prestige, the reality was that they held on to the traditional view of marriage which gives the husband supreme authority as head of the household and to all the other "privileges" associated with this position. It was this duplicity that was the cause of great dissatisfaction to civil marriage wives.[14] Of this phenomenon Chandler notes:

> "People use the language of mutuality to describe their commitment to the relationship but the commitment to marriage is distinct from the divisions and inequalities of being married. In the language of marriage, jointness is not the same as symmetry, and partnership does not necessitate equality."[15]

6:3 DEFINING THE PROBLEMS

Defining marital dissatisfaction as being problematic was a gradual process.[16] Thornes and Collard identify four stages in the process from the articulation of the problem to the legal dissolution of the marriage.[17] Difficulties arise in the reconstruction of the marriage for the interviewee's perception of the "problem" may be coloured by hindsight and be a reconstruction of the history of the dispute to fit into legitimate categories of disputing.[18] In constructing a retrospective account of their marriages most of the women pointed to a specific event as being the start of their marital problems, yet it is doubtful that if at the "relevant" time they had been asked about the state of their marriage they would have responded with "oh everything was fine until yesterday, that's when the problems started."[19]

It is for this reason, Brannen and Collard argue, that it is important to distinguish between the different stages in the respondent's help-seeking career.[20] They suggest that there are three stages to this process. The first is awareness of the problem, followed by the definition of the dissatisfaction as being problematic. The final stage is the decision to approach an agency for assistance. Sarat and Felstiner call this process "naming, blaming and claiming".[21] Although this is a useful way of framing the process, the data suggests that the three categories are not divorced from each other, but are inter-linked. Two sequences emerge with the first being that of naming and blaming and the second being blaming and claiming. In between the two comes the legitimation of the

problem. This chapter discusses the first sequence that is the articulation or naming of the problem in a move towards seeking advice. The blaming which is started at this stage continues into the help-seeking phase, and eventually leads to claiming relief. The second sequence is discussed in chapters seven and eight.

In trying to make sense of the naming process, the issues which the women articulated as being the problems of the marriage have been reduced to four main groupings, which overlap to some extent. Not surprisingly the main cause of complaint was financial. Related to this were the broader issues of family obligations and other issues which were extraneous to the marriage. Thirdly, there were those problems which were more specific to the couple such as other women and to a limited extent tension between wives in polygamous unions. Finally, there were the "value-laden" complaints which were specific to the women in the second sample. These consisted of the woman complaining about the husband's personality or character defects.[22] The distinctions are somewhat artificial, for the respondents did not themselves conceive of their problems in isolation. Rather there was a fluidity in their perceptions of the problems of the marriage which they saw as having a knock-on effect.[23] Thus one woman said:

"He started going out with someone's wife then he stopped giving me money for food and other necessaries. Sometimes he would beat me." Ms Chidamayia

Having identified or named the problems the women needed to find a way to lay the blame at the husbands' feet.

6:3(a) Attributing Blame for the Problems of the Marriage

One of the key stages in the definition of a problem is the attribution of blame.[24] Brannen and Collard identified three patterns of blaming. The first involved the parties blaming each other. The second involved one party blaming the other and the other accepting the blame whilst the third involved the wife blaming the husband and the husband ignoring the complaints or denying the legitimacy of the wife's definition of the problem.[25]

The two groups were composed of women who fitted the first and third patterns of behaviour, that is they laid the blame entirely at the man's feet. When one considers the interview setting (the door of the court) it makes sense that the women were not willing to acknowledge any blameworthiness on their part. They were aware of the adversarial nature of the disputing process which lay ahead of them and realised that to maximise their chances of success they had to minimise their role in the breakdown of the marriage. Felstiner et al note that:

> "People who blame themselves for an experience are less likely to see it as injurious, or having so perceived it, to voice a grievance about it: they are more likely to do both if blame can be placed upon another, particularly when the responsible agent can be seen as intentionally causing or aggravating the problem."[26]

Below is a table indicating the various grievances as articulated by the women in the two groups.

6:4 GRIEVANCES

Table 7 - Grounds for Complaint

Grievance	Customary (76)	% (100)	Civil (21)	% 100
Lack of Support	63	82.89	16	76.19
Tension with co-wives	16	76.19	-	-
Other Women	40	52.63	15	71.42
Violence	26	34.21	16	76.19
Threats/ Taunts	26	34.2	1	4.76
Relatives	17	22.36	6	28.57
Value-Laden Complaints	-	-	10	55.00

The content analysis of the data yielded six broad categories of problem namely: lack of support, tension with co-wives, other women, relatives, violence (including taunts and threats) and value-laden complaints mainly as articulated by the women in the civil marriage group. These shall now be considered in greater detail.

6:4(a) Lack Of Support

It is still expected that the financial burden of supporting the family will fall on the man.[27]

The Customary Law and Primary Courts Act recognises the rights of a woman married in terms of the customary law to receive maintenance from the man regarded as being her husband.[28] Similarly a man is under an obligation to support his children, whether or not they are living with him.[29] From this we can deduce that one of a woman's rights in marriage is the right to be maintained. Women therefore expect that the men

to whom they are married will provide for them and their children. One woman who had a registered customary marriage was fully aware of her husband's legal obligations towards her and told the Presiding Officer as much.

"I told him (the Presiding Officer) that under a Chapter 238 marriage a husband was under a legal obligation to maintain his wife." Ms Masimirembwa

That the women were aware of this right, and that the husband's failure to provide for them adequately constituted "illegitimate" behaviour, is reflected by the fact that lack of support was the most frequently cited "problem" or cause of marital breakdown. 82% (63 out of 76) of the women in the customary group listed it as being a grievance. Similarly, in the civil marriage group, lack of support and problems about money was the most cited cause of complaint with 76% (16 out of 21) of the women mentioning it as a problem. In this instance the women were not necessarily looking to the man to provide all the resources as were their sample one counterparts. Rather, it was more a question of the husband not meeting his share of the responsibility for financial provision for the family:

"He was the type of guy who would leave everything to me. He left me to settle all the accounts. I only earned $450 then. He used to get paid in the middle of the month, yet even if it was pay day and you asked for money he would tell you to go and borrow it. He wouldn't even spare a cent." Ms Ngwenya

Also, part of the ethos of the companionate marriage is joint management of resources. Some of the women in the second sample were disgruntled when this did not take place in their

own marriages:

"Communication between us was bad because of finances. He didn't want us to work things out together. He used the money we got from our wedding presents to buy a lounge suite and a black and white television set. I don't know what happened to the balance. He just said that the cheques bounced." Ms Chengeta

"Before we used to work out our monthly budget together. Now he'll bring money home and then he'll draw $500 or $1000. I don't know where it goes. I keep quiet, but at the end of the month I have to meet all the household and fuel bills alone." Ms Sibanda

Tied to non-consultation about the way that the money was being spent was also conflict with a husband who saw it as his traditional right to appropriate the woman's salary:

"Then he said that I should give him my salary. He did the budget alone. He would give me $20 for groceries and when I told him that it wasn't enough he would say that I was extravagant...After the tax laws changed (separate taxation introduced) I said that I wanted my salary back. He refused to budge insisting that I should deposit my salary in his bank account...Everytime he bought things I didn't feel like I was part of it. He never consulted me about how he was using my money. If I asked or suggested that we do things together he would say, `I paid for you so you can't tell me anything'." Ms Chengeta

This was part of the husband maintaining power within marriage for as Pahl has pointed out:

"Having power in marriage is associated both with contributing money to the household and also with controlling finances in it."[30]

Legitimating the Claim

Because it was a generally acknowledged and indisputable "right" which the women knew they had, the need to legitimate the claim was not as strong as for other grievances. However what they did seek to do was to lay greater moral

blameworthiness at the husband's feet by showing that his lack of support not only threatened the marriage but had adverse effects on innocent third parties, namely the children. That a woman should be expected to undergo some hardship in marriage was accepted. However what was not accepted was that the children of the marriage - who are after all seen as belonging to the patrilineal line - should have to suffer as a result of a father's neglect of his duties. By using the "victim" argument, women were seeking to gain more sympathy for their claims:

"I just want him to look after his child and to buy her clothes. I am not interested in anything else." Ms Chirume

"All I want is for him to help to look after the child." Ms Mushonga

"His relatives are saying he should at least give me money to look after the children. They say that he should not be allowed to squander all his money in Harare. He should at least give me money to enable me to send the children to school." Ms Chikerema

"He should take pity on me and give me money for the child. My brothers can sue him if they like." Ms Rekeni

As regards lack of support there was a continuum from those who did not pay anything to those who realised that they should pay but said that they could not do so. The women complaining about lack of support fell into three broad categories: those where the man stopped supporting them altogether, those where he continued to provide money but was erratic in the provision thereof or provided for them inadequately and finally those who promised to support but did not do so.

The men who stopped supporting the women altogether usually

did so as a means to an end. Usually the desired "end" was the departure of the woman. By denying her support they hoped to "starve" her into submission or, more correctly, leaving. One of the women whose husband had been transferred to another town realised this and said:

"The trouble started when he was sent to work in Shurugwi. He stopped giving me money to hasten my departure." Ms Gute

The next category is probably the most common. This comprises the men who became inconsistent in their provision of financial support. This was usually because they had encountered "diversions" in the form of other women or else they had other demands on their money such as increased financial obligations towards the extended family which made them unable or unwilling to give as much or as regularly as they had done in the past:

"The problem started three years ago. He just stopped looking after us properly. When he got paid he would only give me half his salary..." Ms Kuzara

"When I returned from the hospital I noticed that things had changed...He started giving me everything in halves. He started giving the maid money to buy provisions for the house." Ms Chigudu

"He buys groceries from time to time. Other times he says that I should take care of things myself. He gives me money occasionally - $20-$30 at a time. He pays $110 per month in creche fees for our son." Ms Chinamasa

"He became financially more responsible to the other woman. I took over everything. I had to make sure the kids were clothed and fed, and that their fees were paid. I was running the home alone." Ms Nhamo

Rural women seemed to suffer the most from inconsistent support. Theirs was a case of "out of sight out of mind." Their husbands who were migrant workers often remained in town and failed to remit money or provisions for the families they

had left behind.[31]

"He got caught up with the good life in town and sometimes forgot about us. My mother helped out occasionally with food and clothes." Ms Gomo

"When the war ended we moved back to his village. He left me there and went to town. That's when the problems started. He stopped coming to the village to visit. He also stopped sending money." Ms Mutseyekwa

A distinction can be drawn between the attitudes of rural and urban women to non-support. Rural women seemed to "tolerate" non-support for longer periods of time before complaining than did their urban counterparts. I attributed two reasons for this. First, the rural women lived with his kin thus the atmosphere was not conducive to complaint. They had to contend with the husband's family making excuses for him, thus one said:

"I again spoke to his sister...She said that as he was living with his first wife, perhaps the cost of living in Harare was proving to be high." Ms Chitopo

It was only when the situation became critical and their suffering became acute that the husband's family denounced his irresponsibility thus leaving the way open for the women to articulate their dissatisfaction. This contention is borne out by the large number of women (mainly rural) who said that they had been encouraged to seek maintenance by his family.

"It was his father who suggested that I sue him for maintenance. He said that I would not get money to support the children any other way. He said that he had tried speaking to his son but had tired of getting any response." Ms Ruzengwe

The second reason was that the rural women were able to plough

so that they could grow food for subsistence but the urban ones could not. This meant that urban women were more dependent on their husbands for money to buy provisions than their rural counterparts. They therefore felt the "pinch" much quicker and as a result complained a lot faster too.[32]

The third category comprises those men who promised to provide support but did not. Specific to this group were men with illegitimate children. They used promises of support in the same way that they used promises of intention to marry and that is as a way of buying time and pre-empting maintenance actions being brought against them. Thus a few of the single women said:

"I came to find him in 1989. I asked him what he thought the child was surviving on. I told him that I needed nappies and money for soap. He kept saying he would come home to the rural areas. He did not come." Ms Ndoro

"After I had the baby I went to tell him but he reneged on his promise. He refused to supply the promised soap and porridge. He kept telling me to come back the next day." Ms Kabote

6:4(b) Tension With Co-Wives

Whilst boys are socialised to believe that monogamy is not "normal", girls are socialised not to expect their husbands to be faithful. Nevertheless women still hold monogamy up as the ideal. Christian teaching supports and encourages them in this ideal as do the realities of living in cramped urban conditions. However, more pressing than the social desirability of being in a union which is *de facto* monogamous is the need for economic security and the need to be protected from competing for limited resources. To be part of a

polygamous situation, then, involves rivalry not only for the man's time and affection but also for his money. Socialised or not, many women find this a bitter pill to swallow.[33] This explains why the majority of the women who were interviewed in the customary group who were in polygamous marriages were first wives (22 out of 33). Those who entered as second wives did so out of ignorance, desperation or in the belief that the man was wealthy. As civil marriages are meant to be monogamous, this section will only be dealing with women from the customary group. This is not to suggest that men did not "remarry" whilst still in a monogamous union for they did:

"Well it's obvious that they must be married because she changed her name at work to Mrs Takaenda. Who will know that he has a registered marriage elsewhere?" Mrs Takaenda

The extra-marital liaisons of the husbands of women from the civil marriage group will be dealt with in the following section on other women as a problem.

Legitimating the Claim

Women realised that it was socially acceptable for their husbands to have more than one wife so they had to find another way of articulating their dissatisfaction.[34] This is reflected in the comments of the women themselves, hence one said:

"We continued to live amicably until 1982 when he married my cousin...I did not object to this course of action. I was not really upset. What did upset me is the fact that he took her to Harare with him and stopped maintaining the children and me." Ms Chinwada

Legitimation of this problem was a process, whereby the women

acknowledged the husband's right to engage in polygamy, but then pointed out that his enjoyment of his right to take other wives had led to a neglect of his other duties. This neglect was often highlighted by first wives who felt that the husband had a primary responsibility to them as the "first family". This was reflected in the comment of one first wife who said:

"Everyone knows that I am the elder wife." Ms Madembo

It is significant that first wives found the acquisition of second wives by their husbands particularly hard to bear. This, as Goody points out, is because the woman has come to enjoy and become accustomed to a monogamous state where she has access to all the husband's resources.[35] The displeasure of senior wives is particularly acute if the marriage has been of long duration and has produced offspring. A first wife described her husband's two new wives thus:

"He took the first wife in 1983 and the second one in 1987. He just took them for fun, just to please himself. They were not pregnant when he married them and they still have not had any children. Both women don't work, they don't do anything. He just met them in the bars." Ms Tsorayi

She questioned the husband's need for these women. In essence she was saying that he did not have a legitimate need for them. By saying that he had met them in the bar she implied that they were women of ill-repute. They did not have any labour value and, as she pointed out twice, they did not have any children. In her eyes, this made them completely worthless. Similarly, a childless woman who was informed by

her husband that he was taking a second wife said:

"I asked him if she was pregnant. He said she wasn't. I asked him what was the point of marrying her." Ms Masimirembwa

Having discredited the other wives and questioned their value, the women then proceeded to show how the acquisition of the new wife had resulted in the husband neglecting his duties towards them and as a result their rights had been breached. Therefore, in articulating the claim the women did not complain about the other woman per se, but about the <u>effect</u> of the introduction of the other wife on the husband and by implication their lives.

What was particularly irksome was that having acquired another wife the husband failed to treat them equally, as tradition dictates he should. Thus the one said:

"Previously his wife and I took it in turns to come to stay with him in town after the harvest. I last came in 1988...It was her turn in 1989. She came but she did not return to the rural areas. She did not even come to plough. I was pregnant and stranded." Ms Ruzengwe

Another complained about the husband's neglect of general duties:

"He did not help me to plough my fields." Ms Madembo

Sexual jealousy was a cause of frequent quarrels:

"By this time my husband had stopped visiting me in my hut...Yet he slept in his first wife's hut. I asked about this. He said he was not having intercourse with his first wife." Ms Chitopo

Another complained:

"He was always sleeping with his junior wives and none of them helped me." Ms Tsorayi

Perhaps the greatest bone of contention between the women was to do with money and the manner in which the husband distributed the resources. In a cash economy it is easy to tell when one wife is being favoured over another. This comes through very clearly in the women's accounts:

"Then he stopped paying fees for my children, yet he paid fees for the other woman's children." Ms Ruzengwe

The interviewees' economic reliance on men led them into conflicts with co-wives with whom they saw themselves as being in competition. Sometimes it literally became a fight for survival with the tension escalating into physical violence. Three of the women reported having had fist fights with their co-wives whilst many more reported verbal confrontations. One of the respondents reported having picked up a kitchen knife (in self-defence, or so she told me) and stabbed her co-wife. She assured me that the resultant wounds had been superficial and complained that the other woman had been unnecessarily vociferous in her complaints to the Police.

6:4(c) Other Women

"Behind most family problems or domestic violence, there is another woman."[36]

Women do not fight over men. They fight to protect their interests which, more often than not, are economic. The man is seen as being the agent through whom their social and financial aspirations can be realised. To want a part of the

agent is to threaten another's livelihood. This was the basis for wives dissatisfaction with their husbands' extra marital liaisons in the customary group. For the women in the civil marriage group, however, the dissatisfaction was linked to social status and the threat posed to the companionate nature of the marriage, for as Martin, Richards and Elliott have noted:

> "As couples share more, emotionally and in every other way, the prospect of sharing any of the aspects of this with others outside the marriage becomes more difficult and threatening. There is the added threat that an extra-marital relationship might also be a companionate one."[37]

It was both demeaning and humiliating for them to be faced with their husbands' infidelities. It was for this reason that the husband's infidelities ranked equally with lack of support as a cause of complaint so that 71% (15 out of 21) of the women in this group cited this as a complaint.

If polygamy is on the decline, does it mean that more men are monogamous? It appears not for:

> "...a tradition which did not demand an exclusive sexual partnership of a man with one woman readily permits the spread of concubinage as a means of securing sexual satisfactions of polygamy without the economic burden."[38]

However is it true to say, as Mair does, that because a man does not have to pay *lobolo* for the woman with whom he is having an affair, the economic burden is lessened? <u>His</u> may be, but his wife's certainly is not. It is precisely because a man does not have any legal hold over his "lady friends" that he will make a greater effort to ensure that their

affections are secured. If "making a greater effort" is translated into spending more money on them, it means that his wife and family will receive proportionately less of his income, thus it is they who suffer the economic burden and not the men. Added to this is the threat which is posed to the stability of the marriage if the other woman is single.[39]

Legitimating the Claim

As was the case with polygamy, the interviewees realised that, within society's norms, they could not complain if their husbands had extra-marital liaisons.[40] The fact that they accepted the situation did not necessarily mean that they agreed or were happy with it.[41] Thus one said:

"I admit that he occasionally slept out but that is what men do." Ms Masimirembwa

They acknowledged that as long as he was not neglecting his familial duties, there could be no cause for complaint.

"I had known that he had a girlfriend with whom he occasionally spent nights. However, as he had continued to look after the children and myself, I had not objected." Ms Madembo

The interviewees only complained when the husband's extra marital affairs began to have a detrimental effect on family life. As is to be expected, the greatest bone of contention was over financial support, which was often the first to suffer when the man was having an affair. Thus one complained:

"Some men have girlfriends but they still look after their wives." Ms Zowa

"He was a womaniser, I tell you. He would rent houses for his

girlfriends. He had about five of them. He was the jealous type and he didn't want them to see someone else. He would do all these things yet he was neglecting his family." Mrs Ndhlovu

The wives in the civil group complained when the husbands' affairs became public. The "etiquette" was that if he had to cheat on her then he was expected to be discreet about it.[42] Mrs Muzambi whose husband was having an affair with a co-worker of his complained:

"They stopped trying to be discreet about the affair. Everyone knew and they used to come and tell me. What makes the whole situation so unbearable is the fact that our jobs are next to each other so everybody at his place of work and at mine knows." Ms Sibanda

Another way of legitimating the claim was for the wives to show that the husband had behaved in a socially unacceptable way. One woman complained that her husband had intercourse with his girlfriend in her house. She explained that under customary law this was considered taboo because it was believed that it could result in the wife becoming ill. Yet another complained that the husband had brought bedsheets which he had been given by his girlfriend and asked her to spread them on the marital bed. Two others complained about the introduction of other women into their homes. In the first case the husband's mistress by whom he had a child had been evicted from her home and so she came to stay:

"I had this very nice Japanese dressing gown. She was wearing it. It looked like she had been wearing it all day. It had oil marks all over it. I told her to take it off. She said that since she would be living with us, I shouldn't be so possessive. I had to learn to share my things. The children were fretting and getting confused about what was going on. We stayed like that for a week." Ms Ncube

"What really broke up the marriage was that in 1988 I travelled to Botswana for a conference. When I left the house he was supposed to be looking after the children. He had done it before without any problems. This time he went and brought this other woman into the house. She was sleeping in my house using everything of mine. She literally walked into my house. I was away for three weeks and she left a day or two before I came back." Mrs Nhamo

What these women were saying was that they did not mind so much that their husbands had been having these affairs, but that they had breached socially accepted rules of behaviour which dictate that men may have affairs, but these should be conducted with discretion. In these instances the men had been unnecessarily disrespectful.[43] In another instance the husband's extra marital liaisons had resulted in his wife contracting venereal disease from him:

"I have an infection which he gave me. I have smelly discharge and after I have intercourse with him my uterus swells and I have to visit the doctor. As it is I have just come from there...I first got STD (sexually transmitted disease) from him when I was pregnant for the first child. I was hospitalised and the nurses told me that if I had delayed coming, then I might have died. I was given ten injections. They told me that my child might be born blind or with some other abnormality. I contracted STD from him when I was pregnant with the second child and had to get ten injections again." Ms Kudita

Here the husband's cavalier attitude towards the health not only of his pregnant wife but also towards his as yet unborn children was used to show his selfishness and justify or legitimate his wife's complaints against him. Often the man's flagrant disregard for the wife's feelings was linked to the fact that he was aware of her economic dependence on him and the fact that she would be hard put to live without him. One went so far as to expect his wife to live in the same room as his girlfriend, with whom he would share the bed whilst she

slept on the floor. He had simply introduced her as "the younger wife".

Not surprisingly, the wives sometimes became extremely angry and sought to remove the cause of the problem - the other woman. Again there were both verbal and physical confrontations. Unfortunately for one the confrontation did not have the desired effect for:

"From the day that I beat her, they became more committed to one another. They began living together until eventually she fell pregnant."

Yet another who was forced to live with a schoolgirl whom her husband had made pregnant resorted to locking her up in the spare room at night. Her strategy worked for she reported:

"She stayed for two months then went home to have the baby. She refused to come back after she had the baby. She must have told her parents that I was difficult to live with." Ms Zhakata

However for women with civil marriages, being confronted with proof of the husband's infidelity proved to be the catalyst that provoked the split. Mrs Nhamo came home early from work one Friday afternoon to find the husband moving the other woman, now pregnant with a third child by her husband, into the matrimonial home:

"At that point I knew it was never going to work again." Mrs Nhamo

Another said:

"I walked in and found he was having sex with the maid. It brought me to my senses." Ms Thebe

Vaughan has noted that one of the strategies used by people trying to leave a marriage (initiators) is rule violation whereby the `the initiator breaks some rule...about proper conduct toward the partner and the initiator's behaviour is so contrary to the expectations that the partner is shocked to attention'.[44] She goes on to note that of the rule violations sexual relations outside the partnership are the most public and therefore the most likely to move the partner to confront the initiator.[45]

6:4(d) Relatives and The Marriage

In 1952, Holleman put it that, amongst the Shona, a marriage between two people without the parents' approval was invalid.[46] Although that is not the legal position today the family's influence remains strong. Few couples would wish to risk alienating their families by marrying without their consent.[47]

The importance of maintaining family ties lies in the fact that traditionally marriage was a coming together of two clans. The two individuals merely acted as the catalyst which had brought the two families together.[48] Thus it was that traditionally the whole group contributed towards the *lobolo* required to marry the woman. Whilst the man acquired uxorial rights in his wife, the payment of *lobolo* also secured genetrical rights to the woman's children. The family's "investment" meant that they had "corporate" rights in the new wife.[49] Although it now sometimes happens that the groom pays all the *lobolo* without any contribution from the family, his links with the family remain strong. This is because he is

still dependent on the family for moral and economic support, which support he is expected to reciprocate.

This duty to the wider kinship network is in conflict with an increasingly individualised economy. It is therefore important to look at the pressures on both men and women in these situations. In the study, the husband was trying to help the wider family, whilst the women were trying to attract resources for the use of the immediate family. Seen in this light it could be argued that men were forced by the social structure to oppress women to enable them to fulfil their obligations to the wider family network. Whatever the rationale, women were the losers.

Legitimating the Claim

Complaints about the husband's family were some of the hardest to legitimate, not least because the respondents realised their dependence on his family should problems arise within the marriage. Added to this was the acknowledgement by the women themselves that they were considered to be "outsiders", thus making it difficult to complain. The fact that the society around them was of the opinion that a man's first allegiance was to his natal family made it difficult for them to articulate their problems with his relatives in a way which would fit them into the social arena.[50]

In articulating their grievances, the women alleged that the man's relatives had behaved unreasonably, and suggested that no one should be expected to tolerate that kind of behaviour.

One woman pointed to a particularly troublesome mother-in-law as being the root of the problem:[51]

"It is his mother who puts him up to all this. I would offer her food and she would refuse, yet when he came home from work she would tell him that I had not fed her. He would beat me for this. If you bought her clothes then she would bury them." Ms Makanza

An interesting strategy adopted by the interviewees was that of complaining about the man's behaviour rather than about the relatives. He was painted as being unduly attached to or influenced by his family. They often alluded to the fact that they did not receive sufficient emotional support from their partners:

"I think he is being brain washed by his mother. He doesn't do anything without his mother's knowledge or approval. It's a very weird attachment." Ms Chengeta

That the family takes their genetrical rights very seriously is reflected in the fact that in just under a third of the cases in the customary group where the woman cited the relatives as having been the problem, it was because the relatives had complained about her inability to have children or the fact that she had too few:

"I stayed for seven years without having another child. His relatives were not very happy about this. Privately he supported me. However, publicly he agreed with his relatives." Ms Gomo

"I did not have any children for three years. The two of us were not unhappy or worried about this. His relatives said that they had heard that I was barren. They made me visit several traditional healers but to no avail. His parents were complaining but he did not say anything." Ms Ndoro

Even women in the civil marriage group were not immune to this criticism:

"His family started asking how he could stay with a woman with only one child. They said I was barren. He started staying out. He would go and visit his family and come back in a completely changed mood." Mrs Rinashe

"His mother and I never really got on well together. We didn't get on because I didn't bear her many children. She once said that I wasn't a proper woman. She said that a proper woman bears children and seeing as I only had one I was as good as a man." Mrs Takaenda

Also linked to the notion of corporate ownership was the assumption that the family was entitled to harness the woman's labour for their own use. Hence one woman who had been unhappy living with her in-laws was told by her husband that he was not prepared to remain married to her if she was unwilling to return to his parents in the rural areas to assist with the work there. Yet another who was in formal employment in Harare complained saying:

"His parents destroyed our home. They said that I should stop working and go and work for them. His mother also wanted his salary. He used to send them groceries and money behind my back." Ms Chiadzwa

"We also quarrelled over money. He would take my salary and spend it the way he felt like. He took most of my money and sent it to his parents. His argument was that his parents were poor but that mine had jobs and were working. This went on for a year until I said that I was fed up." Ms Gogodi

Most arguments were over money. Whilst the interviewees acknowledged that the husband had a duty to support his family they questioned how far that duty of support extended.

"His parents were difficult. They said that my husband was not buying clothes for his siblings, yet they were all working." Ms Kanoti

This was a source of great tension for whilst wives wanted to be maintained adequately, relatives were of the opinion that

their demands should be met first. This sharing of scarce resources extended to accommodation, so that women reported having shared housing with members of his family.[52] The problems arose when the relatives took over the house and in one instance even tried to evict the wife. She said:

"When his relatives are there he is nasty, but when they are not then he is very nice. If he brings money home then he gives it to his sister who buys the food and then cooks it and gives us a share. She often feeds her own children first. She is very troublesome. He also gives her the money to pay the mortgage. When he is away I have to use my own money to buy the provisions. They (his brother and sister) just want me to leave so that they can find a permanent place to stay." Ms Gatsheni

The women's problems were compounded by the fact that they were considered to be "the outsiders." Traditionally the daughter in law was attributed with having mystical powers and anything that went wrong in the family was laid at her feet.[53] Speaking to the women it became obvious that very little had changed.

"His mother then became ill and she said that it was my fault. She died in May 1989. His sister chased me from home saying that I was a witch and had killed their mother." Ms Dube

"His brother stayed with us for awhile. When he died I was blamed for his death. I left and went back home to my parents for two weeks." Ms Zowa

A woman in the civil marriage group who had lost one of her two daughters said:

"After the child had died, his relatives packed up all her clothes and took them away. Later I asked for the clothes back. His mother said that I would have to wait until we could have a family gathering since they belonged to the child who had died... They gave the impression that I had killed the child. Much later he phoned and told me that if I wanted Mary's clothes I would first have to kill Anna (the other

child)." Ms Chengeta

Whilst the wife was often the victim, the husband was also in a somewhat ambivalent position. He was torn both emotionally and financially between his wife and his family and their expectations and this made for a very unhappy situation.[54] Ms Rinashe recognised this as being the problem which had wrecked her own marriage:

"I don't really blame him for the break-up of our marriage. It wasn't his fault. He came under pressure from his mother and relatives. I think he regrets taking that step." Ms Rinashe

5:4(e) Violence

Many men believe that it is acceptable for a man physically to chastise his wife. Indeed it was accepted under customary law that a man had the right to beat his wife as a way of making her obey his orders.[55] The problem is compounded by the fact that women have been socialised to accept men's cruelty towards them as being part of their lot.[56] As Ms Ncube rather ironically put it:

"Zimbabwean society treats behaviour which is abnormal as if it were normal." Ms Ncube

The situation is exacerbated by women's inferior economic position which makes them heavily reliant on men for economic support. The men capitalise on this and use it as an excuse to beat their wives knowing that it would be difficult for them to leave.[57] Added to the problem of physical violence is that of mental cruelty so that many women reported having been taunted by their husbands.

In her study of domestic violence Pahl noted that:

"It has been hypothesized that this is a problem which frequently co-exists with other problems, though it seems unclear whether these other problems are more accurately seen as "causes" of the violence as "enablers" which allow violent feelings to be expressed, as "symptoms" with the violence of some deeper malaise or as unrelated to the violence."[58]

It is significant that the Police list sexual jealousy, money problems and family influence as being the three main causes of domestic violence in Zimbabwe.[59] In the survey, the three were shown to be inter-related with the first two being particularly relevant. A cyclical pattern often emerged with the wives complaining about the presence of another woman being linked to a decrease in the level of support they were receiving from their partners. When they raised this issue with their partners, they were assaulted.

"He used to beat me almost every weekend. He would beat me for asking how he was using the money and where he had been for the last few days." Ms Chigudu

There were reports of fighting between the women themselves and this was reflective of the women competing not only for the man's affections but also for his money.[60]

Legitimating the Claim

To complain about violence in a society which condones it is difficult.[61] The women realised this so in articulating their dissatisfaction they pointed to the fact that the husband had used illegitimate violence. That was usually done by showing that he had been excessive in his use of force, that he had been drunk or that he had simply assaulted the woman without good cause. They created a description of violence which both

the interviewer and the society at large would condemn as being outrageous, so a number of women said that their husbands had beaten them when they were pregnant:

"I was once hospitalised for four days when I was pregnant after he had beaten me." Ms Mushonga

"He beat me throughout the pregnancy...He had a set of four knives which he constantly threatened me with. He once told me that it was harder to kill a chicken than a person. With a chicken you had to hold the wings and legs down whilst you did the job. He said that he could simply shoot me and I would die." Ms Muzangaza

Often the beatings were linked to requests for money. The women legitimated the complaint by showing that it had been wrong for the man to withhold support in the first place, but then to go on to beat her was outrageous. Thus they said:

"He would beat me when I asked him where the money was." Ms Gatsheni

"In 1984 I ended up at the Police Station after he had beaten me for asking for money." Ms Chipangura

"In 1987 we quarrelled and he beat me. The reason was that I had told him that the money was short...That is when he grabbed hold of me and beat me telling me that I had no right to ask him about his money." Ms Chakwenya

One of the main reasons behind the men's violence was an attempt to rid themselves of the women. They tried to make their wives leave so that they could bring in other women. Two of the interviewees said:

"I went home and found another woman. I kept quiet. He told me that I could not stay. He said that my time was over. He said that if I wanted to stay then I should act like a visitor, and not touch anything. He then beat me." Ms Muzangaza

"Then he started living with another woman in Harare. He started beating me. He said that I should leave the house so

that he could bring in the other woman." Ms Kundizora

Perhaps the worst cases were those where the men used violence as a means of asserting their authority. Their aggression was marked by a chilling sadism:

"He is a very violent man. He would lock me in the bedroom, tie me up with chains and beat me. If he asked me a question and I answered him, he would beat me for being cheeky. If I kept quiet, then he would beat me for not responding to his question." Ms Zowa

Both these women were married to soldiers. Significantly, some of the most harrowing tales of violence and general deprivation were told by the wives and girlfriends of men in the defence forces. These were not only soldiers but police officers and security guards. In fact all but one of the women who had been married to service personnel reported having been assaulted. This would seem to suggest that the aggression which is a requisite of their professional lives carried over into their personal lives. It is possible that coming from the lower socio-economic group the men experienced a fracture between their social and domestic power. They occupied low status jobs or in the case of service personnel, low ranks so that it was only in the home environment that they could assert their authority and acquire "real" power over a person who was obviously more powerless and reliant than themselves.[62] As the women's work in the household had no monetary value attached to it, they were further devalued and laid open to abuse.[63] Goode notes that:

"It is not so much that beatings and cruelty are viewed as an obvious male right in marriage, but only that this is one of the techniques used from time to time, and with little or no subsequent guilt, for keeping control over the wife."[64]

Two-thirds of the women in the customary group who were beaten were urban dwellers. I would suggest that this is because the urban environment is more stressful than the rural one. Urbanisation has led to the loss of the useful social control mechanism of the family.[65] It is easy to avoid the consequences of wife abuse in the urban setting because the neighbours are less likely to intervene and there will be less immediate social control by local pressures. Moreover with growing economic independence from the family, a parent's word is no longer law as it used to be, and therefore correspondingly the parents' powers of intervention have been reduced.[66] In both groups the couple often lived alone without the support or sanction of the extended family.

Musarurwa argues that one of the main reasons behind domestic violence in Zimbabwe is "cultural marginalism"-

> "Couples have grown in an environment with two cultures - African and English cultures - both of which they have failed to fully grasp and internalise. The modern propaganda and accent on equality and partnership in marriage have led to great expectations and self-assertion on the part of women, which has engendered hostility and resistance on the part of men who were brought up on the biblical teaching and African custom that women are under the authority of their husbands who they should obey and cherish...The concepts of equality and partnership cause a vicious struggle for power between husband and wife."[67]

Musarurwa speaks for a great many male traditionalists who feel that their power has been usurped. These men feel that women's heads have been filled with "silly" Western notions of equality all of which are not part of "our culture" meaning of

course the male culture. They invoke custom and male privilege as an excuse for behaving in a manner which they think is acceptable. Women who aspire to, or demand to be treated fairly are accused of "playing white" and being culturally bankrupt. They are trivialised and marginalised.

"He just said that I was too liberated and just made my own decisions without consulting him. The problems became more acute." Mrs Nhamo

For many women in the civil group, the husband's violence was linked to professional and sexual jealousy. As the women were often in good jobs and earning reasonable salaries, they wanted to be a part of the domestic decision making process and to be treated as equals. The husbands felt that their power to dominate was correspondingly reduced. They therefore used violence as a means of reasserting their authority and manhood. One woman had been promoted at work said of her husband's reaction:

"He thought that I had used `bottom power' to get the job. He started beating me. He said that I earned lots of money and was screwing (sic) my bosses." Ms Ngwenya

This husband went so far as to telephone the Managing Director of the company where the woman worked and threaten him. When this failed he started telephoning the Managing Director's wife and the wives of his wife's superiors telling them that their husbands were having affairs with his wife. He tried to assault the woman in the reception area of her place of employment. Another said of her situation:

"He had a complex about me going back to college, like in my final year he beat me up very badly the night before finals.

Things were not so nice. There was a lot of beating, arguing, sleeping out." Ms Thebe

One who liked to go out alone with her friends noted:

"The problem is that if I went out alone he would row with me when I came back wanting to know where I had been. He once beat me badly." Ms Samkange

"He would come from Mutare anytime he wanted, even in the middle of the night. He said that he was receiving calls from people saying that I was leaving the kids alone and staying in the suburbs with rich guys...He used to hit me. If someone rang and it was a wrong number and it was a male voice, he would say that it was my boyfriends who were hanging up." Ms Ndhlovu

6:4(f) Value-Laden Complaints

For women in the civil marriage group, it seemed that the expectations of a companionate marriage were not always met and this created certain tensions, which tensions were explained by the wife in terms of the husband having certain personality defects.

Among the charges made about the husband's behaviour was one of excessive authoritarianism.

6:4(f)(i) Authority

In questioning the husband's use of authority, the women were keen to show how the authority was used in an oppressive manner. The complaint was that the husbands had tried to thwart their ambitions so that they would not achieve self actualization. It was strongly linked with a charge of chauvinism and oppression in not wanting to see the woman succeed. There was also a suggestion of some insecurity on the husband's part:

"Anything I owned he wanted to get rid of because he said that

it would make me proud. He sold my colour TV and video while I was out at work." Mrs Silefu

"I didn't like teaching so I enroled at Ranche House College to do my `A' levels...My husband didn't like what I was doing so he became tight. He said that he wasn't prepared to pay my fees as well as buy food for the kids. While I was teaching I had saved some money so I paid for myself. He discouraged me but I persevered." Ms Ncube

6:4(f)(ii) *Home Life: No Love for the Children*

This was used to show the selfishness of the husband. The suggestion was that even if the marriage was in the process of disintegrating, the children should not become embroiled. In ignoring the children, the husband was shown to be irresponsible:

"He no longer showed any love for the children - like before he made sure to remember birthdays and to make even little occasions into celebrations but he stopped even that." Ms Sibanda

"I had the baby but he never came to see it. He never came back to visit. The children were being looked after by my parents who sent them to school." Ms Mupindu

6:4(f)(iii) *Lack of Consideration*

Linked to this was other general inconsiderate behaviour, which was often, though not always, linked to alcohol consumption. Goode calls this "the complex of drinking, gambling and helling around".[68] For the woman this behaviour marked not only a rejection of herself and the home, but also an unnecessary waste of money:

"He was drinking heavily and started spending weekends away from home with friends." Ms Mapfungautsi

"He would come home from work on Friday evening, park the car, change into jeans and a tee shirt and leave. You wouldn't see him again until Monday morning." Ms Rinashe

"He started coming home late - the earliest he would come home was 11.30pm even during the week. Usually it was 12-1 am. We

were always fighting and it was usually over petty things." Ms Chengeta

Legitimating the Claims

In all the instances the man was portrayed as being irresponsible, self centred and unworthy. Other problems were over the husband's belief in witchcraft which the wife found to be inconsistent with the `civilised', modern lifestyle they had chosen to adopt:

"He believes in *nangas* (traditional healers) a lot and we always quarrelled over these beliefs." Ms Gogodi

"The other thing is that I come from a Christian family. My parents have never done any of this *nanga* stuff. He went to a *nanga* and was told that he had an evil spirit. He bought the spiritual cloths he was told to buy. He wanted me to look after them and brew beer, but I didn't want to so I refused." Ms Ngwenya

"Shortly before our marriage in 1985 I was clearing out his flat when I found lots of herbs and powders under his bed. I also found pieces of cloth similar to those used by traditional healers." Ms Chengeta

6:5 Conclusion

Whilst it is obvious that many of the problems were rooted in money, it cannot be seen as the sole cause of marital breakdown. Rather, the breakdown of most marriages can be seen to be as a result of differently inter-acting pressure factors all of which contributed to the eventual break-up of the marriage. The factors cannot be seen as being independent of each other, but as a continuum with one flowing into the other. What matters, therefore, is the inter-relationship of all the pressure factors and not the dominance of one. When looked at in this way each breakdown becomes unique for different weight must be given to each factor in every marriage. In the sample the triangle of lack of support,

women and violence was prevalent.

The social construct of marriage as being the *raison d'etre* of women's lives led to the women trying to resolve the problems of the marriage in a way which would have the least disruptive outcome. They knew that they had limited rights and very little room to manoeuvre, so they learnt to articulate their unhappiness in a manner which would make the husband's actions appear socially unacceptable, thus legitimating their complaints.

Having acknowledged that the marriage was in trouble, the women did not go straight to the court. It was a process with them seeking help from family and friends in trying to resolve the difficulties. What follows therefore is an examination of the strategies adopted by the women in dealing with their marital problems.

[1] Cf Clark, D. and Haldane, D. (1990) at p.38.
[2] Bernard, J. (1982) at p.8.
[3] Clark, D. and Haldane, D. (1990) at p.42.
[4] Brannen, J. and Collard, J. (1982) at p.79.
[5] Vaughan, D. (1986) at p.43.
[6] Goody, E. (1962) at p.18, May (1987) at p.37.
[7] Cf Burman, S. (1984) at pp.122,128, May at p.40.
[8] Cf Holleman, J. (1969) at p.275.
[9] Weinrich, A. (1982) at p.176.
[10] Oppong, C. (1980) at pp.334-335.
[11] Weitzman, L. (1985) at p.367, Cf Brannen, J. and Collard, J. (1982) at p.48.
[12] Goody, E. and Groothues, C. (1979) at p.73, Cf Harrell-Bond, B. (1975) pp.61-83, Bernard, J. (1982) at p.95, Weitzman, L. (1985) at p.xvii, Hart, N. (1976) at p.64.
[13] Levinger, G. (1968) at p.130, Cf Clark, D. and Haldane, D. (1990) at pp.26-27.
[14] Cf Reed, A. (1970) at pp. 5,6, Harrell-Bond, B. (1975) at pp.64-65.
[15] Chandler, J. (1991) at p.49.
[16] Davis, G. and Murch, M. (1988) at p.37, Cf Brannen, J. and Collard, J. (1982) at p.47.
[17] Thornes, B. and Collard, J. (1979) at p.117.
[18] Brannen, J. and Collard, J. (1982) at p.61.
[19] Cf. Clark, D. and Haldane, D. (1990) at p.43, Cf Hart, N. (1978) at pp.103,107.
[20] Brannen, J. and Collard, J. (1982) at p.79.
[21] Sarat, A. and Felstiner, W. (1981) at p.635.
[22] Cf Goode, W. (1956) at pp.122,125.
[23] Cf Goode, W. (1956) at p.116.
[24] Cf Felstiner, W. et al (1981) at at p.641.
[25] Brannen, J. and Collard, J. (1982) at p.62.
[26] Felstiner, W. et al. (1981) at p.641.
[27] Cf Brannen, J. and Collard, J. (1982) at p.48.
[28] s.12 (3) and 4 (a) of the Customary Law and Primary Courts Amendment Act, 1982 (No.21 of1982). This Act has been repealed and replaced by the Customary Law and Local Courts Act which is yet to be promulgated. It contains the same provisions as the repealed Act as regards maintenance.
[29] s.12 (3) and 4 (b) of the Customary Law and Primary Courts Amendment Act (No 21 of 1982)
[30] Pahl, J. (1990) at p.57, Cf Harrell-Bond, B. (1975) at p.76.
[31] Mair, L. (1969) at p.24, Cf Burman, S. (1984) at p.119.
[32] Cf Mair, L. (1969) at p.42, Cf Clyde-Mitchell, J. (1969) at p.50.
[33] Cutrufelli, M. (1983) at p.54.
[34] Goody, E. (1962) at p.37.
[35] Goody, E. (1962) at p.39.
[36] Muzvidziwa, V. (1989) at p.55.
[37] Martin, P. Richards, M. and Elliott, J. (1991) at p.49.

[38] Mair, L. (1969) at p.25.
[39] Burman, S. (1984) at p.129.
[40] Goody, E. (1962) at p.40.
[41] Burman, S. (1984). at p.129, Cf Harrell-Bond, B. (1975) at p.142.
[42] Cf Harrell-Bond, B. (1975) at pp.225,226.
[43] Holleman, J. (1969) at p.219.
[44] Vaughan, D. (1986) at p.93.
[45] Vaughan, D. (1986) at p.95.
[46] Holleman, J. (1969) at p.73.
[47] Cf Cutrufelli, M. (1983) at p.41.
[48] May, J. (1987) at p.75.
[49] May, J. (1987) at p.40.
[50] Cf Isono, F. (1988) at p.190.
[51] Cf Harrell-Bond, B. (1975) at p.234.
[52] Cf Finch, J. (1989) at p.21.
[53] Holleman, J. (1969) at p.278.
[54] Cf Harrell-Bond, B. (1975) at p.240.
[55] Cf Maboreke, M. (1986) at pp.88-89, Goldin, B. and Gelfand, M. (1975) at p.18, Burman, S. (1984) at p.122.
[56] Muzvidziwa, V. (1989) at pp.53,54.
[57] Cf Cutrufelli, C. (1983) at p.46.
[58] Pahl, J. (1978) at p.29.
[59] Zireva, H. (1989) at p.18.
[60] Cf Muzvidziwa, V. (1989) at p.55.
[61] Cf Muzvidziwa, V. (1989) at p.54.
[62] Cf Maboreke, M. (1986) at p.109.
[63] Cf Brannen, J. and Collard, J. (1982) at p.48.
[64] Goode, W. (1956) at p.122.
[65] Cf Musarurwa, W. (1989) at p.28.
[66] Cf Maboreke, M. (1986) at p.91.
[67] Cf Musarurwa, W. (1989) at p.26.
[68] Goode, W. (1956) at p.117.

CHAPTER 7 - THE HELPSEEKING PROCESS

7:1 Introduction

In the last chapter, we saw how having "named" the problem, the women tried to legitimate their discontent. They did this by showing that the husband had failed in his duties. After defining their marriages as problematic, the women sought help in trying to find solutions to the problems. This chapter examines the "blaming" stage of that process whereby the "perceived injurious experience" (PIE) was transformed into a grievance and aired.[1] It concentrates on the help-seeking careers of the women before they got to court. Their experiences of getting to court will be examined in chapter eight which follows.

Although described as being a linear process, the helpseeking was part of a wider process whereby the agents impacted and influenced each other and the parties moved between agents. Yngvesson notes:

"If we are to understand processes of disputing in continuing relationships, we must view these relationships as political processes situated in time, that we must use an approach which permits the analysis of disputing as a social, political and economic process through which relationships are defined, reinforced and changed..."[2]

7:2 Towards A New Theory of Disputing

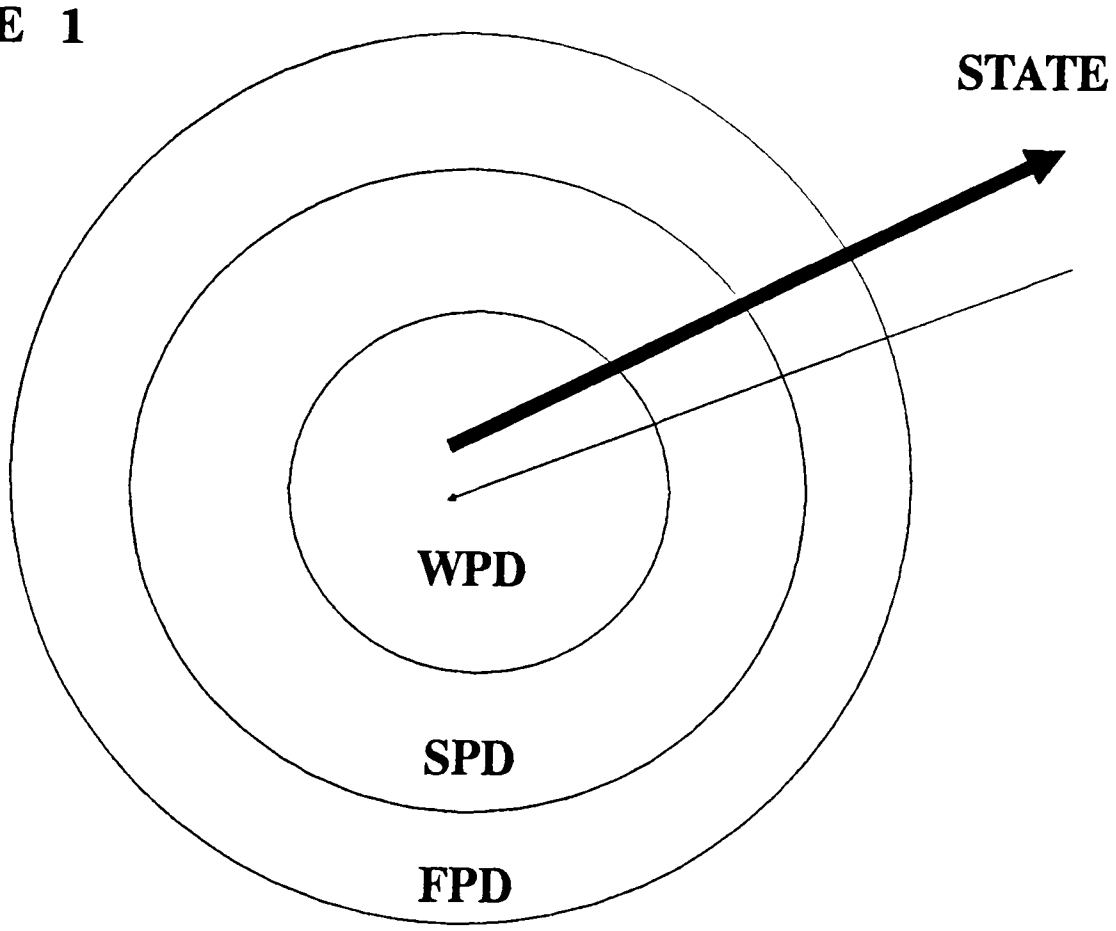
The monolithic linear model of disputing has been severely criticised as ignoring the plurality of the litigation process. Griffiths notes:

"There is nothing in itself `natural' about a steady, regular process of tidily packaged `cases' moving via orderly stages toward ever more specialized and differentiated institutional settings, with at the end of the (possibly complex) route a

paradigmatic ultimate destination. It is wrong to treat the various non `court' destinations along the way as mere `exit' or `settlement' options for a `case' which could have gone all the way to `court'. To do so begs the analytic question by treating the folk notion of an hierarchical litigation system as an empirical given." [3]

Griffiths' model which is the one proposed in this thesis sees disputing as being part of a more dynamic and less orderly process.[4] The model proposed is represented in figure 1.

FIGURE 1



1 - The problem is internalised, that is kept within the confines of the relationship of the two affected parties. (Wholly private domain) (WPD)

2 - The problem cannot be contained within the dyad and is made public. However, only a few agents or actors close to the central relationship are consulted. (Semi-private domain (SPD)

3 - Before, during or after some internal litigation

> one of the actors or `internal outsiders' takes the problem directly to an institution (court) or to an experienced third party who is external to the immediate group. This third party can negotiate with the other actor or with another third party on the actor's behalf or can proceed directly to the institution (Fully Public Domain) (FPD).[5]

Note - There are five possible variables which determine how a claim will move through the various social fields. The first is the nature of the dispute[6], the second is the relationship between the two actors, the third is the relationship between the actors and second parties (for example, counsellors or supporters), the fourth is the relationship with third parties (for example, lawyers) or dispute institutions (courts) and the fifth possible variable is the relationship between third parties and institutions (lawyers and courts).[7] All variables are affected by the behaviour of the actors.

1. Type of claim
2. Actors eg. / Husband v. Wife or Motorist v. Insurance Company
3. Actors and Counsellors / Supporters
4. Actors and Lawyers / Actors and Courts
5. Lawyers and Lawyers / Lawyers and Courts

Figure one shows that there is movement between the social fields (that is both inwards and outwards) so that the problem which emerges between the parties (ie WPD) determines the

parameters of the conflict which the state institution will have to resolve. Conversely, the manner in which the courts resolve disputes feeds into the norms affecting not only the way in which third parties negotiate (for example, lawyer and lawyer)[8], but also impacts upon the way that actors relate to each other and influences the decision as to what route they should take in trying to resolve the problem.[9] For example, in chapter four we saw how a supposed court bias which favoured the rights of mothers to have custody of their children resulted in most men forfeiting the right to claim custody.[10]

In this survey, the use of extra-legal strategies for settling disputes was based on the need to maintain long-term relationships, so that the benefits of going to law were outstripped by the need to continue an amicable relationship with the other partner.[11] Here there was a fear that going to court would exacerbate the conflict between the parties thus jeopardising any hope of a reconciliation. In trying to localise the conflict, there was a desire to find a settlement which would hold them together rather than force them apart. It is for this reason that effort was made to settle the problem at the lowest possible level.

Although the women realised that their marriages were in trouble, they did not perceive themselves as having a dispute with the husband nor that the marriage was necessarily at an end. Rather, they saw themselves as having problems which they had failed to resolve between the two of them and were therefore in need of outside help. Writing about legal

research which she had carried out in Zambia, Himonga noted:

"When the interview schedule was initially tested on a group of people, they were, for example, asked if they had any "disputes" in the past. Most of them responded in the negative but added that they had some problems or conflicts but not such as required their going to court to resolve. It became obvious that these people associated a `dispute' with the court in terms of its solution. The need to rephrase the question therefore became obvious as the study was concerned with the processing and settlement of disputes by informal means as well. The term `dispute' was consequently substituted by such terms as problems or conflicts for interview purposes."[12]

The process of seeking help was also seen to involve a political exercise in the choice of agent. The help seeker's perception of the attitude of the agent approached for help was important for it informed her decision in two ways. Firstly, in deciding whether or not to consult that agent and secondly in the timing, that is when to consult that agent. This could take place when the cracks first appeared, or not until conflict seemed inevitable. Diane Vaughan has noted that the act of going public `has a powerful effect on a relationship, causing others to acknowledge that it is in trouble'.[13] Initially the woman was looking to an agent who would appreciate the legitimacy of her complaints and who would sympathise with her and her apportionment of blame on the husband.[14] Felstiner, Abel and Sarat note that:

"Whether that support is provided depends on a number of independent variables: the subculture of the audience which will define the experience as injurious or harmless, encourage or discourage the expression of grievance and prefer certain dispute processing strategies; and the social composition of the audience - whether it is made up of peers and superiors. These variables, in turn are influenced by social structural factors."[15]

The wide range of agents consulted is a reflection of the

women's enterprise and desperation. The more acute their need for a solution became, the wider they cast their nets. This, in my view, points to the women's desire to resolve the grievance amicably and often within the confines of the family without having to resort to the formal law. This in itself can be tied to the women's desire to preserve their marriages. Marriage in Shona society is conceived of as being the *raison d'etre* of women's lives. Marriage confers on women status and prestige amongst their peers. Moreover whilst the success of marriage is shared, the failure of many marriages is often laid at the women's feet. The women were therefore anxious to avoid the burden of having failed their marriages and by implication their children and their families.

7:3 Factors Influencing the Helpseeking Process

In their article on bargaining in the shadow of the law, Mnookin and Kornhauser point out how, in the process of negotiating and trying to resolve their disputes outside the realm of the formal legal system, there are many considerations which impact on the parties' decision making. These include the parties' preferences, their aversion to risk and the uncertainty inherent in taking legal action.[16] Factors influencing the decisions of the women in the study included the woman's perception of her moral blameworthiness, the "illegitimacy" of the husband's behaviour, considerations of the social, political and economic benefit which her family was receiving from the husband.

Other factors included the way in which the marriage had been

contracted. Had the proper customary formalities been completed? If not, was the woman to blame in any way, for example, had she eloped or married against her parents' will? All these impacted on the woman's decision to seek help and on the agent's attitude to the request for help.

Linked to this was the woman's fear that the dispute might be taken out of her hands and solutions imposed which she may not have agreed with or wanted.[17] An important practical factor was that of accommodation and the worry of having enough money to live on should the union be dissolved. The question of accommodation was particularly problematic for urban women whose relatives were already living in overcrowded conditions and could not afford to take them in as well. One whose father worked as a gardener said:

"I am living with my parents at my father's work place. He lives in the servant's quarters. There are two rooms. My parents sleep in the one and I sleep in the kitchen with my four children." Ms Gute

All these considerations played an important part in the strategy adopted for dealing with the problems which had arisen in the marriage. A tripartite helpseeking structure emerged from the data starting with negotiation between the spouses, followed by turning to "outsiders" for mediation and finally on to approaching the courts to have the matter adjudicated.

Often the helpseeking process started from avoidance as a strategy for coping with the disjunctures in the marriage.

7:4 Avoidance as a Strategy

The decision to seek help, even from one's family was not lightly taken. There was often a large time gap between acknowledging that the marriage was problematic and the decision to do something to remedy the problems. In dealing with the problems in their marriage, a number of women used avoidance tactics refusing to confront the problem head on. Davis notes:

> "An understandable human reaction to conflict is to pretend that it does not exist, or at least that it is not too serious or may be overcome. There are two reasons for this. First conflict is painful and secondly to pretend that conflict does not exist may be useful in getting one's own way."[18]

Often one of the reasons given for not consulting was a desire to protect their families from the disappointment of knowing that the marriage was floundering.[19] Moreover the shielding extended to protecting the interests of the children. Afraid of losing their children should they complain, many women tolerated a great deal of misery. They said they had wanted to stay married for the children's sake. Felstiner notes that:

> "...the costs of dispute processing by avoidance may be analysed in terms of disturbances in social relations which are accompanied by economic, psychological and social losses."[20]

He goes on to note that the psychological costs of avoidance have been the least explored and that:

> "if the hostility does not dissipate it may be re-directed toward an available non-disputant or against oneself."[21]

The women in the two groups internalised the problems often at

great cost to themselves. There were reports of illness so that one woman in the civil marriage group attempted to commit suicide whilst another was treated for depression by her family doctor. A twenty one year old woman with a customary marriage whose husband had started having an affair with the housemaid said:

"I was sickly and was sometimes detained at the hospital. I had high blood pressure." Ms Chigudu

Whilst one would not wish to be seen to be attributing the inexplicable illness to the avoidance of marital problems, it does seem significant that all of the women reported having enjoyed an improved state of health on return to their families. Linked to avoidance was denial that there was a problem. One woman was told by the maid that the husband had been harassing her (the maid) in her absence:

"When I came back from training the maid told me about his advances but I didn't believe her so I fired her. I was still very much in love with him." Ms Chavunduka

Yet another whose husband had a history of extra-marital liaisons and who had on this occasion been left for a younger woman said:

"At first I didn't believe it. I thought he would come back like he had always done." Ms Takaenda

Once the women had decided to confront the problem, the first step, especially for those with civil marriages, was to confront the husband. This involved a process of negotiation whereby the parties tried to resolve their differences within the dyad. This constituted the first level in the problem solving careers of the women.

7:5 Negotiation With the Husband

In both groups the women reported having tried speaking to their husbands about the problems of the marriage. Significantly over 90% of the women with civil marriages said that they had first spoken to their husbands before consulting third parties. This would seem to fit in with the ethos of companionate marriage premised as it is upon greater communication between the parties. The desire to contain the problems of the marriage was also linked to status and the need to preserve a "public front" of unity.[22]

"I confronted him and asked him what the problem was. He told me that he was not happy in the marriage." Ms Pike

"I began to suspect that something was going on. I asked him but he said that nothing was going on." Ms Sibanda

The husband's refusal to talk about the problems of the marriage or to change his behaviour were used to show that he was unreasonable and not willing to save the marriage. His lack of co-operation was also used to justify the woman's decision to break the silence and involve third parties in trying to solve the problems of the marriage. Vaughan has noted that in trying to terminate the relationship, initiators use both direct and indirect methods whereby they leave the partner to infer from their behaviour that they are no longer interested in the relationship. By doing this:

"The initiator feeds into the partner's negative reassessment of the relationship. Negative redefinition is important to the partner's transition. By emphasising the bad points, the initiator begins to leave the partner behind."[23]

It was only when this process of negotiation failed to work that third parties outside the marriage were consulted.[24] The

involvement of outsiders in trying to solve the marital problems forms the second stage in the help-seeking careers of the women.

In dealing with these agents for assistance, I have divided them into two groups: that is, the informal group which included the families, friends and employers, and the formal, which included the Police, the Citizens Advice Bureau and other specialist agencies. Of this divide Davis notes:

> "Before seeking professional help, most couples are likely to have received `informal' mediation from family, friends, work colleagues. These networks are truly informal in that they bring in people who usually have no claim to expert status; they are on a level with the divorcing couple."[25]

It would seem therefore that formal agents are those who are not personally known to the helpseeker and who have or are part of a bureaucratic structure. This division is not without its problems for some agents could be said to belong in both categories, for example five per cent of the women in the customary group consulted the Chief. According to one school of thought, he would be part of the informal or non organisational structures.[26] However when one considers that the Chief in these instances is the nominal head of the group and has authority and power, then one sees that arguably he is part of the formal structure. [27] The discussion of the Chief's role is at the beginning of the discussion on formal structures. This is because traditionally the Chief was charged with administering customary law in his community so that he could be seen to be acting as an arbiter.

It became clear in examining the case studies that the women's help-seeking careers, like their problems, could not be neatly compartmentalized. Placing them in different categories is merely for ease of analysis in trying to see the attitude and influence of each agency consulted by the woman.

TABLE 8 - INFORMAL AND FORMAL AGENTS CONSULTED FOR HELP

	Customary Group (76)	Civil Group (21)
INFORMAL AGENTS		
1. Her Family	64 = 84.2%	21 =100%
2. His Family	36 = 47.4%	16 = 76.19%
3. The *Munyai*	12 = 15.8%	2 = 9.5%
4. Friends	10 = 13.1	10 = 47.61%
5. Employers	11 = 14.5%	7 = 33.3%
FORMAL AGENTS		
1. Chief	4 = 5.3%	-
2. Police	16 = 21.0%	8 = 38.1%
3. Government	6 = 7.9%	7 = 33.3%
4. Political	2 = 2.3%	1 = 4.76%
5. CAB*	8 = 10.5%	6 = 4.76%
6. HLPC*	2 = 2.6%	
7. Media	2 = 2.3%	
8. Specialists	-	5 = 23.8%

* CAB - Citizens Advice Bureau
* HLPC - Harare Legal Projects Centre

Looking at the table it would appear that both groups relied

more on informal agents for assistance. This was particularly noticeable in the customary group. As most of the marriages in the customary group had been contracted without reference to any formal structures, being unregistered, it would seem to explain why, in seeking help, the women in the customary group concentrated their efforts on informal agents who would have been familiar with the histories of the marriage and whose help and assistance seemed more appropriate. Those women in the civil marriage group relied on formal agents for information and practical advice. Having a higher level of education and socio-economic status, women with civil marriages would themselves know of the existence of certain formal agencies or else belong to social networks which would have access to such information. For this group of women informal agents provided moral and emotional support and guidance. Economically independent, this group of women was not as bound to adhere to the advice offered by the informal agents or to keep the problems within the confines of the informal structures for fear of losing the support which was vital to their continued existence as some of those in the customary group were.

The process of seeking help tended to be a progression starting from seeking help from informal agents and gradually moving on to the formal agents for assistance as the problems became harder to contain or proved to be insoluble within the confines of the informal agencies. Nevertheless, the helpseeking careers of the women cannot be divided into two distinct phases which are mutually exclusive. Rather, the

process of seeking help should more accurately be seen as a continuum with help and advice continually flowing in both directions. Brannen and Collard note that:

"...the specific interventions of agencies are likely in turn to have the same impact upon clients' social networks since even though people become clients they still remain active participants in their social networks."[28]

The kind of help that the women sought was a reflection of the problem at hand, so that those complaining of lack of support approached the husband's employer for assistance whilst those who needed clarification about the husband's attitude to the continuation of the marriage relationship often went to the respective families for help. Others seeking to stop violent behaviour approached the Police for assistance. As many of the problems were rooted in a breakdown in communication, counselling was often sought from the families of the respective parties who convened family councils comprised of the senior members of both lineages.

Given the group nature of Shona marriage, it is not surprising that both sets of families played a large part in the resolution of problems in the marriage.[29] This was also because both sets of families had a proprietary interest in the form of the *lobolo* paid for the woman, each side wanting to ensure that their interests were not prejudiced by having the marital difficulties attributed to them. Similarly, the *munyai*, who acts as the go-between when the marriage is contracted, continued to be consulted when problems arose in the marriage. Having a detailed knowledge of the history of the marriage and of the respective parties, the *munyai* was

well placed to offer advice. Merry has noted:

"Mediators are generally neutral, but they are rarely disinterested, nor are they complete strangers to the disputants. Their impartiality is secured by the cross-cutting ties that link them to both sides."[30]

Unpaid and non partisan, the *munyai* was such a person. There was a marked difference in the use of friends to try to resolve the problems of the marriage with a significantly larger percentage of women with civil marriages mentioning having spoken to friends (47 per cent as against 13 per cent). There was also a distinction in the reasons advanced for approaching friends with those in the customary group looking to friends to provide practical advice whilst those in the civil marriage group relied on friends for moral and emotional support. Similarly proportionately more women with civil marriages spoke to employers about their marital problems than did women in the customary group (33 per cent as against 14 per cent). This can be explained by the fact that more women with civil marriages were employed than their customary marriage counterparts who therefore had to approach the husband's employer for assistance.

Within the formal sphere, five per cent of women with customary marriages approached the Chief for assistance. All these women lived in the rural areas and had traditional lifestyles. The role of the Police was expanded beyond that of maintaining law and order to include social counselling for troubled marriages. Again there was a distinction between the two groups in the Government agencies approached for

assistance. Those with civil marriages went to the Legal Aid department at the High Court whilst those with customary marriages in addition to seeking legal aid, also sought help from the Ministries of Social Welfare and Community Cooperative Development and Women's Affairs.

This division is a reflection of the different needs of the women. Those with civil marriages needed the help of lawyers to consult about their legal rights in the event of the marriage being dissolved and to institute the divorce action in the High Court. Not having registered marriages needing formal dissolution, legal aid was not as pressing a need for women with customary marriages. Instead, they were primarily concerned with obtaining access to material resources hence the approach to agencies such as the Ministry of Welfare. Not as disadvantaged, the women in the urban group did not need extra financial assistance.

The purpose of approaching agencies such as the Citizens' Advice Bureau and the Harare Legal Projects' Centre was for both groups of women linked to the need to get information about how to go about instituting an action for divorce or maintenance in court. The use of specialist agencies such as the Samaritans and psychologists was limited to the women in the civil marriage group who would no doubt have access to information on the existence of these agencies. The various agents consulted will now be considered starting with those in the informal sphere.

7:6 INFORMAL HELPSEEKING

For a long time the view of mediation which prevailed was that of "voluntarianism, private ordering and equality".[31] However the reality was somewhat different for as Bottomley has noted:

> "The anthropological literature has long alerted us to the need to look behind the presentation of such a form of dispute resolution and ask two questions. Firstly, is there equality of power in the relationships between the parties and the parties and the mediator? Such an "open process" is open to manipulation. To be persuaded may be an invidious form of judgement and control. Second, despite the presentation of the mediator in terms of neutrality and objectivity, the mediator may be the purveyor of a particular pattern of beliefs that would tend to favour a particular "resolution" to which the parties give their formal agreement."[32]

In looking at the mediation process, therefore, it is important to examine both party competence and also the role of the mediator.[33] Simon Roberts identifies three models of mediation, starting with minimal intervention whereby a third party merely facilitates a meeting between the two disputing parties leaving it up to them to resolve their differences.[34] The second model is directive intervention whereby the mediator takes a more active role, giving the parties more information and influencing their decision. In therapeutic intervention:

> "...joint decision making on specific issues is postponed in favour of an examination of the relationships that have broken down within the family... At a practice level it implies three tasks for the mediator: an examination and assessment of the relationships involved; ensuing corrective intervention to redress the malfunction, or at least to bring the parties to terms with it; a process of joint decision-making in the light of the transformations wrought with the help of therapeutic techniques...It aims openly at a break with the original conversation in which the parties were engaged; a new situation is invoked or imposed."[35]

It is probably this last model which best describes the attitude of the families to the women's need for help in problem solving.

7:6(i) Her Family

For both sets of women, their families were the first port of call so that all the women with civil marriages and 84% of the women with customary marriages reported having gone to seek assistance from their families.[36] The women's families reacted in different ways to requests for help from their daughters. Not all gave their unequivocal support.

7:6(i)(a) Minimising Culpability

Some families were anxious to appear not to be taking sides and condoning the very behaviour which was said to be causing the problems.[37] Of this phenomenon Holleman notes:

"The attitude of the family to the problem is realistic rather than ethical. They are mainly concerned with the safeguarding of their respective interests. In this respect the interests of the family outweigh the private interests of husband and wife, whose marital troubles and impulsive actions are always curtailed by the dissuasive counsel or disciplinary actions of their less impassioned elders."[38]

A good example of this is the case of a woman who had been assaulted by her husband throughout their married life. Her father had intermittently removed her. After the last assault her husband came in search of her and was fined by the father:

"My father said that he should give him a cow as reparation for wanting to cut me with a knife. Alternatively, he could pay him $400." Ms Dube

She was caught in the middle. There is here an extension of the contractual analogy, which has pervaded the analysis of

customary marriage, for here the seller obtains damages for assault and not the victim herself. Explained in delictual terms the father claims damages because the wrong has been done to him. The woman is merely the agent through whom the harm is perpetrated. In this instance the husband had not finished paying *lobolo* so that ownership had not passed and he had not acquired full title to the woman.[39]

This highlights the importance of *lobolo* in the family's decision whether or not to help. Parents were reluctant to appear to be the rejecting party for that would mean that their side was at fault. Poulter notes:

"The wife's parents have a direct proprietary interest in the success of the marriage and can therefore be expected to urge her towards a reconciliation of differences with her husband as opposed to a break upon the flimsiest pretext."[40]

An admission of fault would weaken their bargaining position when the time came to terminate the marriage contract and equalise the position as between the two families. This refusal was often expressed as neutrality or impartiality with her parents not wishing to be seen to be taking sides. One mother who was asked for counselling by her son-in-law refused to give it:

"My mother said that she was not in a position to do this. She told him that he could take it up with the *samkuru* (also called the *munyai* or middleman) or with one of the aunts. My mother left saying that if he was finding it difficult to stay with me then he should bring me back. He could go to his elders and tell them so that they could advise him. She said that we were both her children so she could not adjudicate our matter." Ms Mushai

Yet another woman said:

"They do not want to interfere. They say that we can sort ourselves out. As far as they are concerned we can take each other to court if we like." Ms Madembo

Ms Bonda reported:

"I would run away to my parents house and they would send me back."

The women with civil marriages told of their parents refusal

to take sides so that Ms Samkange recounted:

"You know what it's like with parents. They want to see the marriage work so they encourage you to reconcile. My mother used to tell me to stay. She said that the situation wasn't bad. She used to say that I should listen to the other women then I would know how much they were suffering. My father told me that I was too harsh and that I should give him time." Ms Samkange

Yet another commented ruefully:

"My family was very supportive - but mind you that's another problem with African culture - your parents won't let you divorce. They just tell you to stay and ask if you think you are the only one with problems. If you complain to your mother, she will ask you what you think happens in other homes." Ms Thebe

It is not insignificant that in one case the family felt

powerless to act against the husband who said that he no

longer wanted his wife of many years and wanted to take

another:

"My family kept quiet. They said that they could not do anything about the matter since he had rejected me. He had finished paying his *lobolo* so they did not have a cause of action. They said that everything was complete, he even had his children." Ms Chikumira

In another case, the family felt justified in rendering her

assistance precisely because no *lobolo* had as yet changed

hands. When he told her that he no longer wanted her, she

said:

"I left and went to my parents who happily took me back. They

had been unhappy about the fact that he was ill-treating me, yet he hadn't even paid a cent for me." Ms Macheyo

Whilst in the latter case this non payment worked in the woman's favour, it can be seen how, in many cases, women were made to suffer so that the families would not incur a loss or prejudice their position.[41] The inability or unwillingness of the woman's family to repay the *lobolo* often meant that they were unable to seek relief. This also applied to women with civil marriages so that Ms Ncube told of the time she approached her father for help in persuading her husband to allow her to return to school:

"My father refused to get involved. He said that I was now married and I had to listen to what my husband said. He told me that he had used up all the ten cattle he had received as *lobolo* and that I shouldn't come back home." Ms Ncube

The parents' attitude to their daughters' problems mirrored the process undergone by the daughter in trying to articulate the dispute, for both sought to legitimate their behaviour in some way. The families tried to lend a legitimacy to their actions by showing that "innocent" children were suffering as a result of the father's neglect. Another way of exonerating themselves from blame was for her family to first ask what his family's attitude had been before venturing to help. If his family had been supportive of her, then her own family was more willing to throw their weight behind her. Thus one woman said of her husband who was not supporting the family:

"I spoke to my parents who said that since the idea of suing for maintenance had come from my father-in-law, I should go ahead and sue." Ms Ruzengwe

Her aunt who was accompanying her to court added:

"We realised that if her in-laws could see her suffering then

her burden must be hard to bear. She had to keep coming to us for help."

In the last case the aunt, to justify the family's backing of her claim for maintenance said:

"If he doesn't want her, he should at least say so. Then he could just provide her with money to look after the children. At least that way we won't have a repetition of last year when the children failed to go to school." Ms Ruzengwe

7:6:(i)(b) Playing For Time - "Wait and See"

The "let's wait and see" strategy was most commonly adopted by the woman's family. Again this was part of the blame-minimising strategy. They did not wish to be seen as home wreckers or to be taking their daughter's side.

"I came back home and my parents welcomed me and said that I could stay. They said that they would see him when he followed me. They said that they would talk to him when he came." Ms Chilimbe

"My parents told me that I could stay. They said that they would wait for him to determine who was responsible for the break-up" Ms Chakwenya

"I went to Chegutu to see my parents. They said that if he no longer wanted me then he would let them know. If it was just the usual trouble between married people then we would soon sort ourselves out." Ms Chiadzwa

However, if after some time had passed and the family had still not heard from the husband then they would follow him to try to ascertain his intentions. Again this was linked to a wish to be seen to be trying to salvage the marriage and effect a reconciliation rather than ending it. The woman's family realised that for them to remain silent after a considerable length of time had passed might make it appear as if they were agreeing to the dissolution of the marriage. This feeling was stronger when it was the daughter who had

left. Nevertheless even if she had been routed the parents wanted confirmation from him that he was no longer interested, hence one woman who had been chased away by her husband after he had started seeing another woman said:

"I went to stay with my parents. They accompanied me back in June. They said that they did not understand why he had chased me away. He said that he needed time to think. My parents took me away saying, "let's go back and give him time to think." Ms Zvinavashe

"I left and went back to my family. I stayed for six months...My parents said that since he had not followed me I should go back." Ms Dhlakama

Again the family's desire to be absolved from blame for the breakdown of the marriage comes through. Hers was not the only family who sent her back to obtain tangible proof that she had been rejected. Another interviewee said:

"Eventually my family told me to go to him to get ten cents *gupuro* (rejection token) to show that he no longer wanted me." Ms Ndoro

They had done their part to deflect the blame.

Another way around the problem was for parents to suggest that their daughters seek help from the *munyai* who acts as the go between when the marriage is being contracted. Not only was this the correct customary thing to do, but it also meant that they did not have to confront the problems directly themselves. After having been given *gupuro* and having her children taken away from her, one woman approached her family for help:

"I told my parents who told me to tell the *munyai*." Ms Makanza

Often it was not the parents themselves who were directly involved in the conciliation process. Paternal aunts who traditionally played the counselling role continued to be consulted and to play an active part in trying to reconcile the two.

"I told my relatives who tried to resolve the matter. They convened family councils. My aunt tried to sit him down to ask him why he was refusing for me to live with him." Ms Nyoni

"I went to my aunt who sat us both down and urged us to reconcile." Ms Zowa

"I came to see him with my aunt. He was asked what was wrong. He said that he still loved his wife. He said that my aunt should take me home with her and he would come and fetch me." Ms Mandiopera

"He told my aunt that he had brought me back. She woke my uncle up. They both insisted that the *munyai* be called." Ms Ndoro

7:6(i)(c) "Let's Talk About This" - Internal Litigation

The convening of family councils made up of representatives from both families was popular. This was largely because the families realised the importance of maintaining the "alliance" not only for themselves but also for the sake of the children. The main purpose of these councils was to enable the parties to air their grievances. The function of the councils was to try to achieve a reconciliation through counselling.[42]

"When he arrived we had a family council. He agreed that we really didn't have any problems and he uplifted the *gupuro*." Ms Magade

"I went to stay with my parents for a week. They gathered us together and straightened the matter out." Ms Masarirambi

"I told my relatives who tried to resolve the matter. They convened family councils." Ms Nyoni

Women with civil marriages were not exempt so that they too

reported:

"My parents and his tried to sit us down and asked us to say what was wrong. They would put us right and we would stay together but we would have the same problems again." Ms Mapfungautsi

The effectiveness or otherwise of the family council's decision was dependent largely on the woman's economic position. Those in employment and self supporting were less likely to stay in unsatisfactory marriages than those without independent means. Women without means depended on the family not only for moral support but for economic support as well. This meant that their future lives were entirely in the hands of their families so that if the family was unwilling or unable to take them back, the women were stranded. Just as traditionally on marriage they had passed from male "guardian" to husband, so too on divorce they passed back to male guardian. The fact that their mothers were generally also non wage earners and were themselves considered "outsiders" meant that the women were always at the mercy of some man, whether that be husband, father, brother or uncle, because they controlled the finance and therefore had power to make decisions. The position was different for independent women:

"They kept telling me to stay but I said that it wasn't a small matter. It was a build up and I couldn't deal with it any longer." Ms Ncube

"They tried to persuade me to stay but I refused because I didn't have any love for him at all." Ms Ndhlovu

"I mean even if my parents tell me to stay, I am the one who is suffering. My parents told me to go back but after what I had faced I couldn't go back." Ms Ngwenya

In certain cases there was unequivocal support of the daughter which was usually based on anger and frustration at witnessing the hardships which the daughter had to endure.[43] The daughter's unhappiness had aroused feelings of protectiveness which saw the parents wishing to see her suffering being brought to an end. The mother of one who had a long history of marital trouble said:

"He is chasing his wife which must mean that he does not love her. She has been staying with us for four months, yet he has not given her any money to buy food or soap for the children. Her father is saying that he would rather she stayed with us and we can look after her. You can't force them to live together if he no longer wants his wife." Ms Kanoti

One who had been severely assaulted reported:

"We left and went home. My family was very supportive. They said that he was a mad man who would kill me. They would rather keep me." Ms Masarirambi

Generally these women were married to violent men. In trying to resolve the problems of the marriage, the woman not only looked to her own family for support but also to her husband's.

7:6(ii) His Family

Considering the fact that the man's family was cited as having been one of the major causes of marital breakdown, it was surprising that so many women (46% of the customary group and 76% of the civil marriage group) said that they had approached the man's family for help when experiencing marital difficulties. However when one considers that on marriage the woman is "transferred" to the husband's family and in the case

of rural woman moves and lives in his village this should not have been so surprising. Looked at in this light it made sense that the man's family should be consulted when problems arose in the marriage. As urban conditions militate against the clustering of extended families in one area, it was the rural women who tended to live with their in-laws. This would explain why two thirds of the women with customary marriages who reported having consulted his family for assistance were rural dwellers. As with her family, the woman's requests for help met with a variety of responses.

7:6(ii)(a) Helping Out

A third of the women in the customary group reported having received active encouragement and support from his family. A few of these women said that it was his family who had initiated the inquiry to look into the husband's shortcomings, they had not themselves complained. One whose husband had taken the first wife to town to live with him and had stopped coming to visit or sending any money said:

"His family saw my suffering. A family council was convened with his younger brothers. He agreed to look after us. Then at Christmas in 1989, he came and asked me for the children. His father refused to release the children. His father said that he should give me money so that I could buy food for the children. Then his father told me that I should go to my aunt's house to have the matter adjudicated. His father said that I should find out why he wanted to take the children and why he was not giving me any money for food. We went to my aunt. He promised to support but didn't.

It was his father who suggested that I sue him for maintenance. He said that I would not get money to support the children any other way. He said that he had tried speaking to his son but had tired of getting any response... His father died last month. He died saying that I should take the matter to court." Ms Ruzengwe

This father-in-law was unequivocal in his support for his daughter-in-law. This may have been for two reasons. Firstly he appreciated her contribution towards the family in both labour and reproductive terms. Aged twenty-three she had already had five children. Moreover, as she was living with him, the father-in-law realised that she was his responsibility. He had to ensure that her children were sent to school and that the new born baby was provided with napkins and other necessaries. Ailing, the father-in-law knew that he could not manage to look after the family by himself hence his attempts to get his son to assist. The fact that she had fetched such a high brideprice which included nine head of cattle of which only one had been paid must have weighed heavily on his mind. He knew that should the union be terminated, her family would be entitled to demand the outstanding bridewealth and that they would have to acquiesce and pay under threat of losing their rights to the children of the marriage.

A few women with civil marriages also reported having received a great deal of support from the husband's family:

"Even his parents tried to counsel us. They sat us down several times and we had many family councils. They told him that he was behaving badly and that he should look after his family. They encouraged me to stay. Life was actually better when his parents were still alive." Ms Chipangura

However, the parents' support of their daughter-in-law cannot and should not be seen in purely altruistic terms. Often it was motivated by two concerns. Firstly, there was the desire to keep the marriage intact so as not to lose any entitlement to *lobolo*. Secondly and most importantly it was an attempt to keep the children. Many of the parents were anxious to ensure that their rights to the children were preserved. The grandparents see it as their privilege to bring up their grandchildren hence most children, myself included, spend part of their childhood living with their grandparents. In fact, so valued are children in Shona society that one woman complained of her in-laws:

"They just say that he is a man. It is his mother who puts him up to all this. She just looks after all his children. Right now she has his first wife's children, plus my two and another illegitimate one." Ms Makanza

7:6(ii)(b) "He Who Pays the Piper Calls the Tune" - Partisanship

Eventually even the families who supported the daughter-in-law abandoned this position. This was usually because they became resigned to the fact that the son would not listen. Very little could be done to make him change, hence one mother said:

"Her father accompanied her back to her father-in-law who explained that he was merely carrying out his son's wishes. He gave my daughter her clothes." Ms Makusha

Whilst another woman said of her in-laws'reaction to their son's intransigence:

"His parents said that I may as well go. I did not have anything to stay for. They said that they had their own problems to contend with. They said that I would be better

off at my parents' house. They advised that if I had problems getting money to look after the child from its father, then I should take the matter to the courts." Ms Bhunu

However, in most cases it was because these parents relied on their sons for their livelihood. With growing urbanisation and a cash economy there has been a great shift in the balance of power so that whilst previously families monopolised power, now individuals who control the money have power and with it influence. They can therefore choose to disregard the advice of their elders in the full knowledge that no effective sanctions can be brought to bear against them. The fact that the rural economy is largely dependent on cash remittances from migrant workers highlights this position. Ms Chikumira said of her in-laws:

"They are just afraid of the repercussions but they are definitely on my side. They would come to be my witness if they could. They keep saying that I was just a victim and that I did not do anything wrong. They are very cross with him." Ms Chikumira

This of course brings interesting comparisons between men and women for it is precisely because they are lacking in economic power that women have to rely on their families for assistance. In bargaining with men they are disadvantaged, for whilst men do not need their family support to enable them to make decisions about their lives, women do. Often this exacerbates the situation for if a man knows that a woman's family is unhappy with her for some reason or if he knows that they will not be able to take her back for economic reasons, he can maltreat her knowing that she cannot do anything about it. Another strategy adopted was that of simply keeping quiet.

7:6(ii)(c) Playing for Time - Silence as a Strategy

The man's family did not say or do anything to show support or rejection. The "silent position" was adopted when faced with a pregnant woman to whom the son seemed to show ambivalent feelings. Silence seemed the only feasible option. Tactically it was a good move because the family did not want to side with the woman for fear of breaking family loyalties and antagonising the son on whom their livelihoods were often dependent. Also, by not speaking they were biding their time until the birth of the child when they could see for themselves if the child was really one of their own in which case they could claim it. If it turned out that the child was not one of theirs, then they were free to walk away not having committed themselves to marriage. The silence helped them to maintain a delicate balance between keeping family loyalties whilst still preserving an interest in future rights to the children. One woman who had eloped and had been returned to her family when she was eight months pregnant said of his family:

"They have remained quiet throughout this whole saga. I bumped into them once. That is when they saw the child. They are not saying anything." Ms Gute

Whilst the families' responses varied, what is clear is that the man's family gave help, advice and support with their genetrical rights in mind. The withholding of support was tactical with the aim of preserving family ties or in a desire not to offend a strategically important member of the family. The families who fell between these two extremes experienced

feelings of divided loyalties. They were torn between helping the long suffering daughter-in-law and keeping family allegiance. Their resolution of this dilemma was dependent largely upon their reliance, usually economic, on the "sinner" son.

It sometimes became necessary to involve third parties who were not part of the family group. The "outsider" most familiar with both sets of parties was the *munyai*. The *munyai* or middleman who is also known as the *sadombo* or *samukuru* is the person who facilitates negotiation of the *lobolo* between the two families and also acts as a guarantor of the marriage. Generally not belonging to either of the two lineages, the *munyai* is acceptable to, and is of strategic importance to, both families for he forms the conduit through which they can negotiate.

7:6(iii) The *Munyai*

The *munyai* was involved not only at the conception and dissolution of the marriage but throughout its existence, hence he was often called in for counselling purposes and when problems arose in the marriage. One woman whose husband had stopped maintaining her approached the *munyai* for help:

> "I then went to see the *munyai* to explain the situation to him. He went to see my husband who had gone back to work. The *munyai* asked my husband why he was not giving me any money for soap and food." Ms Musakwa

In mediating between the two parties, the *munyai* was concerned primarily with trying to reconcile them rather than with the

dissolution of the marriage. His interest extended to trying to ensure that the marriage was a success rather than a failure, thus he used his good offices to persuade the parties to stay together. Women with civil marriages also spoke of the *munyai* having been called in to try to reconcile them so that one who had gone back to her parents said:

"After two weeks my parents wrote to the *munyai* to see if the problems could be solved. We didn't hear anything. They wrote to him again. He said that he was trying to get a response from my husband's family. He had even tried phoning them." Ms Chengeta

Although he had customary functions, the *munyai* did not possess any real power thus he could not insist that his advice be followed. One woman who was assaulted constantly by her husband said:

"I went to see the *samukuru*. He said that he was tired of hearing about our constant squabbles. He told me that I may as well go back home to my parents. He said that my husband was out of hand and he may one day try to kill me. He told my aunt who came. She was told the story. She took me back home." Ms Desai

It was significant that of the 12 women in the customary law group who mentioned having spoken to the *munyai* or considered consulting him, 10 lived in town. Only two women with civil marriages, both urban dwellers, spoke of having consulted the *munyai*. This the researcher attributed to the breakdown of the extended family network which leaves people in need of someone of influence to consult when experiencing marital difficulties. As both sets of parents lived in the rural areas, the *munyai* was often the only person connected to them or the marriage that they felt they could talk to.

It seems clear that although the primary function of the *munyai* was to act as a witness at the conclusion of a marriage contract and on the dissolution of that contract, he remained active throughout the subsistence of that marriage providing counselling for the parties and sometimes their families whom he assisted in the re-distribution of the *lobolo*.

7:6(iv) Friends

There were differences in the attitude of the two groups towards helpseeking from friends. For women with customary marriages, the role of friends was peripheral.[44] These women were more likely to depend on family rather than friends for assistance. Where friends were called upon, their help was sought after the parties had already separated. Ultimately, the aim of disclosing problems to friends was to seek practical help in the form of suggestions to the question "where do I go to from here?"

The interviewees with civil marriages said that they had consulted their friends over marital difficulties during the course of the marriage. Friends formed an integral part of the social networks of those aspiring to companionate marriages, hence their importance to women in the civil marriage group.[45]

Zander has argued that what determines whether or not a person seeks legal help is contact with a "knowledgeable lay person" who points the person needing help in the right direction.[46] Friends in my survey performed this function. A large number

of women said that they had first heard about claiming maintenance from "others" around them. An unmarried mother said:

"I used to ask people around and about me what to do and they advised me to go to court for assistance." Ms Kanokanga

Specialist knowledge was also acquired in this way, hence Ms Chigudu asking for a garnishee order said:

"I heard from others that one could ask for a direction to be made for the maintenance money to be docked from his pay."

Information was also provided about other agencies which might be of assistance to the person seeking help. Most of the information seemed to have been acquired by word of mouth.

"I told others of my plight and they told me to come to the CAB." Ms Smith

"Others told me to go to the Council Offices to get help. They said that there was a woman there who would advise me as to what I should do. (She turned out to be the paralegal at the Legal Advice Centre run by the Harare Legal Projects Centre.) They said that I had a lot of children and would never manage to look after them without help." Ms Peni

Similarly, friends were also mentioned as having provided practical support, often using their own social network to get help for the friend in need. One woman whom I met and interviewed at the Citizens' Advice Bureau offices said:

"I have a friend who lives next door to a woman who works for a firm of lawyers. My friend told her my story. She asked to see me. I went to her house and she advised me to come here." Ms Bonda

Another with a civil marriage reported:

"When I was thinking of going to a lawyer I approached my friend at the law library and asked her for some divorce cases to read." Ms Samkange

Gossip was also useful in the spreading of information hence

one woman whose husband had changed jobs in order to stop paying maintenance said:

"I heard from others that he had left his job at OK Bazaars and was now working at TM Supermarket where he had been since March 1989. They advised me to get my maintenance renewed. They said that he was living with his younger brother in Zengeza." Ms Gute

This vital information enabled the woman to trace the recalcitrant husband and claim maintenance from him.

Friends were often instrumental in the women taking the problem out of the family domain into the formal legal process realm. They not only provided the information but also the impetus needed to make that step. Where consulted, friends also provided a valuable source of support. Whitehead notes that:

"Most studies have shown that poor women, as well as women who are independent child rearers maintain significant female networks which function as daily or weekly or annual safety nets." [47]

Working women often had to tell their employers of the marital problems whilst non-working women approached the husband's employer in an attempt to get help, usually in the form of financial assistance.

7:6(v) Employers

For unemployed women, who dominated the customary group, the husband's work place was reported as having been an agent for assistance. When one considers that lack of support was cited as being the main grievance, it becomes easy to understand why the women went to the source of the wealth for help. The

husband's employer was seen as having the power to provide a lasting solution. Those who were themselves employed reported having involved their own employers in trying to resolve their marital difficulties.

Many found the employers to be understanding and helpful. The wife of a soldier who was not receiving any money from her husband reported:

"I went to his work place to explain what was happening. I spoke to the Padre who said that he would ask for the money to be withheld from his salary." Ms Gatsheni

One woman encountered a particularly helpful and sympathetic personnel manager after she had gone to explain that her husband was not paying the children's school fees or bringing any money home.

"I went to his job to talk to his employers last month. His manager told me to take the matter to court. When I had a judgement against my husband then I could ask for a garnishee order which he would happily enforce. He promised to keep my visit secret so as not to further anger my husband. He doesn't know that I went to his employer." Ms Mushai

Ms Chipangura who had a civil marriage was similarly pleased:

"I even tried talking to the Personnel Manager at his job. He phoned the Police who advised that I should go to the Rusape Magistrates Court to claim maintenance."

The other group of women who sought help from the husband's employers were those who had been assaulted. The wife of one soldier who had endured great hardship and had then been chased by the husband who had brought in another woman said:

"Later I went to his work. I had been referred there earlier by the Police. They (the employers) told me to come and report to them every time he beat me. I told them that he had

thrown me out. The Chaplain gave me a letter to take with me to the Community Court. He said that they had given up on him. They had tired of trying to correct him and were now washing their hands of the matter. They said that I should just take the matter to court." Ms Muzangaza

Working women consulted their own employers, thus one woman who wanted help looking after the children from her ex husband spoke to her employers who advised her to go to the CAB (Citizens Advice Bureau) for help. She worked for a non government organisation and one of the social workers gave her a letter to take to the CAB giving the husband's details and asking that they assist her. Another who worked as a domestic (housemaid) and was being sued for custody of the two minor children by a very difficult ex husband was also referred to the CAB by her employers. Mrs Ngwenya who had a civil marriage was being evicted by her husband. She spoke to her superiors:

"My boss had a friend who was an estate agent. He put me in touch and they found me a house belonging to a family which was moving to South Africa. I didn't have anywhere to cook so my boss gave me a gas cylinder to use."

When the house came up for sale she said:

"I told them at work and the Financial Director asked the Board to give me a 100 per cent loan and they approved it. The company bought me the house and now the money is being deducted from my salary. The interest is not as high as it would have been if I had gotten a mortgage."

Work colleagues were helpful in providing information about agencies which would be able to assist the troubled person, hence a Policewoman that I interviewed at the Citizens Advice Bureau said:

"I was supposed to go to some lawyers this morning but a friend told me to come here first to get free legal advice." Ms Sibanda

Other colleagues had useful contacts hence one whose husband moved another woman into the house over the weekend and who worked at the Polytechnic reported:

"I had met Susan (a lawyer) on Committee meetings. I went to find her. I needed someone to talk to. Advice was secondary...She advised me to talk to someone in the department dealing with family law. She put me in touch with him." Ms Nhamo

Other employers were not so helpful. Not only were they partisan, but they also refused to involve themselves in domestic matters. An unmarried woman, who went to the man's work place to ask how much he earned so that she would know how much maintenance to ask for, said that the manager was not very co-operative:

"His manager is like supporting him. When I went to ask for his pay-slip they refused to give it to me saying that the matter was in his lawyer's hands. They said that they didn't want to see me there any more." Ms Radebe

Yet another whose husband had started having an affair with the receptionist at work went to speak to her husband's boss about moving the receptionist to another of the firm's branches. She was accompanied by her sister:

"I met his boss in the reception and asked if I could speak to him privately in his office. His boss started shouting and swearing at us... He (the husband) phoned me from work and he was swearing. He was calling me names and all his work mates were laughing in the background." Ms Pike

The use of religious personnel in the helpseeking process was referred to by five people, three of whom spoke to the Army Chaplain. On the whole the employers, especially the army, seemed to be sympathetic to the wives of their employees who were experiencing difficulties at home. Those women who were themselves in employment received not only moral but also practical support from employers and colleagues.

The move to seeking help from more formal agencies was a continuing attempt to salvage the marriage. The woman's contact with informal agencies did not terminate at this point, but was contemporaneous with approaches to formal agencies.

7:7 FORMAL HELP SEEKING

Brannen and Collard contend that people approaching agencies for assistance did so only after "the other partner had taken the unequivocal action putting the marriage in danger."[48] Agencies often represented the final attempt to seek help in salvaging the marriage. In approaching the agency for assistance a few women were unclear about what the agency could do for them. On the problems of defining the need to be met, Wilson has noted:

> "On a purely logical basis clients can only use the services that the agency provides, but on a more significant level, the way in which the agencies interpret and define the needs of its prospective clients will have a significant bearing on the way in which demands are made."

This could be seen with women approaching the Citizens' Advice Bureau and the government run legal aid clinic. They were looking for lawyers to represent them or to be told about the procedures for instituting the action which they had decided to take independently. The wide range of agencies consulted is a testimony to the diversity of the women's problems, so that those approaching the Police wanted interdicts to stop violence whilst others wanted material assistance from government agencies and others needed counselling from more

specialised agents like psychologists. For five per cent of the customary sample the Chief was one of the first formal agents consulted for assistance.

7:7(i) The Chief

Traditionally the Chief held both legal and administrative powers thus he not only governed the tribe but also arbitrated disputes amongst its members. That they still have power and influence is reflected in Ms Macheyo's account:

"I don't have an aunt or other relative close by that I can tell these things to. I went to see the Chief in our area. I told him that my husband was no longer looking after us. In fact, I told him that my husband was not providing soap or food. He said that he would try the matter. I don't know when he is going to call us. The Chief is a good man. At the trial he has people advising him. What happens is that on the day of the trial you invite people to come and listen and everybody contributes." Ms Macheyo

This account is both interesting and revealing on several counts. Firstly this woman came from Bulawayo which is a considerable distance away from Mrewa where she was living. She was Ndebele, her husband's family Shona. Aged 54, only her younger brothers remained, her parents and uncles who had been party to the contracting of the marriage having died. As her husband was older than her, it is unlikely that there was anyone in his family whom she could consult. Isolated in this way, the Chief formed the last salvation and so she took her problems to him. The fact that she describes him as being a good man shows that she anticipates a fair hearing. This is important because in choosing agents to assist them, the women were looking for those who would treat their problems sympathetically. To her, the Chief represented such a

person.[50]

The Chief also played the role of counsellor and mediator using his traditional authority to try to get the parties to reconcile. Hence Ms Magade said:

"I went to the Chief in the area who said that my husband could not just give me ten cents *gupuro*. He had to give me the bus fare to enable me to return to my parents. He told me to stay until my husband took me home himself. When the Chief took me home he said that he still wanted me." Ms Magade

Not surprisingly, all four women who spoke of having had contact with the Chief had been living in the rural areas at the time. At the present time Chiefs can only be found in the rural areas where they head small communities made up of members of the same lineages. The accounts of the women in the survey show that they continue to exercise their function of minimising any disjunctures which may arise in the community by seeking reconciliation by compromise if possible and by coercive threats of ostracisation if necessary.[51] Of the role of mediators in small scale societies Merry has noted:

"They advocate a settlement that accords with commonly accepted notions of justice couched in terms of custom, virtue and fairness and reflecting community judgements about appropriate behaviour. To flout such a settlement is to defy the moral order of the community...Finally they are experts in village social relationships and genealogy bringing the conflict a vast store of knowledge about how individuals are expected to behave toward one another in general as well as about the reputations and social identities of the particular disputants."[52]

7:7 (ii) The Police

Internationally, Police have the reputation of not wanting to become embroiled in "domestic affairs".[53] Marital problems

belong to the family sphere and are therefore outside their jurisdiction. Given this popular view of the Police, it was surprising that one fifth (21%) of the customary group and over a third (38%) of the civil marriage group reported having consulted the Police about their marital problems. The vast majority of women expressed satisfaction with the way the Police had treated them. A possible explanation for this is the setting up of the Community Relations Liaison Office (CRLO) henceforth within the Police force. Officers in this section deal specifically with civil law related matters including domestic violence.

7:7(ii)(a) Law Enforcement - Dealing With Domestic Violence

The Police were approached for help to stop women being assaulted. One whose husband beat her and brandished a knife said that she had gone to report him to the Police who had fined him $60. Ms Bennet who was married under the Marriage Act had become a regular visitor at the Police Station being married to a violent man. Although she had him bound over, he continued to assault her. On her last visit to the Police she reported:

"The Braeside Police said that if I come again they will put him in gaol." Ms Bennet

Yet another who was being constantly assaulted reported:

"He was arrested and fined by the Police several times. He

would try to evade the Police who eventually started carrying a photograph of him for identification purposes." Ms Muzangaza

The woman did not say that her husband had at any time been imprisoned. When one considers the viciousness of the beatings this seemed a questionable omission. There still remained a few Policemen who refused to become embroiled in domestic issues. Of this phenomenon, Yngvesson notes:

"This official reluctance to handle on-going inter-personal conflicts reflects legal and cultural rules about the nature of the family and community, about inter-personal as versus "impersonal" relations and about the role of law."[54]

Patriarchal attitudes still prevailed so that one woman who had been severely assaulted said:

"The Police refused to deal with the matter on the basis that it was a domestic issue. They said to go to the Village Court. They asked if I wanted to stay married and I said for the sake of the children yes. I told them that I didn't want them to grow up like orphans. They told me to go back to the Chief." Ms Chitopo

In another case the Police refused to assist because it was a "domestic" dispute:

When he threw my clothes out, I went to the Police. It was evening. They called him but he said he had not thrown me out. The Police said that they did not deal with domestic issues and that I should go and report the matter to court." Ms Nyoni

In one of the two civil marriage cases where they refused to get involved, the Police did make an appointment for the couple to see the Social Worker. The other case involved a Zimbabwean woman living in Malawi with her husband. He used to assault her and she would go to the Police for assistance:

"I used to go to the Police but they didn't do anything. Basically he was Malawian and I was a foreigner. He would just buy (bribe) them. He would come to the Police station and apologise. He had a sweet tongue." Ms Silefu

7:7(ii)(b) The Police as Mediators

The most cogent explanation for the women's use of the Police is that when the women found themselves in trouble and were at a loss as to what to do and could not think of anyone else to turn to, they approached the Police whose job they saw as being to rectify problems. One woman who had been chased by her husband and told to leave the children who were very young approached the Police for assistance:

"I then went to the Police and asked them to accompany me because I was scared that he would assault me. I told them that the children were still young and needed their mother. The Police accompanied me to his parents' house and I took the children. We then all went to the Police station. He said that he would look after the children...I protested. The Police refused to give him the children saying that he could take them when they were 18." Ms Manguni

Another whose civil law marriage ended somewhat acrimoniously said that the Police had been called in to help her move.

7:7(ii)(c) Giving Information

The Police also provided information so that five of the women with customary marriages and one with a civil marriage reported having been told about claiming maintenance by the Police. One woman whose husband had long stopped supporting her and had abandoned her at the bus stop with no money said:

"I went straight to the Police who advised me to go to the Community Court to claim maintenance. They told me that the Community Court personnel would advise me about the procedure for claiming maintenance." Ms Rekeni

She was one of the two women with customary marriages who had been brought to the Community Court by the Police. The Police were sympathetic towards the women and their plight, hence two women who were themselves guilty of crimes received

understanding from the Police. One wife who had burnt her husband's girlfriend's clothes in anger and frustration said:

"I went to the Police and told them what I had done...I explained that I had two children ...who were not going to school yet the father was busy enjoying himself with his girlfriends. He came to the Police station and the Police asked him if I was his wife and he said that I was. They said that in their opinion I had good cause to burn the clothes. They asked him if he wanted to prosecute and he said no." Ms Tsorayi

Yet another woman whose husband had abandoned her in the rural areas and was living in town with his second wife reported what had transpired after she had stabbed the wife (with a blunt knife)

"The Police came and took me to the Police station. I explained what had happened to them. They told me that rather than get involved in life threatening fights I should just go to the Community Court and ask for maintenance." Ms Chinwada

7:7(ii)(d) The Police as Counsellors

The Police also acted as counsellors and were shown to be knowledgeable about customary law, hence one woman who discovered letters from her husband's girlfriend said:

"I then took the letters which she had written to him to the Borrowdale Police. They called us all together (the interviewee, the husband and the two sets of parents). The Police told him that custom dictated that before a man could take a second wife he had first to buy a cow to show the first wife that he intended to get her a companion." Ms Goredema

Some of the interviewees reported having been in contact with various Government Ministries and departments, all of whom they considered or had been told could help them in some way.

<u>7:7(iii) Government Departments</u>

On the basis of research undertaken in the rural areas of

Zimbabwe, Tsanga concluded that:

"...most rural people do not perceive their problems as legal ones even when there is a possible legal solution. For instance, women who needed maintenance often did not consider seeking a legal solution against the man involved, but saw the responsibility as falling on the State. They sought a solution from agencies other than the courts, for instance, they were more likely to perceive their problems as one for Social Welfare rather than for a legal answer."[55]

33% of the women with civil marriages and 8% of those with customary unions said that they had approached different government ministries for assistance. The two main agencies consulted were the Ministry of Social Welfare and also the Ministry of Justice Legal and Parliamentary Affairs. The use of these agencies was divided by marriage type so that women with customary marriages approached the Social Welfare department for assistance while those with civil marriages tried to get legal aid to enable them to institute divorce proceedings against the husband. This division reflects the different needs of the two groups of women so that having unregistered marriages those women in the customary law group did not need to get their marriages formally dissolved whilst women in the civil marriage group generally had sufficient means to support themselves without needing to resort to seeking state relief.

7:7(iii)(a) Seeking Financial Help

The same reasons that had led women to approach the employers for help motivated the women to approach the Welfare office. It was a place which they had been told gave out cash to the needy and the disadvantaged. A woman whose husband had

stopped maintaining her and who had been advised by his employers to sue went to the Welfare office in an attempt to avoid having to go to law:

"I went to the Social Welfare people who called him. They told him that he should give me money for the children." Ms Chigudu

Unable to give her money, they did the next best thing, which was to call in the husband and ask that he fulfil his familial obligations. Often the Welfare officials realised that to get money from the man, the woman would have to go to court. As they were themselves lacking in legal expertise, they referred the women to organisations whom they knew could provide the necessary help and information.

"I then went to the Social Welfare office who advised me to go to the Harare Legal Projects Centre." Ms Chagadama

7:7(iii)(b) Looking For Legal Assistance

Once they had decided to take the legal route, the women tended to approach the Ministry of Justice for help. They were generally helpful, thus a single woman not receiving any material help from the child's father reported:

"I telephoned the Ministry of Justice for assistance. They advised me to go to the Primary Courts office. I explained that I did not have any money. They said that they understood and told me to come in and see them. I went in and they gave me a letter to take to the Community Court offices. I gave them the letter and they helped me without payment." Ms Kanokanga

This woman spoke very highly of the officials at the Ministry. However not all the women were so fortunate. One woman appeared slightly disgruntled by the Legal Aid Department of the Ministry for they had made her undergo a convoluted

process which ultimately turned out to be unnecessary. Her husband had stopped paying maintenance:

"In January 1990 I went to see the Government lawyers in the Legal Aid Department and told them that I wanted to have my maintenance reinstated. I told them that I wanted the house transferred into my name. They said that I would have to get a divorce from the High Court. I told them that I did not want to do this... They said that if that was the case they could only help me with the maintenance. They suggested that I buy garnishee orders, fill them in and have them signed by a Commissioner of Oaths. I did all this and took them to the Maintenance Court. The officials there asked me why I had gone to all that trouble when they already had my case number." Ms Chagadama

The legal aid department at the High Court was used mainly by women with civil marriages who wanted to get a divorce. More than a quarter of women with civil marriages reported having gone to the High Court for *in forma pauperis* assistance. They were given forms to fill to see if they qualified for *in forma pauperis* assistance before being referred to a legal practitioner.

Tied to approaches to government ministries for assistance was the use of political agents for help. In approaching political agents for help, the women hoped that the agents could mediate between the two parties.

7:7(iv) Political Help

In a country in which it becomes increasingly difficult to separate the main political party from the workings of Government, it is not surprising that a few people thought that the political wing had as much influence as the government. One woman who was separated from her husband had gone to the local party representative for help in solving the problems of the marriage. He called for the husband who

refused to come:

"He even refused to listen to the Party Chairman." Ms Zvinavashe

Thus suggesting that most people would not only have come when called but would have acquiesced in whatever decision was reached. All this would seem to suggest that the Party Chairman was a man who had considerable power and authority in the small rural community from which this woman came and would expect co-operation.[56] Another divorcee who was being refused permission to visit her four year old child by the husband said:

"That is when I went to the Zanu PF offices for advice. They told me that I should go to the Community Court. I went." Ms Mandiopera

For some women, the media provided the information which they needed to institute actions, so that two women in the customary group sought advice about instituting maintenance actions.

7:7(v) The Media

The media seemed to have played an important role in the dissemination of information. Issues such as maintenance have received wide coverage. Two of the women in the customary group reported having received assistance from the media. One, a 19 year old single mother spoke of having heard about maintenance on a problem solving programme presented by a popular "agony aunt" on the vernacular radio station. She had gone to see the presenter who proved to be sympathetic:

"I also went to Elizabeth Tinofirei who presents the radio programme *Chakapfukidza Dzimba Matenga*. She has offices in

the same building as the Community Court Inspectorate. She listened to my problems and was very sympathetic. She gave me a letter to take to the Community Court offices." Ms Kanokanga

Yet another woman, married with four children, whose husband had stopped paying fees for the children and who was no longer giving her money to buy food was advised by one of her friends to approach the Women's Action Group who produce a quarterly magazine in the three languages of the country dealing with women's lives. She said:

"On Monday I went to the Women's Action Group offices. My friend told me to go there. I told them my problem. They advised me to take my case to court. They also gave me a copy of one of their publications." Ms Mushai

When interviewed, the woman had a copy of the magazine containing an article on maintenance and the procedure for claiming it.

The use of the media provides interesting insights into the use of "alternative" agents for assistance. In terms of giving legal advice, the Citizens' Advice Bureau was cited as having provided the greatest help.

7:7(vi) The Citizens Advice Bureau (CAB)

The women approaching the CAB looked for information about the procedure for instituting actions in court. The Harare Citizens' Advice Bureau statistical report for the period May 1987 to April 1988 show that the family was the subject on which advice was most frequently sought, comprising 19.7% of the work done by the CAB.[57]

The CAB was used more by women with civil marriages than it was by those with customary marriages (28% as against 10% for the customary group). This may be because more of the women with civil marriages would know of its existence. The fact that the CAB offices were situated in the capital city would also militate against rural women having access to the services of the organisation. Most of the people approaching the CAB for help had already decided to take their problems to law before getting to the CAB.[58] Generally what they wanted from the CAB was to be provided with a lawyer to present their case, thus one woman said:

"Since he has a lawyer I would like someone to help me too." Ms Tsorayi

This woman had recently had her own case thrown out of court and was now being sued for custody of the three minor children of the marriage. She was convinced that not having a lawyer had caused her to lose her last case, thus she said:

"I am only afraid that since he has a lawyer he is at an advantage. His lawyer can confirm what he says. They have already managed to have my case dismissed. Perhaps they may again exert their influence...Perhaps they will oppress me as they have already done with his lawyer." Ms Makumbinde

Yet another who came to the CAB in search of a lawyer said that she had felt prejudiced by not having had one previously:

"I want someone to represent me because the last time I went to court the Presiding Officer was very short with me and asked me if I had never been to court before." Ms Masimirembwa

A woman with a civil marriage said:

"I came to the CAB to find out how to go about getting a

divorce. They gave me a letter to take to the High Court." Ms Mupindu

Although the CAB was not able to provide legal representation, it did provide legal advice having a roster for legal practitioners who came on weekday mornings.

"I came to the CAB yesterday to say that my husband had taken a new wife. I said that my marriage hadn't been dissolved. I asked them what I should do. They advised me to come to see the lawyer today." Ms Chavunduka

As several of the clients had never been to court before, what they wanted was for someone to tell them what happens in court, what to expect and generally how to present their cases.

Perhaps the CAB's main strength is that it has a wide networking system with other agencies. This enables it to refer people to the appropriate specialist agencies should it be necessary. A woman whose husband was violent and constantly beat and harassed her was referred to the Musasa Project, an organisation which deals with violence against women and has close links with the Community Relations Liaison wing of the Police force. Women with civil marriages wanting to divorce were sent to the High Court legal aid office. The CAB also co-ordinated its activities in conjunction with other non government agencies such as the Harare Legal Projects Centre.

7:7(vii) The Harare Legal Projects Centre (HLPC)

Established in 1986 as one of the branches of the Legal

Resources Foundation, the aim of this organisation is the dissemination of legal information to the general populace, especially those in the rural areas. With this aim in mind, it has in the last two years set up Legal Advice Centres staffed by trained paralegals to provide legal and counselling services for people in the rural areas who until recently have not had such a service. In the last year centres have also been established in Bulawayo and Gweru.

Like the CAB, the HLPC is not equipped to offer legal representation so it merely provides legal assistance. The two women married in terms of the customary law who reported having gone to the Legal Advice Centres said that they had been referred elsewhere. One who had not been getting money from her husband had been told by friends that she should go to see the Advice Volunteer at the council offices:

"I went to see the woman. She gave me a letter to bring to the court. She treated me very nicely." Ms Peni

Another said:

"The Advice Volunteer on duty referred me to the CAB." Ms Chagadama

While it was useful to know where to refer someone for help, at times clients were frustrated by the organisation's inability to provide practical help in the form of legal representation or assistance with prosecuting an action to its conclusion.

Other agencies consulted included the Alcoholics Anonymous (AA) and the Samaritans.

7:7(viii) Specialised Agencies

Agencies such as these were consulted by women with civil marriages. One woman took the medical route speaking to her family doctor about her philandering husband:

"In February this year I was treated for depression. I spoke to my doctor who is really open and understanding. He spoke to me about AIDS and suggested that I bring my husband to see him, but my husband refused." Ms Sibanda

Two others reported having seen psychologists, one after a suicide attempt and another after her husband had left her to set up home with a younger woman. All these women lived in town and were well educated thus they would have had access to information about the existence of these agencies for assistance.

Having considered the agents in detail a case study will be presented to show how the woman's search for solutions to her problems led her to various agencies, all of which impacted upon or influenced the next step in some way.

7:8 A Case Study

Thirty year old Mrs Chihota had contracted a Marriage Act marriage with a University Science graduate. The marriage was registered before the customary formalities were completed, a fact which had displeased her parents. She takes up the story:

"The problems started soon after we married. He started getting drunk. He would come home and accuse me of doing things that I hadn't done. Sometimes he would say that I had shouted at him when I hadn't. He would start beating me and I would hit back. If I asked for cooking utensils he would

refuse to buy them for me saying that I was just being extravagant. He would tell me to go and get them from my parents. He would give me the bus fare to go.

I would use it to go to his aunt, and she would accompany me back. He would refuse to be counselled by her. He said that he didn't want a third party interfering in his affairs. He said that she was just trying to destroy his home. They would end up quarrelling. He would bang the doors and leave. The aunt would also get cross and leave. Eventually she tired of coming. I was also too embarrassed to ask for her help because every time she came they ended up quarrelling so I just left it. When I had problems I dealt with them by myself.

At one time I went to see his father after we had a fight. His father came back with me. My husband accused his father of trying to destroy his home and asked that he leave us to fight alone. His father was angry. He said that his son was refusing to listen to him because he was educated. He left and he never came back again."

She had a miscarriage which the doctor said was caused by having been beaten by the husband. She continued:

"My husband told me to go home for awhile. I went to stay with my brother. I came back after two weeks. He had been fired from his job for drunkenness. He phoned to tell me and to ask me to come back home which I did. The following month he got a job in Bulawayo as a teacher. He went and I stayed behind for a short time.

I joined him and fell pregnant. I had the baby, a boy, in March 1986. We lived amicably for six months then he made a schoolgirl pregnant. He was told to pay $1200 in seduction damages. I was very angry with him. I asked him if he wanted to marry this girl and he said no. He begged for forgiveness. He said that he would have to pay the seduction damages to enable him to keep his job. I even remember speaking to the Police about the matter. They told me that my husband had just made a mistake. They said that he still loved me and told me that I should not let the one mistake destroy our marriage.

I fell pregnant again. I had my daughter in June 1988. We had problems throughout this period...The problems were caused by his drug taking. He smoked pot, drank hard liquor and sniffed glue when he was in a particularly depressed state or when he felt the problems mounting. I tried to talk him out of it, but to no avail. I told the Police in the area who tried to talk to him. He said that he would stop. I noticed that his health was failing.

I went to the AA (Alcoholics Anonymous) for help. They said that they could only help if the person with the problem

wanted their help. They could not assist without his co-operation. I also went to the Samaritans. I had already come from seeing the Community Relations Liaison Officer. I did not get any help from these groups. They all kept referring me to see someone else.

I realised that the situation was critical. When we had a fight he would grab hold of an axe and throw it at me. He smashed up all the furniture. I knew that we could not go on like that. I left him saying that I was going home to visit. I went and never returned. After a month I told my parents that I did not want to go back to my husband and why. They said that they could not interfere in my affairs. They told me to go to court to have the matter adjudicated. They said that I was too old for a talking to. They also said that they could not talk to their son-in-law since I was the one who was refusing to stay with him.

I went to the High Court in October 1989 and told them the story. They gave me a lawyer. At first they sent me to a white lawyer. They gave me a letter to take to the lawyer. He was kindly. He asked me if I could discuss the matter with him freely in English and I said no. He sent me back to the High Court to ask for a black lawyer which I did. They sent me to another law firm where I was given a black lawyer. He was very understanding and explained the whole process to me. I saw him several times. I found him to be very approachable. He was also very systematic.

I filed for divorce in October 1989 and the decree nisi was granted on 2 May 1990. Neither of us was there. The lawyer told me when the matter was going to court. However he told me that it was not necessary for me to be there because the matter was unopposed."

If one were to construct a typology of this woman's

helpseeking career, it would look like this:

The Husband
His aunt
His father
Her brother
Community Relations Liaison Officer/Police
Alcoholics Anonymous
The Samaritans
Her Family
The Legal Aid Office
The Legal Practitioner(s) (two of them)
The High Court

In the informal sphere she started with his family and went on

to her own and specialists before going to take steps towards

suing for divorce.

On the occasion of her marriage a woman is informed that should she experience problems in her marriage then she should approach her husband's paternal aunt for help. It was for this reason that Mrs Chihota went to call his aunt every time they had problems. Traditionally the aunts "brief" was to counsel the couple with the ultimate aim of reconciling them. This the aunt tried to do. The husband's refusal to listen to the aunt shows how unreasonable he was. After the aunt failed to reconcile them, Mrs Chihota fell back on the avoidance strategy. Embarrassed to ask the aunt for help, she coped by herself. This was at great expense to herself both physically and emotionally.

Ultimately she gave in and went to see his father for help. The exchange between father and son makes for interesting social commentary. It reflects a shift in the power balance. The son can "afford" to dismiss his father because he is no longer dependent on his patronage and on the family for economic support. If anything it is the family which looks to him for material assistance. Urbanised and educated the son was not bound by the mysticism and cultural constraints against disobeying the family. The father is conscious of this and whilst appreciative of the value of education derides his son for "forgetting where he came from". The powerlessness of the father is reflected in his inability to provide an effective sanction against the son.

While the husband showed disregard for the correct customary practice the wife was very correct. Having failed in her attempt to get the aunt to help and having tired of trying to cope alone, the wife went to the pinnacle of the family hierarchy, the father. The father represented the ultimate male authority figure and it was for this reason that the woman approached him for help. This also shows that appeal procedures exist within the different groups.[59] There are three possible explanations for why this woman first went to his family for help. Firstly, that was the correct customary thing to do. Secondly it reflects that she was on good terms with her in-laws and could count on them to be fair, objective and supportive in times of crisis. Finally her family had not been happy about the marriage being registered before the *lobolo* had been paid hence her reluctance to approach them for help. This last reason probably explains why she chose to go to her brother after her miscarriage. An alternative explanation is that in not going to her parents she was trying to shield them and to stop them from worrying about her.[60]

Having moved to a different locale and having exhausted the family network, Mrs Chihota began to look to outsiders for help. This marked the move away from the semi public in to the wholly public domain. The Police willingly took on an active role in trying to resolve the problems of the marriage. Although she told them that her husband was on drugs the Police chose not to prosecute. This was either because the information was disclosed in confidence or more likely because the husband, being a teacher, had some status and prestige in

the small community in which they lived and was therefore perceived as being equal to if not superior to the Police. The Police's condonation of the husband's behaviour extended to encouraging the wife to stay with him after he had made a schoolgirl pregnant on the principle that "that is what men do".

Having despaired of getting the Police to help her informally, the woman approached professional agencies, the AA (Alcoholics Anonymous) and the Samaritans. That she went to the Samaritans after the AA had failed to help is an indication of the depth of her desperation. The process of being referred is also frustrating and she begins to see the agencies as ineffectual.

All this eventually leads her to take the inevitable final step of leaving and going back to her parents. (This marked the return to the semi-private domain). She only did this when a rupture seemed unavoidable. It is surprising that even at this late stage the woman's parents remain impartial and refuse to become involved in the fray. Perhaps it is because by leaving her husband the daughter has placed them in the unfavourable position of being the refusing party. Also they were probably still angry that the *lobolo* had not been paid. By advising her to go to court, they remove any blameworthiness on their part. No one can accuse them of encouraging their daughter to act irresponsibly. She was one of the fortunate few to be granted legal aid.

Looking at Mrs Chihota's helpseeking career it is interesting

to see how she progressed through the ranks exhausting the familial and informal agencies before progressing onto the more formal agencies which finally led her to court. The fact that she points out how she sought help from the "right" people and her husband's attitude is an attempt to legitimate her ultimate decision to leave.

7:9 Conclusion

This chapter has considered the process undergone by the women in the two groups in trying to resolve the problems of the marriage. The model of disputing which sees litigation as being a monolithic, linear structure was challenged as ignoring the plural nature of the process. It was suggested instead that the litigation process should be seen as a less orderly and more dynamic process and a new model of disputing was presented as an alternative. The chapter then moved on to look at how some women denied that the marriage was problematic and at the personal and psychological costs of avoidance. Premised upon a three tier structure of dispute resolution, namely negotiation, mediation and adjudication, the rest of the chapter was concerned with examining the first two tiers. However it was pointed out that the three should not be seen as being mutually exclusive stages.

It was argued that initially there was a desire to keep the problem in the dyad hence the women, particularly those aspiring to companionate marriages, tried to resolve the problem by speaking to the husband. It was only when this process of negotiation failed that third parties were asked to

intercede. Here a distinction was made between informal agents for assistance and the formal organisations later approached for help by the women. Informal agents were defined as being those which were personally known to the helpseeker and who did not belong to a bureaucratic structure.

The examination of the role of the informal agents was preceded by a discussion of the politics of mediation paying attention to inequalities inherent in the parties relationship as well as acknowledging the potential bias which might come about as a result of the particular bias or ideology of the mediator. The attitudes of the various agents approached for assistance were then considered in greater detail. The two families were the most involved in the process of trying to resolve the marital problems. Given their respective roles in the contracting of the marriage and considering that in Shona culture marriage is a group venture, this was not surprising. Yngvesson notes that:

> "Where multiplex ties link relationships to many others, the social order is "close knit" and conflict is hard to insulate."[61]

In giving advice, both sets of families were shown to be motivated by a desire to protect their proprietary interests in the form of *lobolo*. This they did by trying to get the parties to reconcile or by seeking to minimise the "guilt" of their agent in the marital contract.

Occasionally the *munyai* who was the person responsible for conducting the negotiations of the terms of the marriage was called in to assist. Like the parents his primary aim was the

preservation of the marriage so that his advice was aimed at reconciliation. For both groups of women friends played a role in providing information about how to go about getting help from a formal agency. Women with civil marriages seemed to rely on their friends for emotional support whereas those with customary marriages depended more on their families.

Formal agents were used when it became apparent that the problems of the marriage could no longer be contained. Nevertheless, there was an on going attempt to try to resolve the marital problems. The Chief was the person used by a few rural women to try to resolve the problems of the marriage. Formal agents were also consulted when a specific solution was sought so that women who had been assaulted went to the Police in an attempt to get an interdict to stop the violence, whilst those with financial problems approached employers and to a limited extent government departments such as the Ministry of Welfare and Social Services. Another reason for the use of formal agents was to try to get new ideas about how the problems of the marriage could be solved. The agency's brief dictated the advice given so that agencies such as the legal aid department in the Ministry of Justice, the Citizens Advice Bureau and the Harare Legal Projects Centre advocated instituting legal action thus raising in the client's mind the possibility of instituting legal action.

The next chapter will consider the process of transferring the problem into the formal legal system in an attempt to having it resolved. The "legalisation" of the problem was necessary

to fit it into the narrow categories of disputing recognised at law. Transferring the problem into the formal legal domain should therefore not be seen as necessarily creating conflict but rather as a last attempt to salvage the marriage, hence Yngvesson's assertion that:

"Parties go to court not to solve a dispute but to have the state of their relationships recognised."[62]

Even at this, the "claiming" stage, there was a continuum with the two processes of negotiation and litigation going on simultaneously. The chapter will also discuss the difficulties of obtaining access to law and the role of lawyers in translating problems into legally recognisable categories before moving on to consider the actions brought separately.

7: The Helpseeking Process

[1] Felstiner, W. Abel, R. and Sarat, A. (1981) at p.640.
[2] Yngvesson, B. (1986) at p.626.
[3] Griffiths, J. (1983) at p.78.
[4] Griffiths, J. (1983) at p.182.
[5] Griffiths, J. (1983) at p.183.
[6] For example a custody or visitation dispute might be litigated differently from a claim arising out of a car accident. In the first type of claim, the parties might move systematically through the various fields whereas in the second the plaintiff could move directly to the institution phase without passing through any of the other fields or might abandon the claim altogether.
[7] Here one could also include the relationship between third parties *ie* lawyers negotiating with lawyers.
[8] Cf Ingelby, R. (1992) at pp.155.156.
[9] Cf Macaulay, S. (1977) at p.156.
[10] Cf Eekelaar, J. (1991) at p.134.
[11] Cf Macaulay, S. (1977) at p.158.
[12] Himonga, C. (1990) at p.32.
[13] Vaughan, D. (1986) at p.139.
[14] Cf Vaughan, D. (1986) at p.140.
[15] Felstiner, W. Abel, R. and Sarat, A. (1981) at p.644.
[16] Mnookin and Kornhauser (1979) p.950, Cf Burman, S. (1989) at pp.251-252.
[17] Cf Harrell-Bond, B. (1975) at p.245.
[18] Davis, G. (1983) at pp.134-135, Cf Abel, R. (1973) at p.229.
[19] Brannen, J. and Collard, J. (1982) at p.124.
[20] Felstiner, W. (1975) at p.697.
[21] Felstiner, W. (1975) at p.697.
[22] Cf Harrell-Bond, B. (1975) at p.244.
[23] Vaughan, D. (1986) at p.159.
[24] Cf Rwezaura, B. (1984) at p.55.
[25] Davis, G. (1988) at p.35.
[26] Griffiths, A. (1988) at p.131.
[27] Cf Abel, R. (1982) at p.4.
[28] Brannen, J. and Collard, J. (1982) at p.144.
[29] Cf Mair, L. (1969) at p.25.
[30] Merry, S. (1982) at p.31.
[31] Griffiths, A. (1988) at p.129, Cf Sander, F. (1984) at p.xvii.
[32] Bottomley, A. (1984) at p.295.
[33] Mnookin, R. (1984) uses three concepts namely capacity, relative bargaining power and externalies to show that limits should be put on private ordering (see pages 364-383), Cf Eekelaar, J. and Katz, S. (eds) (1984) at p.3, Davis, G. (1988) at p.13.
[34] Roberts, S. (1988) at p.145.
[35] Roberts, S. (1988) at p.145.
[36] Cf Davis, G. (1988) at p.35, Harrell-Bond, B. (1975) at p.244.
[37] Cf Maboreke, M. (1986) at p.91.
[38] Holleman, J. (1969) at p.267.
[39] Cf s.16 Hire Purchase Act (Chapter 284).
[40] Poulter, S. (1976) at p.155.

[41] Cf May, J. (1987) at p.40.
[42] Cf Mair, L. (1969) at p.42.
[43] Davis, G. (1988) at p.37.
[44] Cf Davis, G. (1988) at p.38.
[45] Cf Harrell-Bond, B. (1975) at p.245.
[46] Zander, M. (1978) at p.288.
[47] Whitehead, A. (1984-85) at pp.15-16.
[48] Brannen, J. and Collard, J. (1982) at p.190.
[49] Wilson, P. (1992) at p.9.
[50] Anne Griffiths (1988) using a case study of divorce shows how gender inequalities can militate against women in Chief's Courts.
[51] Rwezaura, B. (1984) at p.63 and Ng'maryo, E. (1984) at p.66.
[52] Merry, S. (1982) at p.31.
[53] Cf Pahl, J. (1978) at p.48.
[54] Yngvesson, B. (1985) at p.643.
[55] Tsanga, A. (1990) at p.169.
[56] Cf Abel, R. (1982) at p.4.
[57] CAB Statistical Report for 1987-1988.
[58] Cf Brannen, J. and Collard, J. (1982) at p.190.
[59] Cf Griffiths, J. (1983) at p.182.
[60] Brannen, J. and Collard, J. (1982) at p.124.
[61] Yngvesson, B. (1985) at p.628.
[62] Yngvesson, B. (1985) at p.637.

CHAPTER 8 - GETTING TO COURT

8:1 Introduction

The last chapter discussed the process undergone by the women in seeking help to resolve the problems of the marriage. The conceptualization of litigation as being a linear process was challenged and it was noted that in trying to find solutions to their problems the parties moved between agents making the whole process considerably less orderly than the linear model suggests. In concluding, it was noted that the approach to outside third parties and courts may be seen as part of the continuation of the dual process of negotiation and litigation (litigotiation) rather than as an escalation of conflict between the two main actors.

This chapter deals with the process of adjudication as the last stage in the helpseeking careers of the women upon resorting to divorce. Even at this stage, there was an attempt to salvage the marriage so that when they did get to court, the women, especially those in the customary group, did not necessarily perceive of their marriages as being at an end. Often the help and counsel of agents not connected to the court continued to be sought so that getting to court should not be seen as marking the end of the process of seeking help informally to resolve the problems of the marriage.

This chapter looks at the different actions instituted by the women and how the courts determined such actions. It begins with a discussion of the problems of gaining access to the

courts before looking at the provision of legal aid in Zimbabwe as well as at the role of lawyers as agents for assistance in the helpseeking process and at their role as gatekeepers translating disputes from the informal domain into the official fora.

An examination of the use of the court process must begin with a discussion of the general problems of gaining access. Johnson contends that there are three main factors which may lead to courts becoming inaccessible.[1] These are economic, geographical and psychological barriers. Each shall be considered within the Zimbabwean context.

8:2 BARRIERS TO ACCESS

8:2 (a) Economic

Traditionally, this has for obvious reasons been considered to be the main barrier to obtaining access to law courts. However, Zander challenges the contention that lack of money is the main reason for non-use of courts and argues that:

> "The theory that poverty is the chief cause of unmet need collapses in the face of empirical evidence that those who need advice and do not seek it include many who are not poor and those who do seek it include many who are poor". [2]

The fact remains that in a developing country such as Zimbabwe where incomes are low, the question of having enough money to successfully prosecute an action is of great importance. As the vast majority of women in the customary group were not in formal employment, and therefore not in receipt of a regular income, this was an important factor to consider. Fortunately

those women who presented their claims in the Community Court (all those with customary law unions) incurred minimum costs. All that they were required to pay was the messenger's fee for the delivery of the summons. The average amount paid by women in the customary sample was $13. Although this is seemingly a small sum, it must be seen in relation to the relative poverty of the women. One of the interviewees said:

"I reported the matter in 1987 but they (the court officials) told me that I would first have to pay $16 before they could help me. I did not have the money. In April 1990 I again went to report." Ms Rekeni

Another woman, aged 21, who was trying to claim maintenance from her former husband complained about having to pay a second time for the summons to be served after her husband had failed to turn up at the hearing:

"I had to delay reporting the first time because I did not have the $11 required to send the summons. Now where do I get another $11.50? It's all money down the drain. I would rather go to the rural areas to plough." Ms Muzangaza

As there were no other costs beside those for transport, which could in themselves be prohibitive, it seems fair to say that as regards Community Court based actions, economic considerations were not in themselves a bar to seeking relief from the courts. Bringing an action in the High Court is a more costly exercise so that for women in the civil marriage sample, economic considerations were an issue. Two of the women in this group said that they had not yet initiated divorce proceedings because of the costs involved:

"Since there was no longer any marriage, I wanted a divorce. I consulted others about this and they told me that it would cost about $900. I said no way, he's the one with this woman so if he wants he can get a divorce." Mrs Takaenda

"The case is with his lawyers. He started it when he met this wife. Then he withdrew the case and said that I should take over. He wanted me to pay the costs but I can't afford to."
Ms Ndhlovu

For these women, and many others in similar situations, the lack of money was a significant economic factor which prohibited their access to the judicial system.

8:2(b) Geographic

If courts are located a long way away from where people live then access to them in the physical sense of the word becomes difficult and people are less willing to prosecute their claims.[3] For the women with customary marriages the courts were centrally located with a Community Court being found in every district. The main Harare court is situated in the city centre thus facilitating access while those in the smaller centres are generally situated in the business district. For those living in the rural areas this can raise problems of transport costs. Ms Muzangaza made this point after having been told to come back to court for another hearing date because the summons had not been delivered:

"I refuse to pay again. Imagine if I was coming to town from the rural areas, that would have cost me $20 round trip. It all takes too much time and I am tired of imposing on my relations."

However, for women with civil marriages wanting a divorce, only the Harare and Bulawayo High Courts are open to them.[4]

8:2(c) Psychological

Discussing the problem of unmet need, the Oxford survey on claiming compensation after accidents discussed how socio-psychological factors such as knowledge, access to social

networks and general competence determined the degree of access to legal services enjoyed by individuals.[5] Galanter articulated the problem as being one of party capability which includes:

"... ability to perceive grievance, information about the availability of remedies, psychic readiness to utilize them, ability to manage claims competently, seek and utilise appropriate help etc.."[6]

It seems therefore that although one may recognize that one has a problem which might be resolved by going to law, often the person is lacking in the confidence and legal expertise or legal literacy needed to commence and prosecute an action to its conclusion. Veneklassen argues that women are particularly disadvantaged:

"Even when a woman is aware of her legal rights she may not act on them because of an ingrained dependency or powerlessness: feeling that her situation is inevitable or that she feels incapable of changing her life."[7]

Having overcome the fear of instituting an action, there were other practical problems which also had to be dealt with. The summons forms had to be completed in English and not all the women were fluent in this language. Moreover in claiming maintenance, as most of those in the customary sample did, certain details were expected of them, such as the husband's salary and address and a breakdown of their expenses, information which they themselves might not be aware of.[8] The women were also possibly further constrained by the fear that if they sought to take their husbands to court this would scuttle all possibilities of a reconciliation. Of this Kasonde- Ngandu contends:

"Another plausible explanation as to why women seem reluctant to utilise the court system is tied to their central concern for relationships. A number of women prefer settling disputes outside the court because their primary wish is not to win at the expense of the other. They feel comfortable with a judgement based on mutual agreement between the parties where both parties emerged satisfied."[9]

This fear of jeopardising relationships was not an unfounded one, for as one of the women said of her relationship with her husband after claiming maintenance:

"The last time I went to see him, he refused to give me any money saying that I had reported him so I was now his enemy. He said he would only give me money once the matter had been adjudicated and he had been told to pay." Ms Mavhuna

Other factors which contributed to the access problem included long queues and unfriendly or unhelpful court officials. At the Maintenance Court maintenance can only be claimed on Wednesday or Thursday. Limits are put on the number of people who can institute a maintenance action on any one day so people have to come to court very early. Another factor was that all cases in the Community Court were set down for 8.30 am by which time all the litigants had to be at the court. However, depending on the number of cases one could be at court for a long time before one's case was finally heard.[10]

On the basis of her research in Zimbabwe, Cheater noted that those women who finally did get access to the courts had the following characteristics:

"...the woman's defence of such rights is supported by male agnates and or her husband's family such that she is <u>not</u> jeopardising her social entitlements, that she comes from a family with experience of litigation, that the woman herself is reasonably well educated, able to speak English, with sufficient self confidence to speak to lawyers as well as to appear in court if necessary; that she has experience of dealing with bureaucracies, that she has access to the money needed for litigation and that she feels very strongly that any reasonable person would regard her case as valid whatever

the legal system."[11]

For Zander, what determines whether or not a person will get access to law is whether that person has contact with a knowledgeable lay person.[12] Zander's theory is borne out by the fact that the vast majority of interviewees cited significant "others", whether they be friends, neighbours or relatives, as being the people who had put them in contact with organisations such as the Citizens Advice Bureau (CAB) which ultimately led to law, or who encouraged them to search out and use the law for themselves.

8:3 Why do People Use Courts?

Perhaps the most telling thing to emerge from the data was the fact that most of the claims of the women in the customary sample were "child centred". They related to the care and custody of the children of the marriage. This would accord with the third party or "victim" theory discussed in chapter six which was that it was only when the interests of an innocent third party, in this case the children, were threatened that the women took action. It is significant that all but three of the women in the customary group interviewed had children. The significance lies in the fact that the mothers came to court to protect the interests of their children. Of the three women two were childless and were themselves being divorced. The third, an older woman, had herself been divorced because she could not have children (she had actually had two one of whom had died) was at court over property. All this would seem to bear out the assertion made by Eekelaar and Maclean that those with children are more

likely than those without children to use legal services.[13]

In addition to using the courts to get maintenance for their children, the women used the courts in disputes over property. This would seem to coincide with Mayhew and Reiss's theory that people mainly seek legal services in a bid to "acquire, maintain or increase property".[14] This was confirmed in an interview with one of the lawyers who said that most contested actions were over property entitlements:

"If the joint estate is a very large one then normally the source of major dispute is where both parties are trying to get a piece of the cake." Mr Arnott

One of the responses to the difficulties of gaining access to the courts has been the provision of legal aid. In Zimbabwe, the charitable model of legal aid operates. Here the legal practitioner in private practice provides free legal assistance to those unable to pay. Administered by the Registrar of the High Court, the bulk of legal aid in Zimbabwe is allocated to matrimonial actions.

8:4 Legal Aid In Zimbabwe

The formal provision of legal assistance to the poor in civil matters is in the form of the *in forma pauperis* (ifp henceforth) procedure. The criteria which must be met before a person can qualify for such assistance are stringent. To obtain assistance for an action to be instituted in the High Court a person has to prove:

a) that there is a good cause of action

b) that, excepting household goods, clothes and tools of trade, the applicant does not have property to the value of $400 and that (s)he will not be able to provide such sum from his or her earnings.[15]

This information, which is given in affadavit form, is handed to the Registrar of the High Court who satisfies himself that *prima facie* the applicant qualifies for assistance. On the practical application of this provision, the Registrar said:

"It is with regard to property that most of the discretion is exercised. Like we will ask if the applicant has jewellery. If he or she has expensive jewellery, then we would be loathe to assign a practitioner to act for that person. They should dispose of some of that jewellery first...The reason that we apply the means test stringently is that with the advent of Independence a great number of the country's population have come to know of the existence of the ifp facility so we have to try to limit the numbers."

Having satisfied himself that the person qualifies for legal aid, the Registrar then selects the name of a legal practitioner from a Law Society roster and sends the applicant to the legal practitioner. The legal practitioner inquires into the person's means and the merits of the case, and if satisfied that the client has a case, takes instructions. The legal practitioner is required to sign a form saying that she is acting gratuitously. The clients were also strictly vetted at this stage so that Mrs Silefu said of her experience of trying to get legal aid:

"On 12 April this year I went to the High Court and they gave me a firm of lawyers. I went to see them and they told me to write my life story. Unknowingly, I wrote about the money I make from trading. They said that I wasn't entitled to legal aid. My three children who are working contributed and gave

me the $500 needed for the deposit."

The clerks working in the legal aid section cited another case:

"This lawyer recently sent a client back because he said that the client had a table and four chairs whose value exceeded $400 so he was not entitled to legal aid."

Although the client does not pay the legal practitioner she is required to pay for service of process, the cost of which can in itself be prohibitive. One of the legally aided women in the survey incurred the following expenses:

"The total cost was $105 which I paid. It was for the summons and for a copy of the decree *nisi*. It was also for the telegrams which the lawyer sent asking me to come to sign the various papers." Ms Ncube

If any costs are awarded in favour of the legally aided litigant then the legal practitioner is entitled to receive them. Once she has taken on the case, the legal practitioner cannot withdraw, settle or compromise the case without the leave of a judge. This offers some protection to the client.

It is generally acknowledged that matrimonial actions make up by far the largest proportion of cases handled in terms of the ifp procedure. More significantly, women comprise the main recipients of legal aid so that figures kept by the High Court legal aid office for the period January 1985 to August 1990 showed:

TABLE 9 - Figures for Civil Legal Aid Granted in Zimbabwe

January 1985- August 1990.

	1985	1986	1987	1988	1989	1990
Applicants	230	233	233	190	313	274
Matrimonial	225	231	221	165	279	214
Male Matrimonial	4	0	6	7	14	6
Women Matrimonial	221	231	215	158	265	208

The issue of access to courts cannot be considered without looking at the role played by lawyers.

8:5 Lawyers

The role of the lawyer in the divorce process is analogous to that of the *munyai* in a Shona marriage. She is a gatekeeper and negotiator.[16] Familiar with the client and having specialist knowledge about the workings of the courts, the lawyer brings to bear her influence and experience to try to obtain legally acceptable solutions to the problem.[17] Mnookin and Kornhauser identify five main tasks performed by the lawyer. She acts as a source of information, a counsellor, a clerk, a negotiator and a litigator.[18] Ingelby and Galanter argue that the last two roles cannot be compartmentalised, hence the two talk of the lawyer being involved in a process of litigotiation. Galanter notes:

"The negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it is litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call litigotiation, that is the strategic pursuit of settlement through mobilising the court process." [19]

While lawyers are the intermediaries who help people to

translate their problems into legally recognisable claims, there appears to be a difference in the way that lawyers and clients perceived both the problem and the manner of resolving it. Lawyers saw themselves as being available to provide legal expertise and to reach a speedy resolution of the problem on terms which were most favourable to their clients. However clients appeared to want the lawyer to play a counselling role as well.[20] Mrs Nhamo was one such client:

"I needed someone to counsel me rather than to interpret the law as it stood."

It is this lack of fulfilled expectation between the lawyer's perception of her role and the client's expectations which leads to dissatisfaction and unhappiness in the lawyer/ client relationship.[21] In the divorce process, the lawyer tries to concentrate on the dissolution of the marriage, refusing to engage in the client's reconstruction of the marriage and its failure.[22] In so doing the lawyer is not necessarily being insensitive to the client's needs. Rather:

"The lawyer may be trying to explain to his client that in the long run she is going to be more interested in the economics of settlement than in the vindication of her immediate emotional needs. In his view, legal justice, although narrow is justice nonetheless, and his job is to secure for her the best that can be achieved given the legal process as he knows it."[23]

Indeed this "long sighted" view of the lawyer's role was echoed by one of the legal practitioners whom I interviewed when he said:

"My main objective when I deal with a case is to reach an amicable settlement quickly, and to see that no one loses out. When a person comes to consult you they are invariably emotional and depressed. They want to get the divorce through

as soon as possible or to give up altogether. Your job is to ensure that they don't give up everything. You have to draw a balance between getting it through quickly and making sure that the client doesn't get a raw deal. You don't want the client to come back to you three years later and say `why didn't you tell me that I was entitled to $20000?'" Mr Arnott

Ellman points out how in trying to secure compliance with her interpretation of the way in which the problem should be solved, the lawyer uses a combination of coercion and manipulation.[24] Griffiths notes that:

"On the whole, lawyers present the way a legal provision is generally applied in practice rather than the provision itself. Lawyers probably effect the most important transformation in the law simply by keeping their clients uninformed."[25]

Although lawyers are said to create and encourage conflict, more often than not the lawyer seeks to reach a settlement by consensus and negotiation rather than litigation.[26] Not only does this minimise conflict between the parties themselves, but it is also to the lawyer's benefit. Ingelby points out:

"...the greater costs incurred by contentious negotiations are not necessarily reflected by greater profits. Less contentious cases take up less time and are less demanding on the solicitor. `Client satisfaction' seems influenced to some extent by the amicability of negotiations and a satisfied client is more likely to pay the bill promptly.."[27]

It often happened that lawyers worked out divorce settlements for their clients <u>before</u> getting to court, thus leaving the courts to rubber stamp the parties' wishes as expressed in the draft orders presented before the court. To be able do this, the lawyer had to be in touch with the lawyer acting for the other party. One of the lawyers whom I interviewed said:

"Well, a lot of the time the defendant also has a lawyer, so you will draw up a consent paper and send it to the other

side. The other lawyer will scrutinise it and then advise the client whether or not he should accept. Occasionally, like if the parties are very amicable, we will represent both...but we always point out the pitfalls of this to the other client." Miss Le Roux

While this arrangement worked when both parties were represented, Burman points out the drawbacks which might arise if the other party did not have a lawyer to peruse the settlement:

"First the legal representative might conduct the conference in such a manner as to expose the defendant's claim and preferences without disclosing those of his client. This knowledge places his client at a distinct advantage. Second the legal representative may fail to clarify to the defendant the limits within which negotiation take place - that is what the defendant could expect to achieve if the matter were pursued to court. On the other hand, in order to encourage a speedy and "reasonable" settlement, the defendant will undoubtedly be informed of the dangers of going to court. Third, the legal representative may, overtly or by implication, lead the defendant to believe that the outcome of the case is so uncertain that any settlement would be preferable to a court case. The defendant's attitude may be exposed, thereby placing the plaintiff in a stronger position. Fourth, the economically disadvantaged defendant who faces the complexities and difficulties of the legal aid system ... and who is unable to employ an attorney even for negotiation cannot risk the litigation costs which Mnookin identifies as a major bargaining factor."[28]

One of the factors mentioned by Johnson as "cushioning" people who were legally illiterate against the fears and uncertainties of instituting an action was having a lawyer to act on their behalf.[29] In the customary group only two women reported having employed lawyers to assist them although a third said that she had intentions of hiring a lawyer. One of the two who had engaged the services of a lawyer did so to pre-empt any injustice being done to her.

Many of the women in the customary group said that they did not feel particularly disadvantaged at not having had a lawyer

to assist them. Perhaps this was because the Community Court procedure was designed to be so simple as not to require the services of lawyers. However, besides the question of the cost of hiring a lawyer, the other reason given by some of the women for not getting a lawyer was that they perceived their problem as being a <u>private</u> one, between themselves and their husbands. They viewed the lawyer as an interloper and her involvement in their case as unecessary:

"This is such a simple case that you don't even need a lawyer. You just come and see it for yourself." Ms Radebe

Those who felt disadvantaged had been to court before and had encountered their husband's lawyers. They felt that their cases had been hampered because they had not had lawyers to represent them. They felt that the husband was at an advantage because he had a legal expert to assist him.

"I am only afraid that since he has a lawyer he is at an advantage. His lawyer can confirm what he says. They have already managed to have my case dismissed... Perhaps they will cheat me as they have already done with his lawyer. It is the lawyer who suggested that he claim the children and that he say he has a big house and can look after the children...I want someone to represent me because the last time I went the Presiding Officer was very short with me and asked if I had never been to court before." Ms Tsorayi

As the procedure for getting a civil marriage dissolved was complicated, women in this group needed lawyers to present their cases before the High Court. Over two thirds of women with civil marriages reported having had lawyers to represent them. Tomasic lists seven criteria in the client's assessment of their lawyers. These are: promptness in taking care of matters, interest and concern about the client's problems, honesty in dealing with the client, explaining matters fully to the client, keeping the client informed, paying attention

to what the client had to say and being fair and reasonable in charging for the services rendered.[30]

For women in the civil marriage group, satisfaction with the lawyer's performance was linked to the lawyer having obtained a favourable settlement for the woman. Mrs Takaenda's lawyer managed to secure a half share of the matrimonial home valued at $275 000 as well as the contents of the home and two smaller houses owned by the husband:

"This man is intelligent. If I didn't have a lawyer, I wouldn't have won anything from him. I am very happy with her and the work she did for me." Mrs Takaenda

The total cost to the client of prosecuting the action was also a factor in the client's satisfaction with the lawyer, so that Mrs Takaenda continued:

"I must tell you she wasn't the first one I went to - I had on my own tried two or three others. I asked their advice but before doing anything they would say give us $900 or this amount of money before they could start the procedure. When I went to Mrs Brighton she didn't ask for money straight away."

It was lack of communication between lawyer and client which Tomasic cited as having been the chief complaint put forward by clients about their lawyers.[31] It was striking that the women in the civil marriage group who were legally aided were the most dissatisfied with the service that they were receiving from their lawyers. They complained that their lawyers did not keep them appraised of developments in their cases.

"I can't really complain since I am not paying them. They seem to act only when I phone them and I can't push them too far." Ms Gogodi

"I don't want to complain but I don't feel like he is doing enough. Although the garnishee was supposed to go through at the end of June, I haven't heard anything from him. I am reluctant to call him because he might think that I am being too pushy. I remember I went to see him at the end of March and I said that I had not heard from him in a long time. I told him that I was not receiving any money and he said that as he had not heard from me in a long time he had assumed that we had sorted things out between ourselves. I wasn't impressed. I mean if he sees that I am quiet then he must find out what is going on. I don't want to have to push for information. I told him that I feel he should phone me and tell me what is happening." Mrs Kudita

It appeared that non fee paying clients were not treated as well as fee paying clients. Moreover their cases were generally assigned to new law graduates. This appeared to be the view of both clerks working in the legal aid department:

"Lawyers know that service to the community involves no payment. If a person is difficult there is no purpose in pursuing the case. But if that person were paying fees then he might take more time over the matter. Generally lawyers don't devote as much time to ifp (*in forma pauperis*) clients as they do to fee paying clients" The Clerks

Echoing this view, a judge stated that:

"Yes, it is true that the relatively inexperienced counsel are given the *pro deo* and *ifp* cases to do. Your good practitioner will tend to be busy. He just doesn't have the time to be helping the poor. They need to make money just to survive." Judge

A discussion of the role of courts as the institutions responsible for formal dispute resolution is imperative.

8:6 Courts

On the role and function of the courts Galanter notes that:

"The principal contribution of courts to dispute resolution is providing a background of norms and procedures against which negotiation and regulation in both private and governmental settings takes place. Courts communicate not only the rules which govern the adjudication of the dispute, but possible remedies and estimates of the difficulty, certainty and costs of securing particular outcomes."[32]

If one looks at the role of the courts in divorce proceedings

as being that of equalising or redistributing economic resources between the parties, one is forced to challenge the assumption that courts exist in order to resolve disputes.

The word dispute connotes conflict but more often than not the parties in the group were not in conflict. This was most clearly pronounced in maintenance actions. Once a man had acknowledged paternity of the children, which most men did without a quibble, it followed that he realised and indeed acknowledged that he was under both a legal and a moral obligation to support his children, so in effect the parties, husband and wife, were in agreement rather than conflict.

"We are living together. He asked me why I had come to report. I said it was because he was not buying any food or looking after the child. He just laughed and kept quiet. We still get along." (she laughed) Ms Nyapadi

All that was needed was a third party to tell them what was a reasonable amount of support. They were seeking regulation which was provided by the court:

"He did not deny that the children were his. He merely said that the amount I was asking for was excessive and that he could not afford to pay it. I explained why I needed that much. The court looks at your payslip. They don't just give you any amount." Ms Gute

All this would point to the fact that perhaps the time has come for us to reconceptualize our notion of law and the role and function of courts as being primarily that of a management of change and not really conflict. Perhaps the reconceptualization could start with a re-definition of the adversarial judicial system with its emphasis on opponents who come to court and engage in battles which by their very nature

must produce a victor and a vanquished. However, it is of course possible that in other actions, such as custody and property distribution, the parties may very well be in conflict.

8:7 Satisfaction With The Courts

Satisfaction with the courts being a subjective assessment was very hard to measure. Most of the women interviewed said that they were happy with the manner in which their cases had been handled. Further inquiry revealed that women were happy with the treatment they had received from court officials and the Presiding Officers. There were those who felt that they "had had their day in court", meaning that their cases had been properly adjudicated, and were also happy. What did emerge was that satisfaction with the courts was linked to obtaining the required relief speedily. On average it took less than a month between instituting the action in the Community Court and getting to trial. Where the judgement had been enforced without too many problems the women pronounced themselves satisfied.

Those who were unhappy complained about rudeness of officials, long queues and delays in getting to court and most importantly frustration at not being able to effectively enforce the judgement.

"He didn't pay maintenance in July even though the garnishee order went through in June. I think there's bribery. Even if you get a garnishee order and they tell you when to come the money still won't be there." Ms Rinashe

"The Magistrate said that he would deliver the judgement later. I still have not heard anything. I will go back to the Maintenance Court to check on the maintenance. Maybe I

will try suing in a different court because I don't like the way that Maintenance Court works. How come I am still waiting yet others have their judgements delivered immediately? Others who sue get instant satisfaction." Ms Marovu

Women in the civil marriage group were more ready to complain.

In his study, Tomasic observed that:

"Higher socio-economic groups were more prepared to be critical of legal delays and court administration than were lower socio-economic groups."[33]

Some women in the customary group continued their efforts to seek help in saving the marriage in the court. The fact that the women often sought counselling from the court for their problems would indicate that they saw the courts as playing a conciliatory role.[34] The table below shows that 20% of the women in the customary group approached the Community Court for counselling.

TABLE 10 - Type of Claim Made

Claim	Customary (76)	% (100)	Civil (21)	% (100)
Counselling	15	20	-	=
Divorce	7	9.21	16	76.19
Property	6	7.89	19	90.47
Custody/ Access	15	19.73	17	80.95
Maintenance	63	82.89	17	80.95
Variation	11	14.47	2	9.52
Arrears	4	5.26	3	14.28
Garnishee	8	13.33	3	14.28

As the majority of women in the customary group had unregistered customary law unions, it was unnecessary for them

to go to a court of law to obtain a formal divorce, hence the low figures for women seeking divorce. Similarly the disparity between the two groups in relation to property claims is a reflection of the fact that those in the customary group did not have sufficient property to warrant going to court. The operation of the dual system of law also operated against women with customary unions for whereas under general law the division of property for registered marriage at divorce is at the court's discretion, under customary law all but two categories of property are given to the husband.

Given the fact that lack of support was cited as being the main grievance, it was not surprising to find that maintenance formed the biggest category of claim. The two groups were distinguished by the fact that, generally, women with civil marriages only asked for maintenance for the children and not for themselves, but those in the customary group requested, but did not always receive, maintenance for themselves although they were awarded maintenance for their children. The various claims made will now be considered in turn.

8:8 ACTIONS INSTITUTED IN THE COURTS

8:8(a) Counselling

One fifth of the customary sample reported having approached the court for counselling. In seeking counselling, the vast majority wanted to a clarification of the state of their marriage from the husband.[35] It was a final attempt at reconciliation. The women were at pains to point out that

they were not seeking a confrontation with their husbands. As Mrs Gatsheni said:

"It's not really a judicial dispute, its just a request for my husband to come to court so that we can be counselled and the whole matter sorted out."

Often the court took on the role of social counsellor so that a woman who had been rejected by her husband ostensibly because she could not have children (she had had two one of whom had died) reported:

"In November 1988 I went to report the matter. I said that my husband has left me and now he returns and frequently beats me to make me leave. The matter was heard in November. The court said that he should live with me because I was his legal wife. They said that having children was secondary. What was important was the love between the couple in the home. They said that since I had had two children he could not say that I was barren. The court personnel treated me very nicely." Ms Chikumira

However there were times when the courts refused to assist and this was usually because they could not fit the request for assistance into legally recognisable categories. The general approach was that the person was asked to fit the request for counselling into some legally acceptable framework first.[36] Thus Mrs Rooney said:

"When I reported the matter, I asked them to counsel my husband and me because he was accusing me of being a prostitute and a witch. These were merely suspicions. He had never found me doing any of those things. They said that they could not assist me unless I was making a specific claim. They said that I should ask for damages which sum they could write on the summons as the claim."

For those who had failed to reconcile a formal divorce seemed to be the only option.

8:8(b) Divorce

This part looks at the formal divorce obtained from a court of law. As customary law unions are not registered there is no need to seek a formal divorce, the marriage being dissolved by members of the two families. It sometimes happens that even those with registered marriages do not go to court to get the marriage formally dissolved. This is because, unlike in the West where one of the purposes of divorce law is to secure a change of status to enable a person to remarry, in a polygamous state where the presence of one wife is not a bar to the taking of another an official change of status becomes less important. Often too, there is *de facto* polygamy so even if men are married in terms of the Marriage Act which permits only one wife, they marry another wife under the customary law.[37]

In the customary group a quarter of the people with registered customary marriages reported having been formally divorced. Generally the women in the customary group were reluctant to be seen to be acting to end their marital relationship hence those that mentioned divorce did so in the context of the husband having been the one who had asked for the divorce. Of all the women with unregistered unions, only one had approached the court with the request that the marriage be dissolved. Although the summons to her case read "request for separation from an unregistered customary law union on the grounds of desertion" this was merely a legal construct for she articulated her problem thus:

"I want him to tell me where we are. He should tell me what he wants. If he no longer wants me then he should tell me." Ms Zvinavashe

This contrasted with women in the civil marriage group where over a third said that they had initiated the divorce.

The main statutory ground for divorce, irretrievable breakdown of marriage, is inherently contradictory holding that the proof of fault is no longer a requirement on the one hand, yet demanding proof of fault as evidencing breakdown. It also fails to satisfy the need felt by most of the women interviewed for fault finding and self vindication. Sarat and Felstiner point out the problems with the no fault system of divorce:

"If the intent of no fault reforms was to reduce the tendency of the legal process to encourage acrimony between otherwise friendly divorcing spouses (Weitzman 1984) its effect may also be to make the legal process inhospitable to those aspects of their divorce that may seem more important to them."[38]

This legalistic approach was the reason for the dissatisfaction of women who had customary marriages with the court process. Three of the women with registered customary marriages being divorced by their husbands expressed shock and outrage at the proceedings.

"We only came to court once for the divorce hearing. They did not find out the cause of the problem. We merely uttered a few words. We just said that our problems were those of the aged. They went back a long way." Ms Chikumira

Another could not understand why she as the "innocent" party was being called to court to defend the divorce application:

"Last week I received a summons. He is asking for a divorce on the ground of long separation...I want to counter-claim because I was the one who was chased from the house. I am not the defendant. He is the defendant. He is the one with the problem. I want the house back." Ms Masimirembwa

As well as formally dissolving the marriage, there were ancillary matters which had to be dealt with by the court.

These included issues of custody, maintenance and the equalisation or re-distribution of property as between the spouses.

8:8(c) Property

On the basis of his research on the work done by registrars, Eekelaar contends that the two issues affecting the re-distribution of matrimonial assets are settlement and compensation.[39] The aim of settlement is that on dissolution of the marriage each partner should take out what they put in, whilst compensation seeks to mitigate any prejudice a spouse may suffer as a result of the dissolution of the marriage usually caused by having to look after children.

Within the Zimbabwean context it seemed that the first of these issues was given precedence so that women who had helped to acquire property by direct financial contribution were more likely to be awarded property. This comprised the few women with civil marriages. The former wife of a self made businessman said:

"I told the court that before ending my marriage, I wanted my property back. I said that I wanted my house and furniture back. I said that I wanted a share of all the businesses which I had helped to build." Ms Chuma

Although one talks of dividing property the reality was that very few couples owned property of any substantial value, the household furnishings comprising the bulk of the property.[40] 71% of the women with civil marriages said that there had been disagreement over the sharing of the movable property of the marriage. This contrasted with the 42% who spoke of disputes

over the matrimonial home.

Burman contends that in the urban areas of South Africa, the house, whether or not the parties own it outright or rent it, forms the most valuable asset.[41] Zimbabwe mirrors this position, for with growing urbanisation, accommodation is difficult to find and the house is therefore worth fighting for. In the civil marriage group the house was the main issue in contention. It was difficult to ascertain from the survey which sections of the Matrimonial Causes Act the courts were applying. However, it seemed that in allocating the matrimonial home, the interests of the children were accorded priority so that generally occupation of the house followed the party with custody.[42] There was however a conflict of interests between the provision of housing for the children and the custodial parent, usually the mother, and the husband's claim to a share in the house. One way of circumventing this problem was for the wife to forego claiming maintenance in return for the husband's share of the house.[43]

"He then filed for divorce. He asked for half of the house and some of the moveable property. I refused and said that if that was his attitude then I wanted a part of the car which he bought after I had left. Eventually he agreed to give me the house and custody of the child. I decided to forego asking for maintenance and I said that he could have all the property that was in the house." Ms Mandiopera

Another was by using the Mesher order whereby the wife was allowed to live in the house until the youngest child reached majority.[44] This was the strategy adopted in Mrs Thebe's case:

"I didn't want anything. All I fought for was the house. I managed to get the house. The agreement was that I would stay in the house until my last born is 18."

The position was somewhat different for women with customary marriages. Under customary law a woman is, on divorce, entitled to her *mavoko* property usually comprising kitchen utensils and the motherhood beast (*mombe ye umai)* if she has a married daughter. Most of the rural women did not question this entitlement. They saw it as their natural lot and were grateful if they were given anything at all and unquestioning if they were not. Those who did express dissatisfaction generally complained about their unharvested or unsold crops which they had been made to leave behind.

"He made me leave the children. I also left 100 bags of maize. He wanted to take them to the Grain Marketing Board so that he could be the one to get the money. He left it outside and it got rained on and rotted. I left without any property." Ms Chipangura

Looked at objectively, it is difficult to see what property rural women could have asked for. The "house" would be part of her husband's compound. She could not demand it for herself for she could not continue to live in his village after the dissolution of the marriage. This left the livestock. Some families own it in common so it would be difficult to separate his cattle from those belonging to the rest of the family. Even if it were possible, the practicalities of moving the livestock over considerable geographical distance would preclude her from taking the cattle. Arguably, she could try to sell the cattle. Although technically possible, it would be a difficult goal to achieve given the constraints of the rural economy. Needless to say the woman would need considerable mental and moral stamina to withstand all the obstacles which would no doubt be put in her way.

Despite the provisions of the Matrimonial Causes Act which gives the court greater discretion in the distribution of property, Community Courts still seemed to distribute matrimonial property in terms of the customary law. An example of this is the following case study. The subject, Mrs Nhamo, aged 39, was a University graduate who earned Zim $3600 per month gross ($1800 nett - beside income tax, other deductions included rent and telephone). She was married to a high-ranking civil servant whose income was equivalent to her own. Also a University graduate, the two had married shortly after Mrs Nhamo had completed University in 1977. The marriage was contracted in terms of the African Marriages Act. They had three children, two boys and one girl. They had lived amicably until about 1984-85 which is when Mr Nhamo announced that he had impregnated another woman. He was remorseful and offered his apologies, and promised to do better in future. However this was not to be, for he had a second child with the same woman. The problem was exacerbated when Mr Nhamo moved the other woman, now pregnant with the third child, into the matrimonial home. He told Mrs Nhamo that if she did not like it then she could leave. It was only when Mrs Nhamo approached a lawyer about the possibility of evicting the interloper from her home that her husband commenced divorce proceedings against her in the Community Court.

Although she did not contest the divorce per se the question of the division of the matrimonial property was more complex.

The two had purchased a house in the suburbs. As it was secured by a Government guarantee obtained by Mr Nhamo by virtue of his position in the civil service, it had been registered in his name. Mrs Nhamo had however contributed to the purchase and upkeep of the house. The two also had other moveable property which they had acquired jointly. On the question of the court's distribution of the property she had this to say:

"The most painful thing was about my contribution to the house. For most of the time it was my responsibility to look after the house. The house needed a lot of maintenance and I did a lot of running around. I had to tell them how much I had put into the house because the house was not mine. What was my understanding of my contribution? I said that maybe I was silly but at the time of buying the house I should have put my name but I was so involved in the relationship that I never anticipated that it would come to this. The nasty lawyer said that the house had been bought on a Government guarantee and there was only one civil servant in the house. What claim did I have?

When I thought of the amount of time I spent working for that house and the amount of time I spent on the garden... I paid all the salaries for both the gardener and the housekeeper. All these things, yet my own contribution to the house was put at $400. You get to the point where you can't argue anymore. Maybe I should have gone for an experienced person. (lawyer)

My own perception was that going to court was a complete waste of time because the whole thing was settled in my absence. They came with the package already worked out... It was the most painful experience, but anyway when all is said and done, it was made very clear to me that if I got anything out of the marriage, it would be a favour from my husband. He produced receipts for the things in the house - but they were all in his name so it looked like he had paid for everything. Who would ever have thought it would come to this?

From my marriage I lost everything, literally everything. I was given the children but no home. I was given the children but nothing else - except a stove which wasn't working at the time, a dining room suite with seven out of the eight chairs broken, a bed with half the base broken and some very personal things. The bed was bought the year that he went away (to Britain for a postgraduate course in 1978-79) so I was paying for it; the fridge was sold and another one bought and he got it as personal property, he got the lounge suite. We had gone to a professional curtain maker for the curtaining and he got all the curtains in the house. How was it explained to me? I

can't remember what was said. I was to leave the house..."

It is difficult not to infer that the Presiding Officer was biased in favour of the man in this case. He failed to look at the "respective contributions" of the parties in acquiring matrimonial property, choosing to award all the property of any substantial value to the husband. There was no acknowledgement of both the wife's financial contribution in the acquisition of the property nor of her role in looking after the home and the children in the husband's absence. Although she had contributed to the upkeep of the house the wife was not given a share, nor was she compensated by being awarded spousal maintenance. Perhaps the most shocking aspect of this case was giving the matrimonial home to the husband although the wife was given custody of the three young children of the marriage.

On the relationship between maintenance and property awards Weitzman has noted that given the low levels of matrimonial property owned by the spouses:

"...the primary financial issues at divorce, particularly for women and children are those of spousal and child support"[45]

8:8 (d) Maintenance

Zimbabwe has some of the most comprehensive laws on maintenance in both Central and Southern Africa[46] yet, like

other countries, both developed and developing, it suffers in trying to effectively enforce maintenance orders.[47] Although the legal provisions for entitlement to maintenance were clearly laid out in various Acts of Parliament, putting the law into practice proved to be particularly difficult.[48] However figures of women claiming maintenance would indicate that despite these difficulties women still approach the courts for assistance.[49] This is because the majority of women are not in formal employment and therefore rely on their husbands or fathers of their children for support. If this support is not forthcoming then they are left with no option but to sue for maintenance. Furthermore mothers generally retain custody of their children on divorce or separation, and are therefore in need of financial assistance.[50] It was for these reasons that maintenance formed the most popular claim.

Zimbabwe, unlike Britain, or the Scandanavian countries, does not have a comprehensive welfare scheme to which the women could apply.[51] The lack of a welfare scheme becomes important when discussing enforcement for without state benefit to fall back on the women were more pressed to ensure that they received money from their husbands and fathers of their chidren. Moreover the women were further disadvantaged in not having the state machinery to collect the maintenance on their behalf as is done in Australia via the tax system.[52]

The women in the customary group were linked by one common denominator, that is that all but three of them had children. Of the 63 (83%) who came in search of maintenance, 62 were

looking for their children to be maintained. Similarly 80% of women in the civil marriage group were claiming maintenance on behalf of their children. No doubt ignorance about their statutory rights was one of the reasons why the women did not think to ask for maintenance for themselves. This demonstrates the generally held belief that maintenance is for the children and not the wife.

Although the law states that a man is liable to maintain any woman to whom he is married in terms of the customary law, the courts refused to enforce this provision.[53] Women who asked for maintenance for themselves were met with the response that maintenance was for the children and not the mothers. They were told that the only people who were entitled to ask for maintenance were those with registered marriages:

"I was told that maintenance was only awarded to women whose marriages were registered. They told me that maintenance was for the children and not the wife. He (the Presiding Officer) said that there was no law which said that a man must pay his wife maintenance." Mrs Mundondo

As this was the policy adopted by <u>all</u> the Presiding Officers whether urban or rural it would seem that it was the universal practice to disregard the written law. It is not at this stage known whether it was an administrative directive from the Community Court Inspectorate, or whether it arose in the Presiding Officers' ranks out of the frustration of trying to define what was a customary law union.

Discussing the controversy over maintenance, Smart says that there is resistance from men as husbands towards giving the wife maintenance.[54] This resistance is particularly marked in

the Southern African context where a man pays bridewealth for his wife. If one were to carry the contractual analogy to its conclusion, then, on payment of the *lobolo*, the "purchaser", being the husband, gets both possession (the formal handing over of the woman) and "ownership" (full right and title) to the woman. If that is the case then it seems illogical that one should be expected to pay some more for the upkeep of one's possession. Added to this is the fact that most of the men were in the lower income bracket so that they had trouble maintaining themselves without the added burden of paying for a wife from whom one was separated.[55] A court orderly at the Community Court expressed the resentment felt by many men when he said:

"In our culture there is a belief that if a woman has left my home, I am not under any obligation to maintain her. If she still wants to be looked after she must stay at my house. People still believe that yet the law has changed."

Although four (19%) of the women with civil marriages asked for maintenance for themselves, just under half of the group said that they had decided against claiming maintenance for themselves. Of those not claiming, one said that she had been led to believe that she was not entitled to any:

"I don't get any maintenance. I haven't seriously tried claiming because I was told that those divorced women who aren't working get it. They tell me that they will take into account the fact that you are working." Mrs Takaenda

The rest of the women did not claim maintenance as a matter of principle. They did not want to feel dependant on the husband. Not surprisingly they all had well paying jobs:

"I chose not to be maintained. I didn't want him to come and harass me because he was maintaining me." Ms Gogodi

"I didn't want anything from him. I just want to put it all behind me" Ms Chengeta

There was also a general reluctance to pay maintenance for children, especially if the man had paid *lobolo* for the woman.[56] This is because one of the consequences of paying *lobolo* is that rights in the children are vested in the male line so that the children are transferred to the husband's family. It was assumed that in the event of the marriage breaking up, the father would have custody of the children of the marriage. If he did not then he was expected to pay *chiredzwa* or a rearing fee of one cow to his former father in law as compensation for having raised his children. This he did when he went to collect the children. That this customary practice had been overridden by statutory intervention was a great bone of contention. Speaking to the orderly at the Community Court he stated that most men did not understand the change which was seen as a deviation from the customary practice:

"In our custom, the concept of maintenance does not exist. What we know is that one pays *chiredzwa*; and that is only paid when he wants to get the child. Now you have *chiredzwa* (maintenance) being given to the woman. How can the mother of a child receive *chiredzwa* in her own right? You see, say the woman has been receiving maintenance. The father now wants to take his children; is he expected to pay an additional *chiredzwa?* It means that our old customary law has been destroyed. They are now taking the white man's law." The court orderly

Part of the resistance from men against paying maintenance is the fact that they feel that the women will use the children's money to buy cosmetics for themselves or to entertain men friends.[57]

"It was only when I claimed for maintenance that he came to

contest. I asked for $250 per child. We went to the Maintenance Court and he said that I just wanted the money so that I could look after my boyfriends." Ms Ncube

Sometimes the women were themselves scared of claiming maintenance being under the mistaken assumption that, if they did so, their children would be taken away from them. Also many still subscribed to the old customary law view that the father was entitled to custody of the children once they reached the age of seven. Many women felt privileged at being allowed to look after their children at all. They did not wish to antagonise their husbands by claiming maintenance.

"When I asked for support from him, he would say that if I was having problens looking after the children I should bring them to him to look after. I stayed quietly." Ms Marovu

The criteria for assessing the amount of maintenance to be awarded are set out in section 6(4) of the Maintenance Act, where it is provided that in granting maintenance the court shall have regard to,

a) the general standard of living of the responsible person and the dependant including their social status
b) the means of the responsible person and the dependant
c) the number of persons to be supported
d) whether the dependant or any of his parents are able to work and if so, whether it is desirable that they should do so.

The decision that the court has to make is obviously based on the economic position of the respective parties. Mrs Samkange and Mrs Chipangura, both with civil marriages, had access to widely differing resources. Mrs Samkange had three children all under ten years of age. Mrs Chipangura had seven children

all of whom were still in school although two were over the age of 18. At the time of claiming she was looking after four of the children.

"I sued him for maintenance in August last year. I asked for $750...I didn't ask for any money for myself - basically because I didn't want to. I just listed the children's expenses. We were given $600 per month. It wasn't a bad decision but maybe we could have gotten more." Mrs Samkange

"The lawyer suggested that the amount be increased from $50 to $80 for the children and myself. This $80 was for the two children. It did not cover the two who were already over 18." Mrs Chipangura

As most women are not in paid employment, the court generally only has the husband's salary to divide.[58] In trying to ascertain how much a man was obliged to pay the Community Courts seemed to take into account the man's obligation to the wider family network. In Britain and the United States, much of the debate centres around whether in computing the amount of maintenance to be paid to a man's first family, regard should be had to his second and subsequent families.[59] In Africa the position is complicated, not only by the acknowledged social responsibility to look after one's wider family, but also by the existence and condonation of polygamy.[60] A man with more than one wife is legally obliged to look after each wife and her children equally.

Mrs Masimirembwa had been married in terms of the African Marriages Act. The couple did not have any children and it was for this reason that her husband had divorced her. He had started living with another woman. In May 1990 she claimed $250 in maintenance for herself. This was the court's response to her claim:

"They said that he must look after his first wife. They said that they would take into consideration the fact that he had another wife whom he had to look after. They said he should pay me $70 per month."

Added to this burden is the responsibility faced by most urban men to remit money to their relatives in the rural areas. All this means that the very limited resources are even more thinly spread. A case in point is that of twenty two year old Ms Desai who had been impregnated by a divorced man with two children from his previous marriage. He had promised her parents that he would pay *lobolo* for her but had not yet done so. She had lived with him for three months but had eventually left because he frequently assaulted her. She had returned to her family whom she helped in running a stall at the market. From this she was given an allowance of about $60 per month. He worked as a manager in a fashion house. She continued her story:

"In June I went to the Community Court to ask for $150 maintenance. They told me to come to court on 16 July. We came and I was asked why I needed $150 maintenance. I explained that I needed it to look after the child and gave a breakdown of my expenses.

He said that the money that I was asking for was excessive. He said that he had others that he was looking after. In addition to his children, he was also looking after his sister's child, his sister and he was paying a maid. He was ordered to pay $50 per month for the child."

In many ways this case raises an interesting question about the extent of a person's responsibility to the wider family network. The Maintenance Act defines a responsible person as "a person who is legally liable to maintain another".[61] Although not under a legal obligation to maintain his sister and her child, it is difficult to see how he could have escaped the moral obligation.

There was a large discrepancy between the amount of maintenance requested by the women and the amount granted. What the women asked for was a sum of money which ideally would cover the cost of satisfactorily feeding and clothing the children. The amount that they received in no way reflected the economic or personal costs of looking after the children. A case in point is Mrs Hwacha who was divorced from her customary law husband with whom she had four children, two of whom were in the rural areas with her parents. She lived in Harare and sold vegetables at the market. She estimated her income at $200 and her expenses at $492.68. Her husband who worked as a security guard and earned in excess of $300 had since remarried and had one child with his new wife. She said:

"In 1988 I sued for $300 maintenance. They (the court) said that he did not earn enough money. He was ordered to pay $60 per month for the four children."

It is difficult to see how else the court could have rationalised the position fairly having regard to the fact that he had a new family and added commitments. Small though these awards were, they went a long way towards improving the livelihood of the family.[62] For many women this was the first support that they had received from their husbands in a very long time. For some maintenance marked an improvement in their standard of living for it was more than they had ordinarily been given by their husbands.

With maintenance being the only money the women get, there is tremendous pressure to make sure that the judgement is

enforced. Often the woman was told at the maintenance hearing that should the man fail to pay the maintenance for three months then she should return to the court to ask for a garnishee order or direction to be made against the man's employer.[63]

8:8 (e) Garnishee Orders

Although the garnishee order was supposed to simplify the woman's life, it often had the opposite effect. Obtaining a garnishee order necessitated the woman going back to court to fill out garnishee forms. She had also to pay for delivery of the summons. If married to a soldier or other member of the service personnel then other requirements had to be fulfilled.[64] Even after this was done, there was no guarantee that the money would be forthcoming.

One woman told of how she did not receive maintenance for one and a half years after the garnishee order was made. This is because the procedure for claiming maintenance money once it had been garnisheed was convoluted. On awarding her the garnishee the court would ask the woman to open an account with a specific building society. The employer paid the money into court and the court in turn paid it into the woman's account at the building society. As Mrs Kaseke explained this arrangement was not without its problems:

"The personnel at the court explain that the money first comes to them then they send it on to CABS (Central Africa Building Society). Sometimes the money is only deposited on the 15th of the following month yet it will have been received on the 25th or 26th of the previous month. If you go to his job to complain they will tell you that they deducted the money on the 26th of the month. They will tell you to go to the

Building Society to check for it."

So agitated was this woman that she continued at length:

"In court we are treated well. The problem is only in collecting the money. It is all so confusing. When you go to ask they tell you to come back on Wednesday or Thursday. They don't take time to explain things to you properly. They just open the book and once you give them your number, they look it up and tell you that no money has been deposited for you. If you try to ask them when they think it will come they just tell you that it's not there and they don't know when it will come. The first days I used to come from Rusape. Having to go and come back cost me a lot of money. They don't tell you the proper date. Sometimes I'd come back after two months. The people at CABS would ask me why I hadn't collected my money. They would tell me that it had been sitting there for the last three months yet at the court they tell you that the money has not been sent. It becomes confusing. You don't know who is wrong and who is right. You can't even tell who is telling the truth anymore."[65]

Even if the woman successfully obtained a garnishee order, there was no guarantee that the employer would comply.[66] Technically non compliance constitutes a criminal offence which is punishable by a maximum fine of $100 or up to one year imprisonment.[67] In reality the employers are seldom if ever brought to book. Mrs Chigudu first asked for $250 maintenance for her two children on 7 July 1989. Several postponements later the husband was ordered to pay $100 maintenance per month for the two children and $50 for the rent starting from October. He did not pay. She takes up the story:

"In January I applied for a garnishee order...The matter came to trial. He was ordered to pay the arrear maintenance which had accumulated for the months of October, November and December. The arrears were to be paid off at the rate of $10 per month. A garnishee order was thus made for $110 per month.

He did not pay from January to June. The money was not garnisheed. I then went to report the matter to court. They sent a letter asking why the direction was not being obeyed. The employers said that the instructions had arrived late. The court officials asked if all three letters which they had written during that time had arrived late. In May $63 was

sent. That is all I have received to date."

She went on to express the sentiments shared by many women:

"I am worried about getting the children's money. They (court officials) should make a direction order the first time they make the maintenance order. A law must also be made to force the employers to pay. Say he is given a judgement to pay a certain amount, he won't pay it. Even if you send a garnishee order it sometimes happens (as in my case) that the employers delay in sending the money. Then you have to go to court to ask for another letter to be written to the employers threatening legal action. Then maybe the employers will start withholding the money."

Once a man leaves his job, the garnishee order ceases to operate. Its non-transferability creates further problems for women because it means that they have to start the whole process afresh.[68] This means that the woman has to ascertain the man's whereabouts and whether or not he has secured new employment - not an easy task at the best of times. Given all the drawbacks associated with claiming maintenance, it is not surprising that so few women went back to court to ask for arrear maintenance (2 in the civil group and 4 in the customary marriage group) or a variation (11 women in the customary group and 2 women in the civil marriage group for the variation).

8:8(f) Arrear Maintenance

The claiming of arrear maintenance is provided for in the Maintenance Act, whilst the Matrimonial Causes Act provides that a wife can claim against her husband in the context of a divorce for arrear maintenance.[69] As with instituting an ordinary claim for maintenance, there are several practical problems associated with claiming arrear maintenance. It

involves the woman in returning to court to report the default. Not only does this require an investment in time which may be short given the women's work and childcare responsibilities, but there is the additional expense involved in paying transport and messenger fees. As the main reason for complaining about the man's failure to pay maintenance is a shortage of money in the home caused by the inability to make ends meet, the additional outlay worsens the family's already difficult economic situation. Related to this is the fact that the man may have moved houses or changed jobs so that she may not know where to find him. Added to this is the knowledge that the man may not be in a position to pay any maintenance let alone cope with the added burden of arrears.[70]

The risks, both personal and financial, in claiming arrear maintenance especially when balanced against the possible uncertain rewards are high. Given these odds it is not surprising that so few sought arrear maintenance (5% of those with customary marriages and 9% of those with civil marriages).

It often happened that the man had fallen substantially behind in his maintenance payments. He had therefore accumulated a large maintenance debt. The courts, in awarding arrear maintenance payments, usually ask that the man pay a very small amount to cover the arrears.[71] This means that the likelihood of the man ever paying off the debt is remote.[72]

A case in point was Mrs Gomo. She separated from her husband

to whom she was married under the African Marriages Act in 1981. They had four children. On separation she took the two younger children. She sued him for $100 maintenance and was awarded $15 for the two. He appealed the decision but did not show up to court on the appointed day. He did not pay maintenance so in 1983 she asked for a garnishee order to be made. He was to pay $30, $15 being for the arrears and $15 for the maintenance. By 1984 she had custody of all four children so she went to ask the court to increase the maintenance. He came to court and said that he could only afford to pay for two children. He asked her to give him the other two. Not wanting to give up her children, she agreed to let him pay maintenance for the two. He was to pay $45 for the two children. He only paid that for a month.

In 1986 she went to report the non payment. She told the court that the arrears amounted to $756 for all the years that he had not been paying. This was a deliberate underestimation on her part. He was ordered to pay $65 being $45 for the maintenance and $20 for the arrears. This was paid for two months. He then went to a different Community Court and sued for custody of the children because he could not afford the maintenance payments.

The court refused to give him custody saying that the mother was doing a good job of looking after the children. However, they reduced the maintenance to $48 being $7 for the arrears. Throughout 1987 he paid sporadically. He asked her if he could have the children for the school holidays. She gave

them to him but he refused to give them back. This was in 1988. He then sued for custody saying that she had had a child with another man and that he thought that it would be best if he kept the children. The court agreed to let him have the children. However $600 arrears remained to be paid off. The court wrote to his employers asking them to garnishee $20 per month to satisfy the debt. In late 1988 he sued for divorce. In 1989 she went back to court to say that she had not received any arrear maintenance payments. I interviewed her in August 1990 and still she had not received any arrears.

The case is made interesting by the arbitrariness of the court's decisions. First they award her maintenance for two children although she is looking after four. It seems illogical for them to accept the man's defence that he could only afford to pay maintenance for two children because even if they had let him have the children he would still have had to pay to look after them. The next surprising thing is the fact that they <u>reduced</u> her maintenance although she was only getting money for two children. The amount awarded as arrear maintenance viz $7 is so small as not to make it worthwhile. As regards the court's provisions for the payment of the arrears it would have taken approximately three years for the $756 to be paid up whilst paying the $600 at $20 per month would have taken two and a half years. The amounts awarded as arrear maintenance were so small that it was not worth the time or effort to pursue vigorously a claim for arrear maintenance. Mrs Gomo was exceptional in returning to court

on so many occasions.

Although technically it is possible to attach a person's property to satisfy the unpaid maintenance debt, the procedure is cumbersome and involves obtaining a warrant of execution and paying the messenger's fee. Even after the property is attached, satisfaction of the debt is not instantaneous. The woman may have to wait several months for a public auction to be held so that the property can be sold. The auctioneer's fee and other administrative costs have to be met. As maintenance is an on-going obligation rather than a one off payment it means that the plaintiff will have to leave the debt to accumulate before seeking to have the defaulter's property attached. It would also mean that she would have to return to court regularly.[73]

All this is enough to discourage someone from pursuing their claim. Civil imprisonment, although an option, is not a viable one. The woman realises that if she gets the man imprisoned then he will be unable to pay <u>any</u> maintenance at all and that he is likely to lose his job.[74] These two enforcement options are therefore rarely if ever invoked.

<u>8:8(g) Variation</u>

In the customary marriages group there were 11 (14%) requests for variation of which one was a request for variation downwards and the other was a request that the maintenance order be extinguished as the daughter whom it was meant to cover had married. There were 2 (9%) requests for variation

in the civil marriage group one of which was at the former husband's suggestion.

The two reasons most often cited for wanting an increase in maintenance were the high cost of living and the needs of school going children.[75] This is reflected in the stories of the women who returned to court to ask for increases in maintenance. Ms Mushonga who was receiving $30 per month from the father of her child justified herself thus:

"Right now the child is three years old. She needs to go to creche yet he is not helping me in any way. So last month I went back to the Community Court offices and asked for a variation in maintenance. I asked for between $80-$100. The first time we went to court he refused to pay what I had asked. He said that he had too many commitments. That's why we were given today's date. He says that the $30 he is paying is already excessive. He says that he has several other dependents whom he has to support. He says that he has to look after his parents and his wife yet he doesn't even have a wife."

The maintenance was varied from $30 to $55. In the one application for variation downwards the man sought to have the money reduced from $110 to $60 per month. The maintenance had originally been $100 per month but it had been increased to $110 to cover the arrears he had incurred. Although a direction had been made the employers had not yet started garnisheeing his salary. The court refused the application saying that it could not order a variation downwards because the cost of living was going up and the money that he was paying was already insufficient.

The fact that 50% of the women in the customary group reported having returned to court more than once to get the matter

resolved is proof of the difficulty of trying to get effective relief. Various tactics were adopted to try to avoid paying maintenance.

8:8(h) Evasion

Even if a summons was issued asking a man to appear in court, there was much that he could do to avoid paying. One was to be unavailable for service of the summons. As many of the summons were served at the person's place of employment the man just instructed his co-workers to say that that he was not there.

"I went and asked for maintenance on the 12th of July (1990). I asked for $150. They told me to come on the 16th of August (1990). I came but he did not. They told me that the summons had not been served because he was on leave. That is not true, I see him going to work everyday. I told them that. They told me to ask for a new court date." Ms Jura

Another exasperated woman said of her situation:

"I went to ask for maintenance in July. I asked for $70. They told me to come to court on the 16th of August. Now they tell me that he was not found. They just say that he wasn't at work when they went. Now they are telling me that I should pay for another summons which will be delivered to his superiors who will sign for it and ensure that he gets it... Why don't they take me with them when they go to serve the summons so that I can point him out to them? Then they can make him sign to acknowledge receipt of the summons. I don't believe he wasn't at work. They just lie and cover for each other." Ms Muzangaza

The only mitigating factor was that sometimes the woman was not required to pay for the summons to be served a second time. Postponements were not only caused by lack of service. Sometimes the lawyers delayed the proceedings whilst at other times the Presiding Officers were to blame. A good example of this was Ms Tsorayi who was being sued for custody of the three children of the marriage. She counter-claimed for

maintenance. She said of her case:

"The case was adjourned until 23 July. On 23 July the Presiding Officer was not there so the matter was postponed until 2 August 1990. On 2 August my husband was there but his lawyer was not. The lawyer sent a message saying that he could only come the next day. On 3 August no one came to court. I was told that the Presiding Officer was going on leave. I told them that I didn't know what to do. They told me to go home and wait. I protested about the delay... When I asked how long I was expected to look after the children without any assistance she (the Presiding Officer) said that if I was finding it difficult to look after them then I should give them to their father. I am tired of it all. I think I will go to the Magistrates Court and ask for maintenance."

More often than not the men simply failed to come to court yet nothing seemed to happen to them.[76] Although the prescribed legal consequence of non appearance in court without reasonable excuse is a default judgement entered against one, the courts do not grant this automatically, as happened in Ms Manase's case:

"On 26 August, I came to the court and asked for maintenance of $70 per month. They told me to come on 10 September when the case would be heard. I paid $26 for the summons to be delivered. He did not come on 10 September. The case was postponed to today (25 September). He received the summons yet he still did not come. The court personnel said that they would send the summons again. I don't have to pay again. They told me to come back on 15 October."

Many women found that they had won pyrrhic victories and that getting the maintenance order was just the first step on a long and difficult journey. Some persevered to the journey's end but many fell by the wayside, demoralised and dejected and often in a worse economic position than they had been in before they started their actions.[77]

8:8(i) Appeals

Until 1989 the effect of an appeal was to suspend a

maintenance order until after the appeal had been heard. Many men were using this as a delaying tactic to avoid having to pay maintenance. The Legislature saw through this so in 1989 they passed the Maintenance Amendment Act which provides:

"The noting of an appeal in terms of subsection (3) shall not, pending the determination of the appeal, suspend the decision appealed against unless the maintenance court on application to it directs otherwise."[78]

Despite this provision it sometimes happened that the court did suspend the maintenance order that it had just made pending the hearing of the appeal. Mrs Masarirambi had a registered customary marriage and four children. In May 1990 she claimed maintenance. She was awarded $300 being $200 for the children and $100 for herself. The husband appealed this decision. She reported:

"I am not convinced that the cases are being properly adjudicated. How can they allow him to appeal when I have not yet received a single cent from him? To date I have not yet received any of the maintenance which he was ordered to pay. I am alone and struggling to look after the children.

I went to the court offices on 2 August and asked if my money had come. They said that it had not. I asked them what they expected me to do. They said that they could not help me. He had simply not brought the money. They told me to come and check another time. I asked what effect the appeal would have and they told me I would have to wait for the appeal to be heard.

I meanwhile keep moving up and down and wasting money. The children and I live in the rural areas so that I spend a lot of money on transport. When I come into town I stay at my father's house in Mbare but he expects me to help with food and rent."

It is with the claiming of maintenance that one sees most clearly the difficulties encountered by women in trying to

obtain effective access to the law. First there are the problems encountered in trying to get to the court. The hurdle of ignorance has to be overcome and this is usually done with reference to a knowledgeable lay person or organisation to point the person in the right direction. Next the fear of approaching the court for assistance has to be overcome, followed by the accumulation of financial resources for transport costs and for the Messenger's fee. One has to come to court armed with information about one's expenses, the man's salary and an address for service, all of which require investigative research beforehand. On arrival at court one must be prepared to face long queues, wait for a long time and sometimes cope with tired and irritable officials.

Finally, when given a court date, one must be prepared to be available on the appointed date. This entails making childcare arrangements and if appropriate asking for time off from work. When the day arrives one has to be at the court by 8am although one's case may be the last on the roll and may not be heard until afternoon. One must of course prepare oneself for all the contingencies that may arise such as: the summons was not sent so pay again or come back another day, the man has not come so the court cannot adjudicate the matter without him, the case has to be postponed due to the unavailability of the man's lawyer or the Presiding Officer. If one is fortunate and none of these contingencies come to pass then one must be prepared to have one's claim halved to some pitiful sum. Having finally secured the order one begins

to realise that one has taken but one step in the long march, for what is one to do if the man does not pay?

As most maintenance orders require the man to pay the money into court, one will find oneself making frequent trips to the court to face surly and uncommunicative officials who merely tell you that no money has been paid in for you. After three months, one returns to the court to ask for a garnishee order. Again there is the outlay for transport and Messenger's costs. A court date is set and the same procedure is endured. One is awarded nominal arrears and a direction is made. The employer may not see the urgency in one's children not going to school and one's rent going unpaid so he may take some time to start withholding the money. With all the confusion of claiming maintenance at the Maintenance Court you soon realise that it may be easier for you to open a savings account at a building society of your maintenance officer's choosing. In including another element to the process, one lays oneself open to further bureaucratic red tape.

By the time one's maintenance payments have been regularised, inflation is so high and the cost of living will have considerably escalated, such that one can no longer afford to make ends meet. By this time the maintenance needs to be varied upwards - but does one have the stamina?[79]

The dissolution of a marriage marks the end of both the parties' relationship as husband and wife and also of the family unit. Arrangements have therefore to be made regarding

which of the two parties is to have custody of the children of the marriage.

8:8(j) Custody

"In any case relating to the custody of children, the interests of the children concerned shall be the paramount consideration irrespective of what law or principle is applied."[80]

By enacting this legislation, the Legislature managed to turn the whole customary position on its head. Before this it had always been assumed that children went to their father unless of course they had not yet been weaned or were still very small and "needed their mother".[81] A father's right to custody of the children of the marriage is rooted in his having paid *lobolo* for their mother.

In the customary law group there were 15 (19.73%) custody actions brought before the court. Of these three were brought by women, ten by men and one was raised by the court of its own volition. The question thus becomes why is it that such a large percentage of men sue for custody of their children?[82] The most obvious one is probably that having paid *lobolo* for the woman, they see it as their right and entitlement to have the children of the marriage living with them. Under traditional customary law a father's right to custody of his children on divorce was almost absolute.[83] The women themselves acknowledge this right so that one who was given custody of three very young children said:

"I don't care about the maintenance. If he wants the children when they are seven then I will be more willing to part with them." Ms Makanza

The issue of giving custody to the father went beyond the fact that he had paid *lobolo* to the mother. Other considerations included the fact that the children should not be removed from the protection of the ancestral spirits by growing up under a different totem from their father's one for they would learn strange ways.[84] The women themselves believed in the power of these supernatural forces. Ms Zowa was reluctant to claim custody of the children because:

"I don't know what herbs he has used on the children but whenever I try to take them they cry at night and I have to take them back."

Moreover if the mother re-married or saw other men then the children would grow up in a "foreign" house. To many men this was the "nightmare scenario". Their fears were shared by the Presiding Officers who saw it as not being in the best interests of the child to grow up in another man's house. This came across very strongly in Ms Gomo's case. Separated in 1981 the husband had in 1983 remarried. He had three children with his new wife. She met a new man with whom she had a child in 1988. Her husband brought an action for custody of the four children.

"He asked for custody on two grounds. One he said that he was already keeping the children and secondly he said that I was living with someone else and he could see no reason why he should continue to pay me maintenance or why his children should stay with another man.

I explained to the court that I had only given him the children for the school holidays not knowing that he would ask for the maintenance to be cancelled. I told the court that the children were now staying with me. The court said that since he wanted his children, I should give them to him. They said that I had another husband so the children should go back

to their father. I could not expect another man to look after the children since the father was willing to have them. I agreed and released the children to him. I asked the court what would happen if the children were made to suffer at their father's. They told me that I could come back to tell them."

The case is revealing on many levels. The most striking of course is the court's agreement with the husband's rationale that the mother of the children cannot keep them because of her relationship with another man. In bringing this action for custody the husband was not saying that his ex wife was a bad mother. She had after all satisfactorily looked after the children for the last seven years. He was saying that in having the relationship with this man, she had become a bad wife and this made her unfit to look after the children. The courts were not able to distinguish between a "bad" wife and a "bad" mother.[85] However even my labelling of her as "bad" is questionable for what she did was no worse than what her husband did, yet he was not labelled as being a bad husband or father. Maboreke notes this contradiction:

"A mother who leads an immoral life may be deprived of custody of her minor children, but the question of morality is rarely ever raised with relation to the father."[86]

In this case nothing was said about the fact that the father had been living with another woman with whom he had three children for five of the seven years that the two had been separated. During this time his first wife had looked after the children satisfactorily. It was only when she had a child with another man that her fitness as a parent became questionable.

While it was not good for the children to live with a man who

was not their father, it was perfectly acceptable for them to live with a woman who was not their mother. The court did not see a contradiction in that. In fact it made sense to remove them from their mother because she had another child (just one who was an infant) and move them to live with their father who had three toddlers living with him and his new wife who doubtless had her hands full trying to look after her own children. The ages of the children of the first marriage was probably a factor taken into consideration by the court for they were all of school going age with the youngest aged seven.

In giving fathers custody it is assumed that they have "somebody", usually a woman, to whom they can pass on the burden of the day to day care of the children. They are themselves not expected to look after the children.[87] This was reflected in Mrs Masarirambi's case. Her husband was suing her for custody of the two older children of the marriage (there were four children altogether).

"He said that he wanted his children because they were not being properly looked after. He said that he would find a maid to look after them in the rural areas."

Not only would he not be taking care of them himself, but he would not even be <u>living</u> with them. A senior lawyer specialising in divorce had this to say on the issue of custody:

"Almost invariably the children's needs are best met by the mother. The father is busy and is engaged in other pursuits. If left with the children he calls in a niece or other relative to look after the children. He doesn't get involved. He is in a supervisory role. He just comes home at the end of

the day, checks that everything is okay and gives the children a pat on the head before they go off to sleep." Mr Aitken

That courts acknowledge the fact that men do not themselves look after children is reflected by Mrs Chigudu's case:

"In court he had said that he wanted his children but the court said that they were too young. They also said that he did not have anyone to look after them. He doesn't even show any interest in the children."

This view, however, represents another bone of contention brought about by the introduction of the "white man's law". At customary law when a man had custody of his children he would give them to his mother or one of his relatives to look after. Grandparents took it for granted that they had the right to look after their grandchildren. But the courts have since ruled that a parent cannot be deprived of custody in favour of a third party.[88] This position was alien to custom and both the husbands and the grandparents were unhappy with it.[89]

Mrs Kauma had entered into a customary law union with a fellow worker with whom she had three children in quick succession. His mother did not like her. She preferred an ex girlfriend of his. She made unreasonable financial demands on them and asked that Mrs Kauma give up her job. Eventually the husband said that he no longer wanted his wife and they parted. He took the two older children and gave them to his mother to look after and left her with the youngest child who was still breastfeeding. She sued him for maintenance.

"He was told to pay $68 for the one child. I explained that the other two children were in the rural areas with their grandmother. The court told me to go and fetch the other two children and bring them to court today. At first my husband

refused but the Presiding Officer said that children under 18 could not stay with their grandmother. The court asked how old the children had been when he had taken them and he said six, four and one. The court said that they were too young; they should be with their mother."

In yet another interesting case where the spouses had separated with the mother retaining custody, this had transpired:

"In April 1988 he asked the court for custody of the children. He said that I was at school and was not looking after the children...He told the court that he would employ a maid to look after the children. He said that he would send them to school and the younger one to creche. The court said that since I was at school and was not looking after the children, I could not keep them. They said that the children should either stay with the mother or the father." Ms Mundondo

However in this case neither of the parents was in a position to look after the children themselves. Between the two parents the court chose the father. Of this tendency, Maboreke says:

"Where all the factors are equal, the courts tend to award custody to the father. Therefore, as in other areas of law where discretion is broad, courts tend to exercise discretion in favour of men. Although the law is willing to disturb the traditional preference for the male in the best interests of the child, it does not treat women and men as equal contenders for the custody of children if the interests of the child will be equally served by going to either parent."[90]

Although Maboreke's assertion is not disputed, these cases are also illustrative of another interesting point, which is that courts generally award custody of very young children to their mothers. The bias towards awarding custody of young children to their mothers appears to be universal.[91] The interview with the senior divorce lawyer confirms that this bias is alive and well in Zimbabwe for as he said:

"Men don't make particularly caring parents especially if the children are very young. Men are not prepared to change

nappies and powder bottoms." Mr Aitken

Although seemingly a good thing the reasons for giving women custody must be examined more closely. Firstly as Smart points out courts do not actually give or award custody to a particular parent. All they do is "give legal legitimation to mothers' *de facto* caring role".[92] In effect they merely reflect the status quo. In the vast majority of cases it is the mother who has custody after separation. This is recognised by, and is reflected in, the law.[93] Smart also states that in awarding custody to mothers courts are trying to mirror the old family position "where the mother or mother substitute stays at home and the father or father substitute provides economically".[94] She also argues that the judiciary's preference for awarding custody to mothers symbolises "a celebration of the sexual division of labour in which child care is always the responsibility of mothers".[95]

Most important however is the reason advanced by Delphy which is that given the economic and social disadvantages associated with looking after young children, it is not surprising that custody is given to the mothers.[96]

Part of the reason for claiming custody was to avoid paying maintenance or to get a reduction in the amount of maintenance payable.[97] For many men the issue of maintenance was a contentious one. They were of the opinion that women only wanted custody to enable them to claim maintenance. The issue of custody was also linked to the question of housing. Whilst in the rural areas there is no question of the woman asking

for a house at the husband's homestead, in the urban areas things are quite different. Accommodation is difficult to obtain. As occupation of the house generally follows custody it is worth the man's while to contest.[98] Burman contends that many custody disputes are actually about property.[99] It sometimes happened that men used the threat of contesting custody to make the women give up their claim to property or maintenance for themselves.

"At first he didn't say anything about the children. He only started saying that he wanted the oldest child when we started fighting over the house." Ms Samkange

"Eventually he agreed to give me the house and custody of the child. I decided to forego asking for maintenance and I said that he could take all the property." Ms Chengeta

Moreover some women contended that their husbands were asking for custody merely to spite them. One whose husband had not seen the children in all the time they had been apart (about five years) and who had sent them each a pair of tennis shoes in all that time said of her husband's claim for custody:

"Now he has taken the matter to court. I have not seen my husband since the divorce. He does not really want the children, he is only trying to get back at me." Ms Chitopo

Difficult though it was, the women were prepared to fight to keep their children:

"He wanted the children but I wanted my own children. I wasn't going to let him have my children...If he wanted to go I wasn't going to stop him. I only wanted to contest custody of the children." Ms Nhamo

"He said he wanted custody of the child. That's how the matter came to be contested" Ms Rinashe

As the task of deciding what is in the best interests of the

children is left to the judicial officer's discretion it is interesting to see what use was made of that discretion. On the whole the courts were fair and objective in making custody awards. However a strong traditional bias in favour of the old customary position of awarding maintenance to men who had paid *lobolo* can still be found to operate even though it has been overridden by statute. The question of whether or not *lobolo* has been paid still seems to influence the Community Court's decision. Under customary law a man cannot ask for his children until and unless he has paid *lobolo*.[100]In making decisions about custody it seemed that the court sometimes took this factor into account so that in Ms Mteta's case *lobolo* had been asked for but the husband had not as yet paid any. He tried to get custody of the child:

"The court said that it was giving me the child because he had not paid *lobolo* for me and because he had rejected me. They said that if he paid *lobolo* for me then he would be entitled to ask for and receive his child. After that he came to speak to my brothers about paying *lobolo*."

In awarding custody to the mother there was in this case a punitive element to the court's decision. Upon awarding custody, the courts generally left it to the parties to make arrangements about access and visitation between themselves.

8:8(k) Access

More often than not the parties were able to make arrangements about access without too much trouble. In the civil law group, custody arrangements were usually drawn up by the lawyers and presented to the court in the form of a draft order. In a few instances the courts made provisions for

access when granting the custody order. However sometimes the access agreements were breached. This happened in Ms Mundondo's case. The children were taken away from her because she was studying in Harare and the children were living in the rural areas with her parents:

"The court said that I could see the children every weekend. They said that if possible the children could spend weekends with me. He says that I can only see them once a month. That is the only time I see them. When I visit I am not allowed to take them for walks. We either sit in the kitchen or in the yard.

During the school holidays the court said that we should alternate. They said that I should have the children for two of the three school holidays but he only lets me have them for one."

Generally difficulties over access arose when one party was trying to "fix" the other. The children were used as pawns in the parents battle to outwit each other. In one case where the parties had a civil marriage, the parties could not agree on the access arrangements to be made for the child:

"We are still battling with his lawyers because we had failed to agree on a number of things: one of them being maintenance and the other being access to the child...After the separation he stayed with this female *nanga* (traditional healer) for about six months. During this time he fell in love with the *nanga's* daughter and married her. That is why I am denying him access to our child. I don't want her to associate with my daughter. I want him to have the child for a maximum of one day." Ms Gogodi

These were the main issues which brought the parties to court.

8:9 Conclusion

This chapter has considered the "institutionalization" of the dispute between the two main actors examining their approaches

to court. At the outset it was emphasised that the use of formal institutions to resolve the problem should not be perceived as being an escalation of hostilities between the parties. In looking at disputing behaviour, the chapter has examined the parties' relationships with and use of third parties (lawyers) with specialist knowledge of the workings of the legal system in an attempt to gain leverage over each other. Griffiths calls this alliance behaviour.[101] The chapter began by looking at the barriers to obtaining access to courts.

From the literature, three main hurdles were identified as facing women who seek access to the courts. These were geographical, economic and socio-psychological factors. As regards the economic part of the equation it was argued that although the cost of instituting an action seemed nominal, it had to be remembered that the vast majority of women in the study population were not in paid employment and therefore it was difficult for them to get even the small amount of money needed to institute the action. Moreover costs for transport and accommodation could be so high as to preclude the institution of a claim. The cost in terms of time and personal stress was hard to measure.

Geographically, the women sometimes had to travel from the rural areas into town and this could be costly. However as each district had its own Community Court distance was not a problem. Perhaps the hardest barrier to overcome in trying to gain access to the law was psychological. Not only did this require one to have the knowledge about the correct court to

institute the action, but it also entailed one overcoming one's fear of courts and generally having the confidence to institute the action and see it through to its conclusion.

The role of lawyers in the divorce process was discussed. It was noted that there was often a conflict of expectations with clients wanting their lawyers to provide emotional support, and the lawyers resisting the clients' demands, preferring to concentrate on obtaining the best possible settlement for their clients. The provision of legal aid in Zimbabwe was noted to be limited by financial constraints. However, it was noted that where legal aid was granted, it was for matrimonial actions and that women appeared to be the main beneficiaries. The specific actions instituted by the women were then discussed in greater detail.

The process of seeking help to save the marriage extended to the Community Court which was called upon to play the counselling role formerly played by traditional courts. The attitude to requests for counselling varied according to the attitude of the Presiding Officers. Some agreed and were co-operative whilst others refused to assist because it was not a legally enforceable claim.

There were very few requests for divorce in the customary sample. This was partly because the vast majority of women had customary law marriages which were unregistered. As they were not regarded as being formal marriages there was no need to have them formally dissolved. Also, in a polygamous society it is permissible for a man to have more than one

wife. It therefore becomes unnecessary to divorce the one in order to marry the other. Women too were not in a hurry to secure a change of status largely because it was difficult for them to remarry.

With a few exceptions the property issue, which is the reason most divorces are contested, did not have a bearing on divorces in the customary group. This was because often there was not any property of substance to claim. This was more likely to be the case with rural women where cattle and land formed the main assets. It was often impractical and socially difficult for rural women to ask for property. It was only those who had been in unions with sizeable assets who asked for any property. Here the matrimonial home was the most valuable asset.

Maintenance formed the most popular claim. If one considers the fact that the main complaint advanced by the women was lack of support it is not surprising that maintenance was the most frequently requested relief. Although there were difficulties in claiming it, the difficulties in enforcing a judgement were even greater. The custody issue was made complex by a clash of values between customary expectations and statutory provisions. The traditional position was that a man who had paid *lobolo* for a woman was entitled to have custody of his children after they had been weaned (later changed to seven years by the colonial courts). The new law changed this so that now custody decisions would be made on the basis of what would be in the best interests of the child.

The decision about what was in the best interests of the child in many ways reflected the Presiding Officer's ideological position so that those who subscribed to the traditional view felt that men who had paid *lobolo* should be entitled to receive custody of their children. There was also a male bias reflected in some of the decisions so that a woman who remarried or was involved in a new relationship lost her children because she could not expect another man to look after them. The same reasoning was not applied to men who had remarried. All this contributed to making the women wary of remarriage for fear they would lose their children. As a general rule mothers were given custody of very young children.

Delphy has noted that the formal dissolution of the marriage does not mark the end of the relationship between the parties. Rather, the parties continue to be linked by shared parenthood.[102] The next chapter will consider what happens to women once their marriages have been dissolved. It is a study of both the economic and social consequences of divorce.

8: Getting to Court

[1] Johnson, E. (1979) at p.8.
[2] Zander, M. (1978) at p.288.
[3] Burman, S. and Berger, S. (1988) at p.202.
[4] A judge of the High Court goes on circuit once a year to smaller town centres.
[5] Cf Harris, D. et al, (1984) at p.47, Genn, H. (1982) at p.3.
[6] Galanter, M. (1976) at p.230.
[7] Veneklassen, L. (1990) at p.133.
[8] Gwaunza, E. (1990) at p.74.
[9] Kasonde-Ngandu, S. (1989) at p.32.
[10] Gwaunza, E. (1990) at p.75.
[11] Cheater, A. (1990) at p.85.
[12] Zander, M. (1978) at p.294.
[13] Eekelaar, J. and Maclean, M. (1984) at pp.218-219.
[14] Mayhew, L. and Reiss, A. (1969) at p.313, Cf Tomasic, R. (1978) at p.59.
[15] O. 44 r.394(1)(a) of the High Court of Zimbabwe Rules, s.21 of the High Court Act (Chapter 14)
[16] Cf Sarat, A. and Felstiner, W. (1986) at p.125, Griffiths, J. (1986) at p.159.
[17] Cf Smart, C. (1984) at p.160 and Sarat, A. and Felstiner, W. (1986) at pp.93-133.
[18] Mnookin, R. and Kornhauser, L. (1979) at p.985.
[19] Galanter, M. (1984) at p.268. Cf Ingelby, R. (1992) at p.18.
[20] Cf Morris, P. (1973) at p.66.
[21] Cf Morris, P. (1973) at p.66, Sarat, A. and Felstiner, W. (1988) at p.742, Griffiths, J. (1988) at p.155.
[22] Cf Sarat, A. and Felstiner, W. (1986) at p.125.
[23] Cf Sarat, A. and Felstiner, W. (1986) at p.124.
[24] Ellman, S. (1987) at pp.722-733.
[25] Griffiths, J. (1986) at p.160.
[26] Cf Mnookin, R. and Kornhauser, L. (1979) at p.986, Griffiths, J. (1986) at p.165.
[27] Ingelby, R. (1988) at p.47.
[28] Burman, S. (1989) at p.263.
[29] Johnson, E. (1979) at p.10.
[30] Tomasic, R. (1978) at p.92.
[31] Tomasic, R. (1978) at p.100.
[32] Galanter, M. (1981) at p.6.
[33] Tomasic, R. (1978) at p.22.
[34] Ng'maryo, E. (1984) at p.67.
[35] Cf Yngvesson, B. (1985) at p.623.
[36] Cf Galanter, M. (1981) at p.10.
[37] For a discussion of the legal implications of this see Armstrong, A. (1990) at p.135.
[38] Sarat, A. and Felstiner, W. (1981) at p.124, Cf Davis, G. (1988) at p.7.
[39] Eekelaar, J. (1991) at p.77.
[40] Cf Weitzman, L. (1985) at p.62.
[41] Burman, S. (1989) at p.7, Cf Weitzman, L. (1985) at p.66.
[42] Cf Eekelaar, J. (1979) at p.256.

[43] Weitzman, L. (1985:66) notes that the option of trading off the house for other assets is only open to those families who have other assets and to women who do not need support for themselves.
[44] Cf Eekelaar, J. (1979) at p.257.
[45] Weitzman, L. (1985) at p.69.
[46] See Armstrong's discussion (1990) at pp.132-144.
[47] Cf Burman, S. (1987) at p.221.
[48] s.4 of the Maintenance Act as read with s.2 s.7 of the Matrimonial Causes Act (Chapter 33) s.4(b)(4)(a) of the Customary Law and Primary Courts Act 21 of 1982 (to be repealed and replaced by s.6(3) of the Customary Law and Local Courts Act - s.30 and Schedule Part 111 s.4(3)).
[49] Gwaunza, E. (1990) gives the following breakdown of the total number of maintenance cases brought to the courts in the last three years at p.76:

	Community Court	Magistrates Court
1987	2485	2019
1988	2131	1171
1989	1559	1348

[50] Cf Gwaunza, E. (1990) at p.68.
[51] Even South Africa has a limited state maintenance scheme. See Burman, S. (1988) at pp.345-350.
[52] Ingelby, R. (1992) p.67, Harrison, M. (1992) at p.219.
[53] s.12(a) of the Customary Law and Primary Courts Act 21 of 1982 (s.6(3)) of the Customary Law and Local Courts Act).
[54] Smart, C. (1984) at p.167.
[55] Cf Burman, S. (1987) at p.222.
[56] Maclean, M. and Eekelaar, J. (1992) at p.239 note that there is a greater willingness to pay support for children as these payments carry "less ideological baggage".
[57] Cf May, J. (1987) at p.80.
[58] Burman, S. (1988) at p.336.
[59] Smart, C. (1984) at p.202.
[60] Gwaunza, E. (1990) at p.75.
[61] s.2 Chapter 35.
[62] Burman, S. (1987) at p.220.
[63] Gwaunza, E. (1990) at p.75 and s.3 Maintenance Amendment Act 1987.
[64] Gwaunza, E. (1990) at p.75.
[65] May, J. (1987) at p.80.
[66] Cf May, J. (1987) at p.80.
[67] s.24 Maintenance Act (Chapter 35).
[68] Cf Burman, S. (1988) at p.343.
[69] s.6(6)(c) Maintenance Act (Chapter 35) and s.11(1) Matrimonial Causes Act (Chapter 33).
[70] Cf Burman, S. (1988) at p.340.
[71] Cf Gwaunza, E. (1990) at p.76.
[72] Cf Burman, S. (1988) at p.340.
[73] Armstrong, A. (1990) at p.143.
[74] Cf Burman, S. (1988) at pp.343-344.
[75] Cf Burman, S. (1984) at p.138.
[76] Cf Burman, S. (1988) at p.202.
[77] Cf Burman, S. (1988) at p.202.
[78] Armstrong, A. (1990) at p.143.

[79] Cf Burman, S. (1988) at pp.351-352.
[80] s.3(4) Primary Courts Act, s.3(1) Guardianship of Minors Act, s.10 Matrimonial Causes Act
[81] Cf Smart, C. (1984) at p.123.
[82] Maboreke, M. (1987:143) advances two reasons. One is that if man was going to be the child's guardian and make arrangements about its life especially those regarding marriage then it was probably a good idea to have custody. The second was economic, viz that fathers are materially better able to provide than mothers.
[83] Cf Maboreke, M. (1987) at p.139.
[84] Cf May, J. (1989) at p.16.
[85] Smart, C. (1984:125) contends that English courts are now able to distinguish between the two.
[86] Maboreke, M. (1987) at p.157.
[87] Cf Smart, C. (1984) at p.212. However in Africa where the cost of obtaining child care in the form of housemaids is cheap, the question of who will look after the children when the father goes off to work becomes secondary.
[88] Chitiyo v. Chitiyo HC-H 20-83
[89] Cf Burman, S. (1984) at p.134
[90] Maboreke, M. (1987) at p.158
[91] Cf Burman, S. (1986) at pp.126-127, Smart, C. (1984) at pp.122,178.
[92] Smart, C. (1984) at p.210.
[93] s.4(1) of the Guardianship of Minors Act which gives custody of children to the mother pending the outcome of the divorce hearing. However this is not automatic especially if the father is the one with custody. See Maboreke, M. (1987) at p.157.
[94] Smart, C. (1984) at p.122.
[95] Smart, C. (1984) at p.122.
[96] Delphy, C. (1984) at p.100.
[97] Cf Burman, S. (1984) at p.97 and Burman, S. (1986) at p.133.
[98] Cf Burman, S. (1984) supra.
[99] Burman, S. and Fuchs, R. (1986) at p.130.
[100] Maboreke, M. (1987) at pp.144-145.
[101] Griffiths, J. (1983) at p.184.
[102] Delphy, C. (1984) at p99.

Chapter 9 - Post Divorce Lives of the Women

9:1 Introduction

The last chapter examined the approach to formal institutions by the study population. The chapter began by examining the barriers to access which were divided into three categories, namely economic, geographic and psychological. It then moved on to consider the role of lawyers in the divorce process and concluded that lawyers played an intermediary role, providing specialist knowledge about the workings of the legal system and negotiating with other lawyers to reach agreements which would be satisfactory to their clients. In examining the court's role, it was reiterated that an approach to court should not be perceived as an escalation of hostilities between the two parties. The different actions instituted by the women were then considered in greater detail. From the data it emerged that maintenance formed the most popular claim and an inability to effectively enforce maintenance orders the biggest complaint.

This chapter is an attempt to answer the question, "What becomes of the woman after she is separated from her husband?" An examination of women's economic position after divorce is crucial to an understanding of the post divorce lives of women. Of the process of marital breakdown Maclean has noted:

> "Family breakdown is not only an event, but rather a change in the circumstances, expectations, family organisation and earning power of a group of families whose members take complex paths through life in separate households after divorce. People do not just seek a divorce decree, they subsequently live alone, with or without their children, change their relationships with a wider kin network, go on to form new attachments, to co-habit, to remarry, to separate and even to divorce again."[1]

The chapter is divided into two parts. Part one looks at the economic effects of the divorce, while part two examines the social consequences of the divorce.

In trying to work out an income package women have four options open to them.[2] These are: payments from a former partner, welfare payments from the state, earned income and finally a share in a new partner's income.[3] Maclean points out that women may draw from some or all these sources at the same time in an attempt to make ends meet. Whilst adopting Maclean's model, the state welfare payments have had to be discarded because Zimbabwe does not have a welfare scheme from which women can draw money. The chapter therefore concentrates on the remaining three options starting with employment, then maintenance and finally remarriage.

Generally the courts are loathe to award spousal support especially if the woman is childless. It therefore seems more appropriate to talk about child support. In this section the assertions made in the previous chapter are reiterated so that it is noted that although award and compliance levels are low, maintenance still forms a substantial contribution to the household income. The chapter also looks at property settlements highlighting the fact that women are given custody of children but no home in which to house them. Similarly, the fact that no account is taken of men's career assets results in women being "short changed" in the settling up process.[4]

Remarriage has been advanced as a way out of the poverty trap.[5]

Within the Zimbawean context, it is not a popular or viable option. Firstly, there are the cultural constraints against marrying a divorced woman. Secondly, for the woman herself remarriage demands that she makes difficult choices, which include abandoning or losing one's children to marry or remaining single and keeping them.[6] For most the choice is clear.

In effect, then, the Zimbabwean woman is dependent on two sources of income, that which she earns and that which her former husband chooses to give her in the form of maintenance payments. This makes for a precarious lifestyle and often leads to female-headed households experiencing dire poverty.

The woman's emotional life is examined via her relationships with other people starting with those closest to her, namely the former husband and the children, before moving on to consider her relationships with the respective families and friends. The discussion includes an examination of the changes which take place at the work place as a result of the woman's changed status. It then moves on to look at the woman's attitude towards and relationships with other men. It concludes by looking at the woman's perception of her own life.

Relationships with the former husband were the hardest to sustain. However, regardless of their personal feelings towards the former partner, there was a realisation that they were linked for life by their children and for their sake it

was important to try to keep the relationship as cordial as possible.

Families continued to play a dominant role in women's lives. Relations with the former husband's family generally came to an end with the dissolution of the marriage. There were a few exceptions. The woman's own kin came to take on great importance in her post-divorce life. 54 (71%) of the women in the customary group reported having returned to live with their families on the break up of their marriages. Of these 35 (46%) said that it was to their families that they looked for their maintenance and upkeep. However a return to the family of origin also brought with it some loss of autonomy and became, in a sense, a return to a second childhood.[7]

In a society such as Zimbabwe where a woman's primary calling in life is thought to be marriage, non membership of the "club" can lead to one being ostracised by old friends who either through embarrassment or myopia begin to avoid one. Similarly attitudes towards the divorcee in the work place vary between support and condemnation.[8]

Relations with, and attitudes towards, men were, like those towards the former husband varied. Some had entered new relationships in which they were reasonably happy, while for others the old proverb, "once bitten twice shy", seemed to apply. For all, relationships were approached with caution and many declared their independence and wish to remain autonomous. This they did by insisting on non cohabiting

relationships.[9]

For the woman herself, the divorce necessitated a great deal of personal adjustment. Whilst some women spoke of muddling along and coping as best they could in the new situation in which they found themselves, others felt challenged by the life that lay ahead of them and saw it as a time of tremendous personal growth.[10]

These issues in will now be examined in greater detail.

9:2 PART I - ECONOMIC RECONSTRUCTION

The four sources of income available to women from which they can construct an income package are:

1. payments from a former partner
2. welfare payments from the state
3. earned income
4. a share in a new partner's income.[11]

As Zimbabwe does not provide any assistance in the form of unemployment benefit or income support, as in Britain, or state maintenance grants, as in South Africa, it seems that only three of the four sources are relevant to a discussion within the Zimbabwean context. However, the issue of whether the State should provide assistance will be considered in the conclusion which follows this chapter. The discussion begins by looking at women's employment, then maintenance payments from the former husband or partner and finally at remarriage as a way out of the poverty trap.

9:2(a) Women and Employment

Most women look to marriage to provide for them economically. They have been socialised to do this.[12] It is only at the dissolution of their marriages that the reality of their situation becomes clear. That reality is that while it is assumed (although not always guaranteed) that the husband is maintaining the wife during the subsistence of the marriage, the situation changes on dissolution of the marriage. The former wife is expected to make her own way.[13]

Although legally entitled to maintenance, very few women are actually awarded it and fewer still receive it. The resistance amongst men to paying maintenance is greater when the woman is young or childless. In the former case the feeling is that she can get herself a job and in the latter there is an unexpressed feeling that in not fulfilling her reproductive requirements she has not earned the right to be maintained.[14]

Abandoned and penniless, the women are forced to turn to the labour market in an attempt to get enough to subsist. If, as we have shown, women have less education than men, then their chances of getting good jobs are curtailed correspondingly.[15] The fact that generally women are not awarded rehabilitative maintenance means that they cannot pursue further education or get vocational training of any kind. This in turn means that they will not be able to get decent paying jobs.[16] Should they then be fortunate enough to secure employment women will find

themselves paid less than their male counterparts, for the idea that a woman works to supplement her husband's income and for "pin money" still prevails.[17]

How then do women earn a living? Whilst doing the fieldwork, the researcher would ask the women what they did for a living and they would reply that they were unemployed. However when pressed about how they managed to make ends meet, they would say that they were engaged in a variety of activities such as crocheting doilies for resale, knitting jerseys or growing vegetables for sale. A few of the more enterprising ones reported that they made trips to neighbouring countries, usually Botswana or South Africa, but increasingly Mozambique, to buy goods for resale in Zimbabwe. They comprised part of the 64% of women found in the informal sector.[18]

The majority of women are employed in agriculture so that of the 2.1 million people in the agricultural sector, 56% are females. Of this number 93% are communal farmers.[19] As work is defined as "any activity which is related to the production of goods and services for market (for pay, profit or barter)" it means that most of the work done by women is not valued as it is not quantifiable in economic terms.[20] Heading the list for the economically inactive population are homemakers who are described as "persons engaged in household duties in their own home."[21] This negates the work done by women and renders it invisible. Of this phenomenon, Delphy has noted:

"The valuelessness of domestic work performed by married women derives institutionality from the marriage contract which is in fact a work contract...it is a contract by which the head of the family - the husband- appropriates all the work done in

the family by his children, his younger siblings, and especially his wife, since he can sell it on the market ...Conversely, the wife's labour has no value because it cannot be put on the market because of the contract by which her labour is appropriated by the husband...It has therefore become limited to producing things which are intended for the family's internal use: domestic services and the raising of children."[22]

With a large male migrant population, it is the women who remain in the communal areas ploughing and managing family resources. By growing their own food and tending to the homestead, the women relieve the men of their duty of feeding and housing the family. Any surplus which is produced is sold and appropriated by the man for his own use so that the woman never reaps any rewards for her labour. In many ways this discrimination is institutionalised for:

"Land is still allocated to the "head of the household", which, as long as the husband is alive, is the man. In so far as tradition still prevails, this invariably means that the men are in control both of the land, and of the women's labour when they work on the land. In this way, men feel that they have an absolute right to control the income ensuing from the agricultural production of "their" land, even when they work in town and the wife has done most of the work."[23]

On divorce when the woman is dispossessed, she returns to her family of origin where she tills her father or brother's land. For rural based women all that divorce signifies is a change of master. Instead of working for the husband she now tills the land for the father or brother's gain. This then is the position of the vast majority of women who depend on subsistence level agriculture for their livelihood. It remains to be considered what becomes of the small proportion of women who find employment in the formal sector.
Here again the women's educational disadvantages are reflected in the types of jobs which they do. Generally women are found

in jobs traditionally considered "women's work", which by its nature is undervalued and therefore underpaid. Six women (7.8%) in the customary group said that they were working or had worked as domestics (housemaids).[24] At least two worked as child minders in creches, whilst others were involved in semi-skilled occupations working at nurseries. A few worked in the manufacturing sector either sewing clothes or knitting. It is striking that by and large the women were involved in work traditionally associated with the informal sector. The distinguishing factor was that they were being "paid" for their labours.[25] Even then the wages were not high so that the highest paid formally employed woman in the first sample was paid $319.

Childcare was a problem for the majority of women who were in low paid jobs. They could not afford to employ a full-time child-minder as could their colleagues in the second sample. They had to rely on help from kin and friends. Twenty five year old Ms Hove was employed to knit jerseys at a monthly salary of $125.[26]

"I have custody of the child. I leave the baby with my sister-in-law who lives near by."

Ms Chiadzwa was a twenty six year old ice cream vendor with three children aged three, two and six months respectively. She had a weekly wage of $36. With commission it came to $50 per week. Having recently been awarded custody of the two older children who had been taken by her mother-in-law on separation she had made the following childcare arrangements:

"My twenty year old niece who looks after the baby will look

after these others. We all live in one room in the house where I am a lodger."

She was paying $50 rent per month for this room, $5 for electricity and $2 for water in addition to having to feed and clothe two adults and the children. The niece was a high school drop out. Not engaged in any income generating work, she had been truly unemployed. Her parents were therefore grateful to get her off their hands. Not paid a wage, live-in relatives are "remunerated" by having meals provided and occasionally clothes bought.

Not all women were fortunate enough to have relatives living near them with whom they could leave their children. The splintering of the extended family network has resulted in family members living separately from other kin members. Children posed constraints on women's employability in other ways. Illness was one. A woman who had, until her last pregnancy (she had three children altogether), worked as a hairdresser said of her situation:

"I can't go back to work as yet. The baby was born premature and is very sickly. I can't leave a child who is that ill with the maid. I think I will look after him for a while. When he is one, then I can return to work." Ms Mavhuna

Ms Mawadza had been forced to stop even her informal market trading:

"I used to sell vegetables at the market last year. I stopped because my child is so sickly. I used to make about $15 a day which I used to live on. Now I sell candles after dark. I make about $10 per day, but I don't sell every day. I can't work (she means in formal employment) because the child is sick. There is no one that I can leave her with and I can't afford to employ a maid and anyway she is too sickly to leave with someone else."

Sometimes employers were not favourably disposed to women with children. Those employing women as domestic workers often did so on the condition that they did not bring their children to work and if they lived on the premises they were not allowed to have their children living with them. The lack of child care facilities and the shortage of housing lead to a splitting of families. Women were forced to send their children to live with relatives in the rural areas.[27] Two of the women currently employed as domestic workers had been forced to adopt this course of action. Ms Dengu had to send her eldest child aged six to the rural areas to be looked after by her grand-aunt:

"I send her $20 per month (her salary in 1990 was $80) for the child's upkeep...I recently received a letter from my grand-aunt telling me that the child is sick and needs to go to the clinic. It's also time for him to go to school, so I need to get him a birth certificate. I can't afford the expense of sending him to school and also looking after the other one."

She was fortunate in working for employers who allowed her to bring the other child to work with her. However, they were expatriate workers whose contracts were about to expire. She expressed concern about this:

"I am worried that when my bosses have to leave I won't have anyone to leave him with. Right now I bring him to work with me. He plays outside while I work."

Table 6 showed the women's work careers before, during and after the marriage. The table is reproduced below for ease of reference.

Table 6 Work Careers of the Two Groups of Women.

CUSTOMARY GROUP -

	School	Unemp.	Plough	Informal	Formal	Total
BEFORE	31	9	24	3	9	76
DURING	0	16	33	24	7	80
AFTER	3	12	15	44	8	81

CIVIL MARRIAGE GROUP -

	School	Unemp.	Plough	Informal	Formal	Total
BEFORE	4	1	2	0	14	21
DURING	1	2	2	5	14	24
AFTER	0	3	1	4	14	22

The variation in the totals is a reflection of the fact that some women reported themselves as being involved in more than one activity and were correspondingly recorded more than once.

The table shows that in the customary group, by the time the marriage is over one woman has gone back to formal employment, but the vast majority, unable to obtain or untrained for jobs in the formal sector, have started work in the informal sector. Those who were unemployed were those who had remained unmarried or those divorced women who had lived in town during the subsistence of the marriage and whose childcare commitments prevented them from starting up in business. The reason for the fall off in the numbers ploughing is that some women, on leaving their husbands' villages, did not return to their own villages, or only did so for a short time. Instead they went to live with relatives in town in an attempt to get

jobs and because the opportunities for making a living through informal trading were better in town than in the rural areas.

"My sister who is married and living in Harare told my mother that it would be better for me to come and live in Harare where I could try to get a job which would enable me to look after my children. She invited me to come and live with her and her husband." Ms Dengu

Overall, the small number of women in formal employment would seem to support the researcher's original thesis that the educational discrimination against women is reflected in their absence in the formal sector. Moreover, the dissolution of the marriage forces the women to look within themselves for resources. The realisation that they do not have any formal education, training or work experience leads them into the informal sector where they engage in trade. The fall in the number of those who plough can be interpreted in two ways. The first is that due to overcrowding and shortage of land in the communal areas the families of origin cannot spare any land for the women to grow crops for themselves so they are forced to find other ways of making a living. The second possible explanation is that women are resentful of not controlling their own labour and of not reaping the rewards of their work from household plots so they choose to strike out on their own and become self employed.[28]

We have seen how women's employability within the formal sector is hampered by the limited education which they receive and by their very socialisation which encourages them to look to marriage for lifelong support. The deprivation which results when the marriage breaks up is as a direct result of

those two factors. We have also seen how women's work in agriculture is rendered invisible and therefore valueless by virtue of the unwillingness of official statisticians to class it as labour. In the formal sector women are found doing unskilled or semi-skilled work which is undervalued and therefore underpaid. Added to all this are the difficulties experienced by women with children. They cannot afford to employ child minders so they turn to relatives for assistance if any are in close proximity. For some, other constraints are imposed by the children such as illness, the separation of families and the difficulties of arranging maternity leave.

The question thus becomes, what does a woman do to get money to look after the children? The answer? She looks for support from the father of the children. The support comes in the form of maintenance.

9:2(b) Maintenance

Burman has noted that:

"To place maintenance payments in perspective, they should be viewed, first, against the household subsistence level, and second, against the alternative form of maintenance payments - state welfare grants."[29]

There being no state maintenance of any kind in Zimbabwe, private maintenance takes on added importance. Moreover, given women's limited employment opportunities, support payments from former partners become their lifeline. Because it often formed the only source of income, the women could not afford to let it go, so they invested a substantial amount of time and energy into trying to chase up defaulting former

partners to ensure that they received their money.

The difficulties of trying to enforce maintenance orders were discussed in the last chapter. However, what does warrant restatement is the unreliability of maintenance payments and the negative effect of non-compliance on the lives of those who depended so greatly on it.

Looking at the two groups, it would probably be more accurate to talk about child support rather than maintenance, because generally former wives were not granted support. In the customary group only four women (5%) were awarded maintenance. All but one of these had children. It was the persistence of the childless woman which resulted in an order for support being made in her favour, the attitude of the Presiding Officer being one of scepticism that she, a childless woman, should be entitled to any. In the civil marriage group, only two were awarded spousal support. However, here it must be pointed out that some of the women in the group <u>refused</u> to ask for maintenance for themselves. Given the fact that those refusing were in well paid jobs, it is unlikely that they would have been awarded any. Support for this contention can be found in the attitude of one woman's lawyer to her claim for the matrimonial home:

"I would bring up the issue of the house and he would tell me that I earned enough so I could buy my own house." Ms Thebe

This was in spite of the fact that the husband earned more than she did and that she was getting custody of three school going children. Even women like Ms Chigudu, aged 21 with two

pre-school children aged four and two, were not awarded maintenance for themselves, only the children:

"I had asked for $250 for me and the children. He was ordered to pay $100 being $50 for the rent and $50 for the two children." Ms Chigudu

There were instances of men voluntarily paying child support so that in the customary group, nine (12%) were reported to have begun without much prompting and three (14%) in the civil marriage group. However even with these unforced offers, payment was not always consistent. Ms Mapfungautsi said of her situation:

"During the first few days I have had no problems, but these days he is becoming difficult. He doesn't bring what you agreed so I was threatening to take him to court so this month he was a very good man and he paid up but it's still not enough."

For a quarter of the women in the civil marriage group, the maintenance was part of a pre-organised package, worked out by the couple and their lawyers and incorporated into a consent paper which was brought before the court as the basis on which it should make its draft order. Although voluntarily entered into, these agreements were not always adhered to. Mrs Thebe's was such a case.

"John is supposed to pay for the mortgage, maintenance for the house, school fees, medical bills and maintenance at $75 per child...He pays the mortgage on time but you have to battle with the rest. The school fees - I have to phone to remind him. The maintenance... sometimes its in other times not. He has thrown the eldest child who is 19 out of the maintenance. He says that he is old enough now and should fend for himself. Although he is supposed to pay for the maintenance of the house, if you send him the bills, he doesn't pay."

In this case the <u>only</u> reason that he was paying the mortgage

was because the house was registered in his name and according to the consent paper he would regain possession when the youngest child reached 18 years of age. It was in his own interest to keep up payments. Although the oldest child had reached the age of majority, he was still in school doing his "A" levels and living at home with his mother who now had to shoulder total responsibility for his support.[30]

It was generally only women in civil marriage group who mentioned additional expenses which were met by the husband. The most common was school fees. (Only one woman in the customary group said that her husband paid the fees. This was only because in an attempt to wrest custody from her he had offered to pay for them to attend a boarding school at some considerable distance from where she lived.) The suggestion is, therefore, that all the other women had to find the means to meet any additional requirements not incorporated in the cash sum awarded as maintenance. Mrs Nhamo said that she had tried to raise the question of school fees at her divorce hearing:

"He was to pay $80 per month per child which I sometimes get...I asked about the school fees but the lawyer didn't want to mention it so he left it hanging - so it's not in the settlement."

Although maintenance awards tended to be low and payment inconsistent, often they formed the only real cash income to which the family had access. Maclean has noted:

"The total amount of child support is not the key figure but rather the proportion of the total household income that it represents."[31]

9:2(c) Property

So far the discussion has centred around cash transfers as between households but little has been said about property distribution on the dissolution of marriage. It is common cause that women are awarded custody of their children in over 90% of cases of divorce.[32] The two samples were no different. However there was no corresponding transfer of housing into the wife's name or even provision of shelter for the woman and children. Whilst this may be of no consequence in a rural context where the woman has to transfer to her own village, the lack of housing can, in other cases be the cause of great hardship.

In the customary group, 54 (71%) women reported that they had on the dissolution of their unions returned to live with their families of origin. Almost all of them had taken their children with them. Given the overcrowding that already exists in the urban areas, one wonders where the women were expected to house the children. As Mrs Nhamo pointed out:

"From the marriage I lost everything, literally everything - I was given the children but no home - I was given the children but nothing else.

The argument was that he had another family which was already in the house so he needed somewhere to put them. There was something so grossly wrong about this..."

It seemed that in making property awards, courts appeared to be working on the assumption that as the man had been in waged employment he had paid for all the family assets and that he should therefore receive them. As most women could not afford to buy homes in their own right, they ended up, like Ms

Masarirambi, living in one room with all their children. Even their more well off contemporaries in the civil marriage group could not afford to acquire homes in their own right. They lived in rented accommodation which, whilst comparatively better than that to which their counterparts in the customary group were accustomed, was correspondingly not as good as that to which they had become accustomed in the course of their married lives. In the civil marriage group five women (24%) had homes for which they were responsible for meeting the mortgage payments. Only one of these was receiving any help from her former husband:

"I bought a house in Ashdown Park. The mortgage was $660 per month, so he said that he would pay $160 and I could pay $500. Maybe if I had been smart I wouldn't be paying this $500 now. He could be meeting the entire cost." Mrs Takaenda

The mortgage comprised a quarter of her gross salary. Of the five, one would not have been able to keep up with mortgage payments on the property so the company for which she worked had bought the house and the money was being deducted from her salary as a loan.

Weitzman has shown how, in the distribution of assets, courts do not take into account intangible "career assets" such as pensions and life assurance.[33] However, in making property awards on the basis of direct monetary contribution, the courts failed to take into account the fact that tax laws discriminated against women so that husbands and wives were taxed jointly with the wife's salary being subject to a higher level of taxation.[34] In effect then the wife's contribution throughout the marriage was undervalued and this

undervaluation was reflected when the time came for property to be distributed. This no doubt affected two thirds of women in the civil marriage group who were recorded as having been in formal employment throughout the course of the marriage. Although tax laws were changed in 1988 to include separate taxation there is no doubt that women in the study had been disadvantaged by the old law.[35]

Moreover, until 1985 female workers paid pension contributions at a rate of 6% as opposed to the 7% paid by men and consequently would receive a smaller amount on retirement. In addition to this diminution of income at retirement, the women did not benefit from the husband's higher pension contribution.[36] Women were therefore doubly disadvantaged for whilst they paid part of the husband's tax for him they did not, on dissolution, get any credit for doing so, nor did they benefit in any way from his higher pension contribution.[37] One of the reasons given by men, and taken into account by the court, for non-payment of maintenance or low awards was that the man had other responsibilities, usually to the extended family, but increasingly to second families and extra-marital children. It seemed that in the distribution of resources, second families took precedence. This being the case, would it not be sensible for the woman to attach herself to a new man? By becoming <u>his</u> second family she could have first claim on his income. Here the researcher has in mind remarriage.

Delphy contends that marriage is a woman's best career prospect for it provides economic security.[38] She further

contends that marriage is a self perpetuating state arguing that:

"10 years after the wedding day, marriage is even more necessary than before because of the dual process whereby women lose ground or at best remain at the same place in the labour market, while married men may make progress in their work as they are not hampered by household obligations...Thus it can be said that, from the woman's stand-point, marriage creates conditions for its continuation and encourages entry into a second marriage if a particular union comes to an end."[39]

Remarriage as a way out of the poverty trap will now be considered.

9:2(d) The Second Time Around: Better Than The First? On Remarriage

"The problem with finding a man who will marry you," Ms Gomo explained, was that," while he might be prepared to take on the donkey, most men aren't prepared to take on the cart as well." The donkey in this case was the woman and the cart, her children from a previous marriage or another man.

In that one sentence, she captured the dilemma faced by many women about marrying again. The prospect of a woman with children finding a man willing to marry her was slim. Men do not want to take over somebody else's "baggage". In so far as the presence of children suggests the continuation of the marriage relationship, albeit in a changed form, many men were of the opinion that the woman remained married to her husband even though co-habitation had ceased. Ms Dengu said of her new partner:

"Well he says he wants to marry me but he says that I must first finish sorting out this problem (maintenance) about the

children with my former husband. He says that he can't be seen to be intervening."

The women were themselves reluctant to marry for often a pre-condition to marriage was divesting oneself of one's children and presenting a single and "unburdened" woman to the man. Two women in the customary group left the children of the first marriage with their families of origin and went to the new husbands alone. They then went on to have children with the new husband. One can only imagine the feelings of rejection aroused in those left behind.

Women were also fearful of losing their children should they remarry. They were aware of the fact that the former husband would be indignant at the thought of *his* children being looked after by another man.[40] He would claim custody and, given the conservative attitudes of most Presiding Officers in this area, the husband would be given custody. The decision in Ms Gomo's case, which was discussed in the previous chapter, fully bears out this contention. Her husband had advanced the following reasons as to why he should be awarded custody:

"He said that I was living with someone else and he could see no reason why he should continue to pay (maintenance) or why his children should stay with another man."

The court agreed with him and granted him custody. Even if the new man accepted the responsibility of taking on both the "donkey and the cart" there was still the fear of how the newly reconstituted family would get along.[41] In trying to please the new partner without neglecting the children conflicts were bound to arise. This is exactly what happened in Jane Gogodi's case. She had had a child by a man whom she

had not married before meeting her husband. Of the breakdown of her marriage she said:

"We had lots of problems. To start with I had my own child. When we were still dating as boyfriend and girlfriend, he didn't object. In fact the whole period that we went out my child was staying with me. Straight after we got married he said that the child had to go. We quarrelled about that for a long time. I said that I was keeping my child. He could leave if he wanted.

In 1988 my daughter started going to school. He expected me to put her into boarding school. This is in grade 1. I put her in a day school. He was not too happy about this."

Interestingly, the same constraints did not seem to apply to men so that over 90% of the women reported that their former spouses were seeing, living with or married to someone else. The reasons for this appear to be clear. Firstly as mothers were usually given custody of children, it meant that the new partner did not have the responsibilities of looking after his children. To reverse Ms Dengu's analogy, she got the donkey, but did not have to worry about the cart. Secondly, as men walked away from the marriage with practically all the assets of any value they were more economically appealing than their impoverished wives would be to other men. Finally the cultural constraints about marrying a divorced person seem not to apply to men, or at least not to the same degree that they apply to women.

It was also interesting to note how those women who entered into new relationships or who went on to have more children did so with men who themselves had children with former wives or girlfriends. Only one woman, from both groups, had married a bachelor who did not have other children. The men's new partners were not necessarily divorcees or "unmarried

mothers".

It is a well documented fact that a woman's chances of remarriage decrease with age so that data collected by the Central Statistics Office show that:

"Marriage for both males and females increases with age reaching a threshold in the age group 25-29. Thereafter the percentage married for females drops faster than that of males."

"There is a higher rate of females than males in the divorced/separated category in all age groups and this could be explained by the fact that more men tend to remarry than females and also that women marry much earlier."[42]

If the median age for the customary group was 28 and that for the civil marriage group 37, then most of the women were over the marriageable age. Age was also a factor, so that whilst men could, in searching for new partners, date women who were younger than themselves, women generally could not. Also with the female population at 51%, it means that there are more women than men anyway, thus exacerbating the situation and creating a phenomenon known locally (in Zimbabwe) as "man shortage".

For some women the mere mention of remarriage filled them with horror, viewing it as a case of "out of the pot and into the fire". These are some of their views on the topic:
"I will never remarry. I have the experience. I have seen it all. It just hasn't worked out for me. If children could be put back, I would have swallowed all of mine a long time ago." Ms Dube

"I am no longer interested in getting married. It's difficult to keep having children with different men." Ms Makumbinde

"I am living alone. I am not interested in remarrying. I would rather find myself a job and work." Ms Makanza

"I don't want to marry again because it was a trauma. The

whole marriage institution was a trauma to me and at the back of my mind I still fear it - I have a big family. Three is a big family. They have gone through a lot and I want to give them my love." Ms Thebe

All but the last quotation are taken from the customary group thus showing the universality of the women's feelings. There was no difference based on the economic position of the women in the respective groups or the different types of marriage. For the more well off ones or for those for whom marriage had not provided any form of financial security, there seemed to be little point in remarrying. Furthermore with divorce came freedom and independence. Having had a taste of freedom, few were prepared to give it up.[43]

Despite these difficulties, there were still those who did remarry. They were part of a small minority. In the customary group three (4%) had remarried and two were contemplating it whilst only one in the civil marriage group had remarried. Two things were noted about the women who had remarried, the first is that they had been living on their own when they met their partners and the second is that they had met their new partners in the urban areas. This meant that the chance of rural women meeting new partners was substantially reduced. On divorce it is expected that the woman will return to live with her kin. Villages are grouped around kinship ties so one is precluded from marrying someone in the vicinity. As most women are not mobile and opportunities to leave the homestead do not often arise, it means that the chance of meeting eligible men is greatly reduced.

The picture which emerges is that remarriage is not an option which is open to many women to exercise. It seems therefore that the only two realistic sources of income available to women in Zimbabwe today are those derived from employment, which as we saw was not much, and that derived from ex partners in the form of maintenance, which was more often than not paid inconsistently and at very low levels.

Divorce brings about a change not only for the two parties concerned but also for their children, families and friends around them. It therefore becomes important to examine the effect of divorce on the woman's relationships with these different groups of people.

9:3 PART 2- ALTERED STATES - RELATIONSHIPS

On the process of uncoupling, Waller has noted that:

"The divorce(e) must organise his whole system of relationships in such a way that other people who were not previously important may become so, and that one person who was more important than any other may be held at a distance."[44]

Not surprisingly the breakdown of a relationship considered as

being central to the woman's life brought about changes, not only in the way the women saw themselves but also in the way that they were perceived by those around them. The husband was replaced by the children as the central and most important person in their lives. For both groups of women children became their *raison d'etre* .

Their attitudes towards and relations with the former husband ranged from bitterness and regret at ill treatment and wasted years to longing and nostalgia for days gone by. As for relationships with the families, it seemed that with the breaking of the main connecting link came a cessation of contact with the husband's family. For many the break up of the marriage meant greater reliance on the family of origin with many women returning to live with their families and often relying on them for financial and emotional support. Those in the customary group relied more on their families for practical support than did their civil marriage counterparts. Conversely those in the civil marriage group seemed to be preoccupied with the changing nature of relationships with friends and the wider social network. No doubt those in the customary group had friends, but they hardly mentioned them. The researcher attributed this to the fact that their central relationships were with kin to whom they turned for both emotional and practical support.

Underlying all relationships was the fact that the woman had once been married or had been in a long-term union. Although no longer part of the "club", marriage continued to impact on

the woman's life. In a sense she was still defined in a way which showed that she had once belonged to the "club" so she was often introduced as having been someone's wife or as having had children with someone or as having been married into a particular family. Rarely if ever did she retain her own identity.

The woman's changed relationships will be examined in greater detail. The discussion starts by considering her relationship with those who had formed the core of the family unit, namely the children and the former partner, and then going on to consider how the divorce had affected her relationships with the two families, then friends and the wider society, and finally its effect on her perceptions of men and her assessment of her own situation.

9:3(a) Children

There were in the customary group about five women with a litany of complaints against the partner whom they were suing for maintenance. When asked why they stayed in the marriage given their professed unhappiness they replied variously:

"I decided not to leave because I think that the children must stay in one place." Ms Gatsheni

"If you have five children with the man how can you divorce him? How will you look after five children?" Ms Ruzengwe's aunt.

"I still want to stay married to my husband. How can I divorce him? What would I do with the children? Some of them are still very young. Who would I leave them with? His parents are both dead. That's why I'm staying." Ms Peni

"I am one of those women who stays for lack of any other options. I am quite happy to stay alone. I sometimes think

of leaving and going to my parents, but then I think of my children and I stay. I think that I may as well grin and bear it...Besides my children are nearly grown up." Ms Mushai

"Men are difficult. One just perseveres because of the children...It's difficult to think of leaving one's children." Ms Krahner

Three women who had gone through with the divorce said that they had foregone asking for maintenance to pre-empt the husband from claiming custody of the children.

Throughout the marriage and thereafter the children were the woman's main concern. On divorce the children were both a source of solace and comfort and a cause for concern. It was because of having to deprive their children of things to which they had become accustomed that the women felt the greatest guilt and anger.[45] Financially it was the little things which caused the most consternation, especially the inability to provide the children with a standard of living comparable to that enjoyed by their friends and peers. One of the mothers in the civil marriage group with two children, a 16 year old son whose father she had not married and a 5 year old daughter from whose father she had recently separated, had this to say on single parenting:

"The struggle is tough. You can't be happy when things are not balanced but I try. You're always short of money to raise the children and give them what they want. I can't afford to pay for them to do sports and go to clubs like other children. Just think of all that money I use on transport, food and clothes. You can't always phone their fathers. They will ask you where you think the money comes from or they will just tell you that they don't have it. You as the person who looks after the children have to find it - like now this week there is the show...[46]

If a child is having problems with one of his subjects at school, then you as the parent staying with the child want him to be helped, so you find someone to do private tuition.

Right now my son who is in his "O" level year is having problems with maths. I had to pump out a lot of money - $370 for three weeks... When the child gets ill, I pay for medicines. If I go to him now he will tell me that he doesn't have the money."

It is now a well documented fact that children from homes where the parents are divorced underachieve.[47] Similarly, the children of women whose education was curtailed due to pregnancy are themselves likely to have low educational attainments.[48] Ms Chipangura, a 49 year old mother of nine, who had been rejected by her husband in 1984 and formally divorced in the High Court in 1991 said of her situation:

"1985, 86, 87 all went by and I stayed quietly. I did not hear from him and he did not provide any maintenance or support of any kind. As I did not have any money, the children did not go to school."

In Ms Chipangura's case, the effect of the father's financial neglect on the children's education was easy to see from their educational levels. They were often several years above the average class age.[49]

Joseph	27 years	- single and working
John	24 years	- Form 4, stuck because no money to pay exam fees
Linda	21 years	- Form 4
The twins	18 years	- Form 3 stopped for two years because of lack of money
Susan	16 years	- Form 3
Cheryl	15 years	- Form 1
Mary	12 years	- Grade 5
Tinashe	9 years	- Grade 1

Of all eight children at school, only one, Susan, was close to the correct age for her class. With all the stopping and starting, it was unlikely that they would ever successfully sit and pass a sufficient number of public examinations to get

them the required five pass grades at "O" level needed to secure employment. It was likely therefore that the Chipangura children would join the estimated 100 000 school leavers who were unemployed.[50] A cycle of poverty was therefore likely to be perpetuated.

What irked many women about their former husband's attitude to the children was that he maintained a comparatively luxurious lifestyle when compared to their own and yet he failed to provide child support on time and in adequate amounts. When the children went to visit their father they had a window into a lifestyle to which they might once have had access but which was now denied them. As if to compensate the father showered the children with gifts and money. All that this succeeded in doing was highlighting the poverty in the mother's home. It also cast the mother in a bad light and made her appear tight-fisted.

On a financial level, children, especially young ones, did not realise that the father had more money at his disposal. On an emotional and behavioural level, the father could afford to be more indulgent for he only saw the children periodically and did not have to deal with the insubordination resulting from his indulgence. She did. The mothers therefore not only resented their own inability to provide the children with luxury items which the father could, but were also angered by what they saw as the father's undermining of their parental authority, which in a household without secondary adult back up was difficult enough to maintain. A good example of this

is the case of Mrs Takaenda. A 41 year old teacher, she was separated from her husband, a successful businessman who had left her for a younger woman with whom he was now living in some luxury. The Takaendas had a 16 year old son who was in boarding school. Mrs Takaenda had custody during the school holidays. The boy visited his father during the weekends:

"He (the son) has always liked him (the father) better than me because he gives him everything and never hits him. Once we agreed not to give him more than a certain amount of pocket money, next thing I know, he's giving an 11 year old $40 for the weekend. I was so angry. Now he always feels like mummy is cruel and cringing."

She went on to attribute her son's poor school performance to her husband's over indulgence of him:

"He's not doing well at school yet I know him to be an intelligent child - but deep down inside I think he thinks he's got all that money coming to him so why bother? But I told him that his father has a new wife and that if he dies don't think you'll get anything. I don't think he believes me."

To the mothers it seemed as if the former husbands used their money to gain leverage. To the outsider it seemed like the fathers used their money as a way of assuaging the guilt which they felt at not being there for the children.

"I allow him to visit the kids but he does that rarely. He is based in Gweru and comes now and then. He brings nothing, absolutely nothing. He gives them (the children) $10 for the eldest, $5 for the middle one and $2 for the little one." Mrs Thebe

The children were aged 19, 15 and 8 respectively and would no doubt have been grateful for the extra pocket money.

Similarly, the mother of two pre school children said:

"I have them. He does not show any interest in the children. He does not come to see them. I have to send my uncle with the children to see him, then he gives them $2 and $1 each." Ms Chigudu

The lack of continued contact between father and children angered mothers and hurt children, especially those who were old enough to feel rejected by their father.[51] It seemed that contact visits between fathers and children decreased with time.[52] Although many mothers took this as a sign of irresponsibility on the father's part, for many men it seemed to be the only way out of what seemed an insoluble dilemma. The practice of seeing the children at pre-arranged times and for short periods of time seemed to exacerbate their guilt about the break up of the family and many felt that it was not in the children's best interests to be undergoing a constant emotional see-saw and change of households. It was for this reason that many opted out of household visits altogether.[53] However, sometimes the children did not understand this and therefore felt abandoned and resentful. Eventually the children would refuse to visit the father. This in turn led to charges of "brain-washing" being made against the mother. The mother of a 16 year old daughter said:

"My husband says that I am the one who is preventing her from going to him but she is grown up and has her own feelings. When she goes to visit him, she gets there and gets a negative attitude from him.

He says that I am the one who is influencing her but I think he should keep her out of our problems. The child is growing up and I don't want her to see me begging all the time. I think she needs my moral support." Ms Rinashe

Mrs Nhamo had this to say about her husband's relationship with their three children:

"He used to come to pick them up every other weekend then they started refusing to go. They are not keen to go to him. They would rather talk to him on the phone. This holiday they only went for the weekend. He used to perform but now he has accepted it."

Perhaps the reason fathers seemed to neglect and stop supporting their children after a while was because the vast majority of them had remarried or were now in new relationships. They tended to go on to have second families and these took up the emotional and material resources previously destined for the first family. Added to this was the fact that many men were expected to send support to parents and the extended family thus further depleting limited resources.[54] This is the conundrum presented by Maclean:

"Our society is not clear whether the former wife receiving maintenance should be treated as a "grasping drone" and seen as preying on the former husband and his new wife, or whether anyone marrying someone with a former partner must expect continuing financial obligations to a former family to be a permanent feature of the new household's economy. Society is not yet clear whether children of the same parent but living in different households can expect to enjoy the same standard of living."[55]

What is clear is that while <u>morally</u> it is right that all the children of one parent be expected to share equally in his resources whether or not they are living with him, the <u>reality</u> is different. Those *in loco* will, by virtue of proximity to the source of wealth, get more than those further removed from it.

When the marriage ended, it was the children who gave woman the impetus to continue. They formed the centre of women's lives so that even those who had been deprived of custody had kept a close watch on their children, and, not satisfied with the way they were being looked after, were planning actions to try to regain custody. Ms Nyoni was one of these women:

"As soon as I find the money to get a lawyer, I want to bring

the matter (custody) to court for retrial. Money is the problem. If I bring the action I want to be able to make sure that I can look after the children better than they are being looked after now. I want to erase all their suffering."

This discussion has to a large extent focussed on women who were once married. However there is a group who never married the fathers of their children. Their relationships not only with their children, but also with the fathers of their children, needs to be examined.

Like their previously married counterparts, this group was primarily concerned with getting money to look after their children. Although being supported by their families, they were deeply resentful of the former partner's refusal to contribute to the upkeep of the children. Part of the resentment stemmed from feelings of personal rejection as the men were refusing to marry them. However, for both groups of women, the general feeling was that even if the men were no longer interested in them, they still had an obligation to the children.

We have seen how divorce often resulted in personal and economic deprivation for "the victims", being the children. The financial deprivation had the potential to inflict long term damage on the children's lives because it led to educational underachievement which in turn jeopardised their chances of getting good jobs. On a personal level divorce often resulted in feelings of rejection which in turn engendered ambivalent feelings towards the father. Although the discussion has concentrated on the hardships, the children

brought joy and light to their mothers in often difficult and emotionally trying times. How then did the woman relate to the person who had once been her partner and confidant and was now "on the other side"?

9:3(b) The Former Partner

Delphy has pointed out that marriage continues after divorce, if only in the continuation of the relationship between the two former partners as parents.[56] Since all the women in the civil marriage group had children and all but two of the women in the customary group, it was inevitable that they would continue to have dealings with the former partner. The same can be said of women who had not married the fathers of their children.

An understanding of women's post divorce lives necessitates a return to look at the nature and importance of marriage in women's lives. Marriage is made central to all women's lives whether or not they are married.[57] Their status in society is determined in relation to a man, thus a single woman is defined as one who has never been married, a divorced woman is one who used to be married and a widow is more sympathetically regarded as a woman who through no fault of her own is no longer married.[58] Those most pathologised are "unmarried" mothers. They are, in Shona culture defined as women who have enjoyed the "privileges" reserved for the married without actually being members of the club.[59]

Marriage gives women adult status. However, by getting

divorced, they are regarded as having failed in some way. Living in a society strongly geared towards couples, they are regarded as being deviant and they become social misfits. The socialisation of African women leads them to internalise the notion of marriage as being the most important contract that they will ever enter into. The nature of the contract as presented to them is one of mutual co-operation with each partner having a role to play. The woman's "role" in this joint venture is that of child bearer and general carer, the man's "role" is that of breadwinner and provider.[60]

Imagine then her disappointment at the dissolution of the contract and her betrayal at the equalisation process. It is only then that she realises that although she has kept up her side of the contract, she is not credited for it. Not only is the property distribution at divorce often inequitable, but she is left with the children and no resources with which to look after them. As she has spent the best part of her life in training to be a wife and then subsequently being the prescribed wife, it means that she has not participated in the formal waged employment sector. She is therefore unemployed and by virtue of not having any formal work experience unemployable. To compound her problems she becomes a social outcast. In ostracising, society does not appear to apportion blame. The fact that it may not be her fault that she is no longer married is held to be irrelevant. What does matter is the fact that in a society where a woman's value is attached to both wifehood and motherhood, she is now only a mother and not a wife.

Looked at in this manner, it is understandable that there were feelings of betrayal and bitterness at the breach of this valued contract.[61] Feelings of shock, helplessness and disbelief were commonly expressed:

"We lived well for a long time. This is something which I never thought would happen to me. An ill wind has blown over my husband. He did not have anything when I met him. Getting that store was as a result of a great amount of effort from both of us. I ploughed in the rural areas and he saved his salary. We pooled our resources so that we could get that store. Now that he has money, he is going crazy. I did not even get to live in the house which we built together." Mrs Zenda

After giving so much of themselves, and sharing the best years of their lives with the men, there remained, in many instances, residual feelings of affection and love for the former spouse. With time, memories of married life and of the former husband took on a rosy glow. Given their feelings of social isolation, these feelings were understandable. The long suffering Mrs Nhamo, who had been dispossessed of her marriage and her home in favour of her husband's mistress, had this to say about her relationship with her former husband:

"I think we were friends more...Marriage comes as a by product. Even now we still meet and talk. People still come and tell me what he's up to, but I tell them not to come and tell me - I don't want to know. Life is cruel but maybe it's a blessing in disguise."

Mrs Nhamo said that she had been bitter once, but that one could not stay bitter forever. This, it seemed, was a recurring theme, for several of the women (particularly those in the civil marriage group) said that initial feelings of bitterness and anger at the former spouse had finally given

way to acceptance. They explained that this process was necessary if one was to heal within oneself and have inner peace. They said that since they had stopped being bitter, they had begun to feel better about themselves and now felt that they could get on with the task of rebuilding their own lives:

"I used to be very bitter. When we divorced, he would come to the sports club with his girlfriends but then I realised that being bitter hurts me as a person. Why don't I forgive, even if I can't forget? Why don't I talk to him? At first he resisted..." Ms Thebe

Much of the bitterness emanated from feelings of abandonment and from having to acknowledge that in a large number of cases they had been left <u>for</u> someone else, or that they had themselves left <u>because</u> of someone else. The rate of remarriage amongst the men was high. With new wives often came children and the constitution of new family units.[62] It was this that irked more than anything else, for not only did it represent a blow for any hope of reconciliation to those still interested in being married, but it also meant increased competition for resources and a feeling that one's children would be hard done by as a result of the new family. As it turned out they were justified in feeling threatened.[63]

Although about 90% of women in the customary group were greatly saddened by the breakdown of their marriages, many of those in the civil marriage group were relieved. There were feelings of bitterness and anger, but often these were directed inwards, at themselves, for wasted years and for taking so long to get out of a marriage in which they had been

so manifestly unhappy. A quarter of the women in the civil marriage group had initiated the divorce.[64] There were no feelings of remorse or regret, just relief at being finally rid of the man. Ms Ndhlovu was one such woman:

"We were very different people...looking back now I can see that I was never in love with the man. We were just two different people, just like parallel lines - parallel lines never meet. Looking back now I don't know how I managed to stay with him. He is very inhuman, very insensitive."

She continued:

"It was just a tough life. That's why I decided to go my own way. I am happy as I am because it was as if I was in prison - a self imposed prison because I wasn't forced to marry him."

Regardless of the women's <u>personal</u> feelings towards the man, whether they be of antipathy or love, there was a realisation that they had to try to maintain cordial relations with the former spouse, if only for the sake of the children. None more accurately captures this than Mrs Ndhlovu when she said:

"I don't hate him, no. I just like him as a person that's all. He's just an insensitive human being because of the way he treats my kids. The fact that he doesn't give a single thing means that I write him off completely. To me if he wasn't the father of my kids, I would just think he was dead but because he is the father, I just know that he is somewhere surviving."

Mothers who had never married the fathers of their children also displayed a gamut of emotions from love and hope:

"I would like to continue seeing my boyfriend. He says that he wants to look after his child but he is not working so what can he do? He says that he still loves me and wants to marry me one day." Ms Mukomberanwa

to despair and anger, at having been duped and betrayed.

However like their formerly married counterparts, personal feelings were often shelved for the sake of the children.

Having examined the woman's changing relationship with her former partner, a discussion of the woman's relationships with the families who played a central role throughout the marriage follows. Contact with the in-laws seemed to breakdown almost contemporaneously with the marriage. Often the woman came to rely heavily on her own family to whom she returned. Although now a grown woman with children of her own, she often reverted to being the daughter of the family who in a sense had never left.

9:3(c) His Family

With the severing of the main link which connected the woman to her in-laws, namely marriage to their son, it was almost inevitable that the relationship with the in-laws would also break down.[65] Often neither side wanted to keep it up, with his family being glad to be rid of her and she feeling like the breakdown of the marriage had been precipitated by the family's attitude towards her.[66]

However, for some, the marital bond could not be broken, so that the woman went back for family occasions such as funerals and weddings. Mrs Ndhlovu was one such example. She had lived apart from her husband since 1984:

"I went back to their home earlier this year to sympathise after one of the relatives died. I wasn't really keen but my mother told me that according to tradition I should."

Two women, one from each sample, reported that they had managed to maintain cordial relations with the former husband's family after divorce. This was because they had been popular daughters-in-law who were well-liked by his

family. There was also an element of guilt for his family acknowledged that the woman had been treated badly by the son. The one in the customary group continued to receive material assistance from his family, whilst the one in the civil marriage group continued to be kept informed of important developments in the family and to be invited to family gatherings. Both women saw the in-laws' behaviour as exonerating them from any blame in the breakdown of the marriage.[67]

Whatever else her family may have felt about her getting married and regardless of the position that they had adopted during the course of the marriage, it was to her own family that the woman turned on divorce, and they, without exception, helped in some way, even if only for a short time.

9:3(d) Her Family

When one sees how much women depended on their families of origin for practical assistance after divorce, one begins to understand the family's reluctance to condone marriage breakdown. They realised that the dissolution of the daughter's marriage would have tremendous financial impact on their lives.

In the customary group, a total of 54 (71%) women reported having gone back to live with their families on separation. Of these, seven were unmarried mothers who had continued to live with their families both during the pregnancy and after the birth. Most important, however, is the fact that 35 (46%)

out of the 54 women reported that their living expenses and those of their children were being met by their families. Needless to say this put a tremendous strain on family budgets.

The breakdown of the extended family has meant that it was usually the nuclear family comprising parents and siblings that was called on to assist. Even then, it was usually the parents to whom the woman turned. If siblings were looked to for assistance, it was usually the brother. Sisters were only mentioned in three of the cases and of these two had married.

Ms Makumbinde, aged 28 and with four young children, had been divorced by her husband. She had returned to her family most of whom lived in the village where they grew maize for subsistence purposes. However, they did not grow enough to sell so they all looked to the son, Ms Makumbinde's brother, to meet any other needs which they may have. Unemployed and too sickly to plough, Ms Makumbinde also turned to her brother for help. The brother lived in Harare where he was employed as a forklift operator. His wife and four children lived with him in town. When asked her income she said:

"I am sickly and am in and out of hospital. My brother supports both the children and I. He gives me $60 when he is paid or else he buys the groceries and brings them home."

Ms Chengeta from the civil marriage group said of her situation:

"After I left I moved in with my parents. I stayed with them for six months then my sister suggested that I move in with her and her husband. They have been very good to me. Her husband says that he has invited me into his house so he

doesn't expect me to pay for anything."

As the vast majority of women in the customary group were not in formal waged employment, the family became of paramount importance in the provision not only of shelter but also of financial support. As a growing number of men failed to live up to their maintenance obligations, help from the family took on even greater importance. Even women who had ploughed during the marriage experienced difficulties, for having left their husband's homesteads, they arrived back at their own villages only to find that all the land available for ploughing had been allocated. They would be expected to assist in the ploughing of the family fields but it was doubtful whether they would ever own any outright. In some rare instances the woman would be allocated her own field to grow food for her children and herself, but by and large she was absorbed back into the old household economy. With reliance came dependence.

Some women had families living in the urban areas. They went to join them in town. With accommodation in the towns at a premium, there was severe overcrowding. The situation was exacerbated by the arrival of the daughter and her children. It also proved to be more costly financially.

Where the family could not afford to let the woman stay with them without payment, they asked her to contribute. Often they provided housing at subsidised rates. In Ms Masarirambi's case, her father had evicted one of his lodgers from whom he was receiving $60 (per month) rent for the room

he gave to his daughter and her four children. She was only asked to pay $30. However, not all families owned houses of their own. Sometimes they too were lodging in someone else's accommodation. They could not afford to keep their daughters indefinitely:

"I am currently staying with my parents who meet all my expenses. But they have recently told me that I can't live with them forever and that I will have to find myself somewhere to live." Ms Makowane

When asked what her parents did for a living, she replied that her father was a policeman and her mother was a housewife. She said that they had five other children, all in secondary school to support. Under the circumstances it was a reasonable request to make. However it did mark a shift from tradition which dictated that the maternal family was under an absolute duty to maintain the divorced daughter until her death or remarriage, whichever came first. On the effect of these changing traditions on women's lives Burman has noted:

"They are particularly vulnerable in times of crisis. The original society in which the customary law operated cannot be reconstructed, and possibly few urban African would want it were that possible. But at present they appear to be caught in a singularly unfortunate convergence of economic and legal systems that interact almost entirely to their disadvantage."[68]

For those who did remain with their families, there was a danger that they would be treated as children again. This was more likely to be the case where the family was supporting the woman financially. There was an implied exchange of support for the autonomy and independence which the woman might otherwise have retained.

Family was also useful for child care purposes. Child care in Zimbabwe is relatively cheap so that most women in the civil marriage group could afford to employ full-time child minders to look after their children. However the working mothers in the customary group were less fortunate and had therefore to rely on sending the children to the rural areas to be looked after by kin. The few fortunate ones with kin in the urban areas living close by could leave the children with them. As a general rule, it seemed that they preferred to send the children to the rural areas. Not only was it cheaper for them to do this, but they knew that their children would be well looked after and would escape the dangers of urban living.

The discussion has so far centred on women in the customary group who tended to rely on their families for support. Being financially stable in their own right, the civil group maintained a separate existence, only turning to their families for emotional support.

While those in the customary group relied on their families for support, those in the civil marriage group were themselves relied on for support. As the woman was no longer married the family felt free to make demands again. They were asked to take on responsibilities such as helping to pay fees for siblings and keeping relatives' children for them. Mrs Nhamo felt particularly put upon. Initially her family had been opposed to the idea of her getting a divorce:

"Now they (the family) have accepted it (the divorce) too much. Now I find I am vulnerable. I was protected when I was

married. I mean just look at the fact that I am living with my niece and my sister. No one consults me. They just come and say we got the child a place at a school near you so we brought her to stay with you. My sister moved in soon after I came here (to her new home). She doesn't contribute anything, not a cent, yet she works. She just looks at me and says that I earn more than she does.

I have reverted to being the single African woman where anyone with a child who wants to go on holiday - they send it to me. Even if I wanted to question it they wouldn't take me seriously. I interpret it as the way society looks at me as a divorced woman. I am supposed to give the family more - sometimes at the expense of my own children."

As a general rule, then, those not in paid formal employment could look to their families for financial support whilst those who were themselves "working" could be called upon to provide material assistance to members of the natal family.

It has been seen how families played a crucial role in women's lives. The family provided both practical and emotional support and assisted not only at the initial stages after the break-up but also whilst the woman was looking for work and beyond. The group which most benefited from family support came primarily, though not wholly, from the customary group.

The next question which needs to be addressed is how did the separation alter their relationships with friends and what effect did it have on the way they were perceived by the society at large? These issues will now be addressed.

<u>9:3(e) Friends. How Many of us Have Them? Re-defining Social Networks</u>

"The whole society is not very supportive. Sometimes you can be under so much pressure that you begin to regret the decision you made. Peer groups say that it is better to be married than to be a single woman, so there are people who are prepared to put up with anything to be Mrs So and So.[69]

It's really sad because the women are the ones who will make

it difficult for any advances in legislation to work because the sisters who are influential impress upon the other sisters that it is better to be Mrs So and So than Miss So and So, even if Mr So and So is a beast. Being Mrs So and So will guarantee certain advantages - invitations to certain parties and functions - `we could have called you if only' - in fact they don't even have the guts to tell you themselves - they just say so behind your back.

It's only people who want to break out who want to talk to you. The whole emphasis is on how you must keep your marriage. It's no respecter of socio-economic boundaries. I know a woman who wanted to join my programme. She's sharp and intelligent and would have been good at the job. She came to me and asked to accompany me on one of my trips to Mutare. On the way there she told me that she had been asked if she wanted to divorce by others around her. They told her that when we went away we had drunken orgies and that we got up to nonsense. They told her to keep away from us because we were a bad influence and encouraged people to leave their homes." Ms Ncube

This woman's exposition seems to convey the experiences of the vast majority of women in both groups, but more particularly the civil marriage group. Divorced women are perceived as being deviant for as Chandler has noted:

"For all women marriage casts a long shadow, part of the way in which they are defined and categorised by their relationships to men. Wifehood is keyed into womanhood to socially stigmatize those who are unmarried. In this way the structure and ideology of marriage are central to the gendering of women."[70]

By being divorced they had fallen outside the lifestyle and biography prescribed for women. Men saw them as being too free spirited and therefore threatening because they were no longer under any man's direct control. Women saw them as threatening their own marriages with their unbridled sexuality. On a more subconscious level married women were forced to look at the disjunctures in their own marriages, which disjunctures they would rather not have acknowledged as being there at all.[71] Hence Mrs Nhamo said:

"Most people pretend their marriages are okay when they are not. They are threatened because now they think I know too

much about what their husbands are up to and yet they stay married. The price on marriage is too high."

Friends played a lesser role in the lives of rural women and of those in the customary group in general. When they were mentioned it was for having provided practical information about how to go about claiming money from the former partner. For their civil marriage counterparts friends had been central to their social lives. They had gone out as couples and as women without partners they found themselves excluded from many social functions to which they would previously have been invited as a matter of course.[72] Those who had relied on husbands to provide an entree into society were particularly hard hit. Having grown accustomed to being part of a "set", their new status brought on feelings of marginality and isolation.

Friends whom the couple had shared posed a particular problem. Often the woman reported that contact with these old friends had ceased. It is hard to know whether this came about as a result of the friends' embarrassment at not knowing how to relate to the couple as individuals, in which case they stopped seeing both former partners, or whether it was due to loyalties falling with the husband.[73] Whatever the reasons feelings of hurt, betrayal and sometimes bitterness were engendered by the woman's perceptions, real or imagined, of the changes in the manner in which old friends now related to her. A good example of this is Mrs Takaenda who spoke at length on the subject:

"I don't have all the same friends. This is what gets me down. I had friends whom I thought valued me but since the

divorce...Like I had a friend whom I went to school with. It was my husband who introduced her to her husband, we even had a joint engagement party but now...When I had problems with David I'd go and see her, but if her husband was there she'd pretend to be sick, yet when you phone her she's all excited and asks when you are coming to see her - then you know that her husband is not there. I tried to speak to her about this change in her behaviour towards me, but she denied it. I don't visit her any more. She used to phone me at work a lot but I don't phone back.

Even with the workers there's not that much respect... like when my husband was there - like the gardener - you tell him what to do and he will say that he'll do it another time. At church meetings, if your husband was there people were free - now people are not so free as they used to be."

Her statement about not having the gardener's respect shows how, culturally, she felt at sea. She missed a strong male presence in her life so that she felt that her lack of a husband meant that people no longer respected her. In a society where adulthood is conferred upon a woman by marriage, the dissolution of the marital union can lead to a corresponding withdrawal of the benefits of the marital state, viz, adulthood and the concomitant respect which comes with it.

Others voluntarily withdrew from association with old social networks. This was a self protective mechanism, for, unsure of how their new status would be perceived, they withdrew themselves from the situation before judgements could be passed either for or against them.[74] Mrs Nhamo observed:

"But I've noticed that old friends now come to see me as individuals and not as a family unit as they used to before. I haven't visited any of them because I don't know how I am perceived."

It was of course possible that the whole trauma of divorce had so changed the women that they were themselves no longer able to relate to friends who seemed to belong to another era in

their lives. They wanted to shed old ties which reminded them of the past and were anxious to make friends with people in similar circumstances.[75]

"When you start splitting, you start getting closer to people in a similar situation. I have a completely new set of friends now. In fact I only see one couple that we shared in common." Ms Samkange

"I still have my good friends, but I have had to make new friends. Even if they are married they accept me as I am now rather than as I was before." Mrs Nhamo

We have seen how on divorce women are forced to look for employment in an attempt to make ends meet. What we now need to examine is whether the divorce had any impact on the working lives and promotional prospects of those already in employment.

9:3(f) Employers

In chapter seven we saw how some employers provided both moral and practical support to employees who found themselves in marital difficulties. It appeared that, by and large, this support and understanding continued both during and after the divorce so that they were given time off to go and settle the ancillary issues of the divorce. At least four of the women in formal employment mentioned this. Others who were experiencing difficulties getting support from the man told of how the employers had written letters to lawyers and legal aid organisations such as the Citizens Advice Bureau asking for assistance on the employee's behalf.

On a more personal level reactions seemed to vary so whilst Mrs Nhamo did not find any change in the way colleagues

treated her:

"It is only here in the work environment where I have not had any problems. I have not dropped an ounce (in esteem). Maybe it's because the information filtered down gradually and they could see that I was as I had been before. Nobody has looked at me as less of a senior member of staff or a professional. Now some of them tell me that they knew what was happening to me and they used to wonder how I managed to perform with all the problems I was facing."

Ms Ncube had a different experience, having received mixed reactions from work colleagues. At the time of the break-up of her marriage she had been employed as a social worker:

"At work I spoke to my colleagues. They were supportive because they were social workers and had dealt with these things before. Half my colleagues were, the others weren't. They said that I couldn't deal with marriage guidance because my own marriage had failed. They said that if someone needing marriage guidance came in, they would give it to someone else."

About her prospects for promotion she had been told:

"Then I was told that they could have promoted me, but it would have been easier if I had been married. Sometimes the attitude of the work place is very negative."

We will now look at women's attitudes towards and relationship with men after the divorce.

9:3(g) On Men

The proverb "once bitten twice shy" seems to adequately surmise women's attitudes to men in general and to marriage in particular. For many it took a long time to get over the agony of past hurts:

"For a long time I could not even think of looking at a man. From 1983 to 1986 I stayed without a man." Ms Nyoni

For some like Mrs Nhamo, the prospects of entering into new relationships in the future were, by her own admission, not good. Many had been hardened by the experience and could not see that there was any need for a man in their lives. Ms

Silefu in the civil marriage group was one such case:

"I just left. I have been on my own ever since. I don't need a man. I need maintenance."

For others like Ms Chitopo the feeling was of having tried one's best, but failed, hence they had resigned themselves to their fate:

"I told my employers that I have had it with men. I have my children. I have tried to build two homes unsuccessfully and I am no longer interested." Ms Chitopo

The majority of women interviewed in both groups shared Ms Chitopo's views. They had a jaundiced view of the whole marital institution. They saw that the price of marriage was too high and no longer wanted any part of it. De-romanticised and cured of the romantic belief in happy ever afters, their view on men and relationships was understandably sceptical. A new strategy was called for. The one that was adopted was one of exercising extreme caution in romantic dealings with men. Whilst the populist view of marriage and relationships puts an emphasis on shared values and intimacy, these women wanted some distance and "emotional space". They wanted companionship but not stifling intimacy:

"I have a new friend - it's nothing serious. I am not living with him. I have no intention of living with him or any other man or marrying again, because if it was my fate to get that man it will be my fate to get another. Maybe when my children are married and I am left alone then I might get a widower or divorce." Mrs Ndhlovu

"I don't want to marry again but I have a relationship. He's there and I'm there. He pushes a little bit for a closer relationship but I won't budge. I don't think I can maintain one. He is divorced and has kids of his own. He's completely different from Peter (the former husband). We live separately but our families are very close. My kids know him and I know his but that's as far as I can go." Ms Thebe.

For women like Mrs Ndhlovu and Mrs Thebe who were economically self sufficient, there was a realisation that they did not need men financially, so there was no longer any need or pressure to marry or live with the man. If anything, they were aware of the constraints which marriage could impose on a woman's life. They rationalised that if one could get companionship, sexual or otherwise, outside marriage, then why should one risk losing one's autonomy by getting married?[76]

However some women were grateful for the financial benefits which relationships with men could bring, so Ms Nyoni said of her new relationship:

"I met my current boyfriend in 1976. He is a driver...We are not living together. He comes to visit me from time to time. I don't know how much he is paid. He sometimes helps me with the rent. He buys things for my niece (who was living with her) and sometimes pays her fees. He gives me bus fare and buys me clothes."

Another said:

"Then I met this guy who is married but he is very nice to me and the kids." Mrs Ngwenya

This last case raises interesting issues about men's perception of divorced women. Stripped of romantic notions of fidelity and lifetime commitment, they were sexually experienced and altogether very attractive to men who did not necessarily want to enter into committed relationships. However these perceptions tended to be rooted in a stereotyped view about divorcees, which is that they were desperate for sex and therefore of loose morals. The women were aware of these stereotypes and were wary of falling prey:

"I realised that divorce in African society meant that you

moved from being very respected to being very cheap whether or not you are cheap." Mrs Nhamo

It seemed that even these subsequent relationships did not last long. The women complained of having been taken for granted and not treated fairly, thus four of the women who had gone on to have children with other men spoke of the breakdown of those unions as well. Ms Masawi said of her relationship:

"I met him in Murewa. He worked as a soldier at a Mudzi camp. I started seeing him regularly and had two children with him. He has another wife that he is living with in his village. I did not know that at the time."

Ms Mandiopera had the same story to tell:

"I have lived in the rural areas with my parents ever since the divorce. I met the father of the other two children at a mission nearby. He lied and told me that he was not married. It's only after I went to stay with him that I discovered that he was married."

The proportion of women who mentioned being involved in new relationships was very small, so that less than 10 women said that they had steady relationships with men. For rural women living with their parents within kin related neighbourhoods, the chances of meeting eligible men were few and far between. Even if a man should present himself, the cultural and practical constraints of actually starting a relationship were great.

Those for whom the opportunities arose feared for their reputations and in a bid to avoid further tarnishing them avoided relationships with men altogether. Moreover the interests of their children became their paramount concern. In most cases it seemed that the beginning of a new relationship was incompatible with the on going emotional and financial burden of looking after the children. Primary

allegiance was to the children.

Having had their fingers burnt somewhat early in life, the women who had never married were wary of entering into new relationships:

"I have no immediate plans to get involved again. I think I will first look after my child. These affairs are difficult. If I meet another man... that will be God's wish." Ms Musakwa

"I hope to finish school. I don't have a boyfriend right now, maybe in the future. I am not really settled right now." Ms Bhunu

The chapter has discussed the women's post divorce lives in relation to other people. It closes with an examination of women's perceptions of themselves after divorce. Not surprisingly, feelings on the state of their lives were mixed. Whilst many of those in the civil marriage group expressed relief at being finally free of the man, others were more ambivalent.

9:4 On themselves - The Women Speak

Generally it seemed that the women's attitudes towards being divorced depended on whether they had been the ones to initiate the divorce or whether they had themselves been left. The former were divorcees by choice and happy about it, the latter by default and consequently unhappy about it.[77] The joy of those who had wanted the divorce is best captured by these two women, one from each group:

"I am happy - absolutely - catch me getting married again" Ms Ncube

"Refusing to go back to that man was the smartest thing I ever did. He can't cheat me. I may be short but my brain is all there...I don't have another husband. I am not seeing anyone

else. It's difficult at my age (45). Beside I can't be bothered. How can I go backwards when I have come so far. I am not prepared to start again and suffer all this nonsense a second time." Ms Chuma

If anything they were angry at themselves for taking so long

to leave the marriage hence Mrs Thebe:

"I tell you, sometimes I get so cross with myself. I don't believe I put up with all that but I loved the man."

They expressed regret for the years which they felt they had

let go to waste:

"He set me back. He made me leave school. He wasted my time. I think he should compensate me for all my trouble." Ms Chigudu

"I don't think I have ever regretted it. If anything I am annoyed that I wasted my time. I could have done something with my life but just because I was listening to my elders. I don't think I will ever regret the decision to leave." Mrs Ngwenya

As a general rule women who expressed relief were in full-time

employment. They did not need men for economic security. One

woman went so far as to say that the divorce had brought an

improvement to her economic situation:

"I am much happier now. Economically I find that I am better off alone. Most women spend most of their money on buying provisions for the home. Also most of them aren't registered as joint owners of the home and find themselves dispossessed when the marriage falls apart." Ms Samkange

The challenge of facing up to the breakdown of the marriage

had brought about a great deal of personal growth. They spoke

with pride about how they had proved to the husband that they

could survive without him:

"He took it badly. He never thought I would do anything. He used to underestimate me. I did all this on my own." Mrs Ndhlovu

"He is still very angry because I divorced him. It had gotten to the point where he didn't think that I would do anything.

I was just a football that he could kick around." Ms Thebe

From this group of educated women with their support network of fellow divorcees, there emerged a strong feminist rhetoric. Three of them had even reverted to using their own family name.

"If all women stood together men would start treating us much better. The problem is someone will always take that crap (sic), and as long as we take it, we will never win as a group. It's the same thing all over the world." Ms Samkange

Not all women were as strident or as confident of their position. As stated earlier those who had themselves been rejected suffered a crisis of confidence and feelings of low self esteem and self worth. In addition to coping with feelings of rejection, many of the women had to cope with the practical day to day tasks of keeping the family sheltered, clothed, fed and in school. Ms Lewin spoke for many women when she said:

"My life is so difficult at the moment. I am finding it difficult to cope as a single parent. I am not getting enough money to look after the children properly."

Unable to cope on their own, they had to put up with the splitting of the family. Ms Goredema, a mother of three said:

"I took my youngest child. The other two are living in Mt Darwin with my parents. One is at school and the other is at creche. I have been living with my brother since the divorce. My life is so difficult at the moment. I am suffering."

Faced with these problems, it is not surprising that they sometimes hankered after the apparent security that marriage offered if not financially then at least socially. Many missed the companionship of marriage and wished that they had another adult with whom they could share the responsibilities of child care and of disciplining the children. As always, it

was the presence of the children and their suffering which brought these feelings of guilt, regret and remorse to the fore. Ms Krahner who had been accompanied back to her parents by her husband and who had been made to leave the children was such a case:

"I do still love my husband. I would happily go back for my children...Do you think I would go back if we didn't have children? We live near each other so every time one of the children comes to see you to ask for something, it sets you thinking and you get depressed. You can't even sleep for thinking of the children."

If thinking about the children's future brought about the greatest distress, having the children seemed to make all the past pain and misery and the present poverty and suffering worthwhile.

"I am only working for my children. They are my only goal." Mrs Ndhlovu

Regardless of the way in which they dealt with it, there was no doubt that the whole divorce process had been traumatic for almost all the women. That they had survived was a tribute to them.

9:5 Conclusion

Acknowledging that the effects of marriage reverberate long after the actual marriage has been dissolved, this chapter has examined the post divorce lives of the women in the two groups. This has been done by looking at the woman's post divorce life in two parts, with the first part concentrating on her economic position and the second upon the changes in relationships with the children, former husband, family and

the society at large.

It has been seen how in trying to get access to resources, three options are available to women in Zimbabwe after divorce. These are employment, maintenance from the former spouse and remarriage. However as it is so difficult for divorced women with children to find men willing to marry them, the latter is not an option that is much used. With regard to employment we have seen how women's employment prospects are rendered nugatory by virtue of their lack of formal education and work experience within the formal sector. They are therefore forced into activities which, being associated with the informal sector, are classified as being non productive and therefore undervalued. This forces women to turn to former partners for help.

It has been shown that most of the money which comes to women is in the form of child support rather than maintenance for themselves. Although maintenance awards were low as were compliance levels, maintenance payments still constituted the most important source of income available to women after divorce.

The break down of the relationship which was most central to the woman's life brought about changes in her other relationships with children, kin and the wider community. The children who had always held a place of great importance became the central focus. It was through them and through their deprivation that the acute pain of poverty was

experienced. But, it was <u>because</u> of them that the woman had impetus to continue. The relationship with the former spouse had of course to change. Feelings about the former spouse differed, with some expressing relief at finally being free of him, while others were more ambivalent about their feelings. Regardless of how they perceived the former spouse there was a recognition of shared parenthood and the need to maintain civil relations if only for the children.

The severing of relations with the marital family followed hard upon the dissolution of the marriage. For those women who had been wholly dependent on the husband during the marriage, the natal family came to be of importance. The family provided both financial and moral support. In doing so, there were dangers of the woman losing her autonomy and being treated like a child again. For those who had relied on friends for social validation, the end of the marriage marked a turning point. Old social networks were dissolved and new ones had to be formed. While some embraced this as part of the challenge of being alone again, others were less enthusiastic and consequently suffered from feelings of isolation and marginality. Reactions to the change of status in the work place were also the cause of some consternation, although generally there were reports of support and understanding from employers and colleagues.

With many lacking the emotional stamina needed to start and maintain relationships with the opposite sex, the number of women entering into new relationships with men was very small.

Whatever energy remained was saved for the children. For the woman personally, the change in status sometimes brought about a crisis of confidence. Others saw the post divorce period in a positive light. Generally, however, these were women who were economically independent.

All in all the period after divorce found the woman experiencing social isolation and facing extreme financial hardship.

A summary of the conclusions which have been drawn from this study of divorced women follows. In the light of the evidence presented, it will be considered whether the women felt that justice had been done. The chapter will also consider the manner in which other countries have dealt with the issue of providing support for families after breakdown.

9: Postdivorce Lives

[1] Maclean, M. (1991) at p.14; Cf Waller, W. (1970) at p.100.
[2] Maclean, M. (1991) at p.63, Burman, S. (1987) at p.211.
[3] Whilst Maclean (1991) supra suggests remarriage as the fourth option, Burman (1987) supra simply lists "miscellaneous sources of income."
[4] Weitzman, L. (1985) at p.359.
[5] Maclean, M. (1991) at pp.65-80.
[6] Chandler, J. (1991) at pp.157-161.
[7] Cf Marsden, D. (1973) at pp.122,124.
[8] Cf Waller, W. (1970) at pp.104,105.
[9] Cf Chandler, J. (1991) at p.157.
[10] Cf Waller, W. (1970) at p.106.
[11] Maclean, M. (1991) at p.63.
[12] Weitzman, L. (1985) at pp.xi,367.
[13] Cf Delphy, C. (1984) at pp.95,104.
[14] Cf Maclean, M. (1987) at p.46, Burman, S. (1987) at pp.213-214, Weitzman, L. (1985) at pp.xi, 185, 187.
[15] Cf Batezat, E. and Mwalo, M. (1989) at p.34.
[16] Cf Weitzman, L. (1985) at pp.206,207.
[17] Cf Batezat, E. and Mwalo, M. (1989) at pp.26,27, Maclean, M. (1987) at p.52.
[18] Chauke, N. (1991) at p.3, Batezat, E. and Mwalo, M. (1989) at p.36.
[19] Chauke, N. (1991) at p.4.
[20] Zimbabwe Labour Force Survey 1986-87, Harare: Central Statistics Office, 1989 as cited by Chauke (1991) at p.5, Cf Batezat, E. and Mwalo, M. (1989) at p.34.
[21] Statistical Yearbook (1987) at p.42.
[22] Cf Delphy, C. (1984) at p.95.
[23] "Women on the Land and in Agriculture" (1988) at p.5.
[24] In Zimbabwe today the gazetted minimum wage which is what most domestics are entitled to (although not necessarily always paid) is $138 per month.
[25] Cf Delphy, C. (1984) at p.95.
[26] Labour relations regulations stating the minimum wage are constantly flouted by employers who know that, with high employment, most people are grateful for the mere fact of having the job, and are therefore unlikely to complain to authorities about low pay.
[27] Cf Burman, S. (1987) at p.214.
[28] Cf "Women and Employment and Labour Relations." (1988) at p.4.
[29] Burman, S. (1987) at p.219.
[30] Cf Delphy, C. (1984) at p.104.
[31] Maclean, M. (1991) at p.26.
[32] Cf Delphy, C. (1984) at p.99.
[33] Weitzman, L. (1985) at p.359.
[34] ss.10(2) and 27 Income Tax Act (Chapter 181).
[35] The Finance Act (No 17 of 1987) which has repealed s.10(2) of the Income Tax Act supra.
[36] Cf Batezat, E. and Mwalo, M. (1989) at p.30.
[37] Although included in the Matrimonial Causes Act as one

of the factors that courts have to take into account when re-distributing property on divorce, Zimbabwean courts have not done so.

[38] Delphy, C. (1984) at p.97.

[39] Delphy, C. (1984) at p.98.

[40] Cf May, J. (1987) at p.79.

[41] Cf Marsden, D. (1973) at p.161.

[42] *Intercensal Demographic Survey* (1991) at pp.9,10.

[43] Cf Marsden, D. (1973) at p.161.

[44] Waller, W. (1970) at p.104.

[45] Cf Marsden, D. (1973) at p.68.

[46] The Harare Agricultural Show. It is held in the school holidays and forms the highlight of most school children's holiday. However it calls for new show clothes, an entrance fee and spending money. A single ride at the luna park costs $1.00.

[47] Cf Maclean, M. (1987) at p.54, Cf Marsden, D. (1973) at p.70.

[48] Cf Stewart, J. et al. (1990) at p.202.

[49] On average black children in Zimbabwe start school in their seventh year so that they finish primary school at 13, write "O" levels at 17 and "A" levels at 19.

[50] The Intercensal Demographic Survey (1991) shows that higher levels of unemployment are found among the youth with the age group 15-19 (this includes the post "O" level school leavers with the highest rate of 27%) followed by 20-24 year olds with a rate of 21%. See p.24.

[51] Cf Maclean, M. (1987) at p.50.

[52] Cf Chandler, J. (1991) at p.144.

[53] Interview with a legal practitioner who had himself stopped exercising his right of access to four young daughters for this reason. Similarly a mother who had voluntarily given up custody of two very young children reported that she had not seen the children in over six months because seeing them upset her too much. (Ms Zhakata).

[54] Cf Burman, S. (1987) at pp.214,220.

[55] Maclean, M. (1991) at p.132.

[56] Delphy, C. (1984) at p.99.

[57] Cf Chandler, J. (1991) at p.7, Hart, N. (1976) at pp.37,38,41.

[58] Studies of women alone have been variously called: *Mothers Alone: A Study of Fatherless Families*, Marsden, D. (1973), *Women Without Husbands*, Chandler, J. (1991), whilst Burman, S "Marriage Break Up in South Africa: Holding Want at Bay" (1987) supra talks of remnant families, conjuring up images of "left-over" or discarded families rendered incomplete by the departure of the father/husband.

[59] Even in Western society where cohabitation outside marriage is no longer frowned upon, stigma still attaches to women who have children outside a steady relationship. Perhaps it stems from a perceived drain on public resources spent supporting such women and their children.

[60] Cf Weitzman, L. (1985) at pp.xi,xiii.

[61] Cf Goldthorpe, J. (1987) at p.229.

[62] In the customary group 28 men were known to have other children, whilst four women said that they suspected that their husbands/partners had other children. Of the 28, eight had one child each, four had two each whilst the rest had three or more. The maximum number was 11. With these extra commitments, it is not surprising that the men had a difficult time meeting their obligations to the primary families.
[63] Cf Burman, S. (1984) at p.133.
[64] Cf Delphy, C. (1984) at p.98.
[65] Cf Chandler, J. (1991) at p.78.
[66] Cf Marsden, D. (1973) at p.127.
[67] Cf Marsden, D. (1973) at p.127.
[68] Burman, S. (1984) at p.137, Cf Chandler, J. (1991) at p.77.
[69] Cf Hart, N. (1976) at p.48.
[70] Chandler, J. (1991) at p.2.
[71] Cf Hart, N. (1976) at p.170, Chandler, J. (1991) at p. 90.
[72] Cf Hart, N. (1976) at p.168.
[73] Cf Vaughan, D. (1986) at p.145.
[74] Cf Hart, N. (1976) at p.167.
[75] Cf Chandler, J. (1991) at p.82.
[76] Cf Marsden, D. (1973) at p.159.
[77] Cf Hart, N. (1976) at p.31.

CHAPTER 10 - CONCLUSIONS

10:1 Introduction

This chapter summarises the findings of the study on access to justice for divorcing women in Zimbabwe, and considers the implications of the role and function of law on the divorcing process. Adopting Eekelaar's frame of reference, it was stated in the introduction that one of the functions of family law was to provide mechanisms and rules for adjusting the relationships between family members when family units break down. In performing this function, it was noted that the aims of a good divorce law were two fold. The first was that the law should aim to maximise the future opportunities of the two actors and the second was that in so doing the law should try to minimise the conflict between them.

An analysis of the data suggests that there was an inherent contradiction in the law which would make it difficult for the second objective to be met, for whilst the law was based on the principle of no fault, it was seen that the parties either felt the need to attribute blame, that is allege fault for the breakdown of the marriage, or were disgruntled when unable to "defend" themselves against allegations of wrongdoing. It is only by looking at the financial provisions made at divorce that one can ascertain whether the parties would be left in a position which would enable them to maximise future opportunities. Ultimately the thesis turned on this issue, so that the provision of support and more importantly the ability to enforce support orders was the main focus. Similarly, the women's perceptions of whether or not justice had been done

was dependent upon whether or not they had been able to obtain substantive satisfaction of their claims.

The thesis was divided into two parts. Part one described the conceptualization of the research question and provided the historical and legal foundation. Based on empirical research, the second part of the thesis presented the findings. This chapter begins with a discussion of the conceptualization of the research question in the light of the research findings. It concludes by broadening out the discussion, examining the way in which other jurisdictions have dealt with the provision of resources after divorce.

In the original conceptualization of the research question formal law was given primacy so that access to justice was interpreted as meaning access to formal law and legal institutions. However, the existence of a dual system of law and the realisation that people not only sought access to formal legal structures but used other informal agencies for mediation necessitated developing the research question to encompass not only access to formally constituted courts, but also to include the search for justice in the informal sphere.

With law as the central focus, the thesis was premised upon the assumption that gaining access to the courts would result in a satisfactory resolution of the women's problems. However an analysis of the data suggested that the problem was not with access to law per se but turned more on the limited role which law could play in divorce. The courts and formal law

provide an important regulatory framework through which domestic arrangements can be renegotiated and resolved. But, whilst able to help in the re-distribution of resources, the courts cannot themselves generate income or provide resources so that access to them is only beneficial to those parties who themselves have substantial assets to redistribute. Even then problems of enforcement remain.

10:2 Developing an Analytical Framework

The analysis of the data was based on the framework developed by Abel, Sarat and Felstiner in which they saw the emergence and transformation of disputes as being a three stage process: namely naming, blaming and claiming. These categories were adopted in the analysis of the data starting in chapter six to nine. It must be noted that the three categories were not mutually exclusive but were part of a more fluid process. Their adoption is merely for ease of analysis.

The framework developed by Abel, Sarat and Felstiner is premised upon the notion that a problem undergoes three transformations before it becomes a dispute. The first step in the emergence of disputes is the acknowledgement that there is a problem. For this to happen an "unperceived injurious experience" (UNPIE) has to be turned into a perceived injurious experience (PIE). This stage of transformation is known as naming. The blaming stage is defined as emerging when fault or blame is attributed to another person or societal institution. The final transformation occurs when the aggrieved person claims a remedy from the offending party.[1]

If the person refuses to take responsibility in whole or in part for the problem, then it is transformed into a dispute. Throughout the analysis Felstiner et al. point out that each stage of transformation is heavily influenced by social and personal variables so that there may be various factors which conspire to limit a person's passage through the stages.

10:3 Articulating the Dispute

In their article Felstiner *et al*. describe an injurious experience as being one which is "disvalued by the person to whom it occurs".[2] From the data it appeared that there was a distinction in the way that the women in the two groups articulated their dissatisfaction. The dichotomy was linked to the different expectations that the women had of the marriage so that those women with civil marriages aspired to companionate marriages whereby husband and wife share roles with the wife participating in decision making. The women with customary marriages had the "traditional" or institutional form of marriage whereby the husband was the breadwinner and the wife stayed at home to look after the children. The women were also distinguished by socio-economic status so that those with customary marriages who were married to peasants and low grade workers were primarily concerned with getting money to look after the children. For both sets of women, the articulation of the dispute involved a process of legitimation whereby the women sought to find ways of discrediting the husband's behaviour. This they did by acknowledging that whilst the husband had certain "privileges", his enjoyment thereof had led to a neglect of

family responsibility.

Together with "naming" the problems of the marriage, came the process of attributing blame for the breakdown of the marriage. In chapter six, three patterns of blaming were identified: the parties blaming each other, the one blaming and the other accepting blame and finally the wife blaming the husband and the husband ignoring the wife's claims. It was noted that the two groups fitted into the first and third categories of disputing. The problems of the marriage were divided into four main groupings, starting with complaints about money. The second group comprised complaints about relatives and other issues which were extraneous to the marriage. In the third category were problems which were specific to the couple and the marriage such as other women and tension between co-wives in a polygamous union. The last category comprising "value-laden" complaints about the husband was specific to women in the civil marriage group.

The problems were then discussed individually, starting with lack of support. This was the most frequently cited problem by both groups of women. (82% of the women with customary marriages complained as against 76% with civil marriages.) It was seen that this claim was easy to legitimate because there was both a legal and moral assumption that a man should provide for his family. For women with customary marriages which were polygamous, tension with co-wives was directly linked to competition over scarce economic resources and sexual jealousy. As there is no bar to men taking extra wives

the women had to find other ways of legitimating their dissatisfaction. This they did by acknowledging that whilst the husband was entitled to other wives, the family was suffering as a result of the husband's inability to provide equally for both sets of families. Similar problems arose when the husband was having extra-marital liaisons. For women with customary marriages the presence of other women represented a drain on family resources, whilst for women with civil marriages they signified a loss of face. For this second group of women, infidelity ranked equally with problems over money. For women with customary marriages the process of legitimation involved women saying that their children were suffering as a result of the father's infidelities, whilst women with civil marriages pointed to the monogamous nature of their unions.

Complaints about relatives were tied to unhappiness about the husband's continuing financial obligations towards his family which resulted in a decrease in the amount of support being received by the woman and her family. It was seen in 6:4 that the issue of violence was linked to problems over money, sexual jealousy and family influence. Complaints specific to the civil marriage group were that the husband did not show love for the children or the home and therefore failed to be a good companion.

What emerged from the data was that most of the complaints were linked to money. Having acknowledged their grievances, the women sought help in trying to resolve them.

10:4 Helpseeking

Chapter 7 examined the helpseeking careers of the women and looked at the dual processes of "blaming and claiming". It was seen that in trying to resolve the problems of the marriage, the women began by denying that there were any problems in the marriage. Thereafter there was negotiation with the husband whose refusal to acknowledge or deal with the problems of the marriage led to the women consulting third parties for assistance in trying to resolve the problems. Although described as being part of a linear process, the reality was that the women moved between the various agencies and helpseeking structures.

It was for this reason that a theory of disputing which saw problem solving as being part of a more dynamic and less orderly process was advanced.[3] With the two actors being seen as the main determinants of the helpseeking process, this model acknowledged that the parties moved back and forth between the various agents starting with seeking help from `internal outsiders' or people close to the central relationship before moving on to outside third parties with or without expertise on problem solving or access to a bureaucratic structure such as a court.

It was on this basis that a distinction was drawn between informal agents for assistance and the formal organisations later approached for help by the women. Davis's analysis of the differences between formal and informal agents was

adopted, with informal agents being defined as those who were personally known to the helpseeker and who did not have any claim to social status or authority to ensure that the advice was followed.[4] Table 8 showed that women with customary marriages used informal agents more. Two reasons were advanced to explain this phenomenon. The first is that the nature of the closely knit social networks resulted in greater use being made of the family and other close networks. Secondly, the fact that most of the marriages in this group were unregistered would also account for the low use of formal agents by this group of women.

It was noted in 7:3 that there was an attempt to resolve the problems of the marriage at the lowest echelon of the disputing "hierarchy". This was so as not to jeopardise chances of achieving a reconciliation. Here an analogy was drawn with Macaulay's study of relations between long-term business partners in which he concluded that where parties had an on going relationship there was a preference, in trying to iron out differences which had arisen between them, to use non-legal mechanisms to resolve those differences.[5] Drawing an analogy with the divorce process, Macaulay notes:

"The non-monetary costs may be large too. A breach of contract law suit may settle a particular dispute, but such an action often results in a "divorce" ending the "marriage" between the two businesses since a contract action is likely to carry charges with it at least overtones of bad faith."[6]

It was also noted that care was taken in choosing agents to assist, so that the women approached those agents who would

agree with their assignation of blame.[7] Felstiner et al have noted:

"The grievant's choice of an audience to whom to voice a complaint and the disputant's choice of an institution to which to take a controversy are primarily functions of a person's objectives and will change as objectives change."[8]

As women's needs changed or came to be redefined they approached the agency which they thought could best meet those needs so that those complaining of lack of support looked, *inter alia*, to employers for help in getting financial assistance whilst those who were being beaten approached the Police for interdicts to stop the violent behaviour. The advice which the client received from the agent was shown to be coloured by the agent's definition of the problem.

10:5 Getting to Court

This chapter began by reiterating the fact that the approach to formal dispute institutions and in this case courts should not be seen as an escalation of conflict between the parties, but should rather be seen as an on going attempt to resolve the problems of the marriage. It was stated at 8:2 that there were three main barriers to obtaining access to the courts and that these were economic, geographic and psychological. Given the relative ease with which most of the women in the customary group obtained access to the Community Courts, these barriers did not appear to be insurmountable. However, it was noted that for women with civil marriages needing legal representation to obtain a divorce in the High Court, costs could prove to be prohibitive. It was on this basis that a

discussion of legal aid was undertaken.

Statistics from the Civil Legal Aid department of the High Court showed that more legal aid was granted for matrimonial actions than for any other class of action and that women were the main beneficiaries. Having considered the role of lawyers in the delivery of legal services, the thesis then went on to consider the use made by the two groups of women of the courts. It was shown that women with customary marriages not needing formal dissolution of their marriages used the courts for counselling, whilst those with civil marriages approached the courts to have their consent papers ratified or for property division. In dividing matrimonial property between the spouses, it was difficult to ascertain which provisions of the Matrimonial Causes Act were being applied by the courts. However, it seemed that as a general rule the party with custody of the children of the marriage was awarded the former matrimonial home.

For both groups of women, requests for financial support in the form of maintenance formed the main claim so that 82% of women with customary marriages and 80% of women married under the civil law approached the courts asking for maintenance. It was the perceived inability of the courts to provide the necessary relief which was the cause of the greatest discontent.

Issues of custody were shown to be bound up in a clash of values between the imposed general law which linked the

awarding of custody to the welfare principle and the "traditional" customary law whereby issues of custody were determined according to whether or not a man had paid *lobolo* for the woman. The chapter concluded by acknowledging that the relationship between the parties did not terminate when the marriage was formally dissolved, but continued with the parties' joint parenting responsibilities.

10:6 Post Divorce Lives

The women's social and economic lives after the divorce were examined in this chapter. Maclean's model of analysis of the economic situation of women after divorce was adopted for the purposes of this thesis. She showed that in trying to work out a post divorce income package women had four options open to them. These included payments from the former husband, welfare support, earned income and finally a share in a new partner's income. As Zimbabwe is not a welfare state, only three of those options were discussed. The social lives of the women were examined via their relationships with the former husband, children, other family members and friends.

Given the generally low educational levels of most of the women in the two groups, it was noted that African women began their search for employment from a relatively disadvantaged position. It was difficult for them to get waged labour with the result that the majority of women with customary marriages worked in the informal sector (44 out of 76). They sold vegetables, crocheted and made trips to neighbouring countries to buy goods for resale.

Even when the women did manage to secure employment in the formal sector, they worked in semi skilled jobs and were engaged in activities traditionally considered as women's work, where wages were so low that the highest paid woman earned $317 per month. It was only in the second group that one found women who had tertiary education and who were in the professional classes. Two thirds of women with customary marriages were in formal employment and were therefore not as reliant as were most of the rural women on the husband providing them with maintenance.

For women with customary marriages, maintenance payments from the former spouse formed the main source of income. As former wives were generally not granted support it is probably more accurate to speak of child support. (Only four women with customary marriages and two with civil marriages were given spousal maintenance.) A few of the women with civil marriages had maintenance packages worked out on divorce by their lawyers and incorporated into consent papers. Having isolated the problem as being one of access to resources, the discussion now moves on to consider strategies for improving the enforcement of maintenance orders and for making provision for lone parent families.

10:7 Financial Provision After Divorce in Zimbabwe - A Way Forward

From the study, it appears that access to law was not a real problem for the vast majority of women. This was because of

the speedy, cheap and geographically convenient location of the Community Courts. The data has shown clearly that the problem is rooted in an inability to obtain substantive satisfaction of the claim. If this is the problem, then in looking at ways of trying to ensure that dependent families receive support after divorce, one has to decide on whom the duty to provide this support lies. The discussion will start by first looking at ways of trying to ensure that private maintenance orders are actually enforced.

The Australian and British models of enforcement will be considered for comparative purposes in an attempt to ascertain whether it would be feasible for a developing country like Zimbabwe to copy all or part of these models given the acknowledged dangers of transferring models into a situation for which they were not intended. Sandra Burman warns against falling into this trap in an article entitled rather ominously "First World Solutions for Third World Problems".[9]

10:7(i) Private Maintenance - Improving Enforcement Procedures

On the issue of women as economic dependents, Glendon has noted that:

"In all societies, this group (young children and their principal caretakers) is supported primarily by the family, therefore unlike certain other classes of dependents for which modern welfare states have gradually assumed collective responsibility, this group is the most vulnerable when changes occur in the family structure."[10]

Not having a welfare system, in Zimbabwe this group of persons is even more severely disadvantaged. Here it must be noted

that although one talks of support to the family, the line dividing child support and spousal support has become increasingly blurred so that Maclean and Eekelaar contend that:

"...the resources formerly divided between child support and spousal support may to some extent have remained similar in amount but have been renamed as child support."[11]

They go on to note that although this re-definition has the advantage of allowing continued payments to the former spouse after remarriage, it has the disadvantage "of ceasing when dependent children reach economic independence."[12]

The Australian scheme for the provision of child support will now be examined.

10:8 Providing Support in Australia

Based on the Wisconsin scheme which aimed to make the non custodial parent contribute in financial support what he would supposedly have spent if living in the house, the Australian scheme sought to centralise maintenance payments, removing them from the legal sphere and making the calculation and distribution of support an administrative function.

Based on a two stage structure, the first stage set up a Child Support Agency within the Australian Taxation Department. The claimants were required to register the maintenance order obtained from the court with this agency which would then take over the custodial parent's role as claimant. In return the agency pays to the claimant an amount of maintenance

calculated using a formula based on the "poverty datum line". Having substituted the claimant as the second party to the maintenance action, the agency is free to pursue the man for his maintenance contribution which is calculated using the information on income available to the tax office.

10:8(i) (a) Advantages of the System

Perhaps the biggest advantage of this system is that it removes the burden for ensuring that maintenance orders are enforced from individuals who more often than not have neither the time nor the expertise to ensure that they receive maintenance, and places the burden on an agency whose bureaucratic structure is such that it can collect efficiently contributions from non custodial parents. The scheme also has the advantage of de-personalising the collection procedure so that contact between parties who may be hostile towards each other after the break up of the marriage is minimised. The fact that the payment of maintenance to custodial parents is not dependent on the agency getting money from the non custodial parent leads to consistency in obtaining support. Moreover, the fact that the sum to be paid over is guaranteed by statute creates certainty and enables the custodial parent to budget with confidence.

10:8(i) (b) Disadvantages of the Scheme

Criticisms of the Australian scheme divide into two groups: ideological objections, and practical difficulties of using a state run bureaucratic structure to collect money from individuals for private law based obligations.

10:8(i) (c) Ideological Objections

Perhaps one of the main objections to the scheme is the involvement of the tax department in the collection of maintenance. It seems morally reprehensible that the government should use public policy based structures (that is the collection from each citizen of their contribution towards running community services) for what is essentially a private domain matter. There is the additional criticism that by insisting on collecting maintenance, it takes away from people the right to reach private agreement and "criminalises" those who would have paid voluntarily.

Other objections have been raised by feminists who argued that:

"The privatisation of maintenance was... of no particular assistance to women, who if their job prospects are poor and child-care facilities unavailable or too costly, are unable to improve their long-term opportunities."[13]

Lawyers saw the deregulation of the assessment of the amount of maintenance payable as being contrary to the notions of justice premised as it was upon:

"...the basic and traditional concept of access to the courts for the enforcement of an individual's rights."[14]

10:8(i)(d) Practical Difficulties

Harrison has noted that the practical difficulties raised were tied to issues about the criteria to be taken into consideration in determining the contribution to be made by the non custodial spouse. Issues needing clarification

included:

"...to whom it would apply; what percentages of either gross or net income should be allocated for child maintenance; whether the formula could be avoided by those with an income under or over a certain level; whether custodial-parent income should be taken into account; how non periodic payments should be treated; in what circumstances appeals or variation should be permitted; and how amounts might be reviewed."[15]

Two problems spring to mind immediately in considering whether the Australian scheme could be transplanted to Zimbabwe effectively. The first of these is the fact that in Zimbababwe income tax is payable only by those with an income in excess of Zim.$400 per month, so that the vast majority of those women married to low grade workers would be excluded by virtue of the fact that their husband's names would not be on the tax register. On a more practical level, it is doubtful whether the further bureaucratization of the procedure for collecting maintenance would help or hinder an already very complex system. Moreover, given the economic constraints being experienced by the country as a whole, it would appear that Zimbabwe has neither the infrastructure for collecting maintenance envisaged by the Australian scheme nor the wherewithal to establish such an infrastructure. It remains to be seen how Britain has dealt with the issue of enforcing private maintenance orders.

10:8(ii) The British Scheme

In 1991 Britain passed the Child Support Act whereby the responsibility for collecting maintenance from non custodial parents would fall upon an agency specifically set up for this purpose. Based on the Australian scheme, the major point of

departure is that in Britain the collection agency is separate from the tax department. An innovation is that the British model builds in a compensatory payment of £35 per week which is for the care giving parent and does not cease on the remarriage of the care giver as did spousal support. In so far as this represents one of the first attempts to acknowledge the personal costs of child care to the care giver, it is a radical and long overdue innovation. Like the Australian scheme, the British scheme is based on the formulaic calculation of the amount of money which the non custodial parent is to contribute.

The same constraints which have been said to apply to the transfer of the Australian model, namely over bureaucratization and insufficient funds and an inadequate infrastructure, would seem to apply to the transplanting of the British model onto Zimbabwean soil. It remains to be considered what role the state, as guardian of all of a country's citizens, can play in providing support to the disadvantaged by way of public benefit programmes.

10:9 State Run Welfare Schemes

The most obvious impediment as far as a country such as Zimbabwe is concerned is that it does not have a welfare system in any shape or form to speak of. Increasingly, even in countries with established public welfare schemes there has been growing criticism of the provision of financial

assistance to needy people by the state. The argument has been that the provision of state resources to meet unmet needs in itself creates still more needs which have to be paid for out of public coffers. Indeed Friedman has noted that:

"...benefit programmes are added on one at a time, each move redefines the scope of the system. Expectations, then, have been constantly rising. This is one reason why the welfare state is so sticky and inelastic; why movement always seems to flow in one direction: more."[16]

In a country where resources are severely limited, as in Zimbabwe, this is a criticism which cannot be ignored. One of the main objections raised to the idea of the state providing support on behalf of the non custodial parent is a moral one so that it is argued that it is unfair for the state to pay when there is an obvious and identifiable private individual who already owes a duty to the lone parent family. Added to this moral impasse is the fact that the Zimbabwean economy is in a state of disarray.

"According to the World Bank, total external debt was US$2.659mn at the end of 1988, equivalent to 58% of the GNP. Servicing the public and publicly guaranteed portion of this became an increasingly heavy burden in the early 1980's with interest and principal payments rising from US$44mn (2.6% of goods and services) in 1980 to ten times that figure in 1983 when it was almost a third of foreign earnings."[17]

The problem is compounded by the occurrence of the worst drought that the country has experienced this century. The devastating effects of this natural disaster have been combined with a crippling economic structural adjustment programme imposed on the country by the World Bank and the International Monetary Fund as a pre-condition to the granting of loans to the government.

Given these very real constraints, it does not seem feasible or even realistic to suggest that the Zimbabwean economy could sustain the introduction of a government funded assistance programme for lone parent families following divorce. Furthermore, given the growing poverty of the population at large, it would be morally and politically difficult for the government to justify prioritising one type of poverty, i.e that caused by divorce, over another such as that which follows upon a natural disaster such as a drought. If anything, national disasters for which fault cannot be attributed to another person, as it can in the case of divorce, would be and have been seen as a more pressing need and have, consequently, been accorded priority in the allocation of scarce resources. As regards government spending it has been noted that:

"A high percentage of the budget is earmarked for defence, education, health and debt service; these could only be reduced at high political or economic cost. There is therefore little room for manoeuvre in reducing the deficit or increasing the proportion of spending on capital projects."[18]

Given all these acknowledged difficulties, what options remain open for countries like Zimbabwe?

10:10 Struggling - The Way Forward

It is contended that the only way forward is to use the existing legal framework to try to ensure that maintenance orders are enforced. It is suggested that more use could be made of the sanctions which are already in existence and which were considered in the discussion of enforcement of maintenance provisions in chapter eight. This is based on the

assumption that if non custodial parents are made aware of the fact that they will be penalised should they fail to meet their support obligations, then more of them would be persuaded to pay. However, of the two available sanctions, namely civil imprisonment or attachment of property, it is difficult to know which one to choose, given the fact that each will have a deleterious effect not only on the defaulting party, but also on the lone parent family.

It is of course acknowledged that, pragmatic though this solution is, it will not by itself eradicate the poverty found in lone parent households after divorce. However, given the fact that even rich industrialised countries with reasonable welfare schemes such as the United States have failed to eradicate divorce induced poverty, it is unlikely that the problem is one which will give itself to an easy solution. If anything, this highlights the value of empirically based research in preparing a policy response to an issue where there are no easy answers.

10: Conclusions

[1] Felstiner, W. Abel, R. and Sarat, A. (1981) at p.636.
[2] Felstiner, W. et al. (1981) at p.634.
[3] See chapter 7:2
[4] See chapter 7:6
[5] Macualay, S. (1977) at p.159.
[6] Macualay, S. (1977) at p.160.
[7] Cf Vaughan, D. (1986) at p.141.
[8] Felstiner, W. et al. (1981) at p.642.
[9] Burman, S. (1992) at pp.367-379.
[10] Glendon, M-A. (1987) at p.7.
[11] Maclean, M. and Eekelaar, J. (1992) at p.238.
[12] Maclean, M. and Eekelaar, J. (1992) at p.244.
[13] Harrison, M. (1992) at p.226, Cf Eekelaar, J. (1991) at pp.142-154, Parker, S. (1991) at p.1.
[14] Harrison, M. (1992) at p.227.
[15] Harrison, M. (1992) at p.227.
[16] Friedman, L. (1987) at p.20.
[17] The Economist Intelligence Unit, (1991) at p.41.
[18] The Economist Intelligence Unit, (1991) at p.30.

Appendix 1 - Interview Guide for Women

Name

Address

Age

Education - were there many schools in your area?
what grade or form did you reach?

Type of marriage - have you got a marriage certificate?
may I see it please?

When were the customary formalities completed?

How much *lobolo* was asked for?

Is there any outstanding?

Does your husband have other wives?

Income and earnings

Do you work?

What job do you do?

How much are you paid?

Do you earn any extra money from selling vegetables, sewing, knitting or keeping lodgers?

The husband

What is your husband's name?

How old is he?

What job does he do?

How much is he paid?

Does he earn any extra money from fixing cars or doing carpentry?

The children

Do you have any children?

How many children do you have?

What are their names?

How old are they?

What are they doing? (school v. work)

Other dependants

Are you looking after any other relatives?

If yes, do they live with you?

If no, what form of support do you give? (money v. services)

Expenses - How much do you spend on:

Food

Rent

Electricity

School fees

School uniforms

Clothes

Transport

Other?

The life story

Tell me your story. Start by asking when she got married.

When did the problems develop?

What did you do/ what have you tried doing about your problems?

Have you sought help from family, friends, your church minister, the chief or other community leaders?

What advice did they give you?

a) patch it up

b) wait a while before acting

c) separate for a while

d) get a divorce

e) other

What happened after you spoke to them?

If she has consulted a more formal agency:

Who told you about the CAB/ HLPC?

How do you think the agency can help/ when you went what did

you expect the agency to do for you?

<u>If she has consulted a lawyer</u>

Who advised you to see a lawyer?

How did you choose a lawyer?

a) asked a friend's advice

b) asked family's advice/ used family lawyer

c) had used him/ her before

d) saw office and walked in

e) asked CAB, social workers, employers etc

<u>Client's perception of lawyer's manner</u>

yes, approachable, friendly, helpful

yes, I felt I could confide in him/ her

yes, approachable/ interested

no, uninterested

no, too busy

no, too legalistic

no, other

did not use a lawyer

<u>Liaison between lawyer and client</u>

Did your lawyer keep you informed of the progress of your case?

<u>Lawyer's main concern</u>

The divorce itself

Matrimonial home

Maintenance

Settlement of other property

Getting their fees paid

Lawyer not really concerned with anything

Other

Unrepresented

Client satisfaction with lawyer's services

Were you happy with the advice that they gave you?

Would you recommend him/ her to any of your friends?

Would you yourself go back to the same lawyer if you had further legal problems arising from family life / in general?

Getting the divorce

How long was it between the filing of the suit and the final court decree? (in months)

Pre divorce arrangements with the husband

After finally deciding on the divorce, did you and your former husband have many talks about the details of the divorce?

What did you talk about?

a) division of property

b) effect on the children

c) maintenance or support

d) other?

Were you able to come to a general agreement about any of these matters?

Which ones?

Did he live up to these agreements?

a) all

b) some

c) none

Were you yourself able to live up to these agreements?

The divorce

Who received custody of the children?

How was the property divided?

a) house and furniture

b) cash and savings

c) other / mention pensions and insurance

Do you think that the settlement was fair?

Custody and access

Who was given custody of the children

What arrangements, if any, were made for the non custodial parent to visit the children

a) weekly

b) fortnightly

c) monthly

d) holidays

e) no visits

f) other

Maintenance

Was any maintenance awarded:

a) for you

b) for the children?

If yes, how much

If no, what reasons were given

Does your husband pay the money that he is supposed to?

a) all the time

b) some of the time

c) never

If he has not/ does not pay what have you done/ will you do about it?

Post divorce

With whom are you living?

a) alone

b) with my family

c) with my new spouse/ partner

d) other

If you have had to get outside financial help since the divorce, to whom did you turn?

a) own family

b) husband's family

c) husband

d) friends

e) other

If you have to work away from home, how are the children cared for?

a) your relatives

b) husband's relatives

c) friends

d) nursery school

e) school

f) nanny

How would you rate the children's lives at present as compared with the period -

1) during the marriage - is it now

a) better
b) worse
c) about the same

2) during the final separation - is it now

a) better
b) worse
c) about the same

How do you rate your own life at these periods?

Appendix 2 - Interview Guide for Lawyers

Name

Size of firm

Position in firm

Percentage of matrimonial work undertaken by firm/ by lawyer

What proportion of your cases are legally aided?

a) female clients

b) male clients

In your opinion is it easy or difficult to get legal aid?

What percentage of cases are contested/ uncontested?

When one talks about divorce is one mainly concerned with marriages under

a) the Marriage Act

b) the African Marriages Act

c) unregistered customary law unions?

Where parties are in conflict what issues are most likely to be contested:

a) facts evidencing breakdown or matrimonial fault?

b) levels of maintenance for wife?

c) levels of maintenance for children?

d) division of property?

e) custody of children?

f) access to children?

In negotiating property and maintenance disputes do you use the one-third rule of thumb as a starting point (where a wife is not the joint owner)?

Why (not)?

When advising a client on ancillary matters do you pay regard to the wife's behaviour during the marriage?

Under what circumstances, if any, might a husband's behaviour be deemed relevant to the amount of maintenance he might have to pay or to a property adjustment?

What proportion of your clients own the matrimonial home jointly?

Have you had any experience of cases where a legal right to ownership has been overruled by the court and the property transferred to the other spouse?

Do you think that the tendency for mothers to be awarded custody which in turn gives them a prior claim on the matrimonial home is unjust to husbands? If so, how could this be resolved?

In your experience is a husband or wife more likely to get custody? Can you explain this?

In what situation might a husband get custody?

How frequently do your clients experience difficulty over access necessitating a return to court?

There is a widespread belief in the community that our legal system discriminates against the poor. What are your feelings?

In your opinion is it difficult to get access to legal services in this country?

If yes, to what do you attribute this difficulty ?

Suggest:

financial ie a lack of money

ignorance about how to get a lawyer/ where to get a lawyer

general inertia?

In your opinion do men and women encounter the same problems in trying to get access?

What do you think should be done about it?

Glossary

Chiredzwa - A rearing fee paid by a man to his former father in law when he goes to reclaim custody of his children

Gupuro - Rejection token given by a man to his wife to show that he no longer wants her. Usually a small sum of money.

Lobolo - Ndebele word for bridewealth; Shona call it *roora* or *rovoro*.

Mavoko - Shona for hands property which is the property which a woman acquires through her own personal labour.

Mombe ye umai - Shona for motherhood beast. It is the property which a woman acquires on the marriage of her daughter in recognition of her status as the mother.

Munyai - The person who acts as the go-between when the two families are negotiating the amount of bridewealth to be paid. Also known as the *samukuru* or *sadombo*.

N'anga - A traditional healer.

Roora - Shona word for bridewealth.

Rovoro - Shona word for bridewealth.

Rutsambo - The cash element of the bridewealth payment.

Sadombo - Another word for the go-between or *munyai*.

Samukuru - Another word for the go-between or *munyai*.

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