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**CUSTOMARY LAW COURTS RESTRUCTURED
ONCE AGAIN:
CHIEFS AND HEADMAN REGAIN THEIR JUDICIAL FUNCTIONS**

by
Welshman Ncube¹

Introduction

After the attainment of independence on 18 April, 1980 the colonial judicial administration of Headmen, Chiefs and Native Commissioners which had been primarily responsible for the administration of customary law during the colonial period was abolished and in its place a new court system of primary courts, made up of village courts and community courts, was established. By the time of independence the chiefs and native commissioners' courts had been brought to a virtual standstill by the liberation struggle which had identified these courts as targets. Even though the chiefs' and native commissioner's courts formally existed, they had in practice been rendered obsolete by the forces of the liberation struggle. Chiefs and native commissioners had been vilified and ridiculed as organs of colonial administration and policy. Before independence they had not only been physically rendered non-functional but they had also been totally discredited. Accordingly, it was unthinkable at that time that the new "revolutionary" government would restore the judicial role of chiefs and native commissioners. New, more progressive courts had to be created. These came in the form of the primary courts created by the *Customary Law and Primary Courts Act, No 6 of 1981*.

Ten years after independence these primary courts are being abolished and replaced by headmen and chiefs' courts through the *Customary Law and Local Courts Act, No. 2 of 1990*.

The question that arises is what has happened and why is the judicial role of headmen and chiefs being restored? Has the new government become more reconciled to what in colonial times had become colonial "institutions" embodying colonial values? What is the legal significance and implications of the restoration of the judicial functions of colonial institutions? To what extent will the new system of courts affect the people's access to the courts?

In dealing with this subject, it is necessary to adopt a historical approach and hence being discussing the judicial and administrative roles played by chiefs and headmen within the oppressive colonial structures of Rhodesia so as to understand the restoration of the judicial role of chiefs and headmen within its historical context.

Chiefs and headmen within the colonial administration and judiciary

In order to consolidate its rule the colonial government had to suppress all the political and judicial institutions of the feudal state. In this regard, the institution of chiefs, as a political and judicial institution representing the old order, had to be suppressed or re-defined so as to serve the new political order, rather than act as a rallying point for the resistance of the African people to colonial rule.

The first constitutional document promulgated by the colonial government which applied to the whole territory of Zimbabwe, then Southern Rhodesia, was the *Southern Rhodesia Order-in-Council of 20th May 1898*.

This *Order-in-Council* represented the triumph of colonial forces over both Shona and Ndebele resistance and was in reality a comprehensive constitution providing for the colonial state structure. The *Order-in-Council* established a governmental structure headed by an Administrator

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appointed by the British South Africa Company² and also created a judicial system at the top of which was the High Court of Rhodesia.³ Subordinate to the High Court were Magistrates courts⁴. The law to be administered by these courts was to be the Roman-Dutch common law except in so far as that law had been modified by statute.⁵

For the purpose of native administration the *Order-in-Council* created a special Native Affairs Department under a secretary for Native Affairs assisted by Native Commissioners.⁶ In addition to administrative functions Native Commissioners were given judicial functions over Africans.⁷ The effect of this judicial system was to create courts which were wholly administered by colonialists and which totally excluded Africans. No recognition was given to "Native" Courts and hence chiefs were stripped of all the judicial functions they had exercised prior to colonization. Having stripped the chiefs of their political and judicial functions the colonial state proceeded to re-define not only their role, but also the methods by which they attained chieftainship. This was done through the *Native Regulations of 3rd October, 1910*. In s 2 of these regulations a chief was defined as "a native appointed by the Administrator in Council to exercise control over a tribe". A headman was defined as "a native exercising control under a chief over such section of a tribe as may be defined by its chief and who is appointed by such chief with the approval of the Administrator in Council." The Regulations vested "all political power and authority" over "all natives" in the Administrator⁸ and further provided that the Administrator "appoints all chiefs to preside over tribes and may divide existing tribes into two or more parts or may amalgamate tribes or part of tribes into one tribe as may be necessary..."⁹ He could also remove any chief from his position as chief,¹⁰ and could call upon chiefs to supply men for the defence of the territory and for the suppression of disorder and rebellion and could call upon the chiefs themselves personally to render such service.¹¹

These powers meant that traditional rules were no longer necessarily applicable to the appointment of chiefs and that the African society could and was indeed broken up into administrative areas suited to the needs of the colonial state. The judicial function of administering customary law was given to Native Commissioners by s 14 of the *Regulations*. This provision provided the first step in the judicial history of Zimbabwe towards the separation of customary courts from the other courts applying general law. The Native Commissioners were to apply customary law within the limits provided in s 50 and s 51 of the *Order-in-Council of 1898*.

What is of significance here is that there was no provision for the participation of Africans, including chiefs, in the application of customary law. Chiefs were reduced to being agents and instruments of colonial policy and hence the definition of the position and functions of chiefs in s 30 and 31 of the *Regulations* which provided that:

30. The chief in charge of a tribe shall be appointed by the Administrator in Council and shall hold office during pleasure and contingent upon good behaviour and general fitness. He shall rank as a constable within his tribal area and shall receive

² See s 12 and s 13.

³ Section 49(1)

⁴ Section 69

⁵ Section 49(2)

⁶ Section 49(2)

⁷ Section 79(3)

⁸ Section 3

⁹ Section 4

¹⁰ Section 5

¹¹ Section 6

such pay and allowances as may be fixed from time to time.

31. A chief shall be responsible within his tribal area for:-
- (1) the general good conduct of the natives under his charge;
 - (2) the immediate notification to the Native Commissioner of all crimes or offences or serious attempts at crimes, of all deaths and suspicious disappearances, of any epidemic or prevailing diseases whether among members of his tribe or their stock;
 - (3) the due publication of all such public orders, directions or notices that may be notified to him;
 - (4) the nomination of a sufficient number of men to act as district headmen for sections of his tribe for appointment by the Secretary for Native Affairs who shall also have the power to remove them and to appoint others in their stead;
 - (5) cognition and control of natives not being people of his own tribe who may come into his tribal area, and stock other than stock known to be property of his own tribe;
 - (6) the notification to the Native Commissioner of all applications by new-comers to build and reside in his tribal area;
 - (7) the prompt supply of men called for under the terms of section 6 of Part 11 of this Proclamation as and when ordered to supply the same by the Administrator in Council with the approval of the High Commissioner through the Native Commissioner;
 - (8) the discharge of such further and other duties as may from time to time be prescribed by the Administrator in Council subject to the approval of the High Commissioner.

The chiefs were further charged with the duty of aiding and assisting in the apprehension of offenders of all descriptions. They also had to assist in the collection of taxes from their people whenever these became due. Penalties were provided in s 32 for failure to perform and neglect of these duties.

Immediately below the chiefs were the headmen who were appointed by the Administrator upon the nominations submitted by the chiefs. Sections 37-40 defined their role as follows:

37. Headmen shall be responsible to the chiefs for
- (1) the good conduct of the natives in the sectional area placed in their charge;
 - (2) the prompt notification to the chief of any unusual occurrence in their sectional area.
38. Headmen shall rank as constables within their sectional areas and are authorised and required to arrest any native therein in obedience to any lawful warrant or whom they may see committing or attempting to commit any crime or offence against any person or property or rioting or defying authority and to hand over the persons arrested without delay to the Native Commissioner.
39. Headmen shall be required to assist the messenger and other officials attached to the office of the Native Commissioner whenever called upon to do so.
40. Headmen shall prevent the settlement of fresh kraals in or the removal of existing kraals from their sectional areas without proper authority.

Headmen were also punishable for failure in or neglect of their duties.

Total and unquestioning obedience to colonial orders and discipline by the Africans and their traditional leaders was the hallmark of colonial rule. For example, s 48 and 49 of the Regulations provided:

48. Should any chief be guilty of insolence or contemptuous behaviour towards any Government official he shall be deemed guilty of an offence and shall upon conviction be liable to a fine not exceeding twenty pounds or, in default of payment of any fine imposed, to imprisonment with or without hard labour for a period not exceeding six months, and shall further be liable in addition to any such fine or imprisonment to be deprived of his office as chief.

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49. Should any native other than a chief be guilty of insolence or contemptuous behaviour towards a Government official or a chief or should he be twice convicted of an offence under this Proclamation, he shall be liable upon conviction to a fine not exceeding twenty pounds or in default of payment of any fine imposed to imprisonment with or without hard labour for a period not exceeding six months.

It is clear that these Regulations created a system under which chiefs and headmen were nothing more than paid lackeys of colonial rule.¹² This role, the chiefs and headmen, performed so efficiently that by 1937 the colonial state had come to trust them. The previous policy of reducing chiefs and headmen to nothing more than paid servants of the colonial state had been so successful in incorporating these traditional leaders into the machinery of the colonial state that by 1937 the colonial state felt sufficiently at ease with them to restore some of their pre-colonial judicial functions. Accordingly, the *Native Law and Courts Act, No.33 of 1937*, provided for the creation of Tribal Courts presided over by chiefs and headmen.¹³ In terms of s 6, a tribal court could be constituted on receipt of a warrant from the Governor. The jurisdiction of tribal courts was limited to hearing civil cases where

- (a) all the parties were Africans.
- (b) the defendant actually resided within the limits of the jurisdiction of the court,
- (c) the action was capable of being decided in accordance with native law and custom¹⁴.

However, these courts had no jurisdiction to dissolve a marriage. They were also to be under the close control of Native Commissioners who were entrusted with extensive supervisory powers. The Native Commissioners were given access to all the records of the chief's courts and could, on their own initiative, revise the proceedings of the court or transfer the matter to their own court or any other competent court.¹⁵ "Appeals" lay from the chief's courts to the Native Commissioner's courts.¹⁶ However, these cases were heard *de novo*.

What is of significance is that under the *Native Law and Courts Act* the colonizers recognised for the first time since the defeat of the African people, the traditional judicial institution of chiefs and headmen and made it the lowest level of the judicial system applying customary law.¹⁷ However, this must be understood within the context that chiefs were no longer appointed strictly on traditional grounds nor did they represent the old rallying point of the defiant African people. They had become mere functionaries of the oppressive colonial state machinery. In addition their jurisdiction was strictly circumscribed and they were placed under stringent supervision from native commissioners.

In 1969 there was yet another alteration in respect of the courts charged with the primary duty of applying customary law occurred. *The African Law and Tribal Courts Act, Chapter 237* was enacted and it effected major changes in the structure and jurisdiction of the courts designed to apply customary. The first hierarchy of courts created were the tribal courts made up of

¹² See also the Native Affairs Ordinance, Chapter 72 of 1928 which to all intents and purposes reenacted the provisions of the 1910 Regulations.

¹³ Section 6

¹⁴ See section 10

¹⁵ See section 10

¹⁶ See section 11

¹⁷ Note that it has been argued elsewhere that although the Chiefs Courts were not recognised by the colonial state before 1937, they never really stopped operating; see T.W. Bennett, "The African Court system in Rhodesia: An Appraisal" 1975(2) Rhodesia Law Journal 133, at pp.141-142, Garbett, "The Rhodesian Chief's dilemma; Government Officer or Tribal leader" (1966) 8 Race, 113 at pp. 120-122 and The Hansard, 1st November, 1937 col. 2444.

headmen and chiefs' courts¹⁸ with appeals to the Tribal Appeal Court which was the highest court of appeal in this hierarchy of courts.¹⁹ What was remarkable about this arrangement is that it cut off all connection with the District Commissioner's courts and other "European" courts in so far as civil cases were concerned. For the first time the colonial state created a self-contained hierarchy of African courts hearing civil cases between Africans. In criminal cases, an appeal mechanism was provided from the Tribal Appeal Court to the court of the Provincial Magistrate²⁰ and thereafter to the Appellate Division.²¹ Thus, in criminal matters, the "European" hierarchy of courts was superimposed on the African courts. The Tribal courts had jurisdiction to determine petty criminal cases where the offence was committed wholly or partially within their area of jurisdiction and where the accused or complainant was an African.²² Their competence to mete out punishment was limited to the imposition of a small fine, whipping or restitution of property.²³

In civil cases the jurisdiction of *Tribal Courts* was unlimited as long as the parties were Africans or in the case of non-Africans, such non-Africans had consented to the jurisdiction of the court.²⁴ However, these courts had no jurisdiction to dissolve a marriage contracted in terms of the *Marriage Act, Chapter 37*²⁵

The second hierarchy of courts applying customary law were the District Commissioners' Courts, with appeals to the Court of Appeal for African Civil Cases and thereafter to the Appellate Division.²⁶ The District Commissioners' courts had jurisdiction in civil cases where the rights of Africans only were concerned.²⁷

A third hierarchy of courts, with jurisdiction to apply both customary law and the general law, were the Magistrates Courts and the High Court, the latter being divided into the General Division and Appellate Division.²⁸

Thus, Rhodesia had a triadic court structure under which Africans could have commenced a civil action in any one of three court hierarchies and with options of appealing to one of three different courts of appeal.

This triadic system of courts was abolished after the attainment of independence in 1980. Out went the headmen's and chiefs' courts which had been discredited during the liberation struggle. Indeed, in some rural areas an unofficial system of "comrades' courts" had been established by the guerrillas during the liberation struggle to replace the colonial courts. Out also went the District Commissioners' courts and the Court of Appeal for African Civil Cases. In came the primary courts to replace all these.

The Primary Courts.

The Customary Law and Primary Courts Act, No.6 of 1981 (hereinafter called the *Primary Courts Act*.) repealed the *African Law and Tribal Courts Act, Chapter 237*. *The Primary Courts*

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- 18 Section 7(1)
 19 Section 21(2). The Tribal Appeal Court was composed of three chiefs who were presidents of Tribal Courts.
 20 Section 23 (1)
 21 Section 23 (a)
 22 Section 12(1)
 23 Section 13
 24 Section 9 (1) (b)
 25 Section 9 (3)
 26 See sections 5 and 6 of the Africa Affairs Act, Chapter 228
 27 Section 5 (1) of Chapter 228
 28 See the Magistrate's Court Act, Chapter 18 and the High Court Act, Chapter 14

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Act not only abolished the headmen's and chiefs' courts and the Tribal Court of Appeal but also abolished the District Commissioner's courts and the Court of Appeal for African Civil Cases. Thus the chiefs and headmen lost all their judicial functions which had been restored by the colonial state in 1937 and consolidated in 1969. Having been used as instruments of colonial rule and colonial policy, it was probably inevitable that the chiefs and headmen would lose their judicial functions at independence, in the wake of the enthusiasm to make radical departures from colonial institutions. Indeed, the chiefs had been so totally discredited that it was really unthinkable that they could retain their judicial functions after the attainment of independence.

It was, therefore, no surprise that the *Primary Courts Act* excluded chiefs and headmen from the judicial administration of customary law and in their place created village and community courts.

The *Primary Courts Act* created primary courts, made up of village courts at the lowest level and above them community courts.²⁹ Untrained presiding officers assisted by assessors preside over village courts which are courts of first instance and in which lawyers are not permitted to appear.³⁰ The monetary jurisdiction of village courts is limited to \$500,00.³¹ Appeals from village courts go to community courts,³² which are both courts of first instance and appellate courts for purposes of appeals from decisions of village courts.³³ Community courts hear appeals from village courts *de novo*. Lawyers are permitted to appear before community courts. The monetary jurisdiction of community courts is unlimited.³⁴ Appeals from the community courts lie to the District Court, which is a Magistrates Court constituted as an appellate court for purposes of hearing appeals from the community court. Thereafter appeals go to the Supreme Court.³⁵

Both village and community courts have jurisdiction to hear a case only if it is determinable in accordance with customary law.³⁶ In some instances community courts are given specific jurisdiction to apply certain statutory provisions.³⁷ However, generally speaking, both village and community courts are not competent to apply the general law and thus if a case is determinable in accordance with the general law they would have no jurisdiction to decide that case.

Community courts are presided over by trained presiding officers who are appointed by the Minister of Justice, Legal and Parliamentary Affairs. These presiding officers undergo a year's training in such subjects as Customary law, Interpretation of Statutes, Delict and Contract.

Because village court presiding officers are in practice elected and the procedure in both village and community courts is informal, some commentators have compared these courts to "revolutionary comrades courts" such as those established in Mozambique after the Frelimo

29 Section 7

30 Section 8(1)

31 Section 11(1) (b)

32 Section 19 (1)

33 Section 7(1) (b)

34 Section 11(2)

35 Section 20

36 Section 11(1) (9) and 11(2) (9)

37 See s 12(3) of the *Primary Courts Act* and the *Matrimonial Causes Act, No.33 of 1985*. A community court is given jurisdiction to apply virtually all the provisions of the latter Act.

revolution.³⁸ Now, however, these primary courts are to be abolished through the *Customary Law and Local Courts Act 1990* (hereinafter called the *Local Courts Act*) which restores the system of chiefs' and headmen's courts and gives them jurisdiction to hear cases determinable under customary law.

Credit must be given to the chiefs who quickly managed to establish working relations with the new government, the leadership of which had been in the forefront of the condemnation of chiefs during the liberation struggle. Once they felt at ease with the new state, the chiefs started pressurizing the government to restore their old powers. They demanded or rather negotiated for the restoration of their feudal rights to allocate land. They attacked the operations of primary courts and sought the re-instatement of their judicial functions. They insisted that they could not be respected by their people if they did not have these powers. They met the President of the country to put forward their case, arguing that their positions as chiefs had no meaning if they did not have their traditional powers.³⁹

Eventually, they were promised that their judicial functions would be restored to them. However, the government held out on the land issue and insisted that their old powers of allocating land would not be restored. Justifying the decision of government to give chiefs and headmen judicial functions, the *Minister of Justice, Legal and Parliamentary Affairs* stated that the primary courts system had not worked well because it had been embarrassing for elderly people to appear before youthful village and community court presiding officers with their marital and family problems.⁴⁰ That notwithstanding, a factor which must have played a significant role in the government's decision to restore the judicial role of chiefs is the fact that over the years, the government which had described itself as socialist, had appeared more and more able to accommodate conservative elements of society such as chiefs. Indeed, on many issues the government had demonstrated itself to have adopted conservative or right wing policies and accordingly it is not surprising that it would find an accommodation with chiefs who have taken turns to attack most of the laws the government has enacted in pursuance of its policies of achieving the legal equality of men and women. Chiefs have been most vociferous in their condemnation of the *Legal Age of Majority Act, No.6 of 1981* which they have blamed for causing such diverse social problems as prostitution, baby-dumping, the high rate of divorce, school-girl pregnancies and the disobedience of the youth. It is difficult to understand how the government can believe that chiefs can apply properly the laws to which they clearly are opposed and to advance its stated policies, such as the legal equality of men and women.

The local courts act and the judicial functions of chiefs and headmen

The *Local Courts Act* repeals the *Customary Law and Primary Courts Act*⁴¹ and abolishes the present village and community courts, collectively known as primary courts. In their place, it establishes local courts made up of primary courts and community courts.⁴² The primary court will be the lowest court and will be presided over by a headman or some other person appointed by the Minister of Justice, Legal and Parliamentary Affairs.⁴³ Its monetary jurisdiction shall be limited to \$500.00.⁴⁴ Immediately above the primary court will be the community court to be presided over by a chief or some other person appointed by the Minister.

³⁸ See K Makamure, "A Comparative Study of Comrade's Courts under Socialist Legal Systems and Zimbabwe's Village Courts," *Zimbabwe Law Review* Volume 3, 1985 62.

³⁹ See *The Sunday Mail*, 6/11/88

⁴⁰ See *The Herald*, 3/11/88 and *The Sunday Mail*, 6/11/88

⁴¹ Section 33.

⁴² Section 10 (1)

⁴³ Section 11 (1)

⁴⁴ Section 15 (1) (b) (i)

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The monetary jurisdiction of community courts will be limited to \$1 000.00.⁴⁵ Appeals from decisions of a primary court shall lie to a community court which will hear the case *de novo*.⁴⁶ Lawyers are not allowed to appear before local courts.⁴⁷ Appeals from decisions of community courts shall lie to a magistrates court which shall rehear the case.⁴⁸ Thereafter appeals go to the Supreme Court.⁴⁹ Magistrates Courts are given extensive supervisory powers over local courts.⁵⁰

It will be noticed that this court structure is strikingly similar to that created by the Native Law and Courts Act, 1937. Even the supervisory powers given to magistrates are similar to those given to Native Commissioners over tribal courts by the Native Law and courts Act, 1937.

The jurisdiction of local courts will be limited to those cases which are determinable in accordance with customary law.⁵¹ Thus they will have no jurisdiction to try a case which is not governed by customary law. More significantly, s 15(1) provides that;

- 15 (1) A local court shall have no jurisdiction in any case-
- (c) to determine the validity, effect or interpretation of any will; or
 - (d) to dissolve any marriage, or
 - (e) to determine the custody or guardianship of minors; or

 - (f) to determine the liability of any person to maintain another; or
 - (g) to determine rights in respect of land or other immovable property.

This means that local courts will not have jurisdiction to entertain any matter, even though determinable under customary law, which relates to any of the above stated matters. Thus they cannot hear maintenance, custody, guardianship and divorce claims. All these matters fall within the jurisdiction of magistrates courts which have, for the first time, been given express jurisdiction to apply customary law⁵² and to dissolve customary law marriages as well as to reallocate the property of such spouses in accordance with the provisions of the *Matrimonial Causes Act*.⁵³ These changes mean that local courts will have jurisdiction to hear only customary law cases falling within the monetary limits of their jurisdiction and not concerning disputes over custody and guardianship of children, maintenance of any person, dissolution of any marriage, the interpretation or determination of the validity of any will and rights in respect of land or other immovable property.

With all these extensive exclusions to the jurisdiction of local courts one wonders what effective jurisdiction they are in fact left with. Considering that maintenance, custody and divorce claims probably take up more than 95 percent of the business of the current community courts, it is difficult to envisage what meaningful cases will be left to be heard by the headmen's and chiefs' courts.

⁴⁵ See s 11(2) and 15(1) (b) (ii)

⁴⁶ Section 22

⁴⁷ Section 19 (2)

⁴⁸ Section 23 (1) and (2)

⁴⁹ Section 23 (6)

⁵⁰ Section 24

⁵¹ Section 15(1)(a)

⁵² See paragraph 1 (a) of Part 11 of the Schedule to the Act which amends s 13(1) of the Magistrate Courts Act, Chapter 18 so that it provides that a magistrate court shall have jurisdiction to hear "all civil cases whether determinable by the general law of Zimbabwe or by customary Law".

⁵³ Paragraph 1 (b) of Part 11 of the Schedule to the Act. See also paragraph 2(2) of the same part of the Schedule which amends section 15 of the Magistrates Courts Act.

The only significant action not expressly taken away from their jurisdiction is one for adultery damages provided, of course, the claim thereof does not exceed \$500.00 for primary courts and \$1 000.00 for community courts.

One, therefore, can envisage a situation where these courts will be dealing with petty claims in respect of such matters as the "trespassing" of the cattle of one peasant over the fields of another. Perhaps, therefore, one should lose no sleep over the restoration of the judicial functions of chiefs since the process of restoration has so marginalised their role that they are likely to be of no consequence in practice.

A more important consequence of the new structure relates to the issue of accessibility of the courts. The community courts which dealt with the popular cases of maintenance, custody and divorce claims were not only easily accessible to most people but the legal costs involved were very low and thus making it easier for the poorer sections of society to assert and defend their rights in them. Their procedure was informal and non lawyers were able to prosecute their claims or defend actions without the assistance of legal counsel. The jurisdiction to hear maintenance, custody and divorce actions has now been transferred to magistrates' courts which are very formal courts and whose procedures are complex and thus difficult to follow by non-lawyers. People bringing actions before magistrates courts often require legal assistance which assistance significantly increases legal costs.

Thus the new system will definitely make it more difficult for the poor to mobilize the law. Maintenance and custody rights will be more difficult to assert for most women who are without resources to afford lawyers. *The Local Courts Act* thus negates the spirit of the *Customary Law and Primary Courts Act* which had made the courts which dealt with everyday maintenance, custody and divorce disputes more accessible to the people.



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