DISPARITIES AND UNCERTAINTIES IN AFRICAN LAW AND JUDICIAL AUTHORITY: A RHODESIAN CASE STUDY

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I. INTRODUCTION

The title of this article covers a wide terrain. Not only does the word jurisdiction have more than one meaning, but the implicit reference to the legal pluralism typical of African societies opens the door to an examination of possible disparities between government and traditional or tribal jurisdictions in many fields of law and legal action, and at different levels of analysis. I must therefore limit myself to a few aspects that I believe are fundamental to our theme, and that I hope I can present as a coherent case study in its historical perspective within the scope of a single article.

I may be forgiven if I aim to deal more with the competence of judicial authority (and of authority generally in tribal areas) than with the judicial process. So many, including myself, have been preoccupied with the latter topic, either as a methodological means to an end or as an end in itself, after Llewellyn and Hoebel's Cheyenne study of 1941, that we are sometimes inclined to forget that this is neither the only, nor always the best way to gain insight into the complex problems of law and legal authority in society.[1]

Our problem field lies in Rhodesia, and although the statutory framework applies to all African tribal areas in that country, I shall deal mainly with its effect on the local authority structure in the Shona-speaking majority of African tribal communities, which I know best from my own experience.

Since Rhodesia, in common with most other colonial or ex-colonial states, has a pluralistic legal system--or as Bohannan (1965: 38) has characterized it, "a unicentric power system, with greater or lesser problems of conjoining the colonial government with local government"--the disparity between the general law of the land (a combination of Roman-Dutch common law

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and statute law) and the local tribal law will run as a constant theme throughout this article. Here I must sound a warning, however. One may be too easily tempted to see disparity here only in terms of a dichotomy between two disparate legal cultures. The actual situation is much more complex. First, because in monocultural societies (including our own) legal sociology has also found a rich harvest of disparities between precept and practice--a not insignificant part of it even (unofficially) institutionalized within the prescribed legal framework.[2] In a bicultural society our analytical frame of reference would therefore comprise not a single but a double dichotomy. Secondly, in the bicultural situation with which we are dealing, the spheres of legal activity are not mutually exclusive, but they overlap and interlock in ever increasing measure, and therefore inevitably interact. The result is not merely a clash of conflicting values from culturally entrenched positions, but a process of progressive if uneven adjustment, for better or for worse, of existing values and institutions under the pressure of changing needs and circumstances. In this evolving process, "tradition" is never free from innovation, and the term should be used with great caution. Conversely, much innovation, whether planned or spontaneous, is still burdened with tradition, and this may produce some pretty odd forms of cultural hybridization, as we shall see later in this article.

II. CHIEFS AND COMMISSIONERS IN COMPETITIVE JURISDICTIONS

It may sound odd that, in the statutory legal order of Rhodesia, which since 1898 has known a system of African government built upon a special authority structure comprising both European and tribal authorities, tribal chiefs and headmen had no formally recognized judicial powers whatever until the African Law and Courts Act of 1937 granted a fair measure of civil jurisdiction in cases of customary law (subject to the usual "repugnancy" clauses) to those who were officially recognized. Nor were they given any official powers concerning the control of tribal land until the African Tribal Trust Land Act of 1966; nor any criminal jurisdiction until the African Law and Tribal Courts Act of 1969 made some cautiously limited provision for this.

This tardiness is the more remarkable because the first legislative instrument defining the powers and duties of the special corps of administrators of African affairs after the establishment of European government in what was then Southern Rhodesia, contains the following instruction: "A Native Commissioner shall control the natives through their tribal Chiefs and Headmen" (High Commissioner's Proclamation No. 18/1898--my italics).[3] Though a veteran Rhodesian administrator and scholar recently suggested that this clause contains the early seeds of a policy of indirect rule--"the first legal recognition of a tribal way of life under chiefs...relying mainly on authority derived from traditional sources" (Howman, 1976: 69)--it was dropped soon afterwards in 1902, never to reappear in any subsequent legislative instrument. In its stead came the definition of "chief" in the Native Regulations of 1910 (H.C. Procl. 55/1910): "a

native appointed [by the Head of State] to exercise control over a tribe," a formulation retained in the basic African Affairs Act of 1927, which is still in force today.[4] Though it became common administrative practice to give consideration to the "native view of succession," the Rhodesian High Court has held that "this does in no way derogate from the Governor's absolute discretion in making an appointment."[5]

Together with the provision that chiefs held office during the Government's "pleasure and contingent upon good behaviour and general fitness" (African Affairs Act, s. 17), this gives us the key to the basic position of tribal chiefs in the statutory order of African government. It is that of any African who happens to hold an appointment as a paid government servant to act as a chief "in charge of a tribe" to fulfill such duties as are prescribed to him (African Affairs Act, s. 18). In short, as a subordinate local official in a centralized bureaucratic hierarchy that was conceived as an instrument of direct rule.

This is one side of the picture. If we now turn to practice on the local scene, another and much more complex picture emerges. Here the (European) Native Commissioner (since 1962 called District Commissioner) stands at the top of the local power structure, representing the District Administration as part of the central Government; under him are the tribal chiefs and other recognized lesser tribal authorities. Here Government administration and tribal government meet and conjoin in what is ideally conceived of as a unitary pyramidal power structure, of which the upper and lower parts are fused together in the position of tribal chieftaincy. In reality, however, this structure presents two vastly dissimilar but interlocking spheres of authority, in which the chief functions as the principal link between the two spheres. In an earlier study I observed: "It is the chief's unenviable lot to be both the bottom of the European upper half of the pyramid, and the top of the lower tribal structure. This dual position is fraught with difficulties, because it involves a reconciliation between two inherently conflicting roles and loyalties" (Holleman, 1969: 117-18).[6] The problem is insoluable, because the basically disparate conceptions of legitimate authority derive from the cultural dualism embedded in the system itself.

This takes us back to our point of departure: the non-recognition under statute law of any judicial powers of tribal chiefs and headmen over a period of some forty years during which they nevertheless had to exercise whatever authority they had over their people to assist the local administration in keeping peace and order. Theirs was a necessary function. However considerable the powers and personal abilities of the early Native Commissioners (and they did a stout job of work in resettling badly shattered African communities after the upheavals of the 1890s), with the limited personnel at their disposal they could not possibly have administered their extensive and often barely accessible areas without the assistance of locally recognized tribal leaders. The obvious choice therefore was to

recruit and "appoint" those with legitimate powers according to tribal law, that is the traditional, hereditary heads of the various tribal communities. So these were selected, at least insofar as they were prepared to cooperate loyally with the Administration. If they were not, they were apt to be ignored or sacked, and others were appointed instead. In official practice, therefore, it became an established tradition to recognize, though selectively, hereditary tribal authorities as administrative officials. Through official ignorance or personal preferences, however, the existing tribal hierarchy was sometimes upset.[7]

The point to stress is that every one of these tribal functionaries, at his own level and within his own sphere of authority, as a matter of course exercised the judicial powers inhering in the tribal conception of "governing" (kutonga), which knows no distinct separation of powers. In practice, therefore, whether or not in pursuance of their officially imposed duties and responsibilities as regards "the general good conduct of the Africans in their charge" (African Affairs Act, s. 18[b]), chiefs and headmen "decided cases" (kutonga mhosva) in the manner they had always done: that is, at a public dare (court), assisted by a few trusted counselors and other court officials, and with ample scope for participation by an interested audience.[8] In this way they dealt with the multiplicity of grievances that cropped up in everyday life, from adultery and other domestic troubles to unfulfilled debts, land disputes, damage to property, theft, and even arson and assault. Only in serious cases (e.g., grievous bodily harm and homicide) did they obediently hand the offenders over to police[9] and local Commissioner (who, likewise, held both administrative and judicial powers).[10] Moreover, they, and more especially the ward headmen, also looked after the allocation of land to the smaller units under their control--at any rate until much later, when government officials intervened more incisively in the field of African land husbandry (until this situation too, was changed in the 1950s, as we shall see).

In short, long before such jurisdiction was formally conferred upon them by statute law, appointed as well as nonappointed chiefs and headmen continued to fulfil most of their customary judicial functions. The fact that they did so with the undoubted knowledge of the District Administration (which was not, however, always well informed about the exact scope of these judicial activities), shows a marked discrepancy between official law and official practice during these years.

The African Law and Courts Act, 1937 therefore did no more, at least in respect of officially recognized chiefs' and headmen's courts, and within the field of so-called civil cases, than to regularize long-established judicial practices. (The new African Law and Tribal Courts Act, 1969 did a good deal less in respect of their criminal jurisdiction.)

Meanwhile, however, the rather ambiguous situation had developed in which the European Commissioner was officially the

primary (and only) local judicial authority, but tribal chiefs and headmen actually handled most legal disputes to the best of their considerable abilities, and were determined to preserve their traditional powers. This situation inevitably breeds competition between tribal and European jurisdictions.[11] Despite the common knowledge that by far the superior power rested with the European Commissioner at District Headquarters, the tribal courts could fairly maintain themselves in their domestic spheres. For one thing, they were usually much more accessible to local litigants; for another, their adjudication was comprehensible to all--something that could not be said of the European courts, though these, too, professed to apply "Native law and custom."

It seems a paradox that, though the statutory granting of tribal judicial powers considerably clarified the legal situation, it also sharpened the edge of competition between tribal and European jurisdictions. Sections 9 and 10 of the Act of 1937 not only conferred upon the D.C. extensive powers of supervising tribal courts--in itself a sound principle[12]--but (apart from giving him powers of rehearing and retrial) also made it possible for him to act as a court of first instance either at his own or a litigant's initiative. This means that in the hierarchical order of African civil justice the tribal courts were both subordinate and juxtaposed to the D.C.'s court. In this respect there was the further oddity that, while the basic African Affairs Act of 1927 clearly subordinates headmen to chiefs, the Act of 1937 makes no distinction between their respective jurisdictions. In fact, the Regulations under the latter Act (G.N. 108/1938, as amended) put them on a par as "chief of a native court." It was therefore left to the headmen (or litigants) themselves either to take appeals first to their chief's court, or to bypass the chief by going directly to the D.C. (Apart from this, the situation at grass-roots level was further bedeviled by the tug of war between officially recognized and unrecognized tribal judicial authorities.)

But the major problem of administering African justice through this hierarchical structure lay elsewhere. S. 7 of the Act of 1937 explicitly prescribed that, in the African courts, practice, procedure, and the law of evidence be regulated by African law and custom. But no such prescription applied to the D.C.'s or higher courts in the hierarchy; the Act leaves the matter entirely open. To those who, through Western legal training, have somehow become mentally conditioned to the systematic division of the body of law into its substantive and formal (or adjectival) components, the problem may not be immediately apparent or serious. Broadly speaking, our rules of procedure aim at isolating the relevant rules of substantive law applicable to a particular lawsuit; and our rules of evidence serve to determine what facts are relevant to the pleaded issues and how their truth should be established. Much attention is paid to the preliminary work of restricting the field of contested laws and facts; and to the kind of evidence that is not permissible in a given case. In short, what is dished up for the consideration

of our judges is mostly the bare bones of legal contention, professionally picked out from the meat of social conflict.

Yet here lie some fundamental differences with tribal procedure in the many courts I saw in action. However strict this procedure might be in some respects (e.g., the formal submission to the court's inquiry, respectful conduct, the acceptance of guilt and liability in the most unmistakable terms), it certainly does not aim at restricting the field of inquiry. On the contrary, its whole philosophy is expressed in the formal admonition to all litigants to "Speak openly, hide nothing, so that everything may become clear (chena) to us." The principal parties therefore have the right to speak at length and without interruption.[13] Each will present his version of the dispute from the angle and set of facts he deems most advantageous to himself. So he stresses his most obvious grievances, his opponent's wrongs or intransigence as against his own righteous and reasonable behavior. This kind of testimony not only presents the dispute in a wider context of multiple relationships in which recognized codes of behavior govern the mutual relations between various persons and groups in everyday life, but more often than not also gives the conflict an historical depth beyond the immediate pleaded cause of action. The real cause of conflict may lie a good deal further back in the chain of interpersonal relations. What emerges after the extensive testimonies of the principal parties is not merely two differently slanted tales about the same events, but also different excursions--often by vague allusions--into preceding events which, according to each party's views, materially affect the present case.

A trial thus often becomes a public contest between embittered parties who seek not only legal redress for suffered loss or injury, but also vindication of their general social conduct and esteem in the community. With so much at stake, parties are naturally inclined to dramatize. There is a good deal of "playing up to the audience," and with reason, for the public have a critical role to play.[14] Here we find another significant difference from our own judicial process: No strict injunction about "Silence in the court!" Members of the audience are, in effect, coadjudicators, and in fact can be highly effective ones for the simple reason that, collectively, they are likely to have an even more intimate knowledge of local facts, circumstances, and personal relations than the judges have. In the kind of community life with which we are dealing there is little of any person's conduct that can remain hidden for any length of time. Moreover, though it is readily conceded that the judges usually are (or at least are expected to be) more experienced in handling legal matters, almost every adult has a pretty shrewd knowledge of the legal principles and presumptions operating in a given case. With knowledge of law and of the relevant facts so widely shared, tribal administration of justice is not conceived as the exclusive prerogative of an impersonal select body of legal experts concentrating upon mending the breached fences of law. It is rather the interplay between formal and informal adjudicators in the critical examination of the whole pattern of

conduct and motivations of contesting fellow members in a socio-legal order in which all feel more or less personally involved. The application of the rule of law is therefore almost unavoidably influenced, at least at the local level, by the felt need to restore as far as possible those social relationships whose disturbance may badly affect the peace in the community.

In the traditional Shona process, public "question time,"[15] that is, the intermediate stage after the parties and principal witnesses have been heard and before judgment is pronounced, is perhaps the most crucial stage of the process. People can now draw upon their own considerable inside knowledge to query inconsistencies in the various testimonies, to add useful information, and generally to expound their views on the matter. It is at this stage, too, that public concern with the restoration of disturbed social relations is openly voiced and, in some cases at least, leads to urgent demands for overt acts of reconciliation.[16] In short, no experienced Shona judge fails to take account of the voice of the public when he finally delivers judgment.

From this brief sketch two things at least should have become clear. First, no outsider like a D.C., even if he happens to be well versed in the substantive tribal law (which I found the exception rather than the rule) can hope to conduct a trial in the manner outlined above; he simply lacks the inside knowledge of local factors that invariably influence the course of justice "according to native law and custom." Moreover, to a considerable extent evidence is elicited, in Western procedure, piecemeal through a guided process of question-and-answer, and without the interplay with a knowledgeable public. Moreover, the D.C.'s court may suffer from the not uncommon occurrence that parties and witnesses fail to mention some highly relevant facts or circumstances, for the simple reason that they assume these to be common knowledge to all--as would indeed have been the case in their local community.[17] In short, despite the considerable latitude permitted under statute law, the D.C.'s court procedure generally does not lend itself to the kind of unrestricted socio-judicial inquiry that tribal folk expect from their own tribunals. (Whether these always perform satisfactorily is quite a different story.)

The second point deals more specifically with the production and weighing of evidence. It is clear that the Shona process, in common with other "tribal" processes, knows nothing remotely comparable to the elaborate juridical screening devices that in Western judicial practice aim at barring information not considered "admissible" or "relevant" to the issues as formally defined and presented to the court. In principle all evidence is admissible, and what is really relevant is something that can only be determined after the whole story is unfolded in the course of the trial. The main problem then becomes one of assessing the credibility of evidence that is considered relevant. In this respect Western courts and tribal courts face essentially the same problem of assessing the probative weight of different

kinds of evidence as they perceive it. In a recent article[18] I dealt with this problem in considerable detail. I showed how much this is a matter of culturally determined cognitive values, and I concluded: "In any system of law evidence serves to communicate legally meaningful information. As with all other forms of communication its effectiveness depends on the measure in which its cognitive value is commonly shared. In this respect the admissibility, relevance and credibility of evidence are as much a product of the total complex of a society's cultural values as are its rules of substantive law. Both are means of recognizing normative or deviant behaviour, and cannot be divorced from each other" (Holleman, 1975: 93).

Here I confine myself to but one example to show how different standards of weighing evidence cause confusion in this dualistic legal system and, indeed, may actually stultify the course of justice. It concerns the means of proving illicit sexual intercourse between a man and woman, a difficult matter under most circumstances because independent direct evidence is seldom available. It is also a matter of considerable importance in view of the frequency of litigation in matters of seduction, adultery, and paternal rights. In these cases Shona law attaches great weight to the woman's evidence, and her confession during childbirth naming her illicit lover was generally considered to be irrefutable proof of his complicity. This is based on the deep-rooted belief that no woman under such dire circumstances would dare utter a false accusation for fear of endangering her own and her child's life. Childbirth confessions, duly reported by attending midwives, are even today regarded as the most convincing proof.

The D.C.'s courts could, and in the past often did, respect this kind of evidence; but the Court of Appeal for African Civil cases adopted a stricter attitude. In a series of judgments from 1938 to the mid-1940s the requirements of proof in adultery cases were gradually made much stricter. The woman's evidence became "naturally suspect,"[19] the common law rule against hearsay evidence was invoked,[20] and a childbirth confession made to the woman's mother became "inadmissible."[21] The Court's demand for strong corroborative evidence became so stringent that in 1946 it even went so far as to lay down that such evidence should "leave no room for doubt,"[22] thus confirming an earlier minority opinion that African adultery cases should be proved "beyond reasonable doubt"[23]--a burden normally reserved only for criminal cases![24] With the D.C.'s courts having to follow this lead, the results were predictable. Culprits found guilty by due tribal process soon learned that they stood a fair chance of being acquitted for "lack of evidence" by appealing to the D.C.'s court.[25] It was especially the better and more conscientious tribal judges who felt most frustrated when their judgments were upset by the European courts. The problem was aptly expressed in a public statement by one of the best tribal courts I have known: "There are certain people whom we know to be guilty but who refuse to listen to us. They prefer chirunggu [European ways] and they go to the 'office' where

the whiteman does not know when they are telling lies. All right, but when these people next come to ask us to hear their troubles, we shall also refuse to listen to them" (Holleman, 1975: 93).

III. TRIBAL AUTHORITY BETWEEN TRADITION AND INNOVATION

It is time to widen our focus again and to take a view of the changes that took place in the structure and conception of local African government, in particular after the 1940s. The Land Apportionment Act of 1930[26] had made the division of the national territory into mutually exclusive areas for African and European occupation a matter of fundamental national policy.[27] But the rapid increase of the human and cattle population and the generally poor standards of African land husbandry soon led to a serious deterioration of African-held land, which threatened the prospect of a viable tribal economy. Even in those days tribal incomes needed to be supplemented by the cash earnings of ever larger streams of short- and long-term labor migrants.[28] In African Administration the early emphasis on law and order therefore shifted to an increasingly active preoccupation with the complex problems of agrarian reform. Especially after World War II, under the umbrella of "Native Affairs," there was a vast expansion of technical services and staff to help improve the quality of African land and animal husbandry.

The earlier efforts to promote better crop production and land utilization were based mainly on practical demonstrations and persuasion. When these methods had little success, more stringent and authoritarian measures were adopted. The so-called centralization scheme of the 1940s aimed at putting a stop to the traditional ways of shifting cultivation. It established separate arable and grazing areas, and tried to stabilize the hitherto mobile and dispersed residential pattern. This operation involved the resettlement of countless African households, and (largely unwittingly) the cutting up of many tribal wards, the most vital territorial units in the traditional Shona tribal structure.[29] Extensive conservation measures were being enforced, livestock had to be regularly culled to prevent overstocking, and extension services were greatly expanded. Government officials now not only in name but in fact increasingly controlled the actual allocation and utilization of land, thus encroaching upon one of the most vital areas in which tribal authorities, and especially ward headmen, had in practice still managed to exercise their traditional powers (despite the fact that they lacked these powers under statute law--see above). In short, by the mid-1950s the authoritarian power of central Government, operating through the extensive ramifications of "Native Affairs" at local level, had reached down to the very grass roots of tribal life and agrarian subsistence. The only meaningful remnants of traditional tribal government were the limited judicial powers that chiefs and headmen could exercise through their recognized African Courts.[30]

It is difficult to assess the strain of all these measures upon the fabric of tribal society, because they cannot be isolated from concurrent other developments (especially education, money economy, and labor migrancy) that were also bound to affect the internal cohesion and traditional authority pattern in tribal life. By and large, however, and despite increased individual wranglings about land and the (largely silent) tug of war going on between various official and unofficial land authorities (with the formerly insignificant kraalhead emerging as a patron whose favors it became well worth buying[31] in situations of growing land scarcity), the people themselves seemed to be able to find their way in the new rural order with surprisingly little fuss or overt protest. Two reasons may account for this. First, wage earnings through frequent participation in the European labor market had become a major contribution to tribal family incomes, thus blunting the sharp edge of rural poverty. Secondly, and most importantly, the fundamental right of a labor migrant to a piece of land, however modest, on which to settle again in his tribal community after his long or short absence from home, had not yet been seriously challenged. In a situation of rigid white-black land apportionment, this still gave the African the kind of social security in times of unemployment or old age that was denied him in the European areas.

This acquiescent attitude changed at the end of the 1950s. On the political front, the future of the then Federation of the Rhodesias and Nyasaland was being challenged by the rising tide of African nationalism in the northern partner states, while in Southern Rhodesia itself the political climate became increasingly tense. More immediately, however, the issue was forced by the highly authoritarian African Land Husbandry Act, 1951, the large-scale implementation of which took place from the mid-1950s onwards. This involved a vast redistribution of all tribal land on the basis of strictly demarcated and (in theory at least) economically viable arable holdings and pasture land, with individual, registered, and negotiable farming and grazing rights.[32]

Viewed purely from the point of view of controlled agricultural economy, the Act had its merits. Its fatal flaw, however, was its complete misunderstanding of the very basis of individual African rights of land use. In African law such rights are a self-evident and integral part of a person's recognized membership of a given tribal community (among the Shona, in particular of his tribal ward), and such membership is not affected by temporary absences from home. The Act (s. 27) made actual "lawful occupation" of tribal land at a certain "prescribed date" the principal criterion of elibility for the new farming and grazing rights. This jeopardized the rights of untold numbers of migrant workers who, being absent at such time, did not fulfil these conditions. Worse, as these reallocations progressed (an immense operation that taxed all available staff to the utmost), it became clear that, if the prescribed minimum allotments[33] were to be maintained, there would be too little tribal land to meet the demand. According to Kingsley Garbett

(1961: 19): "By [October] 1959 it had become clear...that there was no land available for 102,000 families entitled to it." Although the actual shortage varied considerably from one locality to another,[34] it was sufficiently general to provoke widespread and increasingly violent opposition, which in turn could only aggravate an already tense political situation. In short, what the Administration had believed to be the logical final step in a long-prepared and progressively executed process of agrarian reform, the African could only interpret as an outrageously unjust act of large-scale dismemberment of his tribal community and a direct threat to his social security. It is difficult to conceive of an issue in which the disparity between statute law and tribal law and the popular sense of justice was so acutely and widely felt. One is here reminded of the observation of the great and experienced British administrator Lord Hailey (1957: 686): "There is certainly no one feature of Colonial policy which has had an equal influence in determining the character of the relations between the indigenous people and a Colonial Administration."

Faced with a major crisis and realizing that it had overreached itself, the Rhodesian Administration decided in 1961 to stop the reallocations of land under the Act, long before the scheme was completed. One result was that, as it was commonly expressed, "the land was given back to the chiefs" to administer (something they had suggested themselves)--a doubtful privilege in view of the fact that, with the already reallocated farming rights being retained, they now had to cope with two disparate systems of land law, statutory and tribal, without having much hope of substantially relieving their basic problem of growing land scarcity.

At the same time, however, the whole approach towards African government was to be changed. Authoritarianism and paternalism were to be thrown overboard. "Community development," the stimulation of the African's own initiative under his own autonomous leadership, became the new Gospel. Its statutory frame had already been provided by the African Councils Act of 1957, a rare piece of nonauthoritarian and imaginative legislation. It provided, if the local population so desired, for the establishment of institutions of local self-government with a flexible measure of legislative and executive autonomy, carefully attuned to the felt needs, growing aspirations and capabilities of the various tribal communities.

One of the structural concepts of the Act was the marriage, within one representative body, of both traditional and newly emerging forms of rural African leadership: the first by the ex-officio appointment of all recognized chiefs as "vice-presidents" of local councils, and of a number of headmen as "members"; the second by provision for popularly elected members. The "President" of the council was the local Commissioner, who, especially during the first experimental years, also acted as council chairman, a role that many an authoritarian-minded commissioner found extremely difficult to play, and which led to a

good deal of mutual frustration as council and chairman became locked in fruitless controversies about the relative merits of their respective plans and priorities. Elsewhere I have dealt with this kind of problem in great detail (Holleman, 1969: chapter 4). What interests us here is the change in the official evaluation of chieftainship (the principal symbol of "traditional" authority) as this system of African local government was pursued with increasing vigor and political conviction by the Rhodesian Administration.[35]

Despite its radically different philosophy of government, the African Councils Act had one thing in common with the authoritarian and ill-fated African Land Husbandry Act. Both were designed to meet the increasingly urgent problem of African rural development, a problem made the more difficult by the conservative attitudes and uncertain leadership of most tribal chiefs, in particular the often aged majority of Shona chiefs. The African Councils Act hoped to solve this problem by accepting them as part of the existing pattern of tribal authority, but to supplement their deficiencies by injecting a popularly elected, and presumably more enterprising, type of leadership into the new institutions of local government.

It is doubtful if the architects of the Act expected chiefs to be very active participants. Departmental documents,[36] written at the time the Act was being drafted, carefully explained that chiefs were not to be "members" of Council and therefore had no "specific functions." As "vice-presidents" they would have a "dignified but aloof status," though if they so wished they would be "free to contribute...to Council discussions." This means that the Chief's role in this context was conceived as a symbolic rather than a substantial one. It might even be only a transient role. As councils developed into effective new forms of self-government, it would be possible for chiefs "to withdraw in course of time," in order to confine themselves mainly to their judicial (and traditional ritual) functions.

If this indeed represents the official appraisal of the modest, and perhaps fading, role of chieftainship within the enfolding prospect of African local self-government at the time the Act was being drafted (i.e., the mid-1950s), subsequent developments appear to have caused a remarkable change in attitude. Faced with the growing pressure of militant African nationalism with its new and radically different breed of political leadership, the Rhodesian Government felt the need to cultivate allies in its struggle for political dominance. So it extolled the virtues of the tribal way of life and set out to bolster the power of the chiefs as its principal exponents. Parliament was assured that chieftainship was "the embodiment of African society,"[37] and that it was the government's "policy to work through and with the chiefs as the tribal traditional leaders."[38] Slogans like these were becoming commonplace in almost every political debate on African affairs. What really matters, however, is the language of the new laws designed to increase the powers of chieftaincy in tribal government, and

how these worked out in actual practice. I shall here have to confine myself to but one illustration in a vital field of tribal life and economy, that is, land tenure.

After the failure of the African Land Husbandry Act, the decision to "give the land back to the chiefs to control," had to be translated in terms of statute law. So the Tribal Trust Land Act of 1967 introduced the concept of "tribal land authorities" (TLAs)[39] in every tribal area. From the responsible Minister's speech in Parliament[40] we learn that henceforth (and for the first time!--J.F.H.) statute law would recognize "traditional land authority and give statutory backing to what has long been tribal law and custom." But not quite! The occupation and use of land would remain "subject to the overriding need for the conservation of the soil." Here lies one obvious snag. Since the care for conservation was also to be the responsibility of the TLAs, the Government retained the right to step in and replace any TLA that did not properly fulfill its functions (s. 51, Land Tenure Act). In spite of its professed reverence for tribal law and authority, Government could therefore in its wisdom both "establish" and "disestablish" TLAs in much the same way it had always been empowered to appoint or sack chiefs and headmen.

But what are these TLAs really? According to the Act (s. 47 [2]) a TLA is: the Chief and any such other resident tribesmen as he may nominate "in accordance with tribal custom." But we have noted that in tribal law the authority over land is vested in hereditary functionaries rather than in nominees of the chief. Moreover, this power is exercised in different ways at different levels of the tribal hierarchy (which itself may vary considerably from one tribe to another). This lack of clarity does not prevent the Act from laying down the functions of a TLA. They are, quite simply, "to exercise such powers and perform such duties as are conferred and imposed upon it (by the Act)," and to control "the use and occupation (of the land) subject to the directions of the Minister" (s. 48, my italics). In respect of these imposed functions a TLA could make its own bylaws, but again not without the consent of the Minister (s. 49 [1]), who could, moreover, also repeal them again (s. 49 [4]). And to crown the ambiguity in the allocation of powers, the Act (s. 49 [5]) also obliges the Minister not to consent to the making of any such bylaw, "unless he is satisfied that it has the approval of the Chief, if any, and is in accordance with the general wish of the headmen and heads of kraals resident in the tribal area concerned."[41]

What do we make of this hotchpotch? The least we can do is to agree with an African opposition Member in the Rhodesian parliament, who vigorously objected to "the imposition of these technical laws which are above the understanding of the bulk of the chiefs."[42] But this merely understates the confusion at grass-roots level. In a recent publication Hughes (himself an official insider) speaks of "the semantic confusion, which had

already bedevilled... the policy of community development [and which] once again became the order of the day." "[M]ost government officials found the whole concept of TLAs... difficult to grasp," and "a variety of different explanations [were] being given to tribal authorities." "Some chiefs...merely selected a few progressive farmers. In other areas chiefs...stated more logically that their TLAs consisted of themselves, their headmen, and all their kraalheads. Elsewhere, the chief himself was described as 'the TLA'." Apart from this, "some agricultural officers considered it quite logical...that they themselves should nominate TLAs; and, through them, personally control all allocations of rights" (Hughes, 1975: 150-51). In this sensitive and already sorely tried field of African land tenure the ordinary farmer was thus faced with an authority structure of great uncertainty (from which many a kraalhead knew how to profit--see above).

During the 1960s and early 1970s more legislation was passed to enhance the power of "traditional" chieftaincy (or at least the official image of it) on both local and higher levels. On the national level the Council of Chiefs had become an important consultative body since its creation in 1962. The chiefs' support of the government at the famous indaba (gathering) at Domboshava in 1964[43] significantly contributed to Rhodesia's declaration of independence a year later; and under the "independence" Constitution of 1969, chieftainship was well represented in the Senate of the new Rhodesian Legislature. On the local and regional levels the African Law and Tribal Courts Act of 1969 (in many respects an imaginative piece of legislation)[44] substantially increased the judicial scope[45] and autonomy of tribal courts, and provided for the creation of regional Tribal Appeal Courts as the final courts of appeal in "customary" civil cases.

Various amendments (e.g., in 1971 and 1974) of the African Councils Act went far beyond the "dignified and aloof status" originally accorded to the chief, and in fact turned him into the indispensable kingpin of the institutions of local government. Since these institutions had greatly increased in both number and range of activities,[46] most chiefs could now exert a powerful influence over the whole range of African local government.

In a fairly recent statement in Parliament the Minister summed up the Government's view of chieftainship as the hub of what he claimed to be "a strong, well-tried structure of local government and control of land": "Government regards chieftainship as the traditional local government of the people. It recognizes that a chief together with his various councils is (1) the traditional leader of the people; (2) the authority over land and its allocation; (3) the judicial authority, which not only means the resolution of disputes but the maintenance of tribal law and customs and the maintenance of such rules as may be required; (4) he is the custodian of the tribal spirit; (5) he is the rural developing authority; and (6) he is the eyes, the ears and mouth of his people."[47] This seems a far cry from

the earlier skepticism regarding the usefulness of most chiefs in helping to bring about a progressive new tribal order. It also tends to obscure the hard fact that this allegedly omnivalent chieftainship still represented the subordinate part of a dual local power structure, and that its strength and efficacy still largely depended on the backing and guidance of the European Commissioner and other Government agencies operating at the same local level. For despite its prolific ramifications to meet the exigencies of changing times and circumstances, this basic dual structure had remained the same since its inception at the turn of the century. Its essential problem (and its principal inherent weakness) was still how to conjoin culturally disparate systems of law and authority within an effective single power system--or as Bohannan (1965:39) ironically put it, how to achieve what is, at best, a "working misunderstanding."

Viewed in this historical context, the switch in the early sixties to a policy of permissively supported community development seemed the sensible thing to do after coercive authoritarianism had clearly misfired; but the subsequent exaltation of "traditional" chieftainship as the mainstay of both the old and the new tribal order is as historically paradoxical as it is politically misleading. Some three-quarters of a century of European political dominance and cultural enterprise (mainly in economics and education) had profoundly changed and in many repects seriously weakened the fabric of tribal society. It had not only progressively undermined the traditional basis of tribal authority, but changed its very nature and function by imposing upon it a host of duties and responsibilities that are anything but traditional. These called for special skills, of which most chiefs and headmen, being barely trained if at all, had little understanding,[48] and for qualities of leadership with which only relatively few chiefs were endowed by nature. In the tribal areas of the early 1970s, people were still prepared to respect and obey chiefs whom they regarded as legitimate and skillful in solving their problems; they had, however, become increasingly wary of those who lacked these qualities but were nevertheless placed in positions in which they could exercise (and abuse) the wide powers that Government had now apparently granted to them.[49]

For the Minister to speak of a strong and well-tried structure of local government was a dangerous overstatement, for the reality as often as not presented a rather fragmented picture of different semi-autonomous so-called tribal authorities, from widely ranging rural councils and variously constituted TLAs to pasture control schemes involving one or more individual kraals and even ill-defined familial groups.[51]

Really competent and physically active chiefs (and there undoubtedly still were and are such people) may hold their own under these conditions, and even bring about some sort of unity in this badly coordinated assortment of partly overlapping and even rivalling institutions. But their weaker brethren (the great majority of old Shona chiefs among them) are simply men-

tally and physically unable to cope. They must content themselves with being chiefs in name only, while leaving it to their sons or other junior near relatives actually to exercise their many duties and powers.

In Shona tribal areas this filial kind of deputyship has become very common. It apparently has the blessing of the European authorities. Most tribesmen, however, still hold old-fashioned views about the matter. If chiefly authority had to be delegated at all (a frequent occurrence also in the traditional past in a system that tends to produce old if not aged and infirm chiefs),[52] it should still rest in the hands of men who themselves rank as "fathers" in the tribal order of seniority. Thus a chief's capable younger brother or half-brother would qualify as a respected nevanje (hereditary deputy), but a son, even of mature age, would still rank as a mere mwana (child) who should not try to throw his weight about without the close support of his tribal elders.

The increasingly common failure to observe these elementary principles of legitimacy in the delegation of powers[53] is not, however, the only reason why chiefly authority is so often more sham than substance today. For one thing, in the traditional system the exercise of power was fairly effectively checked by selected councilors who themselves were senior men of considerable experience and hereditary authority in the community. Today many deputizing sons prefer to engage their own younger brothers or other close relatives of the same age as their henchmen. For another thing, though much improved public health conditions have greatly increased the average life expectancy of Africans, they probably also have (it seems a paradox) considerably shortened the average term of office among Shona chiefs. If appointed with due regard to traditional principles of succession, they are now likely to be a good deal older than their predecessors in the past--and also much nearer the end of their mortal life.[54] At any rate, in one important administrative district (Gutu) in which I recently collected some statistics I found the average tenure among the seven local chiefs to be less than two and a half years, and among the nineteen ward headmen a little more than three and a half years. In this area, at any rate, there was little to sustain the Government's expressed belief in the "considerable continuity in thought and work"[55] of chieftaincy as the vital core of tribal government.

On the contrary, put all these factors together, plus the attraction of the not inconsiderable material benefits to be derived from these tribal offices (government stipends and allowances, and unofficial perks), and the stage is set for a fairly rapid succession of small family coteries of largely inexperienced and self-interested people trying to exercise a variety of executive, administrative, and judicial powers based on little more than a mixture of legal fiction, bluff, and (if needs be) ready recourse to the force of central Government. Under such circumstances to "Leave it to the Chiefs," is to invite disorder and corruption--as indeed it did in this area.

I must stress that this gloomy picture is largely based on an examination *in loco* of one administrative district, and therefore cannot be taken as representative of the majority of Shona-speaking areas. (In fact, in at least two chiefdoms that I briefly visited in other districts the situation seemed a good deal healthier.) Yet it would be wrong to deny that the structural weaknesses and many ambiguities I have signalled are inherent in this dual system itself, and therefore not confined to one or two particular areas.

Likewise general, though locally varying in severity, are the social strains caused by land shortage and economic as well as social and political insecurity. When these social strains become too severe, the whole structure of law and authority may be challenged. We saw this happening when people felt their security threatened by the African Land Husbandry Act. Analytically this could be regarded as a straight conflict between two disparate legal cultures, with Africans resisting a foreign authority imposing a foreign law that was contrary to their own sense of justice. This conflict has not (as yet) meant the rejection of all constituted legal authority. But such a crisis lies close under the surface when the fabric of social life and security is strained and the authority structure so patently weak and fragmented as to inspire little or no confidence among the people. Faced with a sudden personal crisis, a grievous loss or injury, people may then renounce all faith in the existing legal order and resort to self-help to repair their outraged sense of justice.

In the last section of this article I shall deal with this kind of reaction in cases of homicide that I recently struck, quite unexpectedly, during a brief period of fieldwork[56] in southern Mashonaland. They were (so far at least) mainly confined to two areas[57] in which all the above-mentioned factors (including blatant corruption among tribal authorities), making for unstable local government as well as social stress, were present to a very high degree.

The rather bizarre form of self-redress in these cases is interesting. Though said to be a revival of ancient customary law, it was in fact a curiously distorted hybrid of vastly disparate cultures.

IV. SELF-HELP AND EXTORTION IN CASES OF HOMICIDE

Before the European advent the Shona legal system was sufficiently developed to restrain blood-vengeance in cases of homicide, and to insist on due process of law aimed at the payment of compensation to the victim's family. I could find little evidence of unauthorized counterkillings (and subsequent feuds) in the past. Although the law of homicide varied in detail[58] from one tribe or locality to another it was in essence the same. The bulk of the compensation (apparently alike for adult men and women regardless of rank) to be paid by the slayer's family was

mutumbu ("body"),[59] preferably a girl of marriageable age, or else her full equivalent in bridewealth cattle. In addition a number of cattle or other livestock had to be paid as musoro womunhu ("head of a person"), part of which went as "blood-fine" (maropa) to the chief and the remainder to the victim's maternal and other close kinsmen. One beast was usually slaughtered for ritual purposes (cleansing the community and, if possible, reconciling the opposing parties). The essential idea of the mutumbu compensation was that the girl would be married (mukadzi weropa, "wife of the blood") by a close kinsman of the victim, thus establishing ties of kinship and interdependence between the respective families, and that her first child would be given his name, thus reviving his identity among the living. If the slayer's family were unable to produce the required mutumbu immediately, it was sufficient for them to produce one or two beasts as pisika misodzi ("wiping off tears"), a payment that also served as rutenda mhosva, concrete proof of their liability and their promise to pay full compensation later on. Their fulfilment of this debt was considered certain, because the transaction was sanctioned by the deeply rooted fear that the deceased's spirit would otherwise turn malevolent (ngozi) and take vengeance upon the culprit or his family. Nonacceptance of liability led to banishment.

When European government was established, and monopolized the power of punishing serious crimes, the compensatory aspect was mostly neglected and the custom seems to have more or less died out.[60]

In 1973 there was a sudden and dramatic revival of the mutumbu custom, or rather, of a peculiar and virtually uncontrollable aberration of it. It first occurred in the chiefdom of N in the Buhera district,[61] during a disastrous drought (in fact, the second one in succession). Since this case, according to both popular and official views, set the basic pattern for a minor epidemic of similar cases that followed soon afterwards, I shall relate it in some detail.

The immediate cause of the conflict was a land dispute between villages of G and M on the one side, and of K on the other. K was a relative newcomer to the area but a relation of chief N, who had allotted land to K that G and M regarded as their traditional grazing area. After a beer party at G's place a half intoxicated and armed group of G and M men attacked K's hamlet, seriously wounding K and killing his adult son. A good deal of material damage was also done. Police arrived, and after making preliminary inquiries took the dead body with them for a post-mortem examination. When the body was returned, K's family carried it in an armed procession of mobilized supporters to G's village where they placed it in the headman's own quarters. Here they delivered their ultimatum: forty head of cattle (or twenty head plus a marriageable girl) as mutumbu, plus $400 cash for material damage caused during the attack. Should G fail to pay within a few days, K's party would resort to counter-killing.

After this threat they withdrew, but left the body of K's son where they had deposited it. While his village was emptying itself of panic-stricken inhabitants, G managed to collect twenty head of cattle from his own and M's village, with which he made his counter-offer through the intermediacy of his ward headman and a local R.C. missionary. It was flatly rejected by K's party, and a stalemate developed that was to last for six tense weeks. In the words of the local chief of police (a European): "A most ugly situation in which on both sides a couple of hundred people, armed with sticks and axes, stood ready for violence. And all the time the corpse stood rotting above ground, with K's relatives refusing to take it, and no one else daring to touch it."

Both white and black authorities stood powerless. The same police officer testified: "We threw in everything we could muster in the line of authority: police, district administration, public health people, the chief, headman, the lot! Even the missionaries tried their damndest to persuade K's relatives to be more reasonable, that is, to accept what was offered to them, then bury the corpse and settle the rest by negotiation. But they did not budge." The authorities had full power under the Public Health Act to bury or destroy the corpse as an obvious danger to public health, but they dared not act. As the police officer explained: "It might very well have sparked off a civil war."

The impasse was finally broken by a group of younger and educated relatives of K, who had in the meantime arrived from Salisbury where they were employed. At a mass meeting of government officials and both parties (separately lined up), this Salisbury party finally managed to persuade their family elders to accept G's offer of twenty head of cattle and several hundred dollars (with the promise of more to come). Cattle and money were handed over, the body was placed on a police truck by the Salisbury men and carried to K's place where it was finally buried.

I visited the area some twenty months later, and the atmosphere was still tense. People were highly reluctant to talk about the matter, and the local missionary said it would not surprise him if violence were to break out again.

This incident was followed by a spate of some twelve to fourteen other mutumbu cases in less than two years, and their number was still growing after I left the area. A thorough analysis of all these cases requires a separate treatise. Here I must restrict myself to a few salient remarks.

There appeared to be no connection whatever between the various homicides. Their individual circumstances varied very considerably, though beer drinks and intoxication lay at the back of most deaths. The tally included premeditated murders, culpable homicides, sheer accidental deaths, and even one or two suicides. The relationship between (alleged) slayer and victim varied from close kinsmen to unrelated neighbors and

even casual acquaintances. The victims included men, women, and even two children (one inadvertently drowned while playing with a little friend; the other burnt to death in a hut set afire by his mentally deranged youthful cousin). In short, questions of motivation, intent, or existing relationship did not materially affect the subsequent action of the deceased's family to seek its own justice through a process of self-help. Though ostensibly based on the "old law of mutumbu," the actions strayed far beyond the traditional ways of the past. The aberrations were obvious and, though varying in detail, were in essence curiously alike in all these cases.

First, there was the element of self-help backed by the armed threat of violence, in flagrant disregard of all established judicial authority, both tribal and European. The reason for this can only be a complete lack of faith in the recognized processes of justice in such cases,[62] a fact unequivocally stated by those African informants who were prepared to discuss these sensitive matters,[63] and reluctantly admitted as a likely explanation by some European officials.[64]

Secondly, there was the element of extortion, backed by the abuse of the victim's corpse as a highly effective mystical threat to the killer's family. Almost without exception the demands for compensation were vastly in excess of what, even if the old formula were to be translated in terms of current values,[65] would have been reasonable. Such extravagant claims may, I think, be explained by the fact that participation in the Western economy had spurred ambitions of material wealth that were beyond the reach of the average tribesman. By holding, in effect, the culprit's whole group of kinsmen in spiritual bondage, the deceased's relatives could (and did) exact from its combined resources a comparative fortune. Or, as one old informant put it: "Our people have become greedy in the whiteman's towns and want to get rich quickly (va va kukarira pfuma)."

This takes me to my last and probably most vexing point: the abuse of the victim's dead body by his own closest kinsmen for the purpose of extortion, and their refusal to bury it until their full claim had actually been paid to them. The effectiveness of this means of exerting pressure was evident, for in no case did the killer's party dare to remove the body. On the contrary, people fled from the village and all normal activities in the immediate vicinity ceased so long as the corpse was there. This could last from a couple of days to several months,[66] depending on how soon the required amount (or at least so much as the deceased's family was finally prepared to accept) could be scraped together. This procedure is contrary to all tradition. Not only was the culprit's family permitted to pay one or two cattle in commiseration and as an earnest of their promise to pay full compensation later on; also the bereaved family had to observe the proper obsequies in respect of the dead body, on pain of incurring itself the wrath of its departed spirit. This makes the manipulation of corpses a rather puzzling phenomenon.

From Daneel's recent penetrating study of religious beliefs among the same tribes with which I am dealing here, it appears that well over 80 percent of these people, whether Christian, synchretist or traditionalist, still firmly believe that the vengeful ngozi spirit can cause death also among its own kinsfolk (Daneel, 1971: 182). Why then this seemingly reckless disregard for its fearful sanctions among the deceased's kinsmen themselves, while their opponents were clearly terror stricken?

I can offer no conclusive explanation for this apparent belief in their immunity. Also my informants were unable (or unwilling?) to explain this novel, and to them most disturbing, aspect of these mutumbu actions. I can only suggest a possible reason for this curious spiritual ambiguity. One of my most knowledgeable and influential informants, munyai ("messenger") of the ancient Mwari (High God) cult,[67] spoke of the spiritual confusion among his people, and darkly hinted that Chief N had "made a new law" that had spread like an evil spirit (mweya wakaipa) over the country. Now Chief N, according to my closely involved missionary informant, was popularly believed to have actively sustained K's family in their adamant refusal to accept a compromise (see above). He also belonged to an African Church of the so-called Zionist type, a powerful syncretist sect with a strong belief in its own methods of faithhealing and protection against evil spirits. From one of Daneel's studies I quote this testimony of a Zionist preacher: "In our own family there is an ngozi spirit who has already killed many of our own kinsmen. My babamunini (FyB) has already paid ten oxen...to appease...it.... If I had not joined this Church I should also have had to pay mutumbu...only in this Church do I find protection against the ngozi" (Daneel, 1970 b: 48-49 [his italics]).

It is but a slender clue to a possible explanation, for in the shroud of secrecy that enveloped all these cases I could obtain no hard evidence that such protective measures had actually been applied to the victims' families. The only undeniable fact is the existence, in these stricken areas, of a multiplicity of often sharply rivalling religious denominations and creeds (cf. Daneel, 1971, esp. table 15, p.82). It is a factor that can only add division and confusion in the realm of spirit, to the already severe strains and insecurities in the field of social life and secular authority.

V. CONCLUSIONS

In this article I have tried to trace the consequences of some disparities between prescribed law and social reality (and between the official law and official practice as well). I have discussed these problems as a process of progressive interaction between two vastly different but partly interlocking cultures and law systems. In this situation--common in most colonial and post-colonial states--legal traffic (from legislation and administrative practice to the individual transactions of the common man) takes place both within and across cultural and spatial

boundaries: usually with a certain regularity though not always along the same law-ways; sometimes with collisions that induce changes in both law and actual conduct. Given this mobility and the aspect of progressive change, the insight into both cause and effect can be better served by a diachronic than a synchronic approach, and by an analysis going beyond the field of law into the wider aspects of social life with its tussle between changing needs and resilient traditional values.

These considerations have also determined my choice of illustrative material. The examples all lie at the core of every legal order: regulating authority, control, and use of primary resources, social security, and protection against violent death. The order in which I have presented these examples might wrongly suggest that I see them as a single chain of cause and effect. In actual fact the process of change is made much more complex by crosscutting other factors, some of which I could only hint at. In my last example, for instance, I do not think I have yet found a convincing explanation for this peculiar crisis symptom of a failing legal order. (Why not, for instance, straightforward blood-vengeance and feud?)

What these examples do illustrate rather convincingly are, I believe, a few things of more than local significance. First, although disparities between prescribed rules of law and actual conduct probably occur in a more or less institutionalized form in every society, and although such discrepancies are likely to be much greater in a culturally pluralist society, there is an enormous leeway before law-deviant conduct actually threatens the legal order as such. What impresses the observer is the capacity of the common man to adapt himself to a situation in which two very different systems of law and authority prescribe his way of life. Apparently without too much trouble, protest, or mishap he not only manages to satisfy his needs, but even on occasion to manipulate this legal dualism to his personal advantage.

Even frequent mutations of the traditional tribal structure, though causing considerable confusion as regards territorial jurisdictions and political affiliations, never seriously challenged the legal order until, in the late fifties, the implementation of the African Land Husbandry Act threatened the very basis of social security as these people conceived it. Mass protests and violent resistance were then the result. The offending law was suspended and policy shifted.

All the time, however, it was the tribal authority and especially the chiefs, who occupied a most invidious position in this dual power structure. Their traditional bases of power progressively undermined, but their official responsibilities increasing, they became more and more dependent on the local agents of central Government.

The critical stage was reached when, traditional tribal authority having finally lost most of its real substance, and the agents of central Government having assumed virtual control of tribal life and development down to the grass-roots level, official policy changed and sought to reverse the local balance of power. Chieftainship, hollowed out but its image blown up beyond recognition, now became the centerpiece of a revised, increasingly fragmented, but still essentially dual structure of African Government. With the main burden of government thus shifted, the whole local structure of law and authority became as strong as its weakest component.

Two factors have, I believe, so far prevented a general collapse of the system under the increasingly severe social and political stresses to which it is subjected. First, the ill-defined division of powers between District Administration and tribal authority. Its very ambiguity has enabled the former to intervene more frequently and incisively than the official instructions, to "leave it to the chiefs," would strictly permit. Secondly, the resilience, in spite of much change and challenge, of a fundamental popular belief in ascribed authority. It is still strong enough to enable reasonably capable men of legitimate status (from chiefs to family elders) to keep their own houses in order.

In the area hit by the mutumbu phenomenon there was clear evidence that, for some years past, District Administration had become less vigilant, and more tolerant (or ignorant?) of ineptitude in African local government (once a promising venture). Moreover the structure of tribal authority had become increasingly fragmented, riddled with corruption, and popularly deeply distrusted. The critical stage had been reached at which, in an already highly charged social climate, a single murder could spark off the crisis and bring down this tottering structure of law and authority.

When the dust had cleared somewhat, a curiously warped yet oddly consistent form of self-help had emerged as the new norm in the field of homicide, a hybrid product of two disparate and failing legal systems, still burdened with unresolved conflicts of old and new values in the complex process of change.

NOTES

[1]For some Africanist protagonists of the (extended) case method, see Epstein (1967), Van Velsen (1967), and Gulliver (1969); for some second thoughts about its limitations, see, e.g., Gluckman (1973) and Holleman (1973).

[2]For common examples in the field of economic enterprise see, for instance, Beale and Dugdale (1975), and Leonard and Weber (1970). For a recent theoretical treatise and some American-African comparisons, see Moore (1973).

[3]These so-called Native Regulations were issued under the (British) Southern Rhodesia Order-in-Council, 1898 after the disastrous effects of the first few years of operations by the chartered British South Africa Company. Though the Imperial Government left the general administration of the territory in the hands of the Company (with the constraint of a Legislative council that included elected white settlers' representation), African administration and the protection of African interests were entrusted to a specially selected corps of Native Commissioners who, though paid by the Company, received their powers from, and were answerable to, the representatives of the British Government in Southern Africa, that is, the High Commissioner in the Cape Colony and his local "watchdog," the Resident Commissioner in Southern Rhodesia.

For a constitutional history of Southern Rhodesia, see Palley (1966); for a general history (up to 1934), see Gann (1965); and for a critical analysis of the course of African administration up to 1968, see Holleman (1969). A valuable analysis of the ambivalent attitude of the Imperial authorities during the last decades of the nineteenth century can be found in Robinson, Gallagher, and Denny (1961).

[4]As regards headmen, s. 21 of this Act provides for their appointment by the Secretary for Native (later Internal) Affairs "to assist chiefs in carrying out their duties. In making these appointments the nominations submitted by the chiefs shall, except for good reasons to the contrary, be accepted." This formulation, too, runs counter to the principle of hereditary succession in the tribal societies concerned.

[5]Mutandwa v the Minister of Native Affairs, (1937) S.R. 134. In a recent publication Goldin and Gelfand (1976:30) even go so far as to assert that "Accordingly, hereditary rights of succession to the chieftainship under African law and custom have been expressly abolished." This seems an overstatement in view of the provision in s. 3 of the African Affairs Amendment Act (44/1966) that the Head of State "shall give consideration to the customary principles of succession," and of the broadly phrased recognition of customary law under s. 3(1) of both the old (33/1937) and

new (24/1969) African Law and (Tribal) Courts Acts. I submit that statute law goes no further than to say that, with the appointment of chiefs, customary rules of succession need not be applied.

[6]Cf. Garbett (1966). The problem is far from unique. For comparable analyses elsewhere, see, e.g., Busia (1951) (Ghana); Fallers (1955) (East Africa); and Schrieke (1928) (Indonesia).

[7]In the process of amalgamating smaller units and dividing larger ones, some headmen were promoted to chiefs, while some chiefdoms were reduced to ward status. In terms of s. 4(1) of the African Affairs Act, 1927, the Rhodesian Head of State has legal power to create "tribes" by the amalgamation or subdivision of existing tribal groups.

[8]For extensive reports of such proceedings in Shona society, see, e.g., Holleman (1974).

[9]In terms of s. 17 of the African Affairs Act, chiefs ranked as "constables," with powers of arrest in their areas, until 1966. The amendment Act 24/1966 (s. 7) then turned them into "peace officers," a more general and more dignified denomination.

[10]Their civil jurisdiction is basically conferred by s. 9 of the African Affairs Act, as amended. By doubling as magistrates, District Commissioners also had (limited) criminal jurisdiction in which they applied the common law.

[11]There was also, understandably, rivalry between "made" and "real" chiefs, which still persists as an internally divisive force.

[12]The fact that recognized African courts had to keep a simple record of their proceedings facilitated regular scrutiny. At the same time, the D.C.'s court itself was also subjected to the Court of Appeal for African Civil cases (s. 10 African Law and Courts Act, 1937), from which in turn there was access to the (appellate Division of) the High Court (s. 10, African Affairs Act, 1927, as amended).

[13]The controlled process, common in Western courts, of "leading evidence" bit by bit, is a fairly recent innovation in some tribal courts, and often causes irritation (or confusion) among litigants and witnesses.

[14]Public participation in the judicial process is more active and spontaneous at the middle level (headman's court) that at the chief's court. But also in the latter courts, de-

spite recent statutory efforts to "modernize" the procedure, it is still common for members of the public to ask questions and voice opinions, or to be invited by the judges to do so.

[15]Or to use the common expression (also known to the Tswana--Schapera [1938:289])"throwing the bones to the dogs to chew." Among some tribes, such as the Budya of northeast Rhodesia, this stage of public participation is marked by a strict procedure in which successive pairs of volunteer debaters thrash out disputed points of law and fact until there appears to be a general consensus as regards the balance of right and wrong between the real contestants--see Holleman (1974:50ff.).

[16]For some critical comments about the professed aim of reconciliation in African adjudication, see Gluckman (1955:55); van Velsen (1969:143ff.); and Holleman (1974: 78-83).

[17]This is probably also a fairly common and confusing experience of anthropologists sitting in at tribal court sessions in areas still new to them. I at least have on several occasions felt puzzled about the outcome of a trial until, some time afterwards, I was given the clarifying piece of information with the remark: "It was not necessary to mention because everyone knows about this!" It was some consolation to me to find, in 1975, that a Tribal Appeal Court of three highly competent but non-local African chiefs likewise got temporarily lost in a maze of seemingly inexplicable contradictions until vital bits of missing information casually cropped up much later during the process. When the Court demanded why this evidence had not been tendered before, the reply was: "You did not ask for it, so we thought that, being such great and clever chiefs, you must have known already."

[18]Holleman (1975); see also Allott (1970 a) for a valuable general discussion of this topic.

[19]Dune v Nyamaru (1945) NAC 66.

[20]Idi v Mabala (1946) NAC 143.

[21]Joshua v Fani (1940) NAC 114.

[22]See note 20.

[23]Ginger v Kamjgariwa (1944) NAC 28.

[24]Here the Court of Appeal slipped up badly. Though African adultery was indeed (unlike European adultery) also an offense under statute law (African Adultery Act of 1916, Cap.81), in

none of these cases was there any question of the criminal law being invoked (in which event, moreover, this Appeal Court would have had no jurisdiction).

In fairness it must be stated that this court (since 1962 presided over by a fully qualified judge of the High Court instead of a senior African Affairs official) has recently considerably modified these rigid views on the necessity of corroboration, which it considered "an alien importation which was of doubtful value even in its original system" and "a source of discontent to the people (in our system of customary law)"--Masembura v Yawo, C. of A. No. 45/1972.

[25]Ironically, both tribal and European courts were thinking of sterner legal sanctions to counter increasingly lax sexual morality, especially among younger folk. But while European justice raised the barriers of evidence in order to prevent the exploitation of possibly innocent males by enticing immoral females (and their greedy fathers), African judges saw the problem mainly in terms of protecting the virtue and marriage value of the weaker and only too easily tempted sex against irresponsible male prowlers. In Shona law it is the man who is held liable to pay a stiff compensation for seduction or adultery; the woman comes off scot-free except for a sound paternal or marital thrashing.

[26]For a good historical study of the various motivations underlying this fundamental and politically highly controversial measure, see Gann (1963).

[27]The latest affirmation of this policy is contained in the comprehensive Land Tenure Act of 1969, in which "parity" in land rights is expressed in terms of a 50:50 division between one-quarter million Europeans and six million Africans.

[28]According to Mitchell (1961:206) the percentage of males of working age (15-50)at any time employed on the European labor market had risen from 33 in 1911, to 50 in 1941, and 68.5 in 1951.

[29]Though departmental circulars stressed the importance of consultations with chiefs and headmen in these large-scale operations, in practice the professional agriculturists (even more so than most D.C.s) dictated the plan of action with little knowledge of tribal structures and internal relations. For more details about the significance of the Shona tribal wards and the Administration's virtual ignorance of their existence, see Holleman (1958:204-10; 1969:55-6). How sensitively such headmen could react to any threat to their traditional authority is illustrated in a case report included in Holleman (1974:48ff.).

[30]Even these powers were statutorily further curtailed by the African Marriage Act, 1950, which in sections 11(5) and 17 deprived the chiefs of any jurisdiction over claims for the payment or recovery of bridewealth and the dissolution of customary marriages--a particularly fertile field of litigation in Shona society. These provisions were inspired by an ill-judged effort to restrict the value of bridewealth (Holleman, 1952:369ff.). They proved to be largely ineffective, however, and were repealed in the early 1960s, but not without having caused a good deal of confusion and the kind of "selective use" of judicial processes that I illustrated above.

[31]Floyd's researches (1961) had already revealed the widespread practice among kraalheads of demanding money for their efforts to procure residential and arable plots. Though the Administration was aware of these practices they were difficult to stop. During my brief stay in 1975 I heard of kraalheadships being "for sale" for $150-$250: not bad for a nonsalaried job!

[32]This did not mean individual ownership of arable land, but individually registered rights of tenancy of demarcated plots. These rights were, for instance, not automatically hereditable, and could even be revoked in case of persistent ill-use.

[33]These were calculated on the basis of climatic and soil conditions as well as size of household.

[34]For a detailed analysis of the nation-wide calculations made by a Departmental work party in 1961, see Holleman (1969: 32ff.).

[35]The policy of community development was wholeheartedly adopted by the new right-wing (Rhodesian Front) Government, which came into power after the general elections of 1962. This rendered this policy highly suspect in the eyes of African nationalists who saw in it the precursor of the hated South African "separate development" idea. The result was that for many years community development had to wage a constant battle against political opposition and (sometimes violent) intimidation. For analytical case studies, see Holleman (1969) and Weinrich (1971); for a brief but useful general survey of the position up to 1974, see Hughes (1975: 127-43).

[36]For specific references of the following quotations, see Holleman (1969:69).

[37]Parl. Debates (21/7/66:709).

[38]Ibid. (16/2/67:1715).

[39]Though this Act was subsequently repealed by the comprehensive Land Tenure Act of 1969, its provisions as regards TLAs were reenacted virtually unchanged in the new Act. I shall therefore cite or refer to particular clauses as they appear in the Land Tenure Act.

[40]Parl. Debates (16/2/67:1715-19).

[41]To simplify matters the Administration drew up model by-laws that TLAs could adopt if they so wished.

[42]Parl. Debates (16/2/67:1954).

[43]Holleman (1969:345-56).

[44]For a succinct summary of the Act and its main departures from previous legislation, see Allott (1970b:291ff.).

[45]Under warrant by the Minister of Internal Affairs (but approved by the Minister of Justice) the new tribal court could for the first time be granted a measure of criminal jurisdiction over Africans and any other person consenting to its jurisdiction (s. 7(1) and s. 12).

[46]For instance, the Gutu Council (admittedly one of the oldest and larger ones), ran fifty-nine schools. three clinics, three beer halls and one bottle store, several forestry plantations and nurseries, extensive water supplies and maintained 1,100 kilometers of roads. It employed some 130 people and had a budget of over $450,000 in 1974-75. Oddly enough, but in common with so many other councils, it was not involved in agricultural development.

[47]Parl. Debates (3/8/73:1451).

[48]An African M.P., reporting on his findings regarding the activities of TLAs, stated: "In most cases...their problem is this: that the work they do they have no idea of..., so people will not accept [their decisions]." Parl. Debates (3/8/73:1441).

[49]Another African M.P. (with twenty years' experience as a local council secretary): "[W]hat is opposed by the residents of many areas is this [giving] one person the power to dictate over things." Parl. Debates (4/12/73:1978).

[50]For a revealing study of the merits and problems of these so-called Veld-management schemes (one of the latest departures in the search for "growth points" to stimulate African rural

economy) see Danckwerts (1974).

[51]The community development efforts of the 1960s had largely concentrated on revitalizing the hitherto overlooked tribal ward communities as the most promising operative units (Holleman, 1969:331n). In 1973, however, instructions went out to District Administration to concentrate on much smaller units, designated musha or isigaba ("village" in the Shona and Ndebele languages respectively). But, "this must not be done at the expense of the chieftainship." Thus, though these musha communities might tend to elect executive committees, the Administration planned that "eventually the elected committee will be replaced by a body appointed by the chief." (Internal Affairs Circular, No. 205 of 23/7/73).

Some eight months later, the "semantic confusion" (Hughes) having again "bedevilled" the situation at grass-roots level, the new unit was to be renamed "Tribal Group," and it had to be based on "the extended family group or a combination of these," in order to preserve "the disciplines inherent in the tribal extended family." For this reason, too, such recent "interest groups" as "master farmer clubs, saving clubs and the like... [which] tend to break down the tribal system...should be guided back[!] into the extended family form of development" (Ibid., Addendum 'A,' 12/2/74). These quotations (and many more could be culled from these departmental instructions) should suffice to reveal the erratic ideas about community development and the appalling lack of insight into the realities of present-day tribal life at the highest level of administrative planning.

[52]The Shona law of succession prescribes the collateral devolution of office within the oldest living generation of agnates before it passes to the next generation; usually it also rotates between two or more principal "houses" of the chiefly patrilineage--see e.g., Holleman (1969:93ff.) for a brief outline of the system.

[53]The following figures, collected from one administrative district (Gutu) in 1975, give some indication of how serious this problem can be. Of the seven recognized chiefs, only one was still able to attend to his duties personally; of a total of nineteen recognized headmen, only four were able to do so. All the others were regularly represented by their sons as deputies (the one exception being a younger brother of the incumbent).

[54]This is a hypothesis that can only be proved by a nation-wide survey. My genealogies of chiefs show that in the past many a chief who had survived long enough to attain office at, say, fifty-five to sixty years of age, also proved to be physically tough enough to live a good many years longer. With the average age of succession now being, perhaps, some ten to fifteen years higher, they are less likely to live much longer after their

accession to office.

[55]Parl. Debates (16/2/67:1719).

[56]Here I must acknowledge my indebtedness to the University of Leiden for financing this research visit; to the Rhodesian authorities who left me free to go where I wanted to go; to District Officer D. Bertram, who patiently supplied me with much useful information both during and after my visit; and to the Tribal Areas of Rhodesia Research Foundation for generously seconding to me Mr. R. Shora as a field assistant, to whom I owe a special debt of gratitude.

[57]Gutu and Buhera districts. Only one or two similar cases were reported to me from other parts of the country.

[58]See, e.g., Bullock (1928:300ff.); notes by Brownlee Walker and Meredith in NADA (1976:360-63); Goldin and Gelfand (1975: 197-78, 268-69).

[59]There is probably a close association here with dumbu (womb), which gives the term the connotation of creative power.

[60]During the 1940s and 1950s I did hear of a few cases in which the families came to some sort of agreement among themselves, or the culprit's family would move to another place to avoid trouble. Even in the latter event they were not considered to be safe from spiritual vengeance, as several tales of mysterious deaths purported to prove.

[61]This needs some qualification. On Christmas 1972 there was a case of alleged suicide (popularly believed to be murder) in the Gutu district which led to extensive litigation up to the highest court in the land. It already revealed unmistakable aspects of self-help.

[62]As far as I can see, nothing in Rhodesian Statute law would prevent a European civil court (and even a warranted tribal court) awarding a mutumbu compensation, at least in cattle, once the custom itself and the defendant's liability had been proved. Normal practice, however, had confined itself to prosecution under European criminal law.

[63]Research into these cases was made difficult because the people most closely involved either professed complete ignorance of all facts or, visibly perturbed, gave evasive answers.

[64]An undated note (June 1974?) that I found in a D.C's file on mutumbu cases read: "Main reason is that the African has

little faith in the justice of European courts, in that such killers seem to be taken away [for prosecution and prison sentence] for six months and then returned to their homes."

[65]Taking the mutumbu (marriageable girl or her equivalent in bridewealth value) as the principal compensation, the present-day value in these areas would amount to some eight to ten cattle plus $150 to $250 at most. To this may be added a few head of cattle for secondary claims and ritual purposes. Instead of this, demands for a girl, plus twenty to forty cattle, plus $500 and more, were not exceptional.

It should be noted that Bullock (1928:300) puts the traditional claim at: "ten fingers, ten toes, and the head of a person. That is in plain English, twenty head of cattle and a girl." I have occasionally heard of the fingers-and-toes formula, but never of an actual payment in cattle in these terms. Considering the fact that, before 1912, bridewealth in most Shona societies seldom if ever exceeded four cattle (Holleman, 1952:162ff.), I think it not unlikely that Bullock's claim is excessive. See also Goldin and Gelfand (1976:197).

[66]The longest period I have on record is nine months. In this case the killer, a hardened criminal, had threateningly told his family on no account to pay until he was released from prison.

[67]He figures prominently in Daneel (1970a), a revealing little study of the Mwari cult of the present day.

REFERENCES

Allott, A.N. (1970a), "Evidence in African Customary Law," reprinted in Readings in African Law (ed. Cotron and Rubin), vol. 1, London.

_____ (ed.) (1970b), Judicial and Legal Systems in Africa, 2nd ed., London.

Beale, H. and Dugdale, T. (1975), "Contracts between Businessmen: planning and the use of contractual remedies," British Journal of Law and Society, vol. 2 (1).

Bohannan, P. (1965), "The Differing Realms of the Law," American Anthropologist (spec. publ.) vol. 67, part 2.

Bullock, C. (1928), The Mashona, Cape Town.

Busia, K. (1951), The Position of the Chief in the Modern Political System of Ashanti, London.

Danckwerts, J.P. (1974), A Socio-Economic Study of Veld-Management in the Tribal Areas of the Victoria Province (stencilled), Salisbury.

Daneel, M.L. (1970a), The God of the Matopo Hills, The Hague.

_____ (1970b), Zionism and Faithhealing in Rhodesia, The Hague.

_____ (1971), Old and New in Southern Shona Independent Churches, vol. 1, The Hague.

Epstein, A.L. (1967), "The Case Method in the Field of Law," in The Craft of Social Anthropology (ed. Epstein), London.

Fallers, L. (1955), "The Predicament of the Modern African Chief," American Anthropologist, vol. 57 (2), part 1.

Floyd, B.N. (1961?), Changing Patterns of African Land Use in Southern Rhodesia (3 vol. stencilled), Lusaka.

Gann, L.H. (1963), "The Southern Rhodesia Land Apportionment Act 1930: An Essay in Trusteeship," National Archives of Rhodesia & Nyasaland, Occasional Papers No. 1.

_____ (1965), A History of Southern Rhodesia, London.

Garbett, C.K. (1961), "The Doomed Revolution," Central African Examiner, Dec. '61, Salisbury.

_____ (1966), "The Rhodesian Chief's Dilemma," Race, vol. 8 (2).

Gluckman, M. (1955), The Judicial Process among the Barotse of Northern Rhodesia, Oxford.

_____ (1973), "Limitations of the Case-Method in the Study of Tribal Law," Law and Society Review, vol. 7 (4).

Goldin, B. and Gelfand, M. (1975), African Law and Custom in Rhodesia, Cape Town.

Gulliver, P.H. (1969), "Introduction: Case Studies of Law in Non-Western Societies," in Law and Society (ed. Nader), Chicago.

Hailey, Lord (1957), An African Survey (2nd ed.), Oxford.

Holleman, J.F. (1952), Shona Customary Law, Cape Town/Oxford.

_____ (1958), African Interlude, Cape Town.

_____ (1969), Chief, Council and Commissioner, Assen/Oxford.

_____ (1973), "Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform," Law & Society Review, vol. 7 (4).

_____ (1975), "Some Problems of Evidence in Shona Tribal Law," in Essays in African Social Anthropology (ed. Fortes and Paterson), London.

Howman, H.R.G. (1976), "The Guardians," in The Rhodesia Society Occasional Papers, no. 1, Salisbury.

Hughes, A.J.B. (1975), Development in Rhodesian Tribal Areas, Salisbury.

Leonard, W.N. and Weber, M.G. (1970), "Automakers and Dealers, a study of criminogenic market forces," Law & Society Review, vol. 4 (3).

Meredith, V.O. (1976), "Compensation and delayed burial following manslaughter or murder," NADA, vol. 11 (3).

Mitchell, J.C. (1961), "Labour and Population Movements in Central Africa," in Essays in African Population (ed. Barbour and Prothero), London.

Moore, S.F. (1973), "Law and Social Change: the semi-autonomous social field as an appropriate subject of study," Law & Society Review, vol. 7 (4).

Palley, C. (1966), The Constitutional History and Law of Southern Rhodesia 1888-1965, Oxford.

Schapera, I. (1938), Handbook of Tswana Law and Custom (2nd ed., 1955), Oxford.

Schrieke, B. (1928), De Inlandsche Hoofden, Weltevreden. (Eng. transl. "The Native Rulers," in B. Schrieke, Indonesian Sociological Studies, Part I [The Hague, 1955]).

Velsen, J. van (1967), "The Extended-Case Method and Situational Analysis," in The Craft of Social Anthropology (ed. Epstein), London.

———— (1969), "Procedural Informality, Reconciliation, and False Comparisons," in Ideas and Procedures in African Customary Law (ed. Gluckman), Oxford.

Walker, A.R.B. (1976), "Compensation for manslaughter or murder," NADA, vol. 11 (3).

Weinrich, A.K.H. (1971), Chiefs and Councils in Rhodesia, London.

Official Publications:

a) Rhodesian Parliamentary Debates, Vols. 64, 66, 84, 85.

b) Case law (reported decisions):
Mutandwa v Minister of Native Affairs, 1937 S.R. 134
Makonzekenyi v Paradzanyi, 1938 NAC 42
Dune v Nyamaru, 1945 NAC 66
Idi v Mabala, 1946 NAC 143
Joshua v Fani, 1940 NAC 114
Ginger v Kamjgariwa, 1944 NAC 28
Masembura v Yawo, C. of A. 45/1972 (stencilled).

c) Statute law:
Rhodesia Order-in-Council 1898
H.C. Proclamations 18/1898; 55/1910 ("Native Regulations")
African Adultery Act (Ord. no. 33/1916)
African Affairs Act 1927
Land Apportionment Act 1930
African Law and Courts Act 1937
African Marriages Act 1950
African Land Husbandry Act 1951
African Councils Act 1957
African Marriages Amendment Act 1962
Tribal Trust Land Act 1967
African Law and Tribal Courts Act 1969
Land Tenure Act 1969.