



Legitimacy in Zimbabwe

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LEGITIMACY IN ZIMBABWE

1. Introduction.

Preliminarily and even though Holleman¹ in his discussion of the subject focuses on the Shona tribal group of Zimbabwe, his analysis is apt and may be used to fully appreciate the customary law on legitimacy in this country. Secondly, the issue of legitimacy in Zimbabwe is closely linked or actually intertwined with custody; the rights and duties of parents and guardians; the membership of the child in the lineage and the rights and duties of the child. Consequently, an examination of the question of legitimacy under Zimbabwean law can be categorized into two parts, namely (a) acquisition of the rights of parents and (b) classes of children in order to determine the various aspects of legitimacy immediately mentioned below in which children may be classified. Holleman brings out these various aspects of legitimacy in the following statement:-

"Legitimacy in...law has two aspects:- The first concerns the question of parental rights and duties, amongst which are the right to have custody of the child. The duty to sustain and protect it, the right to receive marriage compensation for a daughter; the duty to provide a wife for a son, and the duty to accept responsibility for the child's actions. The second aspect concerns the child's membership of the patrilineage and his right to succeed to the name and dignity of his father and other paternal ascendant. Normally, when lawful marital relationship exist between the child's parents, the child is fully legitimate; it suffers no legal disabilities and legitimacy so to speak is a single indivisible concept. But when the child is born under irregular circumstances, the two aspects become separate issues which need not necessarily coincide. Parental rights and duties will be determined by the question whether the child has been covered by the payment of cattle to its mother's family or its legal guardian. Lineage membership is determined by the question whether it has the same blood (*ropa*) at its legal father."²

¹ J.F. Holleman, *Shona Customary Law; With Reference to Kingship, Marriage, The Family and the Estate* 242-264 (1969)

² *Id.* at 242

1. *Acquisition of Parental Rights.*

Rights of parents to a child born of a lawfully married or betrothed woman is vested in its mother's husband or the prospective groom because of the existence of a prior affinitive agreement which binds the two families together. If on the other hand, the child is an adulterine child of such a betrothed or married woman, the natural father may sometimes be permitted to secure parental rights on payment of *maputiro/lobolo untwana* to the legal guardian. This view is consistent with the position taken by Storry³ who observes:-

"The basic rule of customary law is that a natural father has no right to the custody of his illegitimate child, notwithstanding that he may have paid damages for the seduction of its mother. The father or guardian of the mother has an absolute discretion as to whether he will allow the father of the child to have custody thereof...The mother's father or guardian may relinquish custody on payment by the child's father of *muripo/chiredzwa* but until his payment has been made, it is the mother's father or guardian who is responsible for the maintenance of the child's father...There is no obligation on the mother's father or guardian to accept the payments offered to obtain custody by the father's child--the matter is solely [one] for his discretion--regard being had to the child's moral and material welfare...The natural father of a child becomes liable to maintenance only if he is awarded custody..."⁴

Goldin and Gelfand⁵ also acknowledge this position by Storry, when they state:-

"An illegitimate child born to an unmarried woman belongs to the guardian of such a woman. The seducer acquires no rights to a child born as a result of intercourse between him and an unmarried woman...The seducer can, however, acquire custody and guardianship of the illegitimate child as follows:-

Firstly, if the guardian of the an unmarried mother (a) accepts damages for seduction; (b) payment of compensation acknowledging that paternity is made. This latter

³ J.G. Storry, *Customary Law in Practice*, 70-73 (1979)

⁴ *Id.* at 72 & 73

⁵ B. Goldin & M. Gelfand, *African Law and Custom in Rhodesia*, 183-189 (1975)

payment is known among the Ndebele as *lobolo untwana* and by the Shona as *maputiro or chiredze wora* and (c) upon payment of maintenance...for the period during which the father or guardian of the girl cared for the child...The practice varies among different tribes. According to certain tribes, payment of compensation for seduction entitles the seducer to the child. The seducer has no right to claim the child by offering to pay proper compensation. The choice rests with the guardian of the girl whether or not to accept compensation and thereby be divested of his right to the illegitimate child...Where the father of an illegitimate child claims its custody, it is for the parties to make their own arrangements and not for the court to stipulate the payment... upon which the child should be handed over to the father. *Secondly*, if the seducer marries the girl, he becomes the child's guardian. The illegitimate child is legitimated by the marriage of his parents as is the position under Roman Dutch law. A legitimated child acquires all the rights of a legitimate child in particular rights of succession and inheritance".⁶

It can be concluded therefore, that, the rights of a parent to a child born of an unmarried woman or a non betrothed woman are vested in its mother's family, but may be transferred to the natural father, either when the latter subsequently marries the mother or upon payment of *maputiro/lobolo untwana*.

2. *Classes of Children to Ascertain Legitimacy.*

Four classes of children are described for purposes of legitimacy and legitimation under Zimbabwean law as follows:- (a) children of lawfully married parents; (b) children legitimated by their natural father through the payment of the customary *maputiro/lobolo untwana* or compensation; (c) adulterine children of married women under parental control of their mothers' husbands and (d) illegitimate children who neither are legitimated by their natural fathers, nor recognized by their mothers' husbands. Children in (a) are fully legitimate whether born before or after the marriage is concluded. This is in keeping with the views expressed by Harold Child when he states:-

"There is a presumption of legitimacy where the main elements of an African

⁶ *Id.* at 184

customary union are present"⁷

Children in (b) are a consequence of extra or pre-marital relations of the mother. They are legitimated on payment of *maputiro/lobolo untwana* to the legal guardian of the mother. They become the full legitimate children of the father who pays the *maputiro/lobolo untwana*. This position is also confirmed by Child, above-mentioned who declares:-

"The rule is that a seducer has no right to his child born as a result of an illicit intercourse with an unmarried girl, unless the father of the girl at his option accepts (a) damages for the seduction; (b) a payment of compensation acknowledging paternity. On payment of (b), the child is accepted as that of the seducer. Although, a father may be agreeable to a seducer having his child, the latter cannot demand custody until the father has also agreed to accept the amount of *lobolo* offered..."⁸

Children in the (c) category, namely, adulterine children result from the adultery of formally betrothed or married women, who subsequently marry the fathers of their children from these adulterous relationships. The children in this category are legitimated by the sole provision of the Legitimacy Act, 1961 as amended ⁹, in section 2 which stipulates that:-

"Where the father or mother of an illegitimate person was married to a third person when the illegitimate person was born, and the parents of the illegitimate person marry, or have married one another after the birth of that person, the marriage shall render that person if living, legitimate from the date of that person's birth".

Goldin and Gelfand, above-noted ¹⁰ further indicate the position of adulterine children under Zimbabwean customary law as follows:-

⁷ H.Child, *The History and Extent of Recognition of Tribal Law in Rhodesia*, 73-88 (1965) at 73-74

⁸ *Id.* at 79

⁹ *The Statute Law of Rhodesia [Zimbabwe]* 117 (1961); see also, The Legitimacy Act, *The Statute Law of Rhodesia [Zimbabwe]*, Ch. 47 [1977]

¹⁰ *Supra* note 5

"An illegitimate child born to a married woman belongs to her lawful husband. Upon acceptance of payment of compensation, as is the case of an unmarried woman, the seducer may acquire the rights to a child and become its guardian...The husband of a wife who gave birth to an adulterine child is entitled to claim its custody, but is not obliged to do so and can decline to have anything to do with it..."¹¹

Holleman ¹² further concludes that under Shona customary law, "the extra-marital child of a wife suffers no disability..."¹³ Children in the (d) classification are illegitimate. They are not legitimated by customary law or statute through the subsequent marriage of their parents. Neither are they legitimated nor recognized by their natural fathers or their mothers' guardians. Majority of these children are born to an unmarried or divorced women and are left in the care of their maternal grandparents because the father is either unknown or has declined to accept them. Some of them are offsprings of married women, but are subsequently denied paternity by their legal fathers. These are generally male children in as far as female children are deemed valuable in terms of marriage cattle derived from their being married off. As a general practice, female children are bound to be easily claimed by their natural fathers or retained by their mother's husband. By and large, illegitimate children are raised by the maternal grandparents and for all intents and purposes suffer the stigma and certain disabilities which accrue to illegitimacy.

Unlike most African countries, illegitimacy seems to be an incident of Zimbabwean law. This is evident from the postulation by Child when he observes:-

"A man when marrying a woman who is the mother of an *illegitimate child* [emphasis added] with the consent of the woman's guardian, obtains guardianship of such a child on the payment of additional dowry. This may happen when the natural father of the child has obtained a right to the child under customary law. When parties have not

¹¹ *Id.* at 185

¹² *Supra note 1*

¹³ *Id.* at 255

married, the mother of the children of an irregular union normally would be the person to be given custody or a member of her family. Apart from the question of illegitimacy when children are of a tender age, their mother would be their best protector,...but despite this axiom, interim custody should not be given to the mother without evidence having been taken to ascertain that such custody would be in the best interests of the children..."¹⁴

It can be concluded therefore that in all matters dealing with the status of children even where illegitimacy has been established the courts and other authorities would above all else take into account the interests of the child and appropriate a category in which the child would least suffer disabilities.

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¹⁴ *Supra note 7* at 81