Institute of Administrators of Non European Affairs
Instituut van Administrateurs van Nie Blanke Aangeleenthede
Southern Africa
Suidelike Afrika

THE BANTU MARRIAGE.

PAPER DELIVERED AT THE

EIGHTH ANNUAL CONFERENCE

AT KROONSTAD

by

DR. J. F. HOLLEMAN
DIRECTOR OF SOCIAL RESEARCH
UNIVERSITY OF NATAL.

BANTU MARRIAGE AT THE CROSS-ROADS

Introduction:

It is obvious that a vast, varied and oft-debated subject like Native marriage cannot be fully covered in a lecture like this. Of necessity I have therefore had to select only a few aspects which seem to me basic. Inevitably such a selection is somewhat arbitrary. Moreover, as this audience consists mainly of urban administrators, it seems fitting that I should, in the latter part of this paper, give attention to some modern trends in urban marriage. I shall do this, not because I am able to provide you with the answers, but rather because in this sphere so much of vital importance is still unknown to us, and therefore needs careful observation by people 'on the spot'.

I shall also not be able to resist the temptation to make one or two recommendations with regard to the bewildering problems of marital and family relations which beset our Bantu population in this period of transition.

A discussion of the measure of recognition which the traditional Bantu marriage (as well as marriage by Christian or civil rites) has received in legislation and courts of justice will be found in the Annexure, which, if time had permitted, should have formed the middle section of this paper.

You will forgive me if I use the term Bantu or traditional marriage in preference to the (in South Africa) official and statutory term 'customary union' when I speak of the institution which, in indigenous society, is as fundamental, inviolate, and dignified as its counterpart in our and any other organised society.

The reason why I shall confine myself largely to the lobolo[1] marriage is that this form of marriage transaction not only is by far the most common among Southern African Bantu, but also the only 'complete' form of marriage , in the sense that, apart from a valid marital union (which can be established also without the transfer of lobolo), it creates a new

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1) I prefer to use the word lobolo from now on, being probably the best-known indigenous term for this institution.

family unit and family estate as an integral part of the husband's paternal kingroup. In other words, both the right to the woman as a wife and the right to her offspring, are in the lobolo marriage transferred to the husband's party. This distinction[1] is vital and not only in traditional society; even to-day it remains an issue in probably the majority of present-day marriages contracted outside tribal society and in marriages contracted according to Christian religious or civil rites.

Instead of keeping you with a description of various customary marriage procedures, about which you can read elsewhere[2], I should like to analyse a few basic characteristics which I believe are common in Bantu marriage generally, and in spite of the inevitable dangers of generalization, try to see where our arguments will lead us when we deal with the process of transition which is taking place today.

I. Some Bantu characteristics of Bantu marriage:

Probably the dominant characteristic of Bantu marriage (and one in which it contrasts most significantly with western-Christian marriage) is that the marital union between husband and wife (i.e. the marriage in narrow sense) is but part of a wider 'relationship-in-law' or affinition agreement[3] between their respective kingroups.

In our society this wider affinal relationship obviously also obtains, but in traditional Bantu society this affinition is the primary, causative, and not the secondary, resultant, element of the marriage between the individual spouses. In other words, in our society we may say that two families are each other's in-laws on account of the marriage of their son and daughter; in Bantu society it is rather the other way round: the affinition agreement between the kingroups (i.e. the formal agreement that they shall be linked by marriage) not only precedes (or is assumed to have preceded) the conjugal union of the individual couple concerned, but has a social and legal existence which is in some respects independent of the particular marriage itself.

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1) L. Bohannan, 1949, uses for this distinction the terms 'rights in uxorem' and 'rights in genetricem'.
2) See bibliography.
3) That is, the agreement to establish affinal kinship relations between kingroups. I introduced the term in a technical sense in my 'Shona Customary Law' in which its implications are fully discussed.

In regular proposal marriages a considerable time may lapse between the time the agreement has in principle been reached by the families and the time the proposed conjugal union is in fact established. Yet the affinal relationship between the families becomes socially and legally operative before the consummation of the marriage. In this state of so-called formal betrothal this wider affinal relationship has already assumed a pattern similar to, and sometimes substantially the same as, that obtaining after consummation[1]. In this respect Bantu betrothal goes much further than betrothal in our society, and is, to a varying degree, actually a 'relationship by marriage-in-anticipation'.

The literature on this point is not always very explicit but among the Tswana, Zulu and Shona, for instance, it is certain that the two kin-groups in their social relations already refer to, address and treat each other as in-laws[2], using the customary kinship terminology obtaining between affines (including 'husband' and 'wife' for the betrothed couple) and carefully applying the appropriate behaviour patterns.

Exclusive sexual rights to the wife-to-be are, if not actually vested in, than at any rate reserved for, the husband's party, although the legal consequences of any breach may vary from tribe to tribe. It is usual to find a greater degree of recognised sexual licence among the prospective spouses, and sometimes permissible full cohabitation (e.g. Tswana). Consequently, if premarital pregnancy occurs the normal legal sanctions are fully or largely suspended, provided marriage actually follows. Among the Tswana, in cases of seduction of the girl by someone other than her betrothed groom, the compensation is still payable to her family[3]; among the Xhosa[4], though the husband-to-be has no direct claim to such compensation, he indirectly benefits because the amount is deducted from the bride-wealth if he still accepts her as a wife. Among the Shona, however, the issue is squarely treated as one of <u>adultery</u> with a 'married woman' (mukadzi womunhu), and the <u>groom's</u> family are therefore entitled to the compensation paid by the offending third party[5].

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1) A point well grasped by Whitfield, 1948, p. 85.
2) Schapera, 1955, p. 132; Holleman, 1952, p. 102, and field notes on the Zulu; Krige, 1936(a), does not say so explicitly but implies it in her description.
3) Schapera, 1955, p. 134.
4) Van Tromp, 1948, p. 62.
5) Holleman, 1952, pp. 151 and 195.

Striking evidence of the primary importance of this wider affinal frame of family relations (as against the individual conjugal union) is the question of possible substitution of conjugal partners. Probably more than anything else this reveals the fundamental concept of traditional Bantu marriage as a mutually beneficial agreement between two kingroups for the purpose of family (lineage) procreation. In this concept the individual aspect is not lost right of. During the normal subsistence of the conjugal union the individual aspect is even prominent. This union is the obvious focal point of the affinal relationship, its domestic autonomy recognised, the inviolability of its conjugal unity jealously protected, its individual character as the nucleus of a new and expanding family unit becoming more pronounced with time. But in cases of premature death, barrenness or sterility, the wider foundation of the affinition agreement re-emerges as the primary, causative factor underlying the relationship between the kingroups. The well-known sororate and levirate do not imply the establishment of new marriages, but an addition or change of 'personnel' of existing marriages, and therefore form part of the original marriage contract.

Nor is the idea of substitution confined to the revitilization of existing marriages suspended or rendered unproductive through death or sterility of a spouse. It may find application in cases where no such marriage had as yet materialized. Even a betrothed girl or boy, prematurely deceased or disabled, might on the basis of the family affinition agreement be replaced by a sister, or brother or other available and suitable relative[1]. And among the Shona it is not uncommon practice for two families to enter into a relationship-by-affinition while leaving the choice of spouses in abeyance until some unspecified time in the future. (This element of speculation is probably inherent in many cases of so-called child-betrothal[2].

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1) Schapera, 1955, p. 134; Holleman, 1952, p. 182; Krige, 1952, p. 191. According to Van Tromp, 1948, pp. 62 and 159, however, the death of a wife (unlike the death of a husband) dissolves a marriage, and death of a fiance apparently leads only to a return of certain values given.

2) E.g. Schapera, 1940, p. 39; Ashton, 1952, p. 64; Harries, 1929, p. 3; Krige, 1937, p. 111; Holleman, 1952, p. 116.

A further and rather curious modification of the individual aspect of marriage is found in such cases (e.g. Venda[1], Lobedu[2]) in which a woman, through the payment of lobolo, acquires reproductive rights in another woman, and in this way legally becomes the 'father' (pater) of the 'wife's' children begotten on her behalf by her own husband or other approved male. The odd (but not illogical) aspect of this type of transaction is the existence of a legally perfectly valid and productive affinition agreement without a conjugal union in the normally accepted sense. The ultimate product is a separate (and presumably patrilineal) lineage structure with as founding 'ancestor' a woman who, as a parallel and entirely separate effort has also helped reproduce the lineage of her own husband. The situation is logical only if one keeps in mind the vital distinction in marital and reproductive rights which I mentioned earlier in this paper.

The marriage contract:

Summarising what I have said before, the marriage contract is based on the agreement between two kingroups to establish an affinal relationship between them for the purpose of family procreation. It is a mutual benefit agreement from which both parties expect to derive equal benefits. While this presupposes that the contractual performance by both parties should approximately balance one another, it does not mean that their respective performances need be either strictly comparable nor be running concurrently. In fact, this is only possible in the comparatively rare cases in which the agreement involves a direct and concurrent exchange of wives between two families, with both wives producing at about the same time the same number of children. In the vast majority of cases the obligations of the parties are dissimilar and their performances may or may not be concurrent. In the common lobolo marriage family A undertakes to provide lobolo to family B in return for a normally productive female from B. The basic idea is that this compensation is equated, not merely by B's wifely services but by the fair number of children she bears to A. The lobolo enables B's family to obtain from kingroup C a wife who will fulfil the same functions for family B. A's and B's obligations are therefore dissimilar, but the functional values of these obligations are equated in the marriage transaction. The lobolo may,

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1) Stayt, 1931, 143 f.
2) E.J. and J.D. Krige, 1943, p. 143 f.

according to tribal usage or the explicit terms of the affinition agreement, be handed over in full before, at, or after the time of the transfer of the bride, or it may be given in instalments during the time the transferred wife bears children. Only in the latter case is there a conscious effort to retain the balance at any given time. In all other cases this is clearly impossible, because the wife-providing party's main obligation, i.e. the production of children for family A,can be fulfilled only with the passage of time, and if lobolo had been paid in full by A, there can only be a question of 'balance' at the end of the woman's procreative period.

In the service marriage (widespread but very infrequent) no lobolo as such is paid, but the husband normally spends his working life with, and partly for the benefit of, his wife's family in return for her wifely services. Here the equation of reciprocal obligations is a much more thorny problem, and I found that, for instance the Mashona, have great difficulty in arriving at a satisfactory concept of 'balance'. The snag is the paternal rights to the children born of the marriage, normally 'covered' by the lobolo. Theoretically a husband's life-time service to his in-laws entitles him to a fair share if not all of his children. In practice, however, the equation is so difficult that the husband, in order to establish his claim beyond question, may tender during a late stage of his marriage a substantial material 'compensation' to his in-laws, thus transforming his service-marriage into a common lobolo marriage[1].

From what I have said it follows that the marriage contract is completed only when the basic reciprocal obligations have bean substantially or fully met, which at any rate does not happen until the end of the wife's procreated period (and certainly not upon her transfer to her husband's family).

How does this effect the validity of the marriage in the meantime, and especially the legal position of the lobolo on the one hand, and of the children on the other? The answer is fairly simple if you look at it from the Bantu point of view. The affinition agreement envisages an enduring relationship between the contracting kingroups. It involves far more than the socio-biological mechanism for the production of legitimate children. It establishes ties of kinship and, subsequently, of common

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1) Holleman, 1952, p. 219-200.

blood between families whose future and well-being are now interlinked. It is essentially a long (very long) - term and close relationship. In such a relationship the element of mutual good faith is highly desirable if not essential. After having satisfied themselves that good faith can be expected, the parties enter into their agreement with the confidence that all will be well and that ultimately the required balance between their respective performances will be achieved and the contract completed according to their mutual satisfaction. This being their dominant frame of mind, the legal consequences of ultimate completion of the contract in terms of the affinition agreement, become operative in anticipation of the actual fulfilment of these terms. Therefore, the marriage itself is initially valid, even without a complete lobolo or the issue of children. Therefore, lobolo cattle paid over (even before the consummation of the marriage) already 'belong to' the wife's family and are treated and disposed of as their property. Where, with the tacit or explicit agreement of the wife's family, no or only an insubstantial part of the lobolo has been paid, any children born of the marriage already 'belong to' their mother's husband's family, and are treated as such[1].

It is this flexibility which so often eludes western jurists who are trained to expect a closer connection between contractual performance and counter-performance. It is this lack of conceptual flexibility which has been responsible for the view of our law courts that the transfer of the bride and the transfer of the lobolo constitute a full equation under the marriage contract, and therefore complete the contract. It is also the reason for the erroneous but firmly entrenched attitude of the Cape Division of the Native Appeal Court with regard to the ownership of 'betrothal' cattle transferred before the consummation of the marriage[2]; or for that matter, for the wrong application of the 'sisa'-concept under the Natal Code (Section 85) with regard to pre-paid lobolo.

For, part and parcel of the same conceptual flexibility which in Bantu law leads to the confident anticipation of ultimate results, is the fact, that, once this good faith has been destroyed, the impact of this reaches back to the very root of the affinition agreement. Gross default

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1) This is contrary to the common opinion only recently expressed by Mathewson, 1959, p. 72.
2) Nojiwa v Vuba, 1903, N.A.C. 57 and subsequent decisions; also Van Tromp, 1948, p. 59 f.

of lobolo payments, or gross failure of the wife to fulfil her wifely and procreative obligations, may lead, if uncorrected (see above), to efforts by the agrieved party to wipe out whatever legal consequences may so far have resulted from the affinition agreement. Flexibility then operates retrogressively: the view is then held that the marriage itself was apparently a 'mistake' and therefore the children never really belonged to their father's family; or that the lobolo cattle changed hands on false premises, and therefore never really changed ownership.

It is on these premises, by returning to the status quo ante affinition agreement, that the parties may seek to find, through fresh negotiations, a way to equate whatever concrete consequences (cattle received as against children born) this abortive venture may have had. And it is significant that, for instance among the Mashona, if the father manages to establish paternal rights to any such child in return for a number of cattle retained by or subsequently paid to its maternal family, such compensation is not called rovoro (lobolo), but maputiro, which is the term for the legitimising payment for a premaritally or extra-maritally conceived child. In other words, what was originally confidently regarded as a perfectly valid marriage, is now looked upon in retrospect as an illicit union.

Lobolo:

In the preceding part of this paper I have already said much that is relevant to that most hotly-debated issue, the function and nature of the lobolo. Perhaps the most liberally-documented study on this topic is by Dr. Jeffreys[1], which I do not intend to duplicate. In spite of his sometimes tortuous arguments and overstatements, his main thesis (here phrased in slightly modified form) that the payment of lobolo concerns the husband's family's rights to the children, and that this aspect should be kept distinct from the (legal validity of the) marital union as such, is undoubtedly correct.

Where Jeffreys in his fervour goes on the one side too far, and on the other not deep enough, is inter alia his blunt and repeated statement that marriage and lobolo are not connected at all, and his failure

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1) M.D.W. Jeffreys: 'Lobolo is child price', African Studies, Vol. 10, No. 4, Dec. 1951.

to bring out that lobolo is the inevitable result of a patrilineal and exogamous kinship structure. Generally the effective clan units (patrilineages) are exogamous, which means that the essential reproduction of the lineage cannot be achieved by the (incestuous) union of a male and a female of the same lineage (an exception is the comparatively rare paternal parallel cousin marriage of the Sotho and Tswana). In order to reproduce, a patrilineage therefore needs wives from other lineages to beget its children in whom the male blood (representative of the lineage hierarchy) is perpetuated. Since all patrilineages are faced with this problem, a system of exchange of reproductive power had to evolve. A direct exchange of women between two lineages might occasionally solve the problem but this method is rare (if perpetuated, it would soon lead to interbreeding and conflict with the concepts of incest). Its rigidity is solved by the interpolation in the exchange system of a value in livestock or otherwise, which is generally recognized, and locally often more or less standardized, as the equivalent of the reproductive value of a normal woman. This exchange medium, lobolo, now provides the many exogamous units of patrilineal society with a mobile vehicle to facilitate lineage reproduction. Lineage A, in providing a wife for lineage B, needs in exchange only this recognized lobolo value to enable it to procure its own reproductive medium from any suitable lineage C, thereby in turn providing C with the same facility, and so on. In short, in this system women and lobolo are exchanged as equivalent reproductive potentialities[1].

It takes little imagination to see how, on the loom of tribal society, lobolo (and sometimes substantially the same lobolo herd) carries the woof of affinal kinship through the warp of lineages, weaving them into a growing fabric of inter-kingroup relationships. And herein lies also the link with marriage, which Jeffreys sought to deny. For, in any orderly society, lineage reproduction normally takes place within the sanctioned frames of marital unions of husbands and wives. This is the recognized norm, in spite of the exceptions (some of them institutionalized) which may occur and which then create the impression that marriage and lobolo operate as separate and independent institutions, instead of being distinctive but complementary aspects of patrilineal family reproduction, which is their normal function.

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1) Holleman, 1952, p. 148 f.

In this overwhelmingly common type of marriage, lobolo is indeed an essential aspect of the marriage contract since it is one of the main conditions of the affinition agreement. And although it need not affect the initial validity of the marital union as such, it is as relevant to the completion of the marriage contract as is the procreative effort of the woman on behalf of her husband's family. Gross failure in either of these primary reciprocal obligations strikes at the root of the affinition agreement, and therefore at the marriage itself.

It is necessary to mention one more aspect of lobolo, closely related to the wider affinal basis of the marriage transaction. The structure of the Bantu family estate is such that, ideally, the provision of lobolo rests on the linking of brothers and sisters of the same 'house' for this purpose, with a brother having a prior claim to the lobolo raised by his full-sister. If no such sister is available, or for some other reason such a house cannot help out, recourse can be had to other houses within the kingroup. In other words, both the supply and the distribution of lobolo cattle often is a matter in which several units of the kingroup are materially involved. It is a feature of present-day development that the effective span of such participating kingroups is steadily narrowing[1].

Marriage procedures:

When I now turn to marriage procedure, the process which leads to the agreement of the respective kingroups to establish affinal relations between them and to create a marital union as a new component cel of the husband's patrilineage, I am again forced arbitrarily to select one or two general aspects which seem to me particularly relevant, and to refer you to the vast and detailed literature for the many local variations which obtain on the general theme.

This theme is normally one of an initial approach, formally made, followed by a variable series of negotiations and actions aimed at promoting a steady and ever closer rapprochement between the parties, culminating in, but certainly not ending with, the consummation of the conjugal union of the individual spouses (which itself is merely the beginning of an often slow process of emancipation[2] of the young wife, her

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1) Holleman, 1952, Chapter VII.
2) Holleman, 1952, p. 202 ff; Krige, 1936(a), p. 155.

household and budding family unit, towards domestic autonomy within the frame of the husband's kingroup).

Although in a regular proposal marriage the process leading to marriage is often protracted, and ideally a great many steps of a ceremonial, ritual or merely menial nature should be performed, one will find that even in one tribal locality the number of these steps as well as the relative significance attached to each of them, may vary considerably. Of vital importance generally, however, is the first formal approach, preferably (and perhaps invariably) made through an intermediary and couched in terms which, even if formally allusive (and often accompanied by a tangible token as 'mouthopener'), leaves neither the purpose of the approach, nor its sincerity, in any doubt[1]. Likewise, it is the unambiguous (if formally cautious or even reluctant) acceptance of the approach, (and of the token, if any) which signifies a favourable reciprocal attitude towards the whole matter[2]. Any subsequent action (negotiation, gift, service, ritual) performed by either party, whether tacitly accepted or actively reciprocated by the other party, which serves the purpose of rapprochement generally or specifically, confirms and strengthens this initial understanding and builds up the legal foundations of the marriage contract. Conversely, with the flexibility which underlies all Bantu law, mere omission of one or more normally common practices in this step-by-step process, though it may weaken, or fail to strengthen, this initial agreement, need not invalidate it. It is rather the unambiguous behaviour of either or both parties clearly inconsistent with any reasonable (and locally conditioned) assessment of such an agreement, which invalidates the legal foundation of the prospective marriage. For instance, the refusal to accept, or the return of, a significant token or payment by the woman's party, or the refusal (and not merely default) by the man's party to pay an agreed marriage payment.

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1) In one Shona case of seduction the defendant alleged that he had made a verbal proposal of marriage to the girl's father at a beer party and had received a favourable reply. The tribal court confirmed the father's view that such a casual approach could not possibly have been taken seriously.
2) Schapera, 1955, p. 131; Van Tromp, 1948, p. 40 ff; Holleman, 1952, p. 134 ff.

The consent of the individual bride and groom, though essential under statute law, is merely desirable under traditional Bantu law. Active opposition by one or both prospective spouses renders the marriage a hazardous undertaking, which for this reason might well be called off by mutual consent of the contracting kingroups[1]; but it does not, per se, render the affinition agreement invalid.

Nor is the correct chronological order of customary events and negotiations of great consequence. The elopement marriage among the Shona (in many localities the most common practice) turns the 'ideal' order of events virtually upside down and the consummation of the marriage often takes place even before the details of the fundamental affinition agreement have been settled. Similar post facto 'rectifications' can be found elsewhere in both traditional and modern (especially urban) practice[2].

It is the sort of thing which irks the western-trained jurist with his veneration for correct procedure; it does not worry the Bantu to whom procedure remains subservient to ultimately satisfactory results. It is, moreover, an aspect which especially in modern times deserves full and sympathetic consideration, for it is obvious that at this stage of transition of Bantu society, traditional procedure will suffer, tending to leave its rich detail blurred, its standards impoverished, and its definitions confused. Our courts could give guidance during this difficult period of tranformation and adjustment, and help to find new norms, not by concentrating on preconceived and often erroneous essentials, or by refusing to condone 'omissions', but by examining the issue in its present social context and by determining whether, by and large, the conduct and attitude of the parties, and the actions they did take, was consistent with a mutual agreement to establish marriage[3].

Dissolution of Bantu marriage:

The establishment of affinal kinship relations and of a valid marital union being the concern solely of the respective kingroups (with

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1) Schapera, 1955, p. 133 ff.
2) Holleman, 1952, p. 109 ff; cf. Ashton, 1952, p. 65 f; Schapera, 1939, p. 72 f; Hunter, 1936, p. 190, 194, 199 f; Krige, 1940; Krige, 1936(b), p. 15 ff; Levin, 1947, p. 62; Hellmann, 1948, p. 81.
3) This line of thought is represented in a case like Kgapule v Maphai, 1940, N.A.C. (N & T) 108.

the co-operation of the spouses), the dissolution of the Bantu marriage likewise depends on the agreement of the parties to terminate the relationship[1].

The marriage is liquidated by a settlement with regard to the principal 'assets' involved in the transaction, that is, ideally, by striking a fair balance between the remaining reproductive potentiality of the woman, the proportion of lobolo retained or returned, and the number of children retained by their father's family. In practice the actual settlement may turn out to be far from 'balanced', because such factors of guilty behaviour, overall relations between the families, the existence of a co-respondent who is able to foot the bill, may have a profound bearing on the outcome.

That the unilateral action of the husband can dissolve a marriage, is incompatible with the very nature of the Bantu marriage contract, in which he himself is not the principal contracting party; and the fact that the liquidation of the marriage normally involves the physical return of at least part of the lobolo, seems to preclude the possibility of his family dissolving the marriage unilaterally. On the same ground it appears impossible under Bantu law for any court of law to dissolve a marriage by decree, a fallacy disproved more than once[2], but entrenched in the Natal Code (§ 78), the Southern Rhodesian Legislation (§ 17, Native Marriages Act, 1950), and adhered to in the Union Native Appeal Courts until the middle 'forties (see Annexure).

Valid grounds underlying the dissolution of Bantu marriages are wide, ill-defined, but realistic. Any grounds which render the continuation of the marriage impracticable or unreasonable, may lead to efforts to liquidate it. They include factors which go to the root of the affinition agreement (default of agreed lobolo payment, barrenness or primature death without provision of substitute), or serious domestic upheaval (repeated adultry, desertion, habitual quarrelsomeness, suspicion of witchcraft, etc.). But the risk of losing the high stakes of the lobolo value, and the fact that the individual spouses must persuade their less impassioned family elders to take the necessary steps towards dissolving

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1) The agreement need not always be explicit; it may be that one party merely accepts the inevitable.
2) e.g. Holleman, 1952, Chapter VII; Van Tromp, 1948, p. 151.

their union, are powerful safeguards against dissolution on frivolous grounds.

II. Urban Marriage:

The very absence of the customary lineage structure in present-day urban Bantu society renders it unsuitable for the continuation of the traditional concept of Bantu marriage as a transaction between two kin-groups for the purpose of family procreation. This basic difference alone in the social structure (quite apart from economic and other environmental differences) is sufficient to lift Bantu marriage from its wider affinal setting and to set it adrift as an individualized institution without anchorage in Bantu law. With it goes the traditional concept of lobolo, the very essence of which is rooted in the traditional lineage structure.

Yet a considerable proportion of African marriages in the urban area are referred to as 'customary unions', that is Bantu marriages, and in virtually all of these, and in other forms of urban marriage, lobolo appears to have been paid.

Two conclusions now seem inevitable: either such marriages derive from the rural area where a still extant (though narrowing) traditional kinship structure implies that they are indeed Bantu lobolo marriages; or they derive from the urban environment itself, in which case the marriage cannot be a customary law marriage as we know it[1], and the lobolo cannot be the traditional concept known to Bantu law.

The first conclusion obviously refers to the still numerous couples who either contracted a Bantu marriage in their rural homes before coming to live in town, and the relatively small number who meet in town but go to their rural homes to have their marriage arranged for them by their respective kin units[2]. These marriages are, legally at least, straightforward, although they may be subject to the same social problems as are all other forms of urban marriage.

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1) Junod, 1954, p. 67, quoting several sources.
2) Kaplan, 1945, p. 62; cf. Levin, 1947, p. 13; Hellmann, 1948, p. 80 f; Mitchell, 1957, p. 7 f.

The second conclusion, however, immediately raises two vital questions. First: if these so-called urban customary unions are not proper Bantu marriages, what are they? And second: if they are not marriages under customary Bantu law, how can the courts legally apply Bantu law to them in terms of Section 11(1) of the Native Administration Act, as they have been and are doing?

Any attempt to give a clear-cut answer to the first question leads us straight into the near-chaos which the urban marriage pattern presents. Theoretically we are presented with three legally recognized varieties: the customary union (including genuine Bantu marriage), marriage according to Christian rites, and civil marriage. A fourth category, the so-called illicit unions (including the kipita unions), covers all conjugal relations of varying stability which fall under no official classification and therefore find no recognition under the law of the land.

As the first three forms of marriage are legally recognized (though not in equal measure), each is under the law, in itself sufficiently valid, that is, safeguarded by the law of the land. It is therefore noteworthy that urban studies reveal[1] that only the minority of urban marriages fall under one or other of these three varieties. The majority are a variable compound in which elements of two or even all three recognized forms are combined in one marriage: for instance, Christian marriage combined with civil rites and Native customary union; customary union confirmed by Christian rites; or Christian rites combined with civil rites.

It is this apparent need to pile several individually recognized and legally self-sufficient forms of marriage onto the foundations of a single marital union, which casts grave doubt upon the real protection which the law extends to the urban marriage, and which almost inescapably establishes the fact that the existing legal classifications are out of tune with the social realities and needs of this transitory Bantu community. For, even in spite of this extra padding and reinforcing, the foundations of urban marriage are far from sound.

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1) Hellmann, 1948, p. 80; Kark, 1946, p. 49; Levin, 1947, p. 59 f; Krige, 1936(b), p. 13; Mathewson, 1959, p. 74.

Many factors tend to contribute towards this. There still is the basic unbalance between the sexes in most of the major urban centres (Bloemfontein and Port Elizabeth are among the exceptions with a fairly balanced male-female ratio). The basic situation has undoubtedly improved, from a Union-wide figure of 45.5 urban females per 100 urban males in 1936, to 63.5 in 1951[1)].

This figure is, however, somewhat deceptive because it includes all age groups. A breakdown will show a slight preponderance of urban females over males in the under 15 age group. But in the age groups relevant to this study (15 years and over) the ratio is even more unfavourable than the overall figures indicate. With regard to the over 15 population, the figure for the Johannesburg Metropolitan area was 58.3 females to 100 males in 1951 (49.8 in 1936); in Pretoria 66.8 (42.2 in 1936); in Durban only 38.1 (23.9 in 1936). Cape Town Metropolitan area, which showed a fair 90.8 in 1936, dropped to a dismal 41.5 in 1951.

At the age of serious courtship (20-24) the overall urban ratio in 1951 was 54.2 females for every 100 males. Taking the age group of 15-34 years, within which 97-98% of urban women are said to manage to find a husband[2)], and comparing it with the (more widely spaced) age group (20-44) in which the great majority of men are presumed to marry, the figure drops even further to 46.2 women per 100 men.

In short, although up to date Union-wide figures are not yet available it is not unreasonable to suppose that (with a few exceptions) the position in our major cities still is that, within the effective marrying age brackets, there are approximately two men for every woman.

This need not, of course, constitute an unsurmountable marriage barrier to half the urban males. The urban areas are not watertight compartments and there is the surplus of women in the corresponding age group[3)] in the rural areas of which especially the migrant urban dweller can and does avail himself.

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1) Based on U.G. 42/58.
2) Based on figures by F.S. Breedt for Krugersdorp 1951-55 and by the City of Johannesburg N.E.A.D. for Johannesburg western areas (1951), quoted in Brandel MS 1959.
3) The overall 1951 rural ratio in the 15-34 age group was 127.2 females per 100 males (or 78.6 males per 100 females); in the 20-24 age group there were 142.7 females per 100 males (or 71 males per 100 females).

But the reversed sex ratio in the rural areas (and apparently in some of the smaller non-industrial urban centres[1]) creates a parallel problem to that of the urban areas, with the result that both in women-starved urban society and man-starved rural society the uneven sex ratio strikes particularly hard at the very age groups within which, normally, men and women should be engaged in the building of their married life and the rearing of their children within the fold of a stable family unit. This factor alone cannot fail to have an adverse effect on moral stability and marriage security.

The situation may be aggravated by the tendency for black couples to marry at a later age than they used to marry. Here lies an interesting comparison between black and white society.

In 1937, 30.9% of the European men married under the age of 25; 37.9% between the ages of 25-29; 31.2% at 30 years and older[2].

The comparable figures (concerning mainly urban areas) for black bridegrooms in 1937 are: 19%, 37.4% and 43.6%.

The figures for brides of both races in that year were[3]:

married under 25 years old	:	white - 62.2 %	;	black - 64.4 %
married between 25-29 years old	:	white - 22.0 %	;	black - 18.2 %
married at 30 years and over	:	white - 15.8 %	;	black - 15.4 %

Already at that time, therefore, the black bridegroom tended to be older than his white counterpart, though there was little difference between the average ages of black and white brides.

Twenty years later (1957) the median age of the white bridegrooms had dropped sufficiently to allow nearly half (46.5%) to be married

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1) Mr. Dreyer, Manager N.E.A.D., Dundee, kindly supplied figures showing that in the municipal location as well as in the Native township close by and among the squatters on the municipal commonage, there is a significant preponderance of females over males.
2) Based on U.G. 35/58, Table 11.
3) Based on U.G. 35/58, Tables 32 and 11. N.B. the black figures refer only to registered (i.e. Christian and civil rites) marriages, and therefore exclude the (predominantly rural) customary unions. I see no reason, however, why they should not be regarded as indicative of the trends I have suggested.

under the age of 25[1], but the age of the black bridegroom had risen so much that just over half now married at 30 years and older[2].

The rise of the median age of African urban marriage may be partly due to economic pressure. If so, the figures would support an assumption that, while the struggle to make ends meet has eased for white couples, it has become more severe for black couples. One must here take into account the natural ambition among blacks to share in an ever-extending range of western consumer goods; and also the disproportionally heavy expenses which, mainly on socio-psychological grounds, are lavished on a 'proper' town wedding (see below).

We may prcbably draw a further conclusion from our figures. The rise in the age of African marriage is comparatively greater for males than for females. Both sexes, however, have become wage earners and both can be expected to contribute to the expenses of their marriage and to the family income. The growing gap in their respective median age at marriage suggests that the men are less anxious than women to accept the responsibilities of a formal marriage; the sizeable number of illegitimate children in urban society (40-60% and more, by some estimates[3]) shows, however, that they have no such reservations as regards the privileges of a conjugal relationship. Indeed, reports of a booming trade in love medicine and magic[4] seem to indicate that love making is a thriving cult in which there is little respect for the institution of marriage.

The result is that 'practically every girl has one or more children before marriage, a state of affairs that is found even in the best homes'[5] and apparently condomed by a society which has come to accept this as a norm. African urban society is not unique in this respect[6], and it would be wrong to judge the problem of extra-marital children according to the standards recognized in our own society. For, apart from the fact that 'illegitimacy' (the term in this respect is an awkward one) carries no or hardly any social stigma in the new Bantu society, it does

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1) Comparable black figure: 17.5%.
2) Comparable white figure: 25.6%.
3) Kaplan, 1945, see appendix; Krige, 1936(b), p. 4; Janish, 1941, p. 3.
4) Levin, 1947, p. 22; Longmore, 1959, p. 41 ff.
5) Krige, 1936(b), p. 4.
6) Very close social parallels can be found for instance in Henriques' Jamaican study (1953) dealing with a 70% incidence of extra marital births.

not necessarily carry the implication of social neglect or lack of parental care for these children. In fact, there is clear evidence that this phenomenon draws the ties of blood closer together; but this process takes place largely within the maternal kingroup[1]. The children are either cared for by their mother with the help of their maternal grandmother or other maternal relative, or they are sent to their maternal grandparents where they are treated as children-at-home. With pre-marital and extra-marital birth having become an integral part of the social pattern (and there is little doubt that, for the time being at least, it will remain so) we may expect a continuing trend towards this so-called 'matri-filiation'[2] of the family structure in modern Bantu society. This constitutes a significant modification of the heriditary patrilineal and patrifiliated basis of our southern Bantu, in spite of (and perhaps partly because of[3]) a highly flourishing modern lobolo institution.

Urban lobolo:

It is against a background of an emerging individualism borne of a crumbling traditional culture and a largely shattered kinship structure, of a moral instability partly conditioned by the grossly unbalanced sex ratio at the ages of courtship and marriage, and of severe economic stress - paradoxically accompanied by a steep cash lobolo - that we have to approach the new concept of lobolo.

Personal responsibility for at least part of the lobolo is an idea which even in the rural areas had developed for some time, probably due to the introduction of cash items in the marriage transaction. But where the traditional family structure is still extant, these personal contributions do not seriously challenge the basic concept that the lobolo as such emanates from the groom's kingroup, and that the latter remain the responsible party.

It is in the urban area, where the lobolo responsibility, now predominantly a cash item[4], tends to and often has become the exclusive personal concern of the groom, and where the wider kingroup is a remote

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1) Hellmann, 1948, p. 86; Henriques, 1953, p. 106; Marwick, 1958, p. 17.
2) Marwick, 1958, p. 17 f.
3) Ibid.
4) See e.g. The Baumannville Community, p. 93, for a comparison between payments before and after 1930.

and ineffective unity, that family responsibility is becoming a fiction in matters of lobolo, and a mere formality (if at all) with regard to the overall contract of marriage. Urban investigators therefore report that the function of lobolo is no longer the traditional one[1], and that marriage has become the concern of the individual parties rather than of their respective kingroups.

But in spite of its transformation, the thing called lobolo exists as an urban phenomenon. The very fact that it not only flourishes while Bantu marriage as such is dying, but that it has successfully transferred its roots to such foreign institutions as the Christian and civil marriage, is proof of its need.

What is this need?

In a transitory society, desparately trying to find a familiar symbol of its own identity in a world full of confusion, its symbolic value is perhaps most significant. Miss Brandel[2] quotes a remark by a qualified African observer in Johannesburg - 'When lobolo has not been paid, they do not really know whether they are married or not[3] - and she adds: 'In a union without lobolo, the partners are lost in a network of confusing and only half-understood conventions of a vaguely western type, and there is no precedent of time-honoured and custom-sanctioned behaviour'.

The very fact that this symbol has lost its traditional substance, which enabled it to constitute an enduring guarantee of marital productivity and stability, renders it unsuitable for the dynamics of its original function. For, in a cash-needy society, a cash lobolo is usually dissipated before it can be used in turn by the bride's family for the same, family-productive, purpose. It has therefore lost its character as a dynamic continuity. What then is its present function as a symbol?

It undoubtedly still has the element of what Jeffreys calls 'child price', and it continues to fulfil the only socially <u>generally</u> recognized means of vesting paternal rights to the child on behalf of the lobolo-payer. But if the woman has started a family without the help of a legal

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1) Levin, 1947, p. 58; Hellmann, 1948, p. 81 f; Krige, 1936(b), p. 18 f; Kaplan & Kuper, MS, 1944; Longmore, 1959, p. 65 f; Mathewson, 1959, p. 73 ff.
2) Brandel, 1958, p. 48; also Mathewson, 1959, p. 73.
3) cf. Longmore, 1959, p. 67.

husband (as seems to be rule rather than the exception), this premarital family unit is likely to be matri-linked; and if the husband joins this family as a latecomer, his lobolo may cover his wife's subsequent offspring as by right; but any claim to her previous issue (even if he is the genitor) can be resisted by her family. Moreover, the insistence on a high cash lobolo in a cash-poor community without a wide kinship set-up, tends to delay marriage, and with this delay, militates against patriliny while strengthening the maternal kin-structure. Indeed a paradoxal function of the urban lobolo!

But there are more facets to the new lobolo. There is the information[1] that, excepting an apparently small minority, the women themselves, including educated ones, insist that lobolo be paid for them if only as tangible evidence of the husband's regard for them and his willingness to sacrifice for them. This reveals a woman's personal urge for self-recognition, common already among tribal brides, but with this difference in that its appeal in the urban area is specifically addressed to the man himself.

There is also the observation that the cash lobolo is regarded as a financial compensation for her parents' expenses in educating the bride, which is corroborated by the statement in the most recent urban study that 'the amount paid invariably depends on the standard of education attained by the girl'[2].

This economic argument has considerable validity, the more so when one reads that, in some cases, a husband may be absolved from his lobolo obligations provided he undertakes to maintain also his wife's widowed mother[3].

Yet I doubt if economic security is as fundamental an issue in the town lobolo as it is sometimes made out to be. A significant clue to a possibly deeper urge may be found in the observation[4] that a proper town marriage must involve a wedding feast, a generous display of wealth and hospitality, that the bride's people are largely responsible for this,

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1) e.g. Levin, 1947, p. 59; Longmore, 1959, p. 66 ff.
2) Longmore, 1959, p. 67; Mathewson, 1959, p. 75; see, however, 'The Baumannville Community', p. 95, where no such correlation was found.
3) Krige, 1936(b), p. 15: this may be not so much a 'common innovation', as the authoress states, but a modern application of the traditional service marriage.
4) Krige, ibid, and 'Illegitimacy', 1940; Hellmann, 1948, p. 82.

and that a considerable portion of the newly received lobolo may be directed towards defraying its cost and that of her trousseau[1].

Here the emphasis shifts from economic gain to the means of establishing social status and of publicizing the high standard of respectability (rather than the legality) of the marriage. Here lobolo (as a contribution to the wedding feast) fulfils a social and psychological function rather than an economic or even legal one. In fact, the need for formal legality may be found to be of secondary importance. One qualified observer bluntly stated that even a church marriage without a feast 'would cause more ridicule and talk than if the couple had just lived together without ceremony at all[2]. And if the cost of a festive, generous wedding party is too high, it is considered preferable merely to live together as man and woman and have children, while postponing the legal confirmation of this arrangement until this can be done with the festive display which alone would make it meaningful. For the lobolo to serve this end is to have changed its character and original function.

Even more striking is the information that a considerable number of wage-earning girls themselves make a substantial contribution towards their own lobolo, for this purpose handing over part of their savings to the men they thus hope to marry in proper fashion. In fact, in some cases the whole lobolo[3] (£80-£150) emanates from the bride herself, though officially it is the groom who pays it to her father. This is no longer an extension of the scope of the lobolo, but a contradiction of it. For it cannot possibly mean that the wife pays this with the intention of securing for her husband (and husband's family) his parental rights to her children. Rather the contrary seems true. With this tremendous gesture she serves three purposes: to attain in proper fashion the enhanced status of a married woman; to fulfil her obligation towards her own family and so secure her right to fall back on their support when she needs it; to assert her independence as a wage-earner, wife and mother, should the man fail her as a husband and father of her children. For he would indeed be a bold man who, having received lobolo for his wife from her own hands,

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1) Levin, 1947, p. 54 ff; Krige, 1936(b), p. 15 ff; Brandel, 1958, p. 43 f, and MS; Longmore, 1959, p. 95 ff.
2) Krige: 1940.
3) I am indebted to Miss Brandel for first drawing my attention to this. I subsequently had an opportunity to confirm this myself with a number of cases in Durban, all concerning well-educated and comparatively high-earning women.

would pursue a claim for its return or for his right to the children, should the marriage later fail.

In line with this development is the case of the wage-earning woman who personally refunded the lobolo her husband had paid for her to her family, in order to gain her independence and secure on behalf of herself and her family, parental rights to her children[1)].

Queer perversions indeed of the original concept of lobolo! And yet they fit into the overall unsettled picture of African urban society, the heterogeneous composition of its conjugal institutions and the uncertainty of its norms, and the acceptance of pre- and extra-marital children as part of the recognized social pattern.

Urban Bantu marriage and the application of the law:

I now return to the question which I posed earlier in this paper. If those urban marriages, which are termed customary unions, upon closer examination do not conform to even a flexible interpretation of the basic principles of Bantu customary law, what law must be applied to them in our courts?

Section 11(1) of the Union Native Administration Act provides the courts, as far as I can see, with a choice of only two alternatives: the common law (including statutory Native law), and Bantu law; and no other.

In cases where these urban so-called customary unions are confirmed by civil or Christian rites there is, legally at least, no problem as regards the basis of marriage itself, for the common law will apply (In terms of the Act they are then, in fact, no longer 'customary unions', but 'marriages'). But if there is no such common law confirmation, and these 'customary unions' are not Bantu law marriages, and if my interpretation of § 11(1) is correct, we arrive at the perplexing conclusion that the courts have no law to apply, and therefore have no basis upon which to act, because Section 11(1) does not authorize them to apply a third category of law which is neither common law nor Bantu customary law. (From this conclusion only the urban areas of Natal are probably excluded, because the provisions of the Natal Code with regard to the 'essentials' of the customary union, remain applicable also to the new urban unions).

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1) Own information, Durban.

If this is considered to be a point of merely academic interest (which I doubt), the following is not.

The Union and Southern Rhodesian Legislators have created a dual system of law, with common law and Bantu customary law as its principal components. These components are applied, and are meant to be applied in the main, either singly with regard to restricted issues, or in combination with one another on a wider field of legal interest (e.g. marriage). That this choice exists and that law courts have some discretion in the matter, is to the Legislators' credit, for it is based on an awareness of the fact that wholesale application of the common law to a tribal community is as socially unjust as the wholesale retention of customary law in a society which is emerging from tribalism. What our Legislators failed to see was that, in spite of a measure of flexibility implied in this choice of laws, the system is nevertheless too narrowly conceived and too rigidly framed to serve the changing needs of present-day Bantu society, in which social norms and institutions are developing which do not necessarily conform to either common law or customary Bantu law.

A more liberal application of either the common law or customary law will therefore not meet the situation. To give only two examples: for the tendency towards matrifiliation the common law and our rigid western concept of 'illegitimacy' are no remedy; to the modern concept of lobolo Bantu customary law can give little or no guidance.

But the problem is of more than merely academic interest. In 1936 already, a thoughtful first-hand urban study reported that the European courts of law had proved quite incapable of coping with the situation[1)], and from my own researches I have the unhappy impression that, especially among the emerging class of educated and wage-earning women - the mainstay and principal hope of whatever stability there is in modern African family life - there is a strong feeling of social and legal insecurity, and little confidence in the existing complex apparatus of law. There is much confusion and despair, and what is worse, a growing indifference for a legally sanctioned marriage as an effective frame within which to raise a family.

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1) Krige, 1936(b), p. 10; cf. Brandel, 1958.

As a jurist and social scientist I believe in Law as an instrument to guide the orderly development[1] of social institutions. But to do this the law has to be flexible (which need not be 'uncertain'), attuned to social reality - a fluid quality - and it needs to be applied specifically to individual cases in their social context by a judicial organ which retains close contact with the society.

If the law and the judiciary do not have these qualities, they are apt to confuse rather than guide.

I have, I think, said enough to show that the law, in respect of the changing pattern of African marriage, is losing touch with the reality of the present situation, and I have submitted that its flexibility is not much more than a too restricted choice between prescribed alternatives, neither of which may always reflect social reality.

It has therefore from time to time been suggested[2] that the Legislator make new laws to meet the changing situation. If this means yet another near-exhaustive set of statutory provisions prescribing specific remedies for general application to 'the Bantu', then the results will be just another straightjacket ill-suited to the dynamics of social change. For legislation means generalization of norms; and the very thing we can not do at the present fluid stage of African development, is to generalize.

How,then, can the Legislator, here and across the Limpopo, help to bring order in the present near-chaotic situation regarding African marriage?

Mr. President, I submit that a constructive contribution would involve two things: First, the clear recognition by the Legislator of the facts that indigenous society is changing, that this change is neither uniform in pace nor in pattern, and that it inevitably creates social problems of a multiplicity and diversity with which no legislation (by nature a slow and cumbersome process) can hope to deal adequately and in detail.

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1) With which I do not mean that the powers of legislated law, to determine the course of institutional development, is absolute or even great.

2) One of the more recent occasions: during the discussions in connection with the legal disabilities of African women at the Annual Conference of the Institute of Race Relations, Cape Town, 1959.

If these were to be the broad premises of the new law, it follows:

(a) that the legal guiding principles for dealing with the situation should be laid down only in outline, related to the major issues involved; and

(b) that the specific application of these principles be left to a qualified and effective judicial apparatus specifically charged with the task of examining each case in relation to its particular social context.

Point (a) would at any rate imply that the basis of the law to be applied will have to be widened so as to include possible locally accepted and stabilizing norms which do not form part of the recognized bodies of the common law or customary Bantu law; point (b) implies that the discretion of the appointed judiciary is an even wider one than the present law allows.

It also means that the responsibility for formulating applicable, case-measured law is largely shifted from the Legislator to the judiciary, which now has the task not only of applying suitable legal norms, but of searching for them where they are likely to be found, in the living reality of modern Bantu society.

If some jurists, horrified at the thought of losing the moral support and legal backing of volumes on jurisprudence, statute law and case law, cry out that this means that the administration of justice will now be cut loose to find its way home in a jungle of legal uncertainty, I can only say, that it was the stimulus of legal uncertainty which prompted older and more adventurous jurists to go back to the original sources of law to find and organize the material out of which grew the proud and lasting structures of Roman-Dutch and British common law.

This brings me to the second part of my recommendation, the judicial apparatus to be entrusted with this vital task. Since its responsibility is to provide legal as well as social fact-finding and guidance, the 'bench' should be qualified in law as well as social science. Moreover, in order to be effective, it should be easily accessible to the people (which implies minimum formality and cost of litigation) and yet possess competent jurisdiction in all matters of marriage and family law.

To enable its officers to cope with the essential research function and the necessity of providing a full publishable record of its findings (the accumulation of case law is an essential aspect of its work and

status), it should be a special court, at least one in each major urban centre, fully and solely engaged in this aspect of the civil administration of Justice.

Mr. President, I have spoken too long, and yet I have the unhappy feeling that I have left unsaid more that is relevant and important than I have actually discussed. I here think especially of the legal position of the African woman in modern society, an aspect which, probably more than anything else, will reveal the acute and painful problems resulting from the legal confusion and lack of realistic adjustment of the law, which I have tried to sketch. It is a subject which for this reason may well receive priority at your next annual meeting.

But, if what I have said will contribute to a lively debate, now and in the near future, on the problems of African marriage and family life, problems which directly concern you and the local authorities, then I consider it a privilege to have been invited by you for this purpose.

ACKNOWLEDGMENTS

I have discussed certain aspects of this paper with several experts, and benefited thereby. To them, and others who have been helpful in one way or another, I express my gratitude. The following must be mentioned in this respect.

Dr. E.J. Krige, Professor L. Kuper, Mr. J. Torres, Mr. C.C. Turpin, of the University of Natal; Miss N.I. Nicholson and Mr. S. Bourquin, of the Non European Affairs Department, Durban; Mr. H. Pridham-Jones, African Affairs, Kitwe; Mr. W.S. Dreyer, of the Non-European Affairs Department, Dundee; Miss M. Brandel, Nuffield Research Fellow, Johannesburg.

A N N E X U R E

Recognition of Bantu marriage:[1)]

Generally speaking the status of all Bantu law in the Union is that of a subsidiary law. Primarily the common law of the country applies to the indigenous as well as the white and other population groups, unless the Legislator specifically provides otherwise. Such special provisions exist, and are broadly speaking of two kinds: (a) those that create new laws especially applicable to the indigenous population, and which therefore replace or modify the common law; (b) those that give partial or full recognition to certain sections of Bantu law, which likewise then take precedence over the common law. In the second category, however, a distinction must be made between those provisions which recognize Bantu law per se (sometimes in rather vague terms, such as in the important § 11(1) of the Native Administration Act of 1927) and those that are ostensibly based on Bantu law but are in fact statutory creations to a greater or less extent divorced from the living sources of Bantu law. Examples of the latter are the Natal Code of Native Law of 1932 (which aims at incorporating large slices of Zulu law) and the Bantu Authorities Act of 1951 which, in spite of its name, is not as such part of the traditional body of Bantu law. For this latter category the term 'Native law', in contra-distinction to Bantu law (or specifically Zulu, Tswana, Xhosa, Venda or Shona law) is here used[2)].

From the above classifications are excluded those sections of Bantu law which neither have become unlawful as the result of a specific enactment of the Legislator, nor are specifically recognized as valid law. They include innumerable facets of indigenous law of which State and Legislator are unaware, in the sense that they have received no statutory attention, but are nevertheless operative in indigenous society. These Bantu law fragments are in the odd position that, as far as the law of the land is concerned, they are therefore neither lawful nor unlawful, (i.e. they are 'not unlawful') and continue to exist without being enforceable in an official (Government) court of law.

The basic position in Southern Rhodesia is similar to that in the Union. With regard to the recognition of Bantu civil law in more general terms, there is a potentially significant variation in the wording of § 3(1) of the Southern Rhodesian Native Law and Courts Act (Chapter 73) which lays down that customary law 'shall' (and not merely 'may') be applied in circumstances similar to those referred to in the Union statute. On the face of it this gives the Rhodesian courts no choice but to apply Bantu law in cases where the Union courts still have a measure of discretion[3)]. In practice, however,

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1) For the principal argument in this Section I am indebted to my late father, Professor F.D. Holleman, whose careful analysis of this problem is reflected in his class-notes for the course of Native Law and Administration in the University of Stellenbosch.

2) A practice consistently followed by e.g. the University of Stellenbosch where the two subjects have been taught since 1939.

3) See the test case ex parte Minister in re Yako v Beyi (S.A.L.R., 1948(1) 388 ff). This decision appears to end the 'judicial discretion' in favour of Bantu law, towards which the courts were inclined before. (cf. Fuzile v Ntloko, 1944, N.A.C. (C & O) 2, referring to Moima v Matladi, 1937, N.A.C. (T & N) 40 and Mlongo v Mlongo, 1937, N.A.C. (T & N) 124).

this has not rendered the application of genuine Bantu law either more imperative nor more secure. For this depends on the courts' knowledge and understanding of local Bantu law, a qualification which is (as it is in the Union) only too often sadly lacking.

When we now turn to the recognition of South African Bantu marriage law in particular, it may be said that the broad common premises which I have sketched,here apply, but that differences in detail obtain between the four provinces, a heritage of the different legislators and policies of pre-Union days, which the Union Legislation (especially the Native Administration Act of 1927) has not fully wiped out.

I must stress the distinction between customary Bantu marriages on the one hand, and civil or Christian marriages on the other. Although both categories are directly or indirectly governed by special Native legislation, the relative status and legal position of the two types of marriage are obviously widely different.

First, the recognition of customary Bantu marriages, which are our main concern today.

A brief summary of the situation before Union is both interesting and necessary, because it has strongly influenced the phrasing and contents of Union Legislation.

The position in the Cape, before the annexation of the Transkei, was relatively simple: no recognition of Bantu marriages. The lobolo transaction was not recognized when it was made in consideration of a Bantu marriage, but the courts could take cognizance of it in civil marriages as a contract per se, the argument being that in this sense it was not morally incompatible with marriage[1]. The Native Succession Act (18/1864), applicable only to registered Cape citizens, regulated the material consequences of customary marriages without recognizing these marriages as such.

The subsequent annexation of the Transkei brought about a change of policy as far as these territories were concerned. The Transkeian courts were given discretion to apply customary law in cases involving all-African parties, and Proclamation 140/1885 explicitly recognized both the Bantu marriage contract and its dissolution under Bantu law. The one new requirement, that such marriages be duly registered, was in 1894 declared a 'dead letter' by the Native Appeal Court, because it unduly favoured a person's first Bantu marriage to the exclusion of his subsequent polygynous ones. Which means that in the Transkei even polygynous Bantu marriages were fully recognized as valid marriages, until the Native Administration Act of 1927 modified this recognition.

In Natal, the Codes of Native Law of 1878 and 1891 likewise did not hesitate to recognize customary marital unions as valid marriages, but proceeded to regulate a number of aspects (essential requirements for validity, rates of lobolo, etc.), thereby providing a Native law frame for this Bantu law institution.

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1) Seymour, 1953, p. 2.

Entirely different was the pre-Union situation in the Transvaal, where the statutory language of the Zuid Afrikaanse Republiek was bluntly negative. § 24 of Act 3 of 1876 stated: 'Tot bevordering der zedelijkheid wordt het aankoopen van vrouwen of veelwijverij onder de kleurlingen (this includes Bantu) in deze Republiek door de wetten des Lands niet erkend'. (For the promotion of public morality the buying of women and polygamy among the Coloureds will not be recognized by the laws of this Republic). Nine years later a new law (No. 4 of 1885) took its place, in order to 'provide for the better government and better administration of justice among the Native population of the Republic'. The policy declaration in Section 2 generally pledges the preservation of the 'laws, habits and customs hitherto observed among the Natives', provided these had not 'appeared to be inconsistent with the general principles of civilization recognized in the civilized world'. Section 5, moreover, directs the courts to decide civil matters between Natives in terms of the provision of the present Act, 'and not otherwise', and in accordance with indigenous law, past and present, provided this did not cause obvious injustice and did not conflict with the accepted principles of natural justice ('natuurlijke billijkheid'). If this may sound to us a liberal reaction to the negative conservatism of the 1876 Legislator, not so to the Supreme Court justices of the Transvaal. In a series of decisions they declared that the 1885 Legislation could not possibly have reversed the principles laid down in 1876[1)], and that Bantu marriage, on account of its polygynous character, was inconsistent with the general principles of civilization recognized in the civilized world.

The result was that all Bantu marriages were considered void, all children born of them illegitimate and therefore under guardianship of their mothers, who in turn were not considered to be under the tutelage of their Bantu husbands. Lobolo was unlawful and unenforceable in any court of law. The confusion with regard to Bantu marriage in the Transvaal was therefore complete.

Faced with these widely divergent policies the Native Administration Act of 1927 set out to effect a compromise. The result is an indirect and partial recognition of Bantu marriage as a second-rate marital union. No longer a 'marriage' as hitherto in Natal and Transkei, it is now a 'customary union', which is defined in Section 35 (as amended) of this Act as 'the association of a man and a woman in a conjugal relationship according to Native Law and custom, where neither the man nor the woman is a party to a subsisting marriage'. Also in Natal the Bantu marriages under the Natal Code were suitably turned into customary unions. In the wording, 'a man and a woman', recognition of the possibly polygynous character of the customary union is not excluded.

Read in conjunction with Section 22, which regulates the possibility of a subsequent marriage (i.e. civil or Christian) of the male partner of this conjugal relationship, the attitude of the Union Legislator with regard to the legal status of Bantu marriage is clear. In any conflict between a civil (or Christian) marriage and Bantu marriage, the latter evaporates. What happens to it, is a matter of

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1) e.g. Kaba v Ntela, 1910, T.P.D.; Ebrahim v Essop, 1905, T.S. 59; Nalana v Rex, 1907, T.S. 407.

conjecture: its dissolution, not being specifically regulated, is merely presumed to take place when the subsequent marriage is contracted, and Section 22 is only concerned with its material consequences. Where this clash of marital loyalties does not arise, however, Section 11(1) grants the courts the power to apply Bantu marriage law with the usual safeguards relating to public policy and natural justice, and it explicitly sanctions lobolo and similar institutions.

The Native Administration Act, nor any other legislation, provides a specific code of Union-wide Native marriage law. It provides no more than an implicit and limited recognition-in-principle of customary marriage. Within these limitations, the specific application of the law relating to customary marriages differs from province to province, depending on whether provincial statutory provisions with regard to various aspects of marriage law do or do not exist. If such provisions exist (as in the Transkei and Natal) they, and not Bantu law, must be applied; where no such statutory provisions exist (as in Transvaal and O.F.S.) local Bantu law applies in terms of Section 11 of the Native Administration Act, and therefore becomes largely a matter of interpretation by the courts. The paradox now sometimes results (e.g. in relation to the dissolution of Bantu marriages) that in the Transkei and especially Natal, where traditionally a more sympathetic and understanding attitude towards Bantu institutions prevailed than in Transvaal and the O.F.S., well-intended statutory provisions replace and in effect ignore current Bantu law, while in the Transvaal and O.F.S. Section 11(1) of the Native Administration Act makes it possible for the courts to apply genuine Bantu law with the flexibility it requires.

In Northern Rhodesia the customary law marriage is the only marriage which Africans can contract[1], as they are expressly excluded from the operation of the statutory provisions regulating Christian and civil marriages of Europeans[2].

In Southern Rhodesia the position is in a sense similar to Natal. There is the broad recognition of customary law in Section 3(1) of the Native Law and Courts Act, but statutory provisions, first in the Native Marriage Laws of 1917 and 1929, and finally the Native Marriages Act of 1950, have replaced local Bantu marriage law on several important points to which I shall return in due course.

So much for the recognition of Bantu marriage law in general terms.

With regard to the recognition of the various specific issues of Bantu marriage law, I shall have to limit myself to only a few.

Polygyny:

The polygynous character of Bantu marriage is recognized: in Natal specifically (Natal Code of 1932, Section 57(2)), in the

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1) A. Phillips, 1953, p. 432.
2) Section 47 of the Northern Rhodesian Marriage Ordinance (Chap. 132).

rest of the Union tacitly (Section 11(1) and Section 35); in Southern Rhodesia specific recognition is contained in Section 4(1) of the Native Law and Courts Act.

Basis of marriage contract:

If we now come to the broad concept of the Bantu marriage agreement as I outlined it in this paper, then we find neither in the legislation, nor in the decision of the Union and Rhodesian courts any clear distinction between either the marital and reproductive aspects of the Bantu marriage contract; or between the individual conjugal union of the spouses, and the wider more fundamental and more enduring affinition agreement of their respective families. The Natal Code of 1932 (Section 57(1)) emphasizes the individual aspect of the Bantu marriages as 'a civil contract entered into by and between the intending partners subject to the essential requirements of this Code, (enduring) until the death of the first dying, unless earlier dissolved by a competent court', and therefore denies the existence of the wider affinal foundation of the relationship. The fact that it is 'essential' for the validity of the Bantu marriage in Natal to have the consent of the bride's father or guardian (or of the Native Commissioner if such consent is unreasonably withheld) and of the father or kraalhead of the groom whenever necessary, does not imply a recognition of the principle of contracting kingroups. It simply means that legal assistance is required by parties who are considered to be minors under the law.

The Transkei legislation is silent on the distinctions we have recognized, and only safeguards the bride from marrying against her will, a protection also provided by Section 57(1)(c) of the Natal Code, by the Southern Rhodesian Native Marriage Act (Section 7(1)(b) (both spouses), and by implication by Section 11(1) of the Union Native Administration Act, under which a forced marriage would be in conflict with the principles of public policy and natural justice.

Outside Natal, in the absence of statutory provisions governing this point, the courts have given recognition to the wider contractual basis of Bantu marriage in a varying degree. It is interesting to co mpare the interpretations of two acknowledged scholars of Native law on this score.

Both Seymour (1953) and Whitfield (1948) derive their conclusions mainly from the same sources of information in that, in spite of their preoccupation with Transkeian practice, they profess to have covered the wider Union field of Native justice. Both provide a list of 'essentials' for Bantu marriage. Whitfield unreservedly recognizes the respective kingroups as the contracting parties and includes their consent as an 'essential'[1]; Seymour, however, considers the bride's guardian and the bridegroom to be the contracting parties (with their consent, and that of the bride, among the 'essentials')[2]. Their different deductions may be taken as an indication that, although the courts are aware of a wider-than-individual basis of Bantu marriage, the full implications are not yet generally understood.

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1) Whitfield, 1948, p. 84 ff.
2) Seymour, 1953, p. 64 f.

The issue crops up again with the dissolution of the Bantu marriage, and it is remarkable that, when viewing the marriage so to say in retrospect, the Native Appeal Courts lately appear to have obtained a much clearer understanding on this aspect. Largely on the basis of previous decisions in the Cape, the Native Appeal Court for Natal and Transvaal in 1939[1], and even as late as 1944[2] upheld the old individualistic view that a Bantu marriage could be dissolved by the consent of the spouses themselves, and even unilaterally by the husband alone. A year later (1945), however, a sharp change of opinion occurred and the same Court bluntly stated that 'nothing is further from true Native Law' (than this individualistic concept). 'The marriage ... is a matter between the families ... . So also the dissolution is a matter between the contracting parties, i.e. the families ...'[3]. About the same time the Cape and O.F.S. Native Appeal Court saw the light and adopted the wider contractual basis of marriage as a true reflection of Bantu law[4].

In Natal, however, the individual point of view, firmly entrenched in the statutory provisions of the Natal Code (Section 57(1)), still prevails.

In Southern Rhodesia the statutory position is ambivalent. The reference in Section 7 of the Native Marriages Act, 1950, to the bride's guardian and the 'intended husband' infers an individual basis of the marriage contract. The joint reference, however, to the common Bantu marriage and the succession marriage ('where a man takes to wife the widow or widows of a deceased relative') in Section 3(1) of the Act, implies tacit recognition of a form of levirate, which is clearly based on the wider affinition agreement.

Again, the confusion in the Rhodesian Appeal Court with regard to the dissolution of customary marriages (customary law dissolution between families being recognized in some cases[5], and not in others[6], would indicate that the distinction between the conjugal and affinal aspects of Bantu marriage has, at least until very recently, constituted an unsolved puzzle to the Rhodesian Legislator and Judiciary.

Validity of the Bantu marriage:

Only in Natal and Southern Rhodesia have the legislators prescribed special requirements for the validity of the Bantu marriage. In the rest of the Union prescriptions of local Bantu law are recognized with the usual safeguards under Section 11(1) of the Native Administration Act.

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1) Shabangu v Masilela, 1939, N.A.C. (N & T) 39.
2) Speelman v Speelman, 1944, N.A.C. (N & T) 53.
3) Mashapo and Mashapo v Sisane, 1945, N.A.C. (N & T) 57.
4) Bobotyane v Jack, 1945, N.A.C. (C & O) 9, and subsequent decisions.
5) Marutsi and Nyamayaro v Msekiwa, 1950, SR N.A.C. 240; Nzira and Chitimbi v Zwinavashe, 1947, SR N.A.C. 160.
6) e.g. Moses v Mawaro, 1949, SR N.A.C. 195; Farayi v Hodza, 1945, SR N.A.C. 76. NB the dissolution of Bantu marriages is at present governed by § 17 of the Native Marriages Act 1950, see below.

The Natal Code (Section 59(1) prescribes three essential requirements:-

1) consent of the bride's father or guardian (unless she is exempted);

2) consent of the father or kraalhead of the groom if he is under 21 and not yet married;

3) the bride's public declaration of free will and consent made before the official marriage witness at the time of her wedding.

Failure or omission of any of these requirements renders the Bantu marriage void[1].

Failure to register the marriage (a non-essential prescription of Section 65) does not invalidate it[2].

The Southern Rhodesian Legislator has over the years tinkered a good deal with its Bantu marriages. It has from the beginning protected especially the bride[3] from being forced into an unwanted marriage, and in view of the prevalence of so-called child-betrothal (kuzwarira), especially among the eastern (Shona) tribes it has rightly taken a serious view of this practice[4].

Section 2 of the Native Marriage Ordinance of 1917, however, introduced the drastic innovation of the registration of the marriage as one of the essentials required for its validity. Since countless backward folk did not bother to register their marriage, the 1917 Legislator can boast of the doubtful distinction of having fathered thousands of illegitimate children, the produce of so many invalid parental unions (the old Transvaal Legislator shares this distinction, but for other reasons - see above). This anomalous position was rectified in 1929 when failure to register merely became a punishable omission without actually invalidating the marriage.

In 1950 the Rhodesian Legislator tried again, this time with a new slant: Bantu marriages had to be formally 'solemnized' (Section 3, Act 23 of 1950) by recognized religious or civil marriage officers in order to be valid (this solemnization automatically involves the proper registration). Mindful of the 1917 blunder, Sub-Section (3) at least safeguards the legal position of children born of any unsolemnized customary marriage. What, apart from producing readily available documentary proof of a Bantu marriage, the Legislator hoped to achieve with this measure, is as obscure as the language in which

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1) Mfanombana v Fana, 1922, N.H.C. 26, and subsequent decisions.
2) Ndhlovu v Shongwe, 1940, N.A.C. (T & N) 66.
3) Since 1951 also the groom (Section 7(1)(b) of Act 23/1950, operative as from 1/1/1951.
4) Section 10(1) of the old Marriage Act (Cap. 79) re-enacted in 1950, not only declares such an arrangement involving girls under 12 years old unenforceable in law but lays down penalties. It has, however, not succeeded in stamping out the practice, which is still fairly common.

these provisions are couched[1]. The hope was expressed at the time that solemnization by State-recognized marriage officers, would enhance the status of Bantu marriage. Even if this were to be made a solemn event in each case, it is doubtful whether the ceremony would have contributed much[2]. And as practice since 1951 has borne out, solemnization, for all its lofty ideals, has only too often turned out to be a perfunctionary administrative chore, and about as solemn as the issuing of a drivers' licence.

The definition of customary union in Section 57(1) of the Natal Code might at first raise the presumption that Bantu marriage in Natal may be contracted by fulfilling only the three 'essentials' laid down in Act 59(1), to the exclusion of the requirements of Bantu (Zulu) law itself. But there is the definition of customary union in § 35 of the Native Administration Act, applicable to the whole Union, which includes the phrase 'according to Native law and custom'. This means that, also in Natal, Bantu marriage law still enters into the picture; but the marriage, having been entered into according to Bantu law, still lacks legal validity unless it also meets the requirements of the Code[3].

A similar situation exists in Southern Rhodesia.

In all other areas under discussion, the requirements of local Bantu law must determine the validity of the customary marriage, a position accepted in principle by our courts[4].

This means also, however, that in social situations in which there is a partial or almost complete breakdown of the traditional social structure (as for instance in urban and peri-urban areas) the courts may be faced with the problem that the traditional requirements of the Bantu marriage contract (if it can still be regarded as such), and especially its ceremonial aspects, may sometimes have been reduced to bare essentials[5], a point to which I referred before.

What, now, are the essentials of Bantu law which the Union courts in terms of § 11(1) of the Native Administration Act, and the Southern Rhodesian courts, in terms of § 3(1) of the Native Law and Courts Act of 1937, recognize?

There is first of all the consent of the parties with which we have previously dealt. Whitfield 1948[6], Seymour 1953[7] and

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1) For instance, sub-section 3(1) does not hesitate to call the marital arrangement a 'marriage' even before its solemnization; Section 3(3) referring to the position of children, regards in this respect the unsolemnized, i.e. invalid marriage, nevertheless to be 'a valid marriage'.
2) Holleman, 1952, p. 370.
3) cf. Whitfield, 1948, p. 157; Stafford & Franklin, 1950, p. 102.
4) e.g. Mathombeni v Matlou, 1945, N.A.C. (T & N) 123.
5) Seymour, 1953, pp. 74-75; Kgapule v Maphai, 1940, N.A.C. (N & T) 108.
6) Whitfield, 1948, p. 84.
7) Seymour, 1953, p. 64.

Stafford & Franklin 1950[1], all consider two more requirements to be 'essential':

a) the payment and acceptance of lobolo (Whitfield goes so far as to say, lobolo cattle);

b) transfer of the woman.

I submit that this, although it may reflect the most prevalent practice in the majority of South African Bantu marriages, is an inaccurate, dogmatic and untidy statement of the principles of Bantu marriage law. For we have seen that a) some customary marriages, in which lobolo is explicitly excluded, can be perfectly valid; b) in some valid Bantu marriages lobolo (as distinct from other gifts in connection with the marriage) is not given until some time after the consummation of the marriage, and such postponement has even become institutionalized among some tribes (e.g. Swazi, and some Shona tribes); c) in some cases there can be a perfectly valid Bantu marriage without the bride having been transferred to the husband's family (Sotho[2], some Shona tribes).

What has been lacking here is the ability to see the wood for its trees, or rather, to distinguish between cause and consequence. This has resulted in the failure to recognize that the grounds for the validity of the marriage are to be found in the essential affinition agreement between the contracting kingroups, and not merely in the successful establishment of the marital union, which is but one of its objects. It is essential to distinguish between the validity of the marriage contract and its completion in terms of the affinition agreement. The state of completeness has in the practice of Bantu law nothing to do with its initial validity. For, as I explained earlier in this paper, the parties know that by their affinition agreement they are in good faith committed to a long-term contractual relationship which involves the implementation of mutual obligations over a period of time. Of the major obligations, the passage of wife and lobolo may (but need not) take place at an early stage and at approximately the same time. But at least one major obligation, the bearing of children, can be fulfilled only in course of time.

The veteran Whitfield comes close to understanding the 'stage by stage' realization of objects of the affinition agreement[3] but, like others, he assumes that the completion of the marriage contract takes place 'upon the passing of cattle and the transfer of the woman'. It is as wrong to base the validity of Bantu marriage upon the transfer of cattle as it is illogical to base its completion of the marriage contract upon the transfer of the woman. Both events are merely steps towards the ultimate completion of the contract, and an affirmation of a legal validity which was accepted from the time the parties concluded the affinition agreement.

The recognition by Legislator and courts of Bantu law principles with regard to the dissolution of Bantu marriages I have briefly referred to earlier in this Annexure and also in the first section of this paper.

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1) Strafford & Franklin, 1950, p. 104.
2) cf. Nthole v Lebata, 1942, N.A.C. (C & O) 125.
3) Whitfield, 1948, p. 84 ff.

Recognition of Native Christian and civil marriages:

Only the most general outline can be given here. With one exception both civil and Christian marriages were before Union, and have been after Union, possible for the Bantu population of the Union, although there are some statutory differences in detail between the provinces. The possibility for such marriages has, however, been created by special legislation (i.e. 'Native Law') which leaves the regulation of the various aspects of such marriages (essential requirements, celebration, relations between husband and wife, their property rights, status and property rights of children, dissolution of marriage) either to the common law or to Bantu law, or to special Native law provisions.

Subject to these basic premises the general rule is again as outlined before, that the European common law applies to these Native marriages, except and insofar as certain aspects have been specifically excluded from the common law and provided for in special regulations or placed under the operation of Bantu law.

The situation in Southern Rhodesia is based on similar premises.

In Northern Rhodesia Africans are excluded from European marriage law (§ 47, Marriage Ordinance, Cap. 132).

Natal provides an exception in that a civil marriage can only be contracted if both man and woman are exempted from the operation of the Natal Code. For such couples, only a marriage under the (European) Marriage Ordinance of 1846 (as amended) is possible (whether civil or Christian) with the full legal implications which a European marriage entails. In all other cases only a Christian or Bantu marriage is open to them.

In spite of its supposedly western character, the field of the Christian marriage in Natal, and of both civil and Christian marriages in the other provinces and in Southern Rhodesia, is therefore governed by a composite (and rather complicated) law system. A few examples may suffice. The common law age of legal majority renders parents' consent unnessary in a Native (i.e. Christian and civil) marriage in Southern Rhodesia and all Union provinces, except Natal (Christian marriage) where the bride's guardian's consent is still required. Section 11 of the Natal Law 46/1887, moreover, makes the remarkable provision that in a Native Christian marriage the personal status and property rights of the spouses will remain subject to Zulu law (i.e. in practice, Natal Code).

With regard to the status of children and the family estate, Section 22 of the Union Native Administration Act supercedes the common law and substitutes new provisions which, apart from a near-absolute 'no community of property' rule, to some extent takes into consideration the tribal background of the spouses, and the possible existence of a previously contracted (monogamous or polygynous) Bantu marriage. Sections 13 and 14 of the Southern Rhodesian Native Marriages Act go a bit further and specifically retain customary law on these points.

The subsistence of the - essentially monogamous - civil or Christian marriage, renders the conclusion of any other marriage (including Bantu marriage) void; in Natal such a step is moreover punishable as bigamy (Section 13 of the Law of 1887).

The reverse, the conclusion (with a new partner) of a civil or Christian marriage during the subsistence of a valid Bantu marriage is, however, fully sanctioned and open to both husband and wife[1], who are thereby under statute law in effect given the power to disband their valid Bantu marriage by individual and unilateral action.

In no statute is the incidence of lobolo considered inconsistent with a civil or Christian marriage, and its common appearance side by side with these marriage transactions is therefore permitted. Since it does not, however, form part of the marriage contract, its Bantu-law sanctions fall away: default of lobolo performance is no ground for divorce, nor is its counterpart, failure of the wife to bear issue; nor, legally, does lobolo determine the status of the children. In cases of divorce the (Native Commissioner's) courts do take cognizance of the lobolo transaction as a separate entity, in that they may order a refund of (part of) the lobolo[2] paid where the woman has borne insufficient or no issue to the husband. In other words, the Bantu principle of proportionate 'performance' in this respect may then be applied.

Christian and civil marriages can only be dissolved by a decree of a court of competent jurisdiction (in the Union, the special Native Divorce Courts; in Southern Rhodesia, the Native Commissioner's Courts), and common law principles are applicable[3].

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1) § 22 refers only to males; but the definition in § 35 is wide enough to make a similar action by the woman possible.
2) See e.g. Raphuti v Mametsi, 1946, N.A.C. (T & N) 20; Tobie v Mohatla, 1949, N.A.C. (SD) 91.
3) Seymour, 1953, Chap. VII; Whitfield, 1948, p. 576 ff; Stafford & Franklin, 1950, p. 319 f.

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