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Canons And Customs In Colonial Zimbabwe: Jesuits and African Marriage Practices, c. 1890-1967

Part 2

Nicholas M. Creary
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In this second installment Creary treats the question between African Marriage Customs and canonical marriages in church. This resulted in an attempt to modify the one in accepting parts of the other.¹

Joseph Suter, a Bethlehem missionary priest and member of the Episcopal commission formed to study the problem of African Catholics' tendency to disregard the Church's canonical marriage requirements and marry according to "customary law," supported incorporating certain African elements as necessary preconditions to valid canonical marriage within the church. Lachan M. Hughes, S.J. and a minority of the Episcopal commissioners, on the other hand, saw those elements as impediments to valid marriage which either had to be abolished or ignored in order to regularize African

¹ For Part 1, see Nicholas Creary, "Canons and Customs in Colonial Zimbabwe: Jesuits and African Marriage Practices, c. 1890-1967 (Part 1), *The Journal of the Black Catholic Theological Symposium* 1 (2007), 19-56.

Christian marriages. Suter, Hughes, and their advocates entered into a debate on the issue. Suter structured his response to Hughes around three questions: whether it was possible to “raise” customary unions to church marriage, whether there was consent in customary unions, and why weren’t African Catholic couples obtaining enabling certificates in order to marry within the church. Regarding the possibility of canonizing customary unions, Suter observed that Hughes’ distinction between *matrimonium in fieri* and *matrimonium in facto esse naturale* was useful, but secondary to the question of which unions were marriages (*matrimonium*) and thus capable of becoming church marriages as opposed to “concubinage” (*contubernia*) which were incapable of being “raised” to church marriages.² Suter listed four categories of unions that couldn’t become church marriages: unions that contained a diriment impediment,³ whether absolute (i.e., no possibility of granting a dispensation) or relative (i.e., a

² JAZ, Box 312/2, Joseph Suter, “Memorandum Concerning Church-Marriage versus State-Law/Natural Marriage: Another Attempt,” 1. (“Another Attempt” hereafter).

³ Canons 1067-1079 stipulated the following as diriment impediments: if a boy were under 16 years of age and/or a girl were under 14 years of age; “antecedent and perpetual impotency either on the part of the man or the woman;” if a person was “held by a previous marriage bond,” with due respect to the Pauline privilege; marriage to a non-Christian; if a person were either a “cleric in major orders” or a member of a religious institute who had taken solemn vows; if a man had abducted or forcibly detained a woman and tried to marry her; if a married person committed adultery with the intent of marrying “the partner in adultery,” or killed the spouse of the adulterer, or caused the death of his/her own spouse; if a person married “in the direct line of consanguinity” or within three degrees of collateral lines. See Stanislaus Woywod, O.F.M., *The New Canon Law: A Commentary and Summary of the New Code of Canon Law* (New York: Joseph F. Wagner, Inc., 1929), 216-19.

possible dispensation had not yet been granted); polygamous unions that violated the unity of marriage (i.e., a man and his first wife are validly married, all subsequent unions while both partners remain alive are invalid and not capable of regularization); unions that violated the indissolubility of marriage (i.e., if either or both partners don't "want to enter a permanent union for life"); or unions that lacked the consent of the husband or wife, or that contained consent conditional upon a future act.⁴ Suter believed that the greatest "leakage" was in unions that violated the indissolubility of marriage: "these people shun away from any Church or Civil marriage, as it is later troublesome to get a divorce and as responsibilities have to be faced."⁵

Concerning *lobola* and consent, Suter responded directly to Hughes by arguing that whereas Europeans saw *lobola* as a business transaction, Africans saw it the establishment of "new personal relations."

A whole new kinship system is established by lobolo [sic] and a whole pattern of behaviour among the various groups. For the girl the decisive question is: Is my beloved accepted as mukuwasha? If that is so, tangibly proved by accepting money and cattle, then her interests of being protected by her family are safeguarded, and that is all she wants. Therefore, if a lobolo arrangement is made, the woman understands the following steps as leading to a proper marriage to which she fully

⁴ Suter, "Another Attempt," 1-2.

⁵ *ibid.*, 2.

cooperates with her consent, as she wants the man to be her true husband. If no lobolo arrangement is made, the woman knows very well that this union does not mean marriage, at least not yet. Consequently there is no marriage consent and no basis for a Church marriage. Therefore matrimonial consent is absent or at least very doubtful where there is no lobolo arrangement made.⁶

Although Suter didn't know how many African couples' marriages were excluded from the possibility of regularization within the church, he presumed that there were a significant number who were living *matrimonium in facto esse naturale*, which he defined as a couple not prevented from marriage by a diriment impediment that lives monogamously and intends to remain so for the rest of their lives, in which "a real and true consent is expressed and still exists, but they did not comply with Canon 1094 due to grave and serious reasons,"⁷ and that only those cases could and should be rectified. He further defined *matrimonium in fieri* as "pathetic cases of intended marriage. The two engaged people wait for years, sometimes almost heroically, till the young man has saved enough money to complete the lobolo payment, which may be raised at will by the *tezvara*."⁸

⁶ *ibid.*, 2.

⁷ *ibid.*, 3. Canon 1094 required that a couple had to exchange consent before a priest and two witnesses for a marriage to be valid. See Woywod, *The New Canon Law*, 221.

⁸ Suter, "Another Attempt," 3.

Suter next directed his attention to the question of valid consent in customary unions, directly confronting Hughes' contention that the "customary union as such is not apt to canonical consent or form."⁹ Suter began by proposing "a solution" that first required verification: of a customary union for the validity of consent; that the union did not fall into one of the four categories that were incapable of regularization; of a valid reason for the couple not having obtained an enabling certificate. If the case was one of a civilly registered customary union in *matrimonio in facto esse naturale* then the marriage could be convalidated. If the case was one of a civilly unregistered customary union in *matrimonio in facto esse naturale* then the marriage could receive a *sanatio in radice* because the "radix [root] exists and consent continues."¹⁰ In cases of *matrimonium in fieri*, presuming verification of the aforementioned three elements, Suter recommended that "the couple should be advised [sic] to make use of the extraordinary form of can. 1098."¹¹ Canon 1098 allowed a couple to marry in the presence of two witnesses only provided that they could not go to a priest "without great inconvenience" [*sine gravi incommodo*].¹² As will be seen below, this was a significantly innovative application of canon law to the African context.

Suter then reiterated the commission's view regarding the three elements that constituted a customary union, i.e.,

⁹ Lachlan M. Hughes, S.J., "African Marriages," 7; cited in Suter, "Another Attempt," 3.

¹⁰ See Canons 1138-1141 in Woywod, *The New Canon Law*, 232-33.

¹¹ Suter, "Another Attempt," 3.

¹² See Canon 1098 in Woywod, *The New Canon Law*, 223.

the consent of the woman, the man, and the *tezvara*; the mutual agreement to pay *lobola*; and the formal handing over of the bride. Concerning the *tezvara*'s consent, Suter distinguished between consent to cohabitation, which was necessary for a legal claim to *lobola*, and consent to civil or church marriage in a district commissioner's office which implied that the *tezvara* had received enough *lobola* and was not expecting much more as debt against the enabling certificate. Citing the VaShona proverb that a *mukuwasha* was like a fig tree to be eaten without end [*Mukuwasha muonde usingaperi kudyiwa*],¹³ Suter noted that the *tezvara* would be willing to grant consent to cohabit but reluctant to consent to an enabling certificate in the DC's office.¹⁴ Consequently, "As only the right for cohabitation is essential for marriage, but not the customary transfer of wealth, the first consent is only essential and is sufficient to the marriage contract."¹⁵

With regard to the mutual agreement to pay *lobola*, Suter, noting that the amount of *lobola* frequently wasn't fixed for many years, argued that *lobola* arrangements were "in the first place not a question of wealth, but a question of person."

The *tezvara* group has to decide: Do we accept this young man as our *mukuwasha*? Can we trust him? Are we ready to enter into a marriage agreement with him, to establish a new kinship relation with him and his relatives?

¹³ See also Bourdillon, Michael F.C Bourdillon, *The Shona Peoples* (Gweru: Mambo Press, 1987), 42-43.

¹⁴ Suter, "Another Attempt," 3.

¹⁵ *ibid.*, 4.

Will this young man and his family group behave toward us as expected by tradition, paying proper respect and providing help in case of trouble and death? Can we trust that he will fulfil all his obligations as *mukuwasha*? (One of these obligations is to pay the due lobolo [sic]). The traditional ceremony of “kupinza mukuwasha kumusha”, i.e., to receive him into the village, is the tangible answer that he is in fact received as son-in-law. Thus the condition is fulfilled when the ceremony kupinza mukuwasha kumusha has taken place.¹⁶

Similarly, with regard to handing over the woman, Suter argued that this was done normally during the *kuperekedzwa* ceremony, or during the *kupinza mukuwasha kumusha* in the case of elopement (*kutiza*).¹⁷

Suter further argued that the customary union was “the only way how at present and in all likelihood in the near future the African people *express their marriage consent*,”¹⁸ and thus, a *sine qua non* for consent as opposed to an essential requirement for marriage: “Any *sanatio* or *convalidatio* or any new marriage can only be arranged on the foundation of a customary union. Disregarding this foundation would inevitably bring about a vast number of invalid and doubtful marriages.”¹⁹

Although Suter conceded Hughes’ point that unregistered marriages would not receive protection under

¹⁶ *ibid.*, 4.

¹⁷ *ibid.*, 4.

¹⁸ *ibid.*, 4. Emphasis in original.

¹⁹ *ibid.*, 4.

the civil law, he disagreed that they were unstable unions. Citing the general interest on the part of both families to maintain the marriage as well as the *tezvara*'s reluctance to have a marriage dissolve because he would be obliged to return the *lobola*, Suter thought, "This explains somehow the happy fact that the stability of customary unions and proper marriages among [the] African population in this country is remarkable."

According to [African] customs no marriage is ever broken up against the will of at least one of the spouses. The *vakuru* never divorce a couple, they only accept the fact that two married people have rejected each other... Comparing the efforts of the government to save endangered marriages by counselling or by its courts, I must say that the African customs are much better to iron out marriage difficulties. But if all efforts according to customs have failed, the marriage is simply taken as dissolved. No European court-ruling will make any difference. It can only confirm the *de facto* divorce or it will be ignored.²⁰

While Suter thought it "highly desirable" for church marriages to have civil protection, he felt that if obtaining such protection proved "too cumbersome, it can be dispensed with," because the stability of the marriage rested on the customary union, not the marriage registration certificate.²¹ Thus, he considered the customary union

²⁰ *ibid.*, 4.

²¹ *ibid.*, 4.

“essential for a valid consent [and] essential for the stability of marriage, and therefore indispensable.”²²

Turning to the last of his three questions, Suter addressed the issue of why he thought African Catholics were not obtaining enabling certificates in order to marry in the church. He took issue with Hughes’ assertion that the *vadzitezvara* opposed church marriages because of their permanence. Suter argued to the contrary saying that the *vadzitezvara* would welcome stable, permanent marriages because if the marriage were to fail they would have to return *lobola* to the *vakuwasha*, and so the *vadzitezvara* frequently used the enabling certificate as a means to put pressure on the young couples to ensure that *lobola* would be forthcoming.

The reason for not marrying the couple in the [district commissioner’s] office by the *tezvara* is to leave the couple somehow in a somehow awkward and often embarrassing situation, so that the couple realizes that to finish lobolo may be the lesser evil... He wants by no means the marriage union to be broken. If that should happen, he would have lost the whole game, would be called a fool, who overreached himself, because he did not know when to give in. Be he uses the natural desire of the union to squeeze out the last of his lobolo claims.²³

Suter countered Hughes’ argument that the government would assist *vadzitezvara* to reclaim their

²² *ibid.*, 5.

²³ *ibid.*, 5.

daughters/wards if there were no civil protection, claiming that such a situation would be “certainly out of the question” for any African woman 21 years of age or older (the age of majority in English common law). Further, a *tezvara* couldn’t take a *mukuwasha* to a European court for *lobola* if the marriage wasn’t registered: in such a case they would have recourse to a chief’s court unless a marriage certificate had been issued. In cases of last resort where the *tezvara* could demand the *lobola* of his daughter’s daughter, this was permissible only in a situation where no permission to cohabit had been given, and thus no customary union existed. Suter opined that the reason for the sharp fall in canonical marriages resulted from a mutual mistrust of the younger and older generations of African Christians:

People experienced often that as soon as their son-in-law was married [sic] in the office or in Church, they did not feel any longer obliged to fulfil their traditional duties. To my mind it is part and parcel of the deep-rooted mistrust of the old generation into the young generation. They do not understand each other nor do they trust each other. Where there is no trust, there is no credit or only very limited credit, i.e., the *tezvara* will not register the marriage till he has all.²⁴

Given the relatively low wages of young African men in the face of *lobola* payments in the range of £100-250,

²⁴ *ibid.*, 5.

Suter was not surprised that for many of them it was “impossible to complete *lobola* soon.” Nonetheless, poverty “should not be a reason to prevent the couple from the basic human right to marry,” and deserved the “sympathetic concern of the Church.”²⁵

Responding to Hughes’ suggestion that the church should invoke civil laws against increasing amounts of *lobola*, Suter argued that within the contemporary VaShona cultural practice it was “simply impossible” for a *mukuwasha* to take a *tezvara* to a European magistrate because “The whole lobolo system is in spite of all something of a gentleman’s game. The enabling certificate cannot be forced in such a way.” The church, accordingly, had a responsibility to act “courageously” in proving the impossibility of a *mukuwasha* to pay *lobola* in full prior to marriage, and then either convalidate, sanate, or use the extraordinary form of Canon 1098 to regularize African marriages, particularly cases of *matrimonium in fieri*.²⁶ Citing the work of Belgian Dominican theologian Edward Schillebeeckx, which referred to historical models of marriage practices in the church that were more sensitive to local cultural practices, Suter mused whether:

the Council of Trent laid down the best form of marriage for African people in the 20th century [“Tametsi”]. Previous forms seem to fit much better into our situation. . . . In many respects we are somehow facing problems of the early Church, are in an extraordinary situation for

²⁵ *ibid.*, 5-6.

²⁶ *ibid.*, 6.

which the Church provides the extraordinary form of marriage according to can.1098. . . .In our previous [marriage commission] meetings we discarded the solution with the remark: Exceptional cases. But these exceptional cases have been the ordinary way for 1000 years. The argumentation against can.1098 was that it may open the way to clandestine marriages. But can.1098 is a public affair, only without the priest being present, but at least two witnesses are required *ad validitatem*, who together with the marriage partners are responsible, that the marriage be reported to the priest... If kuperekedzwa ceremony were accepted as the time of applying can.1098, there should always be plenty of witnesses as it is a public affair.²⁷

Hughes began his response to Suter with an extended point-by-point refutation of the Bethlehem missionary's recommendations, arguing essentially that while the elements that the commission proposed as constituting an African customary union were significant for determining the existence of such a union, they were unnecessary for canonical marriage in the church or as requirements for a marriage to be regularized. He reiterated his objection to the requirement of the *tezvara*'s consent for valid marriage, noting that Christian marriage was not a "group affair," as well as his position that *lobola* could not be considered a valid requirement for marriage.²⁸

²⁷ *ibid.*, 6-7.

²⁸ JAZ, Box 312/2, Lachlan Hughes, "Memorandum II: On African Marriages," May 23, 1968, 1-11. ("Memorandum II" hereafter).

What is most interesting in Hughes' lengthy second memorandum is the extended consideration he gave to Suter's suggestion to use the extraordinary form of marriage available in canon 1098. This was a rare instance in which Suter and Hughes agreed, and the latter's reflections amounted to a concrete practical application of the former's idea. As will be seen below, the commission gave serious thought to incorporating Hughes' recommendation into its final report.

After briefly summarizing and analyzing the developments that led to the inclusion canon 1098, as well as several of its interpretations by noted canonists, Hughes determined that the extraordinary form was "a potentially acceptable solution to the problem of *matrimonium in fieri*," and examined its ramifications on four levels: "in itself," its consequences, applications, and limitations.²⁹

Hughes first noted that the use of the extraordinary form would result in canonically valid marriages and that it could be used in situations where there was a civil impediment that the church didn't recognize (e.g., the requirement of the *tezvara*'s consent or agreement over *lobola* for a valid customary union) or a lack of documents required by the civil authority (e.g., an enabling certificate or registration of the customary union). The great inconvenience to the priest was that he would be subject to a £500 fine and/or five years in jail for functioning "as a marriage officer to produce a civilly valid marriage."³⁰ The "grave moral inconvenience" to the couple was

²⁹ *ibid.*, 11-13.

³⁰ See 1964 Marriage Act, Section 10 (2).

“automatic” if they wished to marry but “in the concrete circumstances” could not have a priest be present. “Hence the priest cannot be compelled to marry them: they cannot be *compelled* to remain unmarried.”³¹

Reiterating the canonical validity of marriages effected according to canon 1098 as well as his opposition to the inclusion of the *tezvara*’s consent for a valid Christian marriage, Hughes argued that one of the consequences of the extraordinary form was that:

there could be no absolute requirement that the man, *now validly and licitly married*, should continue to make *lobola* payments. . . . This does not mean that the newly married man may not pay *lobola* as long as he likes: but simply that the Church in these circumstances cannot support that there is a moral obligation to do so.³²

While the priest who would have been “the proper officiant” would be free from any penalties as he was not acting as a marriage officer, the “canonically valid and sacramental marriage” would be civilly invalid. Hughes thought that such a situation could result in a *tezvara* either refusing permission to cohabit and/or refusing to receive the *mukuwasha*, or attempting to recover control over his daughter, which would be likely as the couple would not have any civil protection. This latter situation, in Hughes’ opinion, would be proof that permission to cohabit was not

³¹ “Memorandum II,” 14-15. Emphasis in original.

³² *ibid.*, 15. Emphasis added.

permission to marry, but were the couple allowed to use the extraordinary form and to cohabit then the *tezvara* would effectively have little legal recourse except against his married daughter.³³

Hughes also saw as consequences of using canon 1098 potentially negative effects regarding the civil administration, specifically, that were a priest to become involved at any point in the process he could be accused of acting as a marriage officer or of marrying people without a declaration of intent or civil banns. More significantly, the invocation of the extraordinary form could result in complaints from *vakuru* that the church was treating couples as “fully married, permitting them the Sacraments,” and that while that in and of itself would not be a problem for the government, “the disturbance of custom would,” and could result in government intervention.³⁴

Turning to practical applications, Hughes stated that the local bishops would have to approve the general application of the extraordinary form, and grant permission to use it in every case. The regular canonical investigation “to ensure freedom to marry, absence of or dispensation from impediments, etc.” would still be required, as would the careful instruction of the faithful to prevent “the danger of immense confusion,” and “an explicit form of exchange of consent before witnesses who would record the fact and have the record transferred to the priest.” Two “definite” witnesses would have to be commissioned to confirm the

³³ *ibid.*, 15.

³⁴ *ibid.*, 16.

exchange of consent: “it would not be acceptable that a crowd of guests should be asked to affirm the fact of consent exchanged.” Accordingly, Hughes suggested the development and use of a “definite formula printed in cautious terms.” The couple could receive no form or certificate that could give them the ground to say “The church married us.” This would result in government intervention because couples married by the extraordinary form would more than likely use such a form for civil purposes (e.g., obtaining married family housing in urban areas). A diocese would have to keep a “special book” for such marriages “most scrupulously.” The church would have to instruct the couple and families of the definitive effects of marriage in this form: they would have to determine if it were “prudent” to inform *vadzitezvara* of permission to cohabit plus canonical consent “in all cases” as doing so could decrease the frequency of permissions, and not informing them could result in “serious indignations.” The church would also have to educate people that extraordinary form was not permission for unmarried to go to sacraments: this was one of “gravest difficulties” of the scheme in Hughes’ opinion.³⁵

In Hughes’ opinion, the extraordinary form was applicable only to “suitable” marriages: there must be a provable genuine exchange of consent. He suggested the extraordinary form “plus registration” as best for “subsisting customary union *cohabitations*, i.e., those for which permission has been mainly obtained—but not always.” Where possible, Hughes preferred using the

³⁵ *ibid.*, 16-17.

regular forms of marriage and validation, and he reiterated that the bishops would have to approve the general use of the extraordinary form because:

it is quite unacceptable to suggest that where the circumstances are verified anyone can get married in this way [i.e., the extraordinary form]. Of itself it is true, but in the situation prevailing the duty of providing for public order in remedying the situation is certainly theirs [i.e., the bishops]: this is not a case of an individual taking to himself his rights.³⁶

Any couple doing so “before witnesses in the required manner,” however, would be validly married “before God and the Church.” Thus it remained with the bishops to judge whether the circumstances warranted use of the extraordinary form, and if not, then “the ‘private’ exchange of consent would be quite invalid for defect of form.” It was in this context that Hughes raised the “frightening possibility” of “the dangers of clandestine marriages.”³⁷

Clearly, Suter and Hughes disagreed in their interpretations of canon law and its application to African marriage practices. The most significant difference was the possible inclusion of certain elements of an African customary union as prerequisites for the canonical validation of African Catholics’ marriages, or more specifically the incorporation—albeit very limited—of African marriage practices into those of the Catholic

³⁶ *ibid.*, 18.

³⁷ *ibid.*, 17-18.

church. Suter favored such a move, whereas Hughes did not. Suter's tone is much more pastoral, evoking a concern for the spiritual well-being of the African Catholics in his care, whereas Hughes' writings are more juridical and seem more concerned with upholding the letter of the church's law. Whereas Suter saw the extraordinary form primarily as a means to help Catholics put their marriages right in the eyes of the church—an expression of the church's "sympathetic concern"—Hughes saw the use of canon 1098 primarily as a way for the church to confront "the whole complexus of unjust demands occasioned by the present decadence of the *lobola* system," as well as a means to stifle the criticism that the church "manufactured."

obstacles to Christian marriage... because those who wished to marry correctly by the extraordinary form would have it in their power to do so, provided they were willing to join issue with the family difficulties which it might produce."³⁸

Evidently the members of the marriage commission were favorably disposed to Hughes' application of Suter's idea to use the extraordinary form of marriage found in canon 1098 as they apparently asked the Rhodesian Catholic Bishops to request a legal opinion as to its repercussions with regard to the 1964 marriage act. The bishops' counsel advised that:

³⁸ *ibid.*, 15, 16.

to avail oneself of the provision of Can.1098 would be to solemnise or to purport to solemnise marriage: the clergy who counselled, incited, or advised Catholics to follow this expedient would be in conspiracy and as *socii criminis* [friends of the crime] punishable as principals.³⁹

This legal finding apparently terminated any further discussion of the possible use of the extraordinary form of marriage.

The marriage commission submitted its final report to the bishops' conference in April 1970. Although the commission suggested that causes such as a "lack of real faith in God and in the Sacrament of Matrimony," or a "lack of real mutual love," or a "reluctance to commit oneself to an exclusive and permanent union," or social and economic changes brought about by "the whole process of 'westernization'" contributed to the low rate of canonical marriages within the church, "the main reason," in its opinion, was "the present exorbitant demand" for *lobola* "which enables the guardians to prevent the young couple obtaining an Enabling Certificate" which was required by civil law.⁴⁰ The commission held that customary unions meeting Suter's definition of *matrimonium in fieri* (i.e., were free from canonical diriment impediments, monogamous, permanent, "contracted by a real and true consent," and lacked an enabling certificate from the

³⁹ Cited in JAZ, Box 312/2, Lachlan Hughes, "Marriage Commission," September 29, 1968.

⁴⁰ JAZ, Box 312/2, Marriage Commission Report, April 28, 1970, 2.

tezvara) “are apt for convalidation by the Church and registration by the State.”⁴¹ Further, the commission decided that it would be “disastrous” to marry African couples on the basis of canonical requirements alone, and regarded the triple consent of the woman, *tezvara*, and *mukuwasha*, the mutual agreement to pay and accept *lobola*, and the formal handing over of the woman by her family to her husband and his family as “essential requirements which establish the fact of a customary union” as expressed in either the *kuperekedzwa* ceremony, or—in the case of elopement—the *kupinza mukuwasha kumusha* ceremony.⁴²

The commission suggested that if the aforementioned “essential” elements were present, and if the couple met the requirements of canon law then they could “validly and lawfully contract a Church marriage,” although such a marriage while in accord with customary law would not have legal standing according to civil law, and the couple would therefore “forfeit certain rights and privileges attached to civil marriages.” In the commission’s estimation the benefits of such a policy would be to put Christian marriage “within reach of many more couples than formerly;” such marriages would be in accord with the requirements of canon law and customary law and would have the protection of customary law by virtue of their recognition by African communities. The disadvantages included depriving couples of “the civil effects which follow registration,” and the perception of the church acting

⁴¹ *ibid.*, 2-4. The commission defined “convalidation” as the renewal of consent in canonical form or *sanatio in radice*.

⁴² *ibid.*, 4-5.

contrary to public policy.⁴³ In order to implement the policy the commission recommended that “the priest who investigates such marriages should thoroughly understand the nature of the customary union” and be able to determine whether the conditions for a customary union existed, and that in order to facilitate such investigations that a “customary union addendum” be added to the pre-nuptial forms.⁴⁴

Finally, the commission recommended amending the civil marriage legislation: to abolish the requirement of the enabling certificate, and “for the sake of clarity, [the civil law should] specifically state” that while the agreement to *lobola* is essential for marriage, “the actual details of the agreement and the payment or non payment of [*lobola*] have no effect in law on the validity of marriage.”⁴⁵

Although the marriage commission acknowledged Lachlan Hughes’ contributions to its deliberations, clearly its recommendations followed Joseph Suter’s line of interpretation. It is also possible, especially in light of the recommendations concerning the civil law, to posit that the commission in its deliberations and recommendations was engaging in a belated establishment of ecclesiastical “customary law”: the priests on the commission were willing to defer to African “custom” so long as it was in accord with the institutional church’s interests. As with the early BSAC and settler marriage legislation there were notable differences of opinion as to what constituted the

⁴³ *ibid.*, 5-6.

⁴⁴ *ibid.*, 6-7; see also appendix: “Addendum to Prenuptial Statement: Customary Union.”

⁴⁵ *ibid.*, 7-8.

church's interests. Nevertheless, the commission's deliberations represent an unprecedented openness to engage African culture positively, which was a significant departure from the Catholic church's policies and practice concerning African marriages.

The Rhodesian Catholic Bishops' Conference apparently adopted some of the marriage commission's recommendations, as evidenced by the requirement of "a completed customary union addendum in those cases where the parties [don't] possess a marriage certificate issued in terms of the Marriage Act of 1964."⁴⁶ Despite this significant step toward engaging African marriage practices, however, the situation did not improve significantly. This was more than likely due to the fact that the bishops:

decided that the preferred practice was still to ask the couple to go to the DC for an enabling certificate and for the priest to marry them according to the Marriage Act (1964) when they had got such a certificate.⁴⁷

Because the situation had worsened by 1972 (approximately 85% of African Catholics were not marrying in the church), the bishops established another commission in August of that year, to investigate the problem and recommend solutions.⁴⁸ There is no record of

⁴⁶ AAH, Box 670/G, Edward Ennis, S.J. to Anthony Bex, October 16, 1972.

⁴⁷ Fr. Brendan Conway, AMC, "African Marriages Commission," *Pastoral Service*, December, 1973, 22.

⁴⁸ *ibid.*, 23.

the second commission's final report or recommendations in the Jesuit archives. There is, however, a 1975 letter from the Rhodesian bishops to the cardinal prefect of the Sacred Congregation for the Evangelization of Peoples (formerly Propaganda Fide) requesting:

WITH THE GRAVE URGENCY OF THE SITUATION BEFORE US. . . THAT THE FACULTY BE GRANTED BY THE HOLY SEE TO THIS CONFERENCE [of bishops] WHEREBY INDIVIDUAL, SELECTED CATHOLIC LAYMEN MAY BE APPOINTED BY LOCAL ORDINARIES TO OFFICIALLY WITNESS AND RECORD MARRIAGES IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE INSTRUCTION "SACRAMENTALEM INCOLEM."⁴⁹

Apparently the bishops did not receive such permission from the Vatican, as evidenced by the absence of any discussion of the possibility of an African layperson presiding at a Catholic marriage ceremony in subsequent marriage regulations of the Archdiocese of Salisbury.⁵⁰

Throughout the colonial period the Catholic church did very little to engage African marriage practices in Zimbabwe. It took crisis proportions, 80 percent of African Catholics not marrying within the church—and thus not eligible to receive communion at mass—to spur the bishops

⁴⁹ JAZ, Box 312/1, Rhodesian Catholic Bishops' Conference to Cardinal Prefect of the Sacred Congregation for the Evangelization of Peoples, November 30, 1975. Emphasis in original.

⁵⁰ JAZ, Box 312/1, Brendan Conway, "Some Notes on Canonical and Civil Regulations Affecting Marriage."

to establish a commission to investigate the problem in 1967. Although the commission eventually recommended recognizing African customary unions as the basis for marriage within the church, a significant departure from the hierarchy's previous stance, and five years later the bishops went even further to request that select African laypersons be allowed to preside at wedding ceremonies, the situation did not improve appreciably. The commission's deliberations can be likened to the process of the formation of African "customary" law decades earlier by the Southern Rhodesian colonial administrations: of taking selected elements of once fluid social practices and enshrining them into relatively inflexible legislation.

If colonial Africans tended to ignore civil marriage legislation where possible and continued their marriage practices slightly modified as a result of the marriage ordinances, then such was the case even more so where African Catholics were concerned. This pattern of ignoring or evading church authorities and policies carried over to other issues as well, such as using the ChiShona name for God, Mwari.

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