

## ESSAY REVIEW

### COMMISSIONS OF INQUIRY IN A RAPIDLY CHANGING SOCIETY

MEMBERS OF THREE recent Commissions of Inquiry have ventured where angels fear to tread; the subjects of their Reports are key social issues in Rhodesian society. Two Rhodesian Government Commissions relating to aspects of family life in Rhodesia have reported their findings: the *Report of the Commission of Inquiry into Termination of Pregnancy 1976* and the *Report of the Commission of Inquiry into Divorce Laws 1977*. The third Commission, of Anglicans, was set up by the Church of the Province of Central Africa, Diocese of Mashonaland, and it brought out the *Report of the Commission to Inquire into the Legal Status of African Women 1976*. The Government Commissions' Reports in theory deal with the total population of Rhodesia, but in practice their findings relate largely to the European population of Rhodesia, whereas the Church Commission's Report has a broad focus which embraces the majority of women in this country.

These Reports are here considered from a sociological rather than a legal viewpoint. It is tempting to review the salient characteristics of each Report in relation to the others, but the diversity of the topics and populations covered does not permit other than a fragmented approach in the space available. Thus, each Report is treated separately.

#### PREGNANCY

Before the *Report of the Commission of Inquiry into Termination of Pregnancy* and the subsequent Termination of Pregnancy Act (No. 29 of 1977) which became law on 1 January 1978, abortion in Rhodesia was governed basically by Roman-Dutch common law and English case law. Accordingly all abortions with the exception of those performed for therapeutic purposes were considered common law crimes. For example, abortion could lawfully be performed to save the mother's life and the principle was extended by Mr Justice Macnaghten's direction to the jury in *R. v. Bourne* in 1938, that the law:

does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman.<sup>1</sup>

<sup>1</sup> (1938) 3 All E. R. 615 quoted in Rhodesia, *Report of the Commission of Inquiry into Termination of Pregnancy* (Cmd R.R. 2, 1976), 4.

The Commission was of the opinion that this case would be followed in the Rhodesian Courts. Thus, abortion would be performed where the continued pregnancy would cause physical or mental injury to the mother. This allowed for considerable flexibility in the law. The Report points out that, under the law as it then was, Bulawayo had become the 'abortion centre' of Rhodesia. Abortions were performed in Bulawayo Central hospital by gynaecologists after the abortion had been recommended by a general practitioner and a psychiatrist. These abortions were conducted according to the tariff of fees laid down by R.M.A./R.A.M.A.S. The terms of reference of the Commission stated that it was:

To inquire into, consider and report on the need for legislation to make provision for termination of pregnancy under strictly controlled conditions and, if such legislation is deemed necessary by the Commission, to make recommendations regarding the circumstances in which termination of pregnancy should be permitted and the control that should be imposed.<sup>2</sup>

The Commission reported that, in view of the ill-defined common law in terms of the circumstances in which abortion was legal and the consequent existing uncertainty, it advocated the imposition of certain controls and therefore recommended the need for legislation to make provision for termination of pregnancy under strictly controlled conditions. However, while recognizing that legislation on moral questions should reflect the needs and wishes of the society in question, and while being aware of the universal trend for liberalizing abortion laws, the Commission admitted that:

the evidence indicated that many — perhaps the majority of — younger Rhodesians wish to see abortion laws liberalized. Consequently, it may well be that if this trend continues, any Act which may now be passed will have to be reviewed in the future.<sup>3</sup>

Despite this admission that its recommendation may become obsolete in the near future and there would be a need for constant review of the legislation in the future to take cognizance of changing attitudes, the Commission recommended that termination of pregnancy should be permitted only in the following circumstances:

- (a) Where the continuation of the pregnancy constitutes a danger to the life of the mother and termination is necessary to ensure her life;
- (b) where the continuation of the pregnancy constitutes a serious threat to the physical health of the mother and termination is necessary to ensure her continued health;
- (c) where the continuation of pregnancy creates a great danger of serious and permanent damage to the mother's mental health and termination is necessary to avoid such danger;
- (d) where there exists a serious risk on scientific grounds that the child to be born will suffer from a mental or physical defect so that he will be seriously handicapped;
- (e) where the child is conceived as a result of rape or incest;
- (f) where the mother is an idiot or imbecile.<sup>4</sup>

<sup>2</sup> *Ibid.*, 1.

<sup>3</sup> *Ibid.*, 15.

<sup>4</sup> *Ibid.*, 16.

These recommendations were unanimously accepted by the members of the Commission, and one member of the Commission put forward the further recommendation on socio-economic grounds:

- (g) Where the mother seeking termination is destitute and would be incapable of supporting the child without assistance from public funds.<sup>5</sup>

While the Commission makes a seemingly liberal gesture by recognizing that moral questions should reflect the needs and wishes of society, in substance the Commission's recommendations are no different from previous legislation. The minority recommendation (g) which is innovative and progressive did not carry weight with the Commission. The Commission has perhaps unnecessarily raised people's hopes of a more liberal legislation, only at best to more clearly define previous legislation. Thus, not surprisingly, the remainder of this very brief Report is largely devoted to recommendations on the controls that the Commission considered ought to be imposed to prevent the recommendations on the circumstances for termination of pregnancy being interpreted so widely as to result in termination on social and economic grounds or even on request.

Following upon this *Report* of the Commission of Inquiry, the Termination of Pregnancy Act changed the law relating to abortion and defined the circumstances under which a pregnancy may be terminated, but does not include the Commission's recommendations (c) and (g). This means that there is now no provision under the present legislation for an abortion where the pregnancy is a threat to the mother's mental health, whereas previous interpretation of the common law allowed for abortion on the mental health grounds. Thus, to compound the conservative portion of the Commission's *Report*, Parliament took a retrogressive stand on the question of abortion.

## DIVORCE LAWS

The Commission of Inquiry into Termination of Pregnancy can be said to have made no real attempt to take a more liberal stand, but such a criticism cannot be levelled at the Commission of Inquiry into Divorce Laws whose *Report* was made available to the public in October 1977.<sup>6</sup> The present law of divorce in Rhodesia is based on the fault principle, with adultery, cruelty, and desertion as grounds for divorce, and incurable insanity and imprisonment as the sole concessions to the principle of marital breakdown. The main sections of the Commission's Report deal with:

- (i) A Matrimonial Division of the High Court in Rhodesia;
- (ii) the age at which persons can enter into marriage;
- (iii) the grounds upon which a divorce may be granted and the procedure for obtaining a divorce;
- (iv) the property rights of the parties on divorce, especially question of maintenance of spouses or any dependent children;
- (v) custody of and access to, minor children.

<sup>5</sup> *Ibid.*

<sup>6</sup> Rhodesia, *Report of the Commission of Inquiry into Divorce Laws* (Cmd R.R. 16, 1977).

The Commission's recommendation to set up special Matrimonial Courts would be very expensive to institute, particularly in the present Rhodesian economic circumstances. Additionally, the training of suitably qualified personnel to staff the Court would be a further expense. Presumably, in making this recommendation, the Commission must have taken into consideration the cost factor and the problem of finding suitably qualified staff, but must have concluded that the expense involved was balanced by the benefit to society in setting up a new Court structure to deal with matrimonial matters. The Courts as envisaged by the Commission will require a large specialist staff to deal with matters such as counselling prior to marriage for those under the age of 21 and counselling prior to divorce for those seeking divorce. Furthermore, a vast administrative staff will be required for the smooth running of the Court. It is debatable whether such an expensive enterprise is justified to deal with the matrimonial affairs of a small proportion of the population, especially since African divorces will remain largely the province of the District Commissioner's Court.

The recommendation of the substitution of failure for fault in the grounds for divorce is more realistically appropriate in relation to the behaviour and expectations of those whose marriages the Divorce Law seeks to regulate. However, the recommendation that the marriage should have endured for a period of two years prior to divorce could mean that children may be born during this period to a couple whose marriage is subsequently dissolved. Nevertheless, the Commission recommended that in exceptional circumstances the Court should have the power to dissolve the marriage before this period has expired. This procedure would require some considerable time for the Court to establish guidelines as to when this discretion could be exercised, and may involve considerable unnecessary litigation notwithstanding whether precedents are established over time or not.

The recommendation, that where there is no consent and the petitioner is seen to be 'the cause of' the failure of the marriage, a divorce should not be granted until a further two years of separation have elapsed, would seem to incorporate an element of the fault system, which the Commission claims to have discarded as a ground for divorce. However, it does allow for an element of flexibility because the Commission recommends that even without the consent of the other party such a marriage should be dissolved after the parties have lived apart for one year, provided that the conduct of the petitioner was not in 'overwhelming measure the cause of the failure of the marriage'.

The Commission recommended that the Court should have wide powers in terms of the provisos that it attaches to the granting of divorce. Although this would permit great flexibility, it also may mean unnecessary cost in petitioning in vain before the Court establishes certain precedents. The proviso that the Court must be satisfied that suitable arrangements have been made for the division of property, maintenance of a spouse and custody, maintenance and access to children of the marriage, is a departure from the existing legislation which considers these important consequences of divorce as incidental to the ground for divorce.

Generally, the Commission considered that the aim of Rhodesian Law should be to:

- (a) buttress rather than undermine the stability of marriage; and
- (b) when a marriage has irretrievably broken down, it should be possible for our courts to destroy the empty shell with the

maximum fairness and the minimum bitterness, distress and humiliation.<sup>7</sup>

In recommending to a large extent the abandonment of the fault system as grounds for divorce and the replacement of it by the failure or breakdown system, aims (a) and (b) could be realized.

However, there is not full abandonment of the fault principle, which is still apparent in the Commission's consideration of the granting of a unilateral petition for divorce, and in the assessment of the maintenance and property rights of spouses. In regard to the Commission's recommendations on the setting up of Matrimonial Courts, the present reviewer suggests that while this could help to furnish the Court with the information required to deal with matrimonial matters through the counselling and advice of persons considered to be experts in these matters, it is doubtful whether such an expenditure is justified when the Court would serve such a small proportion of the population. However, matters hereto considered as ancillary to the divorce, such as proprietary rights and maintenance of the spouses and the maintenance, access to and custody of children, may now be considered by the Court in their correct perspective as important matters in the divorce. This is because the Court could now be provided with information on which to make informed judgements on these matters. The move towards the abandonment of the fault principle in divorce would more truly reflect the behaviour and expectation of those seeking a divorce. Finally, the Commission fails to make any distinction between couples seeking divorce who have children, and childless couples or those without dependent children. This reviewer suggests that in the latter two cases much of the administrative procedures and counselling could be dispensed with and thus divorce could be facilitated without complicated and costly administrative procedures. Nonetheless, generally, it is doubtful that the recommendations of the Commission would reduce the costs of a divorce for the individuals involved, although it would most certainly increase the costs for the State.

This discussion shows that although the Commission of Inquiry and its *Report* is a step in the right direction, there are considerable doubts in the present changing circumstances in Rhodesia whether this will result in changes in the divorce law, and even if changes are brought about whether they will be appropriate for the new structure of Zimbabwean society.

### STATUS OF AFRICAN WOMEN

The third *Report* is that of the Commission to Inquire into the Legal Status of African Women. This is not a Rhodesian Government Commission but one set up by the Church of the Province of Central Africa, Diocese of Mashonaland. Whereas the other two Commissions were focused on a minority group in the population, the scope of this inquiry embraces the majority of women in this country.

The Commission was set up to investigate the legal disabilities suffered by African women in Rhodesia where continued application of customary law to the modern African woman was causing both hardship and injustice: 'Customary law, as it exists and is applied in Rhodesia at present, deprives the African woman of her basic rights and freedom; of her claim

<sup>7</sup> *Ibid.*, 28.

to support, maintenance and protection; and of the claim to the custody and guardianship of her children'.<sup>8</sup> The Commission's terms of reference were to investigate the present legal status of the African woman in regard to:

- (a) her relationship with her children;
- (b) her financial rights and duties — her ability to work to earn wages and turn them to her personal use;
- (c) the plight of the widow and divorcee; and
- (d) her general freedom to live her life as an individual.<sup>9</sup>

The Report provides a useful comprehensive coverage of material summarizing the social and legal status of African women backed up by extensive use of illustrative case material. A reading of the wealth of detailed evidence in the *Report*, however, makes it clear that the Commission's recommendations are rather disappointingly conservative.

The *Report* admits that frequently it is not legislation that will provide the solution to the women's problems, but rather a change in the attitude of the men and furthermore:

The law itself cannot, it is agreed, effect social change but it can, by affirming that a greater degree of equality is an official value, clear the way for those who are affected by discrimination and inequality to secure the necessary social change.<sup>10</sup>

Despite this declaration that law should take the lead, the Commission did not, however, consider the emancipation of women as a basic right, but rather felt that a woman must have the choice of whether she wishes to adopt the change to emancipated status or not. At the same time the Commission was aware of a widespread lack of knowledge on the part of African women of their legal rights, and it recommended a publicity campaign to make women aware of their present rights which would also enable them to make the choice of emancipation.

The Commission considered that the way in which an African woman could become emancipated was through a civil or Christian marriage, the reason being that this would require minimal change in legislation. Thus the Commission recommends certain changes to the African Marriages Act [cap. 238]. Firstly, that a section should be inserted in the Act requiring marriage officers to advise the parties of the nature of a civil or Christian marriage and the legal effect of such a union on their rights and duties. Secondly, that section 13 of the Act be repealed so that those couples marrying under the Marriages Act [cap. 37] and thus entering a civil or Christian marriage should have their property governed by the laws of Rhodesia and not according to African law and custom. Thirdly, that a section be inserted into the African Marriages Act in order that the payment of or agreement as to *lobolo* should not be necessary in regarding a marriage valid or in considering the custody and guardianship of children of a marriage. Fourthly, that a section should be inserted in the African Marriages Act to provide that on contracting a civil or Christian marriage according to the Marriage

<sup>8</sup> *Report of the Commission to Inquire into the Legal Status of African Women 1976* ([Salisbury, Church of the Province of Central Africa, Diocese of Mashonaland, 1977]), 1.

<sup>9</sup> *Ibid.*, 1.

<sup>10</sup> *Ibid.*, 17.

Act the African couple should have the same rights and duties before the law as their European counterpart. Fifthly, there should be an insertion of a section in the Act providing that, if a man contracts a potentially polygamous marriage according to the African Marriages Act and subsequently takes another wife according to a civil or Christian marriage while his first wife is still alive and the marriage is not dissolved, this subsequent marriage should be invalid. Sixthly, similarly if a man has contracted two or more valid polygamous marriages in terms of the African Marriages Act and then goes through a civil or Christian marriage with one of his wives or another woman while his polygamous wife or wives are still alive and his polygamous marriage(s) has not been dissolved, the civil marriage should not be valid.

Furthermore, in order to protect the African wife, whether she be married according to the Marriage Act or the African Marriages Act, the Commission recommend further amendments to the African Marriages Act. Firstly, that, if a husband of an actual or potentially polygamous marriage wishes to take another wife, he should obtain the consent of his existing wife or wives. Secondly, there should be an insertion of a section into the Act stating that no one has the right to inflict corporal punishment on his or her spouse. Thirdly, that a section should be inserted to provide that all divorces should be registered and that an appropriate alteration be made to the marriage certificate.

### CONCLUSION

While one can understand the necessity for these Commissions of Inquiry and acknowledge that they have taken care in the evaluation of evidence, there are certain deficiencies; one in particular acknowledged by all three Commissions is the lack of comprehensive research in their particular field and related fields. All three *Reports* stress the need for further research; this is required particularly in the socio-legal sphere where consultations with sociologists and social workers, for example, would prove useful in providing current sociological research findings relevant to these important aspects of family life in a rapidly changing society.

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