

**THE NEED FOR LEGISLATION TO REGULATE MARRIAGES CONTRACTED
UNDER CUSTOMARY LAW IN ZAMBIA**

By

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UNZA

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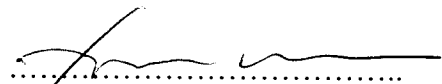
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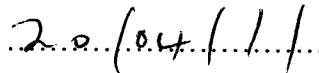
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Abstract

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Customary law regulates the largest section of the Zambian population. This is on the premise that the majority of Zambians are married under customary law. However, there is no statute codified to cover disputes that arise from marriages contracted under customary law in Zambia. The United Nations Committee on the Elimination of Discrimination against Women suggested that the government of Zambia study the possibility of codifying customary laws so that those found to be in violation of the Convention on the Elimination of Discrimination against Women could be reformed or abolished. It recommended that the customary marriage law be reformed so that customary marriages were registered, in order to give women married under that law equal rights and benefits with men. The aim of this essay was to discuss the need for legislation to regulate marriages contracted under customary law in Zambia. This was done by desk research, relevant published and unpublished literature were consulted which included case law as well as other pieces of legislation. The objective of the essay was to examine the need for legislation to regulate marriages contracted under customary law in Zambia in light of the fact that currently there is no statute codified to cover disputes that arise from marriages contracted under customary law in Zambia. From the research conducted, it was concluded that there are common customs and practices on marriage and divorce that are common to all the 73 ethnic groupings in Zambia, therefore it is possible to harmonize and codify them into statute. It was also found that most of these customs and practices do not promote universal human rights and are discriminatory towards women. It is recommended that there should be legislation to regulate marriages contracted under customary law as it will result in the integration of positive aspects of common customs and practices among the seventy three ethnic groupings in Zambia which will represent the values of the Zambian people through codification in statute. Once these values are codified there will be lesser chance of the culture of the Zambian people being lost. However it is important to note that certain customs and practices which have long been held to be fundamental to the Zambian marriage and divorce but have since become detrimental to the positive growth of the Zambian society may be removed.

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CHAPTER ONE

Introductory Chapter

1.1 Introduction

Zambia operates a dual legal system, which comprises the customary law of the indigenous people of Zambia and the received English law inherited from the British by virtue of colonization.¹ Customary law of Zambia comprises the indigenous people's traditions and customs received by oral transmission from their ancestor's. Many of the indigenous ethnic

groups were kingdoms that existed separately and independent in the pre-colonial era. The distinction in their customary laws is still evident but there is an apparent trend of copying from each other.² Before the arrival of the colonialist in Zambia, the laws that were applicable to the territory were indigenous customary laws. Colonization was merely a super-imposition of imported laws, legal systems as well as concepts of justice on an already existing and firmly established legal structure.³

African marriage should be considered in three of its most important aspects as outlined by professor Raddiff Brown; firstly that marriage involves some modification or partial rupture of the relationship between the bride and her immediate kin, and this is marked when the future husband moves to his future parents in laws home in order to be of service to them for a period of time. When a woman gets married to a man and leaves her family and goes and live with her husband and his kin, her own family suffer a loss of a member of the family. The marriage payment can be considered as an indemnity or compensation given by the bridegroom to the bride's kin for the loss of their daughter or her services. Secondly, the marriage gives the husband and his kin certain rights in relation to his wife and the children she bears. Thirdly, an

¹ Women and Law in Southern Africa-Zambia, The Changing Family in Zambia_(2001), Lusaka. Pg 98

² Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

³ A.N. Allott, The Future of African Law, (London: Butterworth, 1960), Pg 123

African marriage is not simply a union of a man and a woman, it is an alliance between two families.⁴

With regard to the legal frame work on the application of Customary Law in Zambia, section 12(1)⁵ of the Local Court Act provides that the Local Courts shall only administer African Customary Law in so far as it is not repugnant to equity, morality and good conscience. In the same vain, Section 16 of the Subordinate Court Act⁶ provides that the application of Customary Law shall not be repugnant to Justice and morality or by necessary implication contrary to any written law. Additionally, section 34 of the Marriage Act provides that, any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any African customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any African customary law, or in any manner apply to marriages so contracted.

In **Mwiya v.Mwiya**⁷, the High Court held that under Lozi custom, a husband is not compelled to share matrimonial property with his wife on divorce. The court further held that there is no Lozi custom which would compel a man to support for life a woman he has divorced. However some customs and practices are progressive. This was illustrated in **Chibwe v.Chibwe**⁸, where the Supreme Court held that the appellant was entitled to a share of the matrimonial property which decision was supported by the advise of the assessors who advised the Supreme Court that under the ‘Ushi custom’ a woman is entitled to a share of the matrimonial property upon divorce.

⁴ B. Radcliff & D. Ford, African Systems of Kinship and Marriage, (London: Oxford University Press, 1950), Pg 58

⁵ Local Court Act Chapter 29 of the Laws of Zambia

⁶ Subordinate Court Act Chapter 28 of the Laws of Zambia

⁷ (1977) ZR 113

⁸ (1978) ZR 45

1.1 Problem Statement

A good legal system has to possess certain attributes. One of the characteristics of a good legal system is that there has to be certainty and predictability. That is, one should be able to ascertain the likely outcome of the case by just looking at the facts. The need for certainty entails the need for several other attributes, such as, the law should be written down so as to ensure certainty. Additionally, the law should be comprehensive, that is to say, it must cover as much as possible all potential disputes.⁹

In Zambia, customary law which regulates the largest section of the population is not written down. This has led to a lot of inconsistency in the way disputes arising from marriages contracted under customary law are adjudicated upon by the courts of law in Zambia. There is no statute which is codified to cover all the potential disputes, in this regard, there is a very high possibility of uncertainty.

1.2 Objectives of the Research

The objective of the research paper is to examine the need for legislation to regulate marriages contracted under customary law in Zambia. This is in light of the fact that currently there is no statute codified to cover disputes that arise from marriages contracted under customary law in Zambia. To this extent heavy reliance is placed on assessors. Therefore the paper will also look at the common customary trends among the ethnic groups, whether or not they can be codified to come up with one customary law on marriages as is the case with civil marriages that are regulated by the Marriage Act¹⁰

1.3 Research Questions

(1) Is there need to have legislation that regulates marriages contracted under Customary Law in Zambia?

⁹M.Munalula, Legal Process: Zambia Cases, Legislation and Commentaries. (Lusaka: UNZA Press, 2004), Pg 5

¹⁰ Marriage Act Cap, 50 of the Laws of Zambia

- (2) How have the courts dealt with cases involving marriages contracted under customary law in Zambia?
- (3) Can common customs and practices among the ethnic grouping be harmonized to come up with one customary law on marriage in Zambia?

1.4 Methodology

The research will be both quantitative and qualitative in nature. Relevant published and unpublished literature will be consulted. Case law as well as other relevant pieces of legislation will also be consulted. Visitation to the relevant institutions will be conducted such as the Zambia law development commission. The internet will also be used as a source.

1.5 Rationale and Significance

The rationale and significance of this research paper stems from the fact that customary law regulates the largest section of the Zambians population. The Zambians society is dynamic; people are acquiring new values as a result of socialization. This is making customary law irrelevant to the new generation as they do not know about it or care to know about it .This is made worse by the fact that what is mostly published is the negative impact of customary law. Therefore, having legislation that regulates marriages contracted under customary will ensure development of customary law making it relevant to the needs of people in society .It will also serve as protection to those whose marriages are contracted under a particular custom in the sense that in case of a disputes, they can predict the outcome. It will also ensure certainty in the application of customary law as a legal system which is very important for every legal system.

1.6 Conclusion

Harmonization of common customary law principles among the 73 ethnic tribes of Zambia to This chapter merely introduces the research topic; the paper shall also discuss how the come up with legislation to regulate marriages contracted under customary law will cure the mischief of applying customs and practices that are not progressive as was illustrated in **Mwiya v Mwiya**. The paper will also look at some of the common practices among the various ethnic groups and

the impact of legislation to regulate marriages contracted under customary law on the people, the judiciary and the country.

CHAPTER TWO

CUSTOMARY LAWS ON MARRIAGE IN ZAMBIA

2.0 Introduction

In order to understand the laws relating to the dual system of marriage in Zambia, it is imperative to trace the historical background of the legal system from colonial period. The British policy in colonial Zambia was to retain indigenous institutions and avoid tempering with them.¹¹ From its very inception the system of judicial administration introduced by the British in Northern Rhodesia differentiated between Europeans and the native Africans due to the belief of white superiority over the natives.¹²

Section 14 of the Royal Charter of 29th October 1889, entrusting the administration of Rhodesia to the British Southern African Company referred to as the BSA Company authorized this differentiation but did not suggest its true dimensions.¹³ It stated that;

“in the administration of justice to the same people or inhabitants careful regard shall always be had to the customs and laws of class or tribe or national to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands, marriage, divorce legitimacy and other rights of property but subject to British laws which may be in force in any part of territories.”¹⁴

Allott rightly observed that:

“The arrival of the European colonial power brought a fundamental revolution in African legal arrangements, the results of which are with us to this day. The nature of the revolution varied somewhat with different colonial powers, but in general each power first introduced its legal system or some variant of it as the fundamental and general law of its territories and second permitted the regulated continuance of traditional African law and judicial institutions except where they ran counter to the demands of colonial administration or were thought repugnant to ‘civilized’ ideas of justice and humanity”¹⁵

¹¹ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

¹² J .Allot, ' The need for study of Native law' Journal of African law vol 1(1957), pg 82

¹³ B. Radcliff & D. Ford, African Systems of Kinship and Marriage, (London: Oxford University Press, 1950), Pg 58

¹⁴ A. Elley, ' Recognition of Native law and Custom' Journal of Comparative studies: vol 20(1937), Pg 16

¹⁵ J .Allot, ' The need for study of Native Law' Journal of African law: vol 1(1957), pg 46

1911 is an important year in the legal history of Northern Rhodesia (now Zambia). By the English law extent of application ordinance 1963, it stipulated that the common law, the doctrines of equity, and all statutes which were in force in England on 17th August, 1911 and any statute of later date in force in England were applicable to Zambia.¹⁶

With specific reference to customary law marriages, the British courts were to recognize these as valid only at customary law. As for the white settlers, the only valid marriages were those conducted under their English laws. Thus two distinct systems of judicial administration developed.¹⁷

The dual system of laws was carried over after independence, with Local Courts administering over disputes arising from marriages contracted under customary law, while the High Court administers over disputes arising from statutory marriages.

2.1 The Legal Frame Work for Marriages Contracted Under Customary Law in

Zambia

Customary Law regulates the largest section of the Zambian population. This is on the premise that the majority of Zambians are married under Customary Law.¹⁸ However, there is no statute codified to cover disputes that arise from marriages contracted under customary law in Zambia. To this extent heavy reliance is placed on assessors.¹⁹ With regard to the legal framework on the application of customary laws in Zambia, the Marriage Act²⁰ recognizes marriages contracted under customary law by implication. Section 34 of this Act provides that,

any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any African customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any African customary law, or in any manner apply to marriages so contracted.

¹⁶ A.N. Allott, *The future of African law* (London: Butterworth, 1960) Pg 132

¹⁷ E. Colson, *Marriage and the Family among the Plateau Tonga of Northern Rhodesia* (Manchester: Manchester University Press, 1958) Pg 34

¹⁸ *Women and Law in Southern Africa-Zambia, The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 98

¹⁹ *Women in Zambia*, <http://www.our-zambia.com/16.html>

²⁰ The Marriage Act Chapter 50 of the laws of Zambia

In addition, Part VII of the Marriage Act on offences and penalties, under section 38 provides that any person who;

- (a) contracts a marriage under this Act, being at the time married in accordance with African customary law to any person other than the person with whom such marriage is contracted;
 - (b) having contracted a marriage under this Act, during the continuance of such marriage contracts a marriage in accordance with African customary law;
- shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five years:
Contracting marriage under this Act when married in African customary law or contracting marriage in African customary law when married under this Act.

With regard to application of customary law by the courts, Section 12.1(a)²¹ of the Local Court Act provides that;

Subject to the provisions of this Act, a local court shall administer African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

Section 16 of the Subordinate Court Act²² provides that;

Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law.

Customary Law regulates the largest section of the Zambian population.²³ However, because it is not written down, and there is no statute to regulate marriages contracted under customary law, there is a lot of inconsistency in the way that disputes arising from marriages contracted under customary law are adjudicated upon by the courts of law. Two similar cases will be decided upon

²¹ Local Court Act, Chapter 29 of the Laws of Zambia

²² The Subordinate Court Act, Chapter 28 of the Laws of Zambia

²³ Women in Zambia, <http://www.our-zambia.com/16.html>

differently depending on the ethnic tribes of the parties involved and the particular custom or traditional practice they were married under.²⁴ In addition, customs and practices that are bad are given effect provided in the opinion of the Judge sitting with or without assessors, application of that particular custom or practice is not repugnant to natural justice, equity, good conscience or any written Law. In **Kaniki v. Jairos**²⁵, the case was referred to the High Court by the Resident Magistrate with a request that the High Court should review the Judgment which he had delivered. This was in a matter in which Beluti Kaniki appealed against the decision of the Resident Magistrate on which he had held in favour of Lot Jairus suing on behalf of the dead husband that the appellant should pay twelve pounds damages and one pound hearing fee to her late husband's relatives. She appealed on the ground that the compensation awarded was too high. The case concerned 'LaLa' customary law in particular a custom known as 'Akamutwe', which apparently exists in various forms amongst a number of tribes in Zambia. It relates to certain consequences which ensue upon the death of a spouse in particular to the payment of compensation by relatives of the surviving spouse to relatives of the deceased spouse. Such payments are made either upon a notional concept of the responsibility of the surviving spouse for the deceased spouses death, or as a means of purifying or releasing the surviving spouse from the deceased spouses spirit so that the surviving spouse is free to marry again. It seemed to have been accepted by the parties that compensation was properly payable but they could not agree on the quantum.

Jairus sued on behalf of the relatives of the dead husband and obtained judgment against the appellant. The appellant appealed against this decision to the Subordinate Court on the ground that the compensation awarded was too much. The Resident Magistrate after reviewing the history of the case and referring to various aspects of the customary law came to the conclusion that the custom itself was repugnant to natural justice and therefore could not be enforced in a court of law. When the matter went to the High Court, it held that, the Learned Resident Magistrates omission to have referred to the contents of the native department circular²⁶

²⁴Women and Law in Southern Africa-Zambia, The Changing Family in Zambia (Lusaka: Government Printers, 2001) Pg 109

²⁵ (1977) ZR 67

²⁶ Native Department Circular No. 2 of 20th May 1964.

properly proved in evidence before him as a technicality on the material including the circular before him, the Learned Resident Magistrate could have come to the conclusion that the compulsory observance of the Akamutwe custom and its actual enforcement was contrary to natural justice, even though its voluntary observance might not be.

To prevent the local courts from giving effect to traditional practices that are not progressive, the legislative arm of government should enact statute to regulate marriages contracted under Customary Law as is the case with statutory marriages that are regulated by the Matrimonial Causes Act²⁷ and the Marriage Act²⁸ respectively.

2.1 How the Courts have Dealt with Disputes Arising from Marriages Contracted under

Customary Law in Zambia

As earlier alluded to, Zambia operates a dual legal system. This allows the courts to administer customary law side by side with English law. Section 12(1)²⁹ of the Local Court Act and Section 16 of the Subordinate Court Act³⁰ give the court power to administer customary law over matrimonial disputes in marriages contracted under customary law in Zambia provided the custom or practice in question is not repugnant to natural justice, equity, good conscience and any written law.

In administering customary law over disputes arising from marriages contracted under customary law, the court of appeal held that customary law should be proved as a fact before the superior courts. This was discussed in **Chitambala v. R**³¹ where the court of appeal held that native law and custom must be a matter of proof in all cases in which it is claimed. Somerhough J said:

²⁷ Matrimonial Causes Act, No. 20 of 2007

²⁸ Marriage Act Chapter 50 of the laws of Zambia

²⁹ The Local Court Act, Chapter 29 of the Laws of Zambia

³⁰ The Subordinate Court Act, Chapter 89 of the Laws of Zambia

³¹ (1961) 4 N.R.L.R. 29

“Native customary law in my view is more or less in the same position as foreign law and it must be established by an expert before courts other than the native courts.”³²

In administering customary law over disputes arising from marriages contracted under customary law, the courts make use of assessors. Assessors are provided for under section 61 of the Local Court Act³³ which provides that, any local court, or any other court before which a case from a local court has been ordered to be tried or retried, or which has before it for revision a case from a local court or to which an appeal has been made from a local court, or any authorized officer in the exercise of his powers under section fifty four may in dealing with any such matters, require the assistance of assessors and make use of such assessors as advisers on matters of African Customary Law as may be necessary. An assessor is a person who is very conversant with the traditions, customs and practices of his/her ethnic tribe.³⁴ In **Chibwe v. Chibwe**³⁵, the husband sued the appellant for divorce before the local court for adultery and unreasonable behavior. The appellant appealed to the subordinate court on grounds that the lower court dissolved the marriage on un established grounds and that they did not address the question of maintenance and property adjustment. The Subordinate Court sat with assessors in Ushi customary law, and held that the appeal was without merit. The appellant appealed to the High Court. The trial commissioner ruled that the respondent had to pay a lump sum of K10, 000,000 for maintenance and property adjustment with interest, as the appeal was not against divorce in principle. The appellant appealed against the decision of the learned trial commissioner. The Supreme Court held that the learned trial commissioner misdirected himself in awarding only a lump sum of K10, 000,000. for maintenance and property adjustment and instead ordered that the respondent was to transfer one viable income generating property, a lump sum of money and meet all educational expenses of the five children of the family.

³² (1961) 4 N.R.L.R. 29

³³ The Local Court Act, Chapter 29 of the Laws of Zambia

³⁴ Marriage in Zambia, www.ozambia.com, last viewed on 20th April 2010

³⁵ (1978) ZR 45

The above case illustrates that not all customs and traditional practices pertaining to marriages contracted under customary law are detrimental to the well being of society. This is so because the Ushi traditional custom the parties were married under recognizes the importance of a woman getting a share of the matrimonial property on divorce.

In contrast, in **Mwiya v. Mwiya**³⁶, the appellant appealed against the decision of Mulobezi Local Court which granted divorce and ordered that she be given K10, to the Subordinate Court which dismissed the appeal. The applicant then appealed to the High Court on the following grounds (1) she could not produce children, (2) she had stayed with her husband for too long and since she had stopped giving birth because of him, who was going to keep her, (3) she was asking the court to order the respondent to keep her and share property, (4) she wanted her husband to support her through out her life. She further submitted that according to Lozi custom the respondent was supposed to look after her, through out her life. The respondent submitted on the sharing of property that he had given her almost three quarters of the items. He further contended that it was not Lozi custom to support a wife after divorce. The questions before the High Court were: (1) does Lozi custom compel the sharing of property acquired during existence of marriage upon divorce? (2) does Lozi custom compel a husband to support his divorced wife through out her life? (3) does Lozi custom compel the husband to take on the wife he has divorced.

Regarding the first question, the assessors were unanimous in their opinion that there is no Lozi custom which compels a husband to share property. The assessors were agreed that if the husband so wished, he may share the property but he is not bound by custom. The judge concluded on this point by stating that on this question he found no reason to differ with the assessors' opinion on the Lozi custom. Turning to the question of whether there is a Lozi custom which would compel a man to support for life a woman he has divorced, the assessors were also unanimous on this question that there is no such Lozi custom. Again the learned Judge held that he found no reason to differ with their opinion. Turning to the third question the learned Judge held that, marriage is an agreement. Like any agreement the parties to it must be willing. The learned Judge further held that he could not envisage a custom compelling parties who do not

³⁶ (1977) ZR 113

want to stay together to take on each other. Again the assessors were unanimous that there is no such Lozi custom and the learned Judge held that he found no basis to hold a contrary view. The learned Judge further held that he was satisfied on record of the appeal that the respondent Alex Mwiya shared his property with his wife when they divorced. He therefore dismissed the appeal and upheld the decisions of both Mulobezi Local Court as well as that of the Senior Resident Magistrate.

The above cases illustrate that in administering customary law over disputes arising from marriages contracted under customary law, the courts will first and foremost look at the custom or traditional practices under which the parties were married. The court will then give effect to the custom or traditional practice in question provided application of that custom or tradition in the opinion of the court is not repugnant to equity, good conscience, natural law and any written law. Further more, the above cases illustrate that two cases with similar facts will be decided upon differently depending on the custom or traditional practice that the parties were married under.

In administering customary law over matrimonial disputes pertaining to marriages contracted under customary law in Zambia, the courts have strived to give effect to the customs and traditions the parties are married under provided application of the particular custom is not repugnant to justice, equity, good conscience and any written law.³⁷ In **Mwiba v. Mwiba**³⁸, the petitioner married under the Rhodesian African marriages Act, Cap 105. The Learned Judge found as a fact that this was a marriage contracted under the African customary law and was therefore potentially polygamous. The petitioner had instituted divorce proceedings under the Matrimonial Causes Act, 1973 on the ground that the marriage had broken down irretrievably. The High Court held that it had no jurisdiction over potentially polygamous marriages. It could only dissolve monogamous marriages following the practice for the time being prevailing in England.

³⁷Women in Zambia, <http://www.our-zambia.com/16.html>

³⁸ (1980) ZR 175

The above case illustrates that customary law marriages are potentially polygamous in nature. When one is married under customary law, they cannot argue to say they want the marriage to remain monogamous. The case also illustrates that disputes arising from marriages contracted under customary law are adjudicated upon first by the local courts and are only heard in the higher courts such as the Subordinate Court, the High Court and the Supreme Court on appeal.

A good legal system has to possess certain attributes. One of the characteristics of a good legal system is that there has to be certainty and predictability. That is, one should be able to ascertain the likely outcome of the case by just looking at the facts.³⁹ The need for certainty entails the need for several other attributes, among other things the law should be written down so as to ensure certainty. Additionally, the law should be comprehensive, that is to say, all the potential problems must be covered by the law.⁴⁰

Customary law is not written down; this has resulted in it being stagnant. In addition, the fact that it is passed on from generation to generation has resulted in it not developing with the development of society therefore making it irrelevant to the needs of the people in society.⁴¹ The courts are forced to give effect to customs and traditional practices that are irrelevant to the needs of society provided that, the application of that particular custom or traditional practice is not repugnant to justice, equity, good conscience, morality or any written law in force in Zambia.⁴²

CONCLUSION

This chapter has examined customary laws on marriage in Zambia by looking at section 12(1) of the Local Court Act, section 16 of the Subordinate Court Act and section 34 and 38 of the Marriage Act respectively in establishing the legal framework for marriages contracted under customary law in Zambia. The chapter has also examined how the courts have been adjudicating upon disputes arising out of marriages contracted under customary law in Zambia. This was done

³⁹ Women and Law in Southern Africa-Zambia, *The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 104

⁴⁰ M. Munalula, *Legal Process: Zambia Cases, Legislation and Commentaries*. (Lusaka: UNZA Press, 2004), Pg 29

⁴¹ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

⁴² J .Allot, 'The need for study of Native ' *Journal of African law* vol 1(1957), pg 67

by looking at the dual legal system. With regard to the legal framework on the application of customary laws in Zambia, section 12 (1) of the Local Court Act and section 16 of the Subordinate Court Act gives the Local Courts and the Subordinate Courts respectively authority to administer customary law over disputes arising from marriages contracted under customary law in Zambia, provided that the application of that custom or practice is not repugnant to justice, equity, good conscience and any written law.

In adjudicating over matrimonial disputes arising from marriages contracted under customary law in Zambia, the Local Courts by virtue of section 61 and the Subordinate Courts by virtue of section 8, may make use of assessors even though the advise given by the assessor is not binding on the court. But the court is at liberty to determine whether giving effect to a particular custom is or is not repugnant to equity, good conscience, justice morality and any written law. If in the determination of the court, the custom is repugnant, the court is at liberty not to give effect to that particular custom. This has been the reason why there have been a lot of uncertainties in the way that disputes arising from marriages contracted under customary law administered upon by the courts of law. Zambia has seventy three ethnic groupings each with their own traditions and customs and the courts are expected to give effect to these traditions and practices and at the same time ensure that in doing so, they do not give effects to customs and practices that are repugnant to natural justice, equity, good conscience and any written law.

CHAPTER 3

HARMONIZATION AND CODIFICATION OF CUSTOMARY LAWS

ON MARRIAGE IN ZAMBIA

3.0 Introduction

Zambia operates a dual legal system. This comprises the customary law of the indigenous peoples of Zambia and the received English Law inherited from the British by virtue of colonization. Customary law of Zambia comprises the indigenous people's traditions and customs received by oral transmission from their ancestors. Many of the indigenous ethnic groups were kingdoms that existed separately and independently in the pre-colonial era. The distinctions in their customary laws are still evident but there is an apparent trend of copying from each other.⁴³

Some of the common features among the seventy three ethnic groupings in Zambia include; capacity to marry. Personal capacity is concerned with a person's qualification to marry. The marriage will be void if the parties to it lack the capacity to contract it. Capacity to marry involves such aspects as a person's age, physical and mental conditions, puberty ceremony and marital status.⁴⁴ In Zambia, there is little variation as to the customary age for marriage that is, at puberty a girl is considered ready for marriage, with some ethnic groupings delaying the marrying off of the girl in order to give her a chance to go to school and finish her school.⁴⁵ In the case of **R v. Chinjamba**⁴⁶, a villager Fulai Njamba, married a girl under the age of sixteen years, and lived with her as man and wife. The accused, who was the village head man, knew of these facts and took no steps to prevent or report the matter. He was charged with being an

⁴³ Radcliffe-Brown and F Daryll, *African Systems of Kingship and Marriage*. (London: Oxford University Press, 1982), Pg 50

⁴⁴ A. Phillips and H. Morris, *Marriage Laws in Africa*. (London: oxford University Press, 1971), Pg 6

⁴⁵ E. Colson, *Marriage and Family among the Tonga's of Northern Rhodesia*. (Lusaka: UNZA Press, 1967) Pg 302

⁴⁶ (1948) NRLR 109

accessory after the fact to unlawful carnal knowledge of a girl under the age of sixteen years, and convicted. The accused's answer to the charge was: "I admit am the headman. I know I have a duty to prevent or report crime, I admit that I knew that Fulai Njamba had married a girl under sixteen years of age at my village and was having carnal knowledge of her and I did nothing to intervene or report to any authority this fact." The Ndola High Court held that this did not amount to a plea of guilty if at the time when the carnal knowledge took place there was a valid marriage subsisting between Fulai Njamba and the girl in question according to native customary law. The carnal knowledge must be unlawful and it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married.

This case illustrates that once a girl comes of age she is considered ready for marriage even if she is still very young. It also illustrates that the courts in Zambia recognize as valid customary law marriages in which the girl is actually a minor.

The boy is also considered mature and ready for marriage upon reaching puberty.⁴⁷ The marital status of the man does not influence his capacity of contracting a marriage because customary law marriages in Zambia are potentially polygamous in nature and as such a man can validly marry more than one wife. This was illustrated in **Mwiba v. Mwiba**⁴⁸, where the petitioner married under the Rhodesian African marriages Act, Cap 105. The learned Judge found as a fact this was a marriage contracted under the African customary law and was therefore potentially polygamous. The petitioner had instituted the proceedings under the Matrimonial Causes Act, 1973 on the ground that the marriage had broken down irretrievably. The High Court held that it had no jurisdiction over potentially polygamous marriages. It could only dissolve monogamous marriages following the practice for the time being prevailing in England.

This case illustrates that customary law marriages are polygamous in nature. It does not matter that one of the parties to the marriage does not want to be in a polygamous marriage. The very fact that they are married under customary law means that when the husband decides to take on a second wife, the marriage will be recognized as valid under customary law. The position differs

⁴⁷ E. Colson, *Marriage and Family among the Tonga's of Northern Rhodesia*. (Lusaka: UNZA Press, 1967) Pg 304

⁴⁸ (1980) ZR 175

when it comes to statutory marriages, where if the parties are married under the Marriage Act, if one of the parties decides to contract another marriage while the other one is still subsisting, they will be considered to have committed a criminal offence punishable under the marriage Act as well as the penal code.

A woman on the other hand must be single to contract a valid marriage; having more than one husband is not permitted among the 73 ethnic groupings in Zambia.⁴⁹

With regard to consent of parents, in the past it was consent of the parents rather than of the boy or girl that counted. In the case of **Muyamwa v. Muyamwa**⁵⁰, the parties to the marriage went through a form of ceremony of marriage before a Registrar at the Lusaka Boma. Thereafter the parties cohabited for about six years and three children were born to the marriage. The parties testified that shortly before the ceremony at the Boma they had been married under customary law. The petitioner was then aged 18 years and the respondent aged 23 years. The petitioner's father was dead and she did not have the written consent of her mother to the marriage as required by section 17 of the marriage Act, Cap 211. Neither party gave notice of the intended marriage on the prescribed form to the Registrar as required by section 6 of the marriage Act. Further the Registrar did not apparently issue any certificate under section 10 of the Marriage Act. Two witnesses attended the ceremony at the Boma, one of them being the petitioner's mother. The petitioner prayed for a declaratory decree of nullity. The High Court held that even if the petitioner did not have written consent, the presence of her mother at the marriage ceremony was consent enough to validate the marriage. Even now in all the seventy three ethnic groups in Zambia consent of the parents is required.⁵¹

The above case illustrates that where parties are married under customary law, it's not the consent of the parties to the marriage that is cardinal but that of the parents to validate the marriage.

⁴⁹S. Zimba, *The Legal Position of Women under Customary Law*, SJD Thesis, unpublished, 1982

⁵⁰ (1976) ZR 146

⁵¹ A. Phillips and H. Morris, *Marriage Laws in Africa*. (London: oxford University Press, 1971), Pg 55

3.1 Harmonization and Codification of Customary Laws on marriage in Zambia

Traditional marriages involve a multitude of acts and payments to be completed. Among the Bemba's for instance it is marked by the young man becoming incorporated in his wife's family matrilocal residence and by exchange of services, food and general support.⁵²

The first step towards the marriage is usually a formal betrothal, this may have been preceded by a period of courtship. The betrothal may take place during the childhood of both parties if the parents of both should decide to do so, this is known as child betrothal.⁵³ However, nowadays the young man chooses his bride. There is, to begin with, the initial formal approach whereby the man's family ascertains from the woman's family whether the prospect of marriage is good. Consequently the first formal approach and subsequent negotiations must be conducted through an intermediary, a disinterested third party (preferably an elderly man) who establishes a contract between the families and who acts as a go in between and principle witness right through the marriage preliminaries even after the marriage has been concluded. His functions are indispensable in all the ethnic groupings in Zambia.⁵⁴

The initial marriage proposal is made through intermediary by way of a tangible gift or token in which the proposal is made.⁵⁵ Therefore at this initial stage, a small payment which is known as the betrothal payment (cha mulolo, insalamu and so on) is made by the man's side to operate as the mouth opener of the girls kin so that they can join in the discussions for the marriage proposal. This payment is quite small and is nowadays paid in money. Among the Tonga's for instance a hoe or a spear was used, among the Bemba's a copper wire bracelet placed and covered in two white plates was used. This payment is returned if the parents of the girl refuse

⁵² Radcliffe-Brown and F Daryll, *African Systems of Kingship and Marriage*. (London: Oxford University Press, 1982), Pg 67

⁵³ *Women and Law in Southern Africa-Zambia, The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 55

⁵⁴ A. Phillips and H. Morris, *Marriage Laws in Africa*. (London: oxford University Press, 1971), Pg 10

⁵⁵ *Marriage in Zambia*, www.our-zambia.com, last viewed on 20th April 2010

the proposal. If accepted it means that they have agreed to the initial proposal but this does not bind either party seriously.⁵⁶

The next procedure among the Ngoni's and Tonga's respectively is the payment of the bride price commonly called as lobola, mpango, cimalo, muyumusho etc. Educated people prefer to leave out most of the rituals but the bride price. This is of paramount importance because it validates the marriage. The rationale behind payment of bride price is that the husband has to pay something that will symbolize his appreciation for the invaluable human being that he is going to live with.⁵⁷ In Bemba customary law it is the biggest payment of them all and is called 'ukwimana' it shows that the man has at that stage married the woman and the other men should be aware, this payment is for the husbands' rights over the children of the marriage.⁵⁸ The acceptance of this bride price by the woman's kin prima-facie legalizes the marriage union, conversely the non payment of the bride price will invalidate the marriage.⁵⁹

After the marriage has been contracted there exist certain rights and duties that have to be exercised between the husband and the wife. Husband is regarded as the head of the family and the provider of necessities needed by the family. The wife is subservient to the husband; she takes care of the husband and the home. Each spouse owes the other a duty to consummate the marriage.⁶⁰

The grounds of divorce under customary law among the 73 ethnic groupings in Zambia are not limited and the seriousness differs from tribe to tribe but the common ones are;

- (1) **Bareness/impotence**, since procreation is an essential element of a marriage under African customary law and the most important value of a woman is her child bearing capacity; the failure to conceive may be a ground of divorce. So customary

⁵⁶ E. Colson, Marriage and Family among the Tonga's of Northern Rhodesia. (Lusaka: UNZA Press, 1967) Pg 26

⁵⁷ Women and Law in Southern Africa- Zambia, The Changing Family in Zambia. (Lusaka: Zambia Press, 2001), p 23

⁵⁸ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

⁵⁹ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

⁶⁰ A Phillips and H. Morris, Marriage Laws in Africa. (London: oxford University Press, 1971), Pg. 78

law interprets this as a failure to perform the most fundamental condition of the marriage contract.⁶¹

(2) **Adultery** by the wife is regarded more seriously as a ground for divorce as it is an injury to the man's integrity. It is stated that this ground extends to other acts of misconduct short of adultery such as the touching of a woman's waist beads. Damages and compensation is due to the husband of the wife against whom the atrocities were committed.⁶²

(3) **Desertion** on the part of the husband or wife if the period is unnecessarily long. When a woman deserts her husband in favour of another man or returns to her family, the return of the marriage price or bride price should arise.⁶³ However there is no prescribed period beyond which divorce will be easily granted. So it is left to the court to decide what length of time would merit granting a divorce. If it's the husband who is guilty of deserting the wife he forfeits the right to claim the bride price.⁶⁴

(4) **Laziness** – laziness is not strictly a ground of divorce. The common practice among various ethnic tribes in Zambia is that when a woman is lazy she will be sent to her relatives for correction.⁶⁵ A lazy, disobedient or quarrelsome wife will be returned to her parents for a period of correction and returned when she had reformed. But if there is no sign of improvement and her behavior is a constant source of disturbance, the husband may seek divorce.⁶⁶

⁶¹ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

⁶² Radcliffe-Brown and F Daryll, *African Systems of Kingship and Marriage*. (London: Oxford University Press, 1982), Pg 77

⁶³ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

⁶⁴ H. Madungu, *African Conference on Local Courts and Customary Laws in Africa*, (Dar-est- salaam: Tanganyika, 1963) Pg 109

⁶⁵ *Women and Law in Southern Africa- Zambia, The Changing Family in Zambia*. (Lusaka: Zambia Press, 2001), p 41

⁶⁶ E. Colson, *Marriage and Family among the Tonga's of Northern Rhodesia*. (Lusaka: UNZA Press, 1967) Pg 32

- (5) **Negligence**- willful refusal by the husband to maintain his wife and the children and neglect thereof, if proved to the satisfaction of the arbitrators or the courts, divorce may be granted. If the wife is in the wrong the husband will seek the return of the bride price but if the husband is the guilty party he will be held to have forfeited his right to have the bride price back.⁶⁷
- (6) **Cruelty**- where a husband beats his wife frequently without a proper reason or without cause she can plead cruelty as a ground of divorce guilty.⁶⁸
- (7) **Witchcraft** – proof that the wife or husband practices witchcraft constitutes a good ground upon which either spouse may seek divorce or dissolution of the marriage.⁶⁹
- (8) **Incompatibility**- between the parties to the marriage leading to the general break down of the marriage is a ground for divorce. The parties would find it difficult to live together and compromise on most matters.⁷⁰

The above are some of the grounds upon which a divorce suit may be based. As regards custody of children in patrilineal society such as that of the Ngoni's for instance children belong to the father, while in the matrilineal society custody of the children is given to the mother on divorce. It is imperative to state that most ethnic groupings in Zambia are patrilineal.⁷¹

⁶⁷ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

⁶⁸ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

⁶⁹ Radcliffe-Brown and F Daryll, *African Systems of Kingship and Marriage*. (London: Oxford University Press, 1982), Pg 55

⁷⁰ A Phillips and H. Morris, *Marriage Laws in Africa*. (London: oxford University Press, 1971), Pg 87

⁷¹ A Phillips and H. Morris, *Marriage Laws in Africa*. (London: oxford University Press, 1971), Pg 87

3.1 Is There Need to Have Legislation to Regulate Matrimonial Causes under Customary

Law in Zambia

Customary law in Zambia regulates the largest section of the Zambian population. Therefore having legislation that regulates marriages contracted under customary law will benefit the majority of Zambians especially women due to a number of reasons; firstly customary law marriages are potentially polygamous in nature. According to Arthur Phillips,

‘The potentially polygamous nature of the customary marriage which is practised by most Zambian tribes is the reason why the cases of adultery in Zambia are high. This is because of the combination in most cases today of the customary and statutory marriages which causes a resulting conflict as there is a tendency to ignore the provisions of statute regarding the exclusivity of the marriage. In addition, the views of a woman’s right to divorce an adulterous man as flimsy ground in customary law marriages has some what discriminatory undertones in that it favours the man’s wrong action and places women in a subordinate position. Polygamy reflects and at the same time intensifies the fundamental inequality between the sexes which appear to be typical of African social systems. It can be hardly denied that the institution of polygamy is normally associated with a social system where there is unchallenged male dominance.’⁷²

This point is further supported by the decision of the High Court in **Mwiba v. Mwiba**, where the High Court held that it had no jurisdiction over potentially polygamous marriages.

Secondly, under customary law, divorce is a matter to be settled by the two families concerned and dissolution of marriage usually entails the return of part or all of the lobola or bride price. There is no need to have recourse to the court unless the parties cannot agree about settlement of the bride price.⁷³ T.W. Bennet in his book on the application of customary law stated that;

‘The woman is often powerless to affect her own divorce. This reflects the subordinate position of the woman as she would have no part to play in negotiating the return of the bride price in the event of a divorce or the guardianship of the children because this is her guardians function as representative of the family.’⁷⁴

Thirdly, it is argued that bride price also undermines the status of women under customary law in relation to divorce. In most tribes, the bride price must be returned by

⁷² A. Phillips, *Marriage Laws in Africa*, (London: Oxford University Press, 1971), Pg 6

⁷³ T. W .Bennet, *The Application of Customary Law in Africa*, (Cape town: Juta and Company, 1985), Pg 160

⁷⁴ T. W .Bennet, *The Application of Customary Law in Africa*, (Cape town: Juta and Company, 1985), Pg 160

the woman's relatives upon dissolution of the marriage.⁷⁵ This therefore means that the woman has to seek her parents consent to dissolve the marriage. Even where the woman is in a position to pay back the bride price, she must still obtain the consent of her parents or guardians. Customary law therefore discriminates against women in denying them the right to terminate their marriage in their own right.⁷⁶

Fourthly, women married under customary law are entitled to maintenance during the marriage not after divorce. This was illustrated in **Mwiya v. Mwiya**⁷⁷, where the High Court held that under Lozi custom, a husband is not compelled to share matrimonial property with his wife on divorce. The court further held that there is no Lozi custom which would compel a man to support for life a woman he has divorced. In contrast, in **Chibwe v Chibwe**⁷⁸, the parties were married under 'Ushi' customary law and upon dissolution of the marriage the Supreme Court held that the woman was entitled to reasonable maintenance and a share of the property acquired during the subsistence of the marriage. The action which commenced in the Local Court went all the way to the Supreme Court on appeal.

The integration of the positive aspects of customary law into statutory law will result in direct representation of the values of the people through codification in statute.⁷⁹ Once these customs and traditions are codified, there is a lesser chance of the culture of the people being lost.⁸⁰ They may however be a disadvantage in that certain customs and practices which have long been fundamental to the African marriage and divorce laws

⁷⁵ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

⁷⁶ J. Steward and A. Armstrong, *The Legal Situation of Women in Africa*, (Harare: University of Zimbabwe Publication, 1990), Pg 149

⁷⁷ (1977) ZR 113

⁷⁸ (1978) ZR 45

⁷⁹ *Women and Law in Southern Africa- Zambia, The Changing Family in Zambia*. (Lusaka: Zambia Press, 2001), p 47

⁸⁰ *Women and Law in Southern Africa- Zambia, The Changing Family in Zambia*. (Lusaka: Zambia Press, 2001), p 47

which have since become detrimental to the positive growth of society due to the dynamism of society may be removed thus resulting in a cultural shock.⁸¹

Removal of repugnant practices may be advantageous to the international status of Zambia as a whole if it is done in line with international instrument's that promote human rights such as the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) which Zambia has ratified.⁸² Article 16 (1) of this convention provides that all state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on the basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right to freely choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibly during the marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount;
- (e) The same right to decide freely and responsibly on the number and spacing of children and to have access to information, education and the means to enable them exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interest of the children shall be paramount;
- (g) The same personal rights as husband and wife including the right to choose a family name, profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

⁸¹ Radcliff-Brown and Darryl Ford, *African systems of kinship and marriage*, (London: Oxford University Press, 1950) page 69

⁸² Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

In addition, if common marriage customs among the various ethnic grouping in Zambia are enacted in to law, the court system in existence can be done away with by which certain cases are relegated to the local courts and can only be head by the higher courts on appeal. This will therefore allow every one a right to be head in the higher courts of law.⁸³

3.2 Conclusion

This chapter examined firstly whether common customs and practices among the various ethnic groupings in Zambia can be harmonized in a bid to come up with a single legislation to regulate marriages contracted under customary law in Zambia. It is submitted that after examining some of the common customs and practices among the various ethnic groupings in Zambia, it is possible to harmonize and codify these common customs and practices to come up with one statute on marriage customary laws in Zambia. The chapter also examined whether there is need to have legislation to regulate marriages contracted under customary law. It is submitted that from the arguments advanced, having legislation to regulate marriages contracted under customary law in Zambia will result in progressive customs and practices on marriage among the 73 ethnic groupings being codified into statute. This will result in direct representation of the values of the people therefore preserving the culture of the Zambian people. Also the grounds for divorce will be the same for both men and women married under customary law. They may however be a disadvantage in that certain customs and practices which have long been held fundamental to the Zambian customary marriage laws and divorce but have since become detrimental to the positive growth of the Zambian society due to dynamism of society will be lost and this will result in cultural shock. The next chapter discusses the effects of having legislation that regulates marriages contracted under customary law on the courts of law in administering customary law over disputes that arise in marriages contracted under customary law and also the effect on the development of customary law and society as a whole.

⁸³ . Colson, Marriage and the Family among the Plateau Tonga of Northern Rhodesia (Manchester: Manchester University Press, 1958) Pg 167

CHAPTER FOUR

The Administration by the Courts of Customary Laws on Marriage in Zambia

4.0 Introduction

In order to understand the administration of marriage customary laws by the courts in Zambia, it is imperative to trace the historical background of the legal system from colonial period.⁸⁴ The British policy in colonial Zambia was to retain indigenous institutions and avoid tempering with them. The BSA Company Charter specifically provided in section 14 that,

‘In the administration of justice to the same people or inhabitants careful regard shall always be had to the custom and laws of class or tribe or national to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and marriage, divorce legitimacy and other rights of property but subject to the British laws which may be in force in any part of the territories.’⁸⁵

Although colonial authorities both here and elsewhere in Africa were prepared to tolerate customary law, they would not enforce rules that might offend European standards of morality and justice.⁸⁶ The British colonial policy in regard to customary marriages was summed up by Professor Phillips, who said,

‘Hitherto, the predominant tendency of government has been to avoid, as far as possible, any interference with the traditional pattern of domestic relations and to limit the intrusion of external authority into this sphere to matters which involve, not merely a conflict with European ideas and codes of behavior, but a violation of the universal precepts of justice and morality.’⁸⁷

The first part of this chapter discusses the administration of customary laws by the courts from colonial period to date. The second part of this chapter will discuss the effects of legislation to regulate marriages contracted under customary law on the development of customary law in Zambia.

⁸⁴ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

⁸⁵ B. Radcliff & D. Ford, *African Systems of Kinship and Marriage*, (London: Oxford University Press, 1950), Pg 58

⁸⁶ T. W .Bennet, *The Application of Customary Law in Africa*, (Cape town: Juta and Company, 1985), Pg 160

⁸⁷ J. Anderson, *Family Law in Asia and Africa*, (London: Allen & Unwin Ltd, 1968), Pg 23

4.1 How the Courts have been Administering Customary Law on Disputes Arising from Marriages Contracted under Customary Law in Zambia

The British administration had in effect expressly given recognition to customary marriages under section 14 of the Royal Charter subject to the repugnancy principle, but in addition made provisions for persons who were previously subject to the customary law to marry under the enactment providing for an English type of marriage in the hope that the existence side by side of the two systems would gradually influence African public opinion and that through education and missionary influence, the monogamous type of marriage would finally prevail.⁸⁸

*Zambia was divided into North Western Rhodesia and North Eastern Rhodesia respectively. Article 9 of the Barotseland North Western Rhodesia Order in Council of 1899 established a judicial system which provided for the appointment of Judges and Magistrates and English law was to apply except where other wise stated.*⁸⁹ *The North Eastern Rhodesia order in Council of 1900 established a more elaborate system than the North Western Rhodesia order in Council. It provided that,*

*'In civil cases between natives, the High Court shall be guided by native law so far as that law is not repugnant to natural justice, morality equity and natural justice. In such cases the courts can obtain assistance of one or more native assessors to advise upon the native law and custom.'*⁹⁰

The British courts recognised customary marriages as valid only at customary law. As far as the white settlers were concerned, the only valid marriages were those conducted under their English laws.⁹¹

Thus two distinct systems of judicial administration developed, that is the officially recognised courts administering English law where statutory marriages were regulated and the tribal courts administering customary law which included marriages between natives.⁹²

⁸⁸ J. Anderson, *Family Law in Asia and Africa*, (London: Allen & Unwin Ltd, 1968), Pg 23

⁸⁹ A. Elley, *Recognition of Native Law and Custom* *Journal of Comparative Studies*. Vol 20, 1937 Page 16.

⁹⁰ A. Elley, *Recognition of Native Law and Custom* *Journal of Comparative Studies*. Vol 20, 1937 Page 16

⁹¹ Allott: *The Need for Study of Native Law* *Journal of African Law*, Vol 1, 1957, Page 82

In the remaining years up to 1911 it became increasingly apparent that the two territories under the B.S.A. Company could be administered more efficiently as a single territory.⁹³ On May 4th 1911 the Northern Rhodesia Order in Council revoked the North Eastern and Barotseland North Western Order in Council and merged the two territories into one jurisdiction. It was brought into operation by the Northern Rhodesia Proclamation Number 1 of 1911 on 17th August. The changes made were that the High Court was to apply customary laws in the cases between Europeans and Africans when ever it would appear that substantial injustice would be done to either party by strict adherence to the rules of English law.⁹⁴

While statutory changes were being made in the officially recognized courts, the tribal courts continued to administer justice relatively with little interference from the British courts.⁹⁵ The Native Courts Ordinance of 1928 was the first legislation which extended official recognition to the native courts. It provided that these courts,

‘Shall consist of such chiefs, headman, elder or council of elders in an area assigned to it as the governor may direct.’⁹⁶

In 1936 it was suggested that urban native courts be established and these were to be wholly concerned with the application of African customary law in different aspects including marriage.⁹⁷ After attainment of independence in 1964, the native courts were little different from the courts of 1936.⁹⁸ The only major change was the fact that the

⁹² Allott: The Need for Study of Native Law Journal of African Law, Vol 1, 1957, Page 82

⁹³ The Changing Scope of Urban Native Courts in Northern Rhodesia, Vol 8, 1964. Page 29

⁹⁴ The Changing Scope of Urban Native Courts in Northern Rhodesia, Vol 8, 1964. Page 29

⁹⁵ The Changing Scope of Urban Native Courts in Northern Rhodesia, Vol 8, 1964. Page 30

⁹⁶ The Native Courts Ordinance of 1928

⁹⁷ The Changing Scope of Urban Native Courts in Northern Rhodesia, Vol 8, 1964. Page 32

⁹⁸ The Changing Scope of Urban Native Courts in Northern Rhodesia, Vol 8, 1964. Page 32

natives were now free to choose either to marry under statutory law or urban customary law.⁹⁹

During 1964, the process of integrating the native courts within the judicial system was begun and the old Ministry of Native Affairs was abolished and become an office of the Ministry of Justice. The native courts become for the first time a part of the Judiciary.¹⁰⁰

The dual law system was inherited by Zambia at independence on 24th October, 1964 which comprises statutory law and customary law, which are administered under parallel legal systems. It is in this light that the Marriage Act under sections 34 and 38 respectively recognize marriages contracted under customary law in Zambia by implication.¹⁰¹ It seems to be the general attitude that legal pluralism is an anathema and its eradication is necessary this means that having a single piece of legislation on a specific matter is better than having a number of legislations on one matter.¹⁰² This attitude stems from several considerations among them being that a single legal and judicial system will do away with the headache of conflicts of laws within the same political unit and the belief that 'legal unitarism' will speed up the development of the country. It is also believed that a uniform national legal system will aid the development of national unity and sentiment.¹⁰³

The status of customary laws with particular reference to the customary law of marriage in Zambia is that it is subject to the 'repugnancy' clauses as enshrined in section 12 (1) of the Local Court Act and section 16 of the Subordinate Court Act respectively.¹⁰⁴

⁹⁹ The Changing Scope of Urban Native Courts in Northern Rhodesia, Vol 8, 1964. Page 33

¹⁰⁰ A. Elley, Recognition of Native Law and Custom Journal of Comparative Studies. Vol 20, 1937 Page 18

¹⁰¹ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

¹⁰² Anyangwe, The Whittling Away of African Indigenous Legal and Judicial System, Zambia Law Journal, Special Edition,(Lusaka: Unza Press, 1998), pp 48-49

¹⁰³ Anyangwe, The Whittling Away of African Indigenous Legal and Judicial System, Zambia Law Journal, Special Edition,(Lusaka: Unza Press, 1998), pp 48-49

¹⁰⁴ Marriage in Zambia, www.our-zambia.com, last viewed on 20th April 2010

4.2 The Effects of Legislation to Regulate Marriages Contracted under Customary Law on the Development of Customary Law in Zambia

Once there is legislation that regulates marriages contracted under customary law, to begin with, the discrimination of women under customary law will be curbed. This is because the legislation will comprise of common customs and traditions among the 73 ethnic groupings that are progressive and do not discriminate against women.¹⁰⁵

Zambia has ratified the United Nations Convention on the Elimination of all forms of Discrimination against Women 1970(CEDAW). Having legislation that regulates marriages contracted under customary law will enable women married under customary law to claim the rights proclaimed in such instruments by demanding that the government of Zambia takes the step of codifying and domesticating such instruments. Article 16 (1)¹⁰⁶ of this instrument provides that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.¹⁰⁷

However legislation to regulate marriages contracted under customary law may have a negative effect on the development of customary law in Zambia. This is on the premise that there certain cultural practices and traditions which doing away with will be seen as a taboo.¹⁰⁸ A good example is the custom and belief that once a girl attains puberty she is ready for marriage.¹⁰⁹ Some customs have long been held to be a fundamental part of the local traditions of Africans. This is true of the practice of bride wealth.¹¹⁰ It follows that to propose to remove such a practice would be seen as a deliberate move to undermine the traditions and values of Africans and the suggestion that it is a discriminatory practice against women may be seen as a direct insult to the

¹⁰⁵ Zambia Law Development Commission, <http://www.our-zambia.com/16.html>

¹⁰⁶ United Nations Convention Against Discrimination of Women

¹⁰⁷ Women and Law in Southern Africa-Zambia, *The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 98

¹⁰⁸ Zambia Law Development Commission, <http://www.our-zambia.com/16.html>

¹⁰⁹ Zambia Law Development Commission, <http://www.our-zambia.com/16.html>

¹¹⁰ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

traditional authorities.¹¹¹ The same is true in the case of consent for the bride as the suggestion for the removal of parental consent may be seen as insubordination on the part of the women as most traditional African cultures view the man as the head of the household who must therefore have authority and the last word over what happens in the marriage. This is in line with the traditional saying that ‘a woman must be seen and not head’, which means that when there is an issue in the home for instance and a decision has to be made, the woman should not argue with the husband even if she is not in agreement with the decision that he makes, instead she should keep quiet and accept the decision made by her husband.¹¹²

Another problem would be the sensitization and socialization of the local populace to a point at which they would recognize or realize that the traditions they had been practicing for so long were detrimental to the positive growth and development of a modern society.¹¹³ Making people in the rural areas understand that customs such as the marriage of girls because they had attained the age of puberty which have been practiced since time in memorial are against the girl child’s right to education and have led to an increase in the poverty rates in Zambia and should no longer be practiced would be a major stabling block.¹¹⁴ Although law is an instrument of social change, the resistance of the people to such measures would be a major factor in its implementation. The main difficulty in this instance would therefore be in trying to educate the people who believe so much in these customs and practices on the importance of an equitable society that is not entirely male dominated. This could be overcome by enforcement measures to ensure conformity with the law and thus ensure social change.¹¹⁵

¹¹¹ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

¹¹² See the Zambia Law Development Commission Report on the Internal Workshop on the Issue Paper presented to the Committee of experts on the Matrimonial causes Legislation Project, Lusaka, August, 2004.

¹¹³ Women and Law in Southern Africa-Zambia, *The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 63

¹¹⁴ Women and Law in Southern Africa-Zambia, *The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 63

¹¹⁵ Committee on the Elimination of Discrimination against Women, including Observations: Zambia, UN. Doc A/49/38, Para. 318-368 (1994)

From the above stated, the development of customary law in Zambia can only be effected if affected parties come together as one voice including notable persons in society, non-governmental organizations and other members of the civil society to speak out against the violations of women's rights in marriages contracted under customary law in Zambia.¹¹⁶ Because of certain customary teachings and the fear of being chastised, independent research by Women and Law Southern Africa has shown that most women would prefer not to speak out against such discriminatory practices.¹¹⁷

Zambia is a country comprising seventy three ethnic groupings in total, it follows that there are diverse customs and practices that are practiced and therefore conflicts are bound to rise as a result of having a single legislation to regulate marriages contracted under customary law.¹¹⁸ Every ethnic grouping would want to continue observing customs and practices on marriage that make them unique in comparison with other ethnic groupings. To remedy this, the legislative arm of government should ensure that legislation to regulate marriages contracted under customary law in Zambia is comprehensive. It should cover as much as possible all the common customs and traditional practices among the seventy three ethnic groupings, so that the legislation to regulate marriages contracted under customary law will be considered legitimate by all the ethnic tribes in Zambia and will represent their traditions and values.¹¹⁹

The Judiciary are the custodians of law; they give effect to the law passed by the legislative arm of government through interpretation of the law. In Zambia, section 12(1)¹²⁰ of the Local Court Act and section 16 of the Subordinate Court Act¹²¹, gives the Local Courts, subordinate Courts, respectively power to administer customary law on disputes arising from marriages contracted under customary law when a dispute is brought before them, provided the application of that

¹¹⁶ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

¹¹⁷ WLSA, Maintenance in Zambia, (1992)

¹¹⁸ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

¹¹⁹ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

¹²⁰ The Local Court Act, Chapter 29 of the Laws of Zambia

¹²¹ The Subordinate Court Act, Chapter 28 of the Laws of Zambia

custom or practice is not repugnant to natural justice, equity, good conscience and any written law in force in Zambia.

Having legislation to regulate marriages contracted under customary law will result in consistency in the application of customary law.¹²² This is on the premise that currently the courts in administering customary law over disputes arising from marriages contracted under customary law will look at the custom or traditional practice that the parties are married under in arriving at a particular decision. However by having legislation to regulate marriages contracted under customary law, they will now be a uniform standard set upon which all disputes arising from marriages contracted under customary law will be adjudicated upon by the courts of law. This will result in certainty in the application of customary law as a legal system.¹²³

Secondly, having legislation to regulate marriages contracted under customary law will result in parties to a dispute that is in a marriage contracted under customary law to be able to predict the decision that the court is likely to render even before the court does so.¹²⁴

In addition, as the situation stands now in Zambia, disputes arising from marriages contracted under customary law are only heard in the higher courts that is, the Subordinate Court and the High Court on appeal. This is because when there is a dispute arising from a marriage contracted under customary law, the action is first commenced in the local court and is only heard in the higher courts on appeal. But having legislation to regulate marriages contracted under customary law will ensure that a dispute arising from a customary law marriage can be commenced in the Subordinate Court or the High Court respectively as is the case with statutory marriages.¹²⁵

¹²² Zambia Law Development Commission, <http://www.our-zambia.Com/16.html>

¹²³ Zambia Law Development Commission, <http://www.our-zambia.Com/16.html>

¹²⁴ Women and Law in Southern Africa-Zambia, *The Changing Family in Zambia* (Lusaka: Government Printers, 2001) Pg 69

¹²⁵ Zambia Law Development Commission, <http://www.our-zambia.Com/16.html>

When the Local Court or the Subordinate Court sit to administer customary law over a dispute arising from a marriage contracted under customary law, they apply the repugnancy clause. Having legislation to regulate marriages contracted under customary law will result in the courts administering customary law without giving effect to the repugnancy clause. Therefore decisions of the court will not be based upon the opinion of the court but rather the provisions of the legislation to regulate marriages contracted under customary law.

4.3 Conclusion

This chapter has examined the administration of customary laws on marriage by the courts from the colonial period to date. It is submitted that with regards to the application of customary law on marriage not much has changed. This is on the premise that during the colonial period customary law was considered inferior to the English law which was brought into the territory as a result of colonization. To date, customary law is still considered inferior to statutory law as is evidenced by the repugnancy clauses provided for in section 12(1) of the Local Court Act and section 16 of the Subordinate Court Act respectively. The chapter has also examined the effects of having legislation to regulate marriages contracted under customary law on the development of customary law in Zambia.

It is submitted that having legislation to regulate marriages contracted under customary law will result in the development of customary law as a legal system in that they will be certainty, predictability in the application of customary law as a legal system. However, it will also mean doing away with certain cultural practices and traditions for instance, the custom and belief that once a girl attains puberty she is ready for marriage will have to be done away with. Another problem would be the sensitization and socialization of the local populace to a point where they recognize that certain traditions and customs have since become detrimental to the positive growth and development of a modern Zambia. Therefore legislation to regulate marriages contracted under customary law should be comprehensive and should include as many as possible of the common customs and practices of the 73 ethnic groupings in Zambia and should reflect the values of the Zambian society as a whole.

CHAPTER 5

Conclusion and Recommendations

5.0 Introduction

The aim of this chapter is to present conclusions from the research and to make recommendations. This shall be done by giving a summary of the chapters, a general conclusion and finally recommendations based on the findings of the research.

5.1 Summary of the Research

Chapter one of this essay introduced the research topic. This was done by giving a general overview of the application of customary laws in Zambia. The chapter then looked at how the research was to be conducted, by looking at the objectives of the research, the problem statement of the research in order to establish the problem the research was trying to address, the research questions which needed to be answered at the end of the research, rationale and significance of the research in trying to show the importance of researching on the topic, and the method that was used in conducting the research.

Chapter two basically examined the application of customary laws by the courts that is the Local Courts and Subordinate Courts respectively by making reference to the repugnancy clauses provided for under sections 12(1) of the Local Court Act and section 16 of the Subordinate Court Act respectively. The chapter also examined sections 34 and 38 of the Marriage Act which recognizes marriages contracted under customary law by implication. It was concluded that application of the repugnancy clause has resulted in uncertainties in the application of customary law as a legal system. Two cases with similar facts will be decided upon differently by the courts in that in rendering their judgment, they will take into account the custom or traditional practice that the parties were married under. They will then determine whether giving effect to the custom or traditional practice in question is or is not repugnant to natural justice, equity, good conscience or any written law in force in Zambia. The Chapter also examined how the Local Courts, Subordinate Courts and the High Court have been administering customary law over disputes arising from marriages contracted under customary law in Zambia. This was done by looking at the dual legal system that is currently obtaining in Zambia. It was concluded that by

virtue of sections 34 and 38 of the Marriage Act, marriages contracted under customary law are recognized in Zambia. The chapter also examined court decisions in which the courts were called upon to administer customary law on disputes arising from marriages contracted under customary law. Two cases were discussed in this regard. In **Mwiya v. Mwiya** the High Court held in part that under 'Lozi' customary law a man is not compelled to share matrimonial property with the wife on divorce. By contrast in **Chibwe v. Chibwe** the Supreme Court held that the woman was entitled to a share of the matrimonial property on divorce. This decision was in conformity to 'Ushi' customary law which provides that a woman on divorce is entitled to a share of the matrimonial property. The two cases illustrated that the courts when administering customary law on disputes arising from marriages contracted under customary law take into account the customary law that the parties are married under and they will strive to give effect to the customs and traditional practices in question.

In adjudicating over matrimonial disputes arising from marriages contracted under customary law in Zambia, the Local Courts by virtue of section 61 and the Subordinate Courts by virtue of section 8, may make use of assessors even though the advice given by the assessor is not binding on them, as they are at liberty to determine whether giving effect to a particular custom is or is not repugnant to equity, good conscience, justice, morality and any written law. If in the determination of the court, the custom is repugnant, the court is at liberty not to give effect to that particular custom. This has been the reason why there have been a lot of uncertainties in the way that disputes arising from marriages contracted under customary law are administered upon by the courts of law. Zambia has seventy three ethnic groupings each with their own traditions and customs and the courts are expected to give effect to these traditions and practices and at the same time ensure that in doing so, they do not give effects to customs and practices that are repugnant to natural justice, equity, good conscience and any written law.

Chapter 3 of the essay examined the harmonization and codification of customary laws on marriage in Zambia. This was done by looking at some of the common customs and practices on marriage among the seventy three ethnic groupings in Zambia. This was done in trying to establish whether these common customs and practices can be harmonized and codified in order to come up with one customary law on marriage. It was

concluded that the customs and traditions among the 73 ethnic groupings in Zambia on marriage and divorce are very similar with very minor differences, therefore harmonizing and codifying them into statute would not be a big problem. The chapter also examined whether there is need to have legislation to regulate marriages contracted under customary law. It was established that customary law regulates the largest section of the Zambian population. There is need to have legislation to regulate marriages contracted under customary law in Zambia because; a good legal system should be certain and predictable. Customary law as a legal system lacks both of these principles that is certainty and predictability, this is because there are 73 ethnic groupings in Zambia, each with their own traditions and custom and the court are supposed to give effect to these customs and practices provided that giving effect to a particular custom or traditional practice is not inconsistency with natural justice, equity, good conscience and any written law in force in Zambia.

Chapter four basically looked at administration of customary law by the courts with specific reference to marriage. This was done by looking at how the courts administered customary law from colonial period to date. It was established that the colonial masters had no problem with application of customary law provided it was not inconsistent with English law. Also customary law was only to be applied with regard to disputes between natives. Customary law was only administered by the native courts. Later things began to change and customary law would be applied in disputes between a native and a non native where substantial injustice would be done if English law was applied. It was concluded that to this day, application of customary law by the courts is still subject to the repugnancy clause. However if there was legislation to regulate marriages contracted under customary law, it would mean the end of application of the repugnancy clause by the courts of law. This is on the premise that the legislation to regulate marriages contracted under customary law will be the standard that the courts will be using in administering customary law over disputes arising from marriages contracted under customary law.

5.2 General Conclusion

There is need for legislation to regulate marriages contracted under customary law. The customs and traditional practices on marriage and divorce among the 73 ethnic groupings in Zambia are very similar with very minor differences. It was concluded that these customs and traditional practices on marriage can be harmonized and codified to come up with one statute on marriage customary law in Zambia. In addition, most customs and practices among the 73 ethnic groupings do not promote universal human rights and are discriminatory towards women. These customs and practices do not refer to international instruments on rights of women with regard to marriage, divorce and other related matters. It was concluded that having legislation to regulate marriages contracted under customary law in Zambia will help to curb discrimination against women. It will also ensure equality between men and women in that the grounds for divorce will be the same for both men and women married under customary law.

In addition, because of the high rates of poverty in Zambia, it is becoming a growing trend to exploit certain traditions to the maximum capacity for monetary gain. This is especially so with the issue of bride price which although is a customary practice with positive undertones is being abused today as a money making venture by some. As there is no legislation in place to govern such practices it has been noticed that such payments are becoming increasingly exorbitant, although this may in fact be attributed to the current social and economic conditions prevailing in the country with the current high levels of illiteracy and poverty. It is submitted that the rising trend of payments is negative and there should be some form of provision regulating it.

However, the legislative arm of government should ensure that as many as possible common customs and practices are included, so that every ethnic grouping in Zambia is covered to ensure that the legislation to regulate marriages contracted under customary law in Zambia is accepted by all the ethnic groupings that is, will have legitimacy. Not every traditional custom or practice is bad. Most of them are very good and should be preserved by codification into statute so that even the generations to come will be able to appreciate these customs and traditional practices. What have been mostly publicized are the negative effects of customary law. This has made the new generation youths not to appreciate customary law. But all this can change by having

legislation to regulate marriages contracted under customary law as it would only contain customs and practices that are progressive.

5.1 Recommendations

1. It is recommended that there should be legislation to regulate marriages contracted under customary law as it will result in the integration of positive aspects of common customs and practices among the seventy three ethnic groupings in Zambia which will represent the values of the Zambian people through codification in statute.¹²⁶ Once these values are codified there will be lesser chance of the culture of the Zambian people being lost. However it is important to note that certain customs and practices which have long been held to be fundamental to the Zambian marriage and divorce but have since become detrimental to the positive growth of the Zambian society may have to be removed. A good example is the custom that a girl is ready for marriage upon reaching puberty.¹²⁷

2. It is also recommended that legislation to regulate marriages contracted under customary law in Zambia should have a provision on the regulation of setting bride price so that it does not lose its value as a token of appreciation and become a commercial aspect of the marriage contract, as it will in effect turn the transaction into one like the sale of a chattel. This will curb the growing trend of setting the exorbitant amounts of money that are being charged as bride price.¹²⁸

3. It is also submitted that the legislation to regulate marriages contracted under customary law should have a uniform standard set to govern the laws of marriage and divorce, to ensure that the grounds for divorce are the same for every one whose marriage is contracted under customary law thereby encouraging equity and equality in marriage. This is also to curb the disparities in the grounds for divorce and to ensure that in customary marriages, the grounds for divorce are the same for both men and women.¹²⁹

¹²⁶ Zambia Law Development Commission, <http://www.our-zambia.Com/16.html>

¹²⁷ Zambia Law Development Commission, <http://www.our-zambia.Com/16.html>

¹²⁸ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

¹²⁹ Marriage Zambia, <http://www.our-zambia.com>, last viewed on 20th April 2010

4. It is further submitted that the issue of consent from parents and guardians before a marriage proposal is accepted should also be addressed in the legislation to regulate marriages contracted under customary law in Zambia.¹³⁰ This is in order that older women and widows who want to get married should not need the consent of their parents to enter into marriage but may inform them as to their choice of spouse. This would therefore limit the role of the parents to one of approval rather than the actual choice of partner for the woman.¹³¹

¹³⁰ Committee on the Elimination of Discrimination against Women, including Observations: Zambia, UN. Doc A/49/38, Para. 318-368 (1994)

¹³¹ Committee on the Elimination of Discrimination against Women, including Observations: Zambia, UN. Doc A/49/38, Para. 318-368 (1994)

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