THE LAW OF MARRIAGE AND DIVORCE AMONG
THE MALOZI OF WESTERN ZAMBIA

A thesis submitted in partial fulfillment
of the requirements for the degree of
MASTER OF LAWS (LL.M)

at the
University of Zambia Law School

by

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1982
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ABSTRACT

This thesis looks at the family law of one of the ethnic groups in Zambia, namely, the Lozi people. The discussion is centred on marriage and divorce.

The marriage contract is one of the most complicated aspects of any customary law: the distinction between custom and law is so slim that it is tempting to substitute one for the other. Furthermore, there is always the temptation to discuss the custom at the expense of the law. Certain customary essentials could in one way or another give rise to legal implications. The test, therefore, is to ask whether the apparent custom gives rise to legal consequences.

Part One of the thesis examines the ways in which a marriage contract may be concluded. Necessarily, Part One looks at the essentials of a valid marriage contract under Lozi law. In discussing the marriage contract, some distinctions are made between the marriage contract under Lozi law and the marriage contract under statute. This distinction is important because of the problems which arise in a "dual marriage," that is to say, in a marriage which satisfies both the customary and statutory requirements.

Attention is focused on the effect of the marriage contract in relation to the spouses. The effect is contrasted with marital property under statutory law.

Part Two discusses the matrimonial rights and obligations created by the marriage contract. Unlike in statutory marriage,
failure to observe contractual marital obligations gives rise to various grounds for divorce. In statutory marriage, however, the allowable grounds for divorce are neatly set out in the Act. Although some obligations are customary and do not have any legal consequences, the cumulative effect of customary requirements could result in legal obligations. For example, it is customary that a husband must provide his family with relish. Although the wife may not petition for divorce because of her husband's failure to provide relish, she can use it as ground for negligence if he persists in his failure to provide it. A valid contract confers sexual rights on the partners. The husband enjoys exclusive sexual rights, and any infringement of this right entitles him to compensation. On the other hand, the wife cannot sue her husband for adultery, although adulterous behaviour may be evidence of negligence. A distinction is also made here between the concept of marriage under Lozi law and marriage under the statute.

Part Three discusses the termination of the marriage contract. The discussion here is contrasted with termination of marriage under the statute. Comparisons are made between the grounds for divorce and the facts that must be proven. It will be seen that the grounds for divorce under Lozi law are almost endless compared to those available to a statutory marriage. This part of the thesis proves, as it is asserted in Chapter One, that law must be dynamic and responsive to the needs of the society in which it operates. The endless grounds for divorce are in keeping with this notion. New grounds must always be made available to adjust to changes taking place in the
society. As an example, twenty years back, going to town for two years leaving the wife at home in the village would not give rise to termination of marriage. The circumstances then were such that a wife could not accompany her husband to town because Africans were migrant workers whose rightful place was in the village. Today, the wife who has been left in the village for two years can petition for divorce on the ground of negligence. Since Independence, the movements of people to and from town have been relaxed and therefore there is no reason why a man who intends to stay away from home for two years should not have his wife accompany him.

Part Three also examines the courts invested with jurisdiction to dissolve a customary marriage. The discussion here includes the various ways in which a Lozi marriage may be terminated. For example, divorce can be obtained by mutual consent, abduction, or elopement.

This part analyzes the effect of termination of the marriage contract on the children, especially in custody matters. The involuntary termination of the marriage contract is also discussed (termination by death). Since this is an area surrounded by superstition and custom. Caution has been exercised to confine the discussion to the legal issues.

Part IV discusses the current issues of Lozi law of marriage and divorce. It is devoted to discussing the intertribal marriages, their impact on Lozi laws of marriage and divorce, and the effect of statutory marriages on customary law.

This is yet another area where law reacts to changes in the society. It is an area where we see law in the making. The changes
taking place since independence are being reflected in the changes in Lozi customary law. What was viewed as an anathema to Lozi law ten years ago is being tolerated today and may become part of Lozi customary law in the future. What was thought to be the proper law ten years back is resented today and may be anathema tomorrow. For example, arranged marriages were very common ten years ago but today are very rare. In a few years, arranged marriages will simply be part of history. Similarly, it was unusual ten years ago to hear of couples arranging their own marriage without prior consent of their parents. Today, it is a common occurrence. These changes are dictated by changed circumstances. They are evidence that law is but a set of rules made by a society in response to circumstances prevailing in a particular community.

Finally, customary marriage is contrasted to statutory marriage. This area may provide a starting point for fusing customary family law with statutory family law.
ACKNOWLEDGMENTS

I cannot remember how old I was when my interest in customary law began. I can only remember my mother telling me that I would age fast because I liked sitting with old people. At that time both my father and maternal grandfather were village headmen, and they spent most evenings by the fireside adjudicating over disputes. Those were my first seminars in law. I must therefore thank the late Makenu Kakula, my father, and Kamuti Mubukwanu, my grandfather, who were never bored by my childish questions.

My other thanks go to Mr. William McClain who, apart from supervising this thesis, has been a personal friend. His suggestions and criticisms have been most helpful. I thank him for his patience and tolerance, especially during the final stages of this thesis, when I at times disturbed him at home for consultations.

During my field work, many people were most helpful. Special thanks go to Mwana Mulena Litia Mbikusita Lewanika, Chief of Naliele in Kaoma for affording me his valuable time for a panel discussion.

In Mongu, the Provincial Local Courts Officer, Mr. Mubanga, made it possible for me to tour the Local Courts in the Western Province and provided me with an Office at the Boma which I used as my base. Other staff in the office of the Provincial Local Courts Officer were also very helpful.

I also thank all those people who willingly gave their time for
interviews. Nor can I fail to mention Induna Lioko Sitenge of Lita-puya Local Court in Makoma, Kalabo; Induna Mwanamungela, now Councillor of Mutala Ward in Makoma, Kalabo; Moffat Muyatwa Simasiku, Deputy Head Messenger of the Kalabo Rural Council in Kalabo; Induna Litungi Kawewa of Imalyo Local Court in Mongu; Induna Matthews Sikufele of the Suulu Grade A Local Court in Mongu; Induna Alibandila of the Suulu Local Court in Mongu; Ngambela Imangambwa of Naliele in Kaoma; and the late Mr. Mushele.

I must thank my cousin Hastings Lubinda Imasiku who nursed me through the flu in Mongu while I was on my way to Senanga for interviews. I owe the completion of my work to him.

I should like to end by thanking all those who in one way or another helped me complete this work. I take responsibility for all of its shortcomings.

Again, because of the numbers involved, I must apologize for not writing notes on all my informants.
INTRODUCTION

Purpose

In discussing the time factor and the definitional problem of what customary law is, Professors A. N. Allot, A. L. Epstein, and M. Gluckman have observed:

If we are to investigate the customary law of an African people, when and where do we find it? Is it the traditional or ancient law, or the modern (traditionalists might say 'perverted') law, infected as it is by non-African ideas, administered by non-customary courts, studied by jurists, challenged by the younger generation of those allegedly subject to it, and recorded in a forum which may fundamentally alter its whole character and style (whether the form be the technical language of the lawyer or the technical language of the anthropologist)?

This observation puts into context the problems with which the student of African customary law must grapple. In the past, scholars studying African customary law have entertained the erroneous view that customary law is static. There is no longer any doubt, however, that customary law is dynamic and changes in response to social and economic developments in the society. Even in Europe and America, old laws are always changing through amendments; customary law is no exception to this. These changes, however, do not imply that principles of African customary law are unstable and unpredictable to be granted the legitimacy of law.

The problem that confronts the researcher in customary law is sifting the law from custom. This study attempts to state the customary law of marriage and divorce of one of Zambia's ethnic groups, the
Malozi of the Western Province.

This study has been undertaken for various reasons. Apart from the immediate objective of satisfying the partial requirement for the LL.M Degree, this thesis will provide materials for teaching customary law at the University of Zambia and other institutions interested in the topic. Secondly, it is hoped that this thesis will serve as a reference for our magistrates who have to administer customary law with the assistance of assessors. Thirdly, this study will serve as a starting point of a project of putting into written form the various bodies of Zambia's customary law. This is a project in which the government, through the Law Development Commission, has special interest.

Methodology

The data for this thesis is from two sources: field research (primary source) and library research (secondary source). The field research was carried out in the six districts of the Western Province of Zambia in which the Malozi live: Kalabo, Kaoma, Lukulu, Mongu, Senanga, and Sesheke. The field trips were made at various times between January 1976 and April 1977.

The field research was comprised of three parts. The first included interviews with indunas (local court justices), chiefs, village headmen, clan heads, and government officials in the Provincial Local Courts Office. The second contained panel discussions including indunas, village headmen, and clan heads. The final stage involved attending local court proceedings.

The nature of the Malozi society itself determined who would be
interviewed. The chiefs, indunas, village headmen, and clan heads are the custodians of Lozi customary law. Their position in Lozi society requires them to know the customary law. In fact, the nature of these positions is such that no one can be appointed unless he is well-versed in customary law. The clan heads mediate in disputes among members of their clan. In performing this duty they explain to the disputants what their respective rights and obligations are regarding the customary law. Therefore, the clan members always appoint clan heads who are knowledgeable about customary law so that they can effectively defend the rights of the clan.

Village headmen are defacto members of the national judicial system. This was especially true for the Malozi in the Western Province where, until recently, village headmen were official members of the Barotse Native Government (the government of the Malozi before independence) Judiciary. Even since the Barotse Native Government has been incorporated into the national system of local governments, the village headmen still play a crucial role in administering customary law. They preside over disputes among their people and, when necessary, act as assessors by giving opinions on matters of customary law in the magistrates' courts. Decisions of village headmen in disputes are treated as authoritative when they reach the local courts on appeal. In some instances, cases that bypass the village headman may be referred to his council as the proper forum for adjudication. Village headmen play such a critical role in dispute settlements applying customary law that, without them, the local courts would probably not be able to handle the case load.
The indunas are official members of the national judicial system. They sit in local courts and administer customary law. The decisions of the indunas in matters properly before them are recognized by the High Court. The indunas thus form the first level of the Zambian judiciary in the Western Province.

The chiefs maintain the customs and laws of the Malozi. Before independence, chiefs exercised legislative powers, and their proclamations became instant customary law. The role of the chiefs as custodians of the customs and laws of their people has been recognized by the Central Government, which has created a Department of Royal Establishment to work with the chiefs. The chiefs also advise the Central Government on matters pertaining to customary law.

Finally, officers in the Provincial Local Courts Office were interviewed because of their role as overseers in administering customary law. All the cases tried by the indunas are filed in the Provincial Local Courts Office, where they are reviewed to check for non-compliance with procedure and customary law. The review is necessitated by procedural changes brought about by standardization of the local courts procedure throughout the country. The reviewers also check for deviations from either the procedure or established customary law. Where there are deviations from either the procedure or established customary law, the case is either sent back for retrial or referred to a magistrate's court. Because they monitor the application of customary law in the local courts, these officers are knowledgeable in customary law.

Interviewees, especially the village headmen, were chosen from
government records at the six district headquarters. Since it was not possible to interview all the village headmen in the districts, interviewees were chosen from the village registers kept by the District Secretary. In choosing interviewees, the number of years that a candidate had been village headman, and hence his relative experience, was considered. The choice of the indunas was influenced by many factors. First, I asked the chief in each district to recommend indunas in his district whom he considered experts on customary law. I made a similar request of the Provincial Local Courts Officer. Being the principal reviewing officer of all the decisions of the indunas in the province, he is in a position to make reliable recommendations. I compiled a third list from the files of the Judicial Department. This list was based on length of service and comments made by the department on the performance of the particular induna. The final list was then drawn from these three lists, plus a random sampling from the provincial local courts register.

This list was used only with respect to interviews. The panel discussions included other indunas to ensure a crosssection representation of all types of indunas. While the interviews were intended to elicit opinions on specific issues, the panel discussions took the form of general debates of set questions (e.g., What are the factors necessary to contract a valid marriage under Lozi customary law? How is divorce effected under customary law? What are the grounds for divorce? etc.). The debates were only interrupted when it was necessary to clarify a specific point. The participants then made a general conclusion at the end of the discussion, stating what the law is on the questions
presented. The interviews and panel discussions were held in several areas in each of the six districts. These areas were chosen to reflect as much as possible even demographical and geographical coverage of the district.

The third phase of field research consisted of attending local court sessions. Although not always able to attend court sessions dealing with issues relating to marriage and divorce, it was a rewarding experience to observe first hand the application of customary law in court. These three phases formed the primary source of data.

The secondary source was library research. Since in customary law, especially in Zambia, there are very few written sources, the main written sources were the District Notebooks maintained by the former District Commissioners during the Colonial Administration (kept in The National Archives in Lusaka) and a few books and papers written by anthropologists. By order of the Central Colonial Administration, District Commissioners were obliged to keep District Notebooks stating the customs and customary laws of the people in their district. These notebooks served as the basic reference material for newly appointed District Commissioners from the metropolitan country. This source, however, has its shortcomings. First, the notebooks were compiled by people who in most cases hardly spoke the language of the people studied. Second, most of the laws recorded have changed with the passage of time. Therefore, the source is useful only as a reference for comparison.

During the library research, considerable time was spent reading case records dealing with marriage and divorce. Such records are
available in the National Archives, and the more recent ones are filed in the Office of the Provincial Local Courts Officer. This important source shows how customary law is applied in resolving specific problems. More importantly, the records carry the comments of the Provincial Local Courts Officer (the principal reviewing officer of the decisions of the local courts).

Interview methodology was preferred over questionnaires. Although questionnaires might have been more scientific, that methodology assumes that participants will be able to read and answer the questions. Although many of the informants could have handled a questionnaire, such a methodology would have excluded a significant portion of the participants. Furthermore, a questionnaire has other inherent limitations. It is impersonal and the participant is required to respond to set questions, leaving little room for the expression of other opinions. In sum, being a speaker of the participants' language, interviews and panel discussions were most suitable for conducting the study.

In writing this thesis, because of the number of informants involved, it has not been possible to refer to informants everytime a point has been made. Reference to informants has thus been made only where necessary. Consequently, the authorities are contained in the bibliography at the end of the thesis.
CHAPTER ONE

THE LOZI AND THEIR LAND: A HISTORICAL BACKGROUND

The law of any given society more often than not is influenced by its social background and its mode of living at any given time. After all, law is a set of rules created by a community to preserve its desired values and to limit deviant behaviour.

The Lozi live in the area we now call Western Province. They inhabit the Barotse Flood Plain, which stretches along the Upper Zambezi River for about 120 miles between 14 1/2 and 16 degrees south latitude. \(^1\) Other Lozi also inhabit the valleys of the Zambezi tributaries.

**Origins of the Lozi**

The people known as the Lozi today were previously known as the Aluyi. \(^2\) There are two conflicting theories regarding the origins of the Lozi. One school of thought says that the Lozi are an off-shoot of the Rozwi of the Karanga Empire. Another school connects the Lozi to the Lunda-Luba Empire of the Congo in present-day Zaire. Comparisons of the two theories tend to connect the Lozi more with the Lunda-Luba Empire than the Rozwi of the Karanga. There are striking similarities between the kingship organization of the Lozi and that of other offshoots of the Lunda-Luba Empire, like the Kazembe of the Luapula, the Bemba of Chitimukulu in the Norther Province, and the Nkoya of the Western Province. \(^3\) Characteristically, the kingship is centralized, and public appearances of the King are restricted.

Further research into the origins of the Lozi by one distinguished
scholar, Mutumba Mainga, supplies strong evidence that the Lozi ruling dynasty came from the Lunda-Luba Empire and established itself in the present-day Kalabo District near Libonda. The ruling dynasty thereafter spread down the Barotse Plain to Senanga in the South of the Western Province. Evidence has further shown that the Lozi Kingdom was a conquering state that imposed its institutions on a pre-existing population.

Coming of The Makololo

When the Lozi Kingdom was prospering on the Barotse Plain, a diaspora began in Southern Africa precipitated by Shaka, the Zulu King. Many groups who could not withstand Shaka's wars left South Africa, among them the Makololo led by Sebitwane. Sebitwane was the chief of the Bafokeng Tribe, a group of the Sotho peoples near the Vet River.

While the Makololo were on the fringes of what is called the Western Province today, the Lozi were tied up in a succession dispute involving the late (Mulambwa) king's sons, Mubukwanu and Silumelume. Before the succession dispute could be resolved, the Makololo entered the Western Province and completely overran the Lozi. This was a significant turning point in the Lozi's history. Their chieftaincy was routed and, above all, an alien system was imposed on them.

The Lozi, who were matrilineal, were now subjected to the Makololo's patrilineal system. It is not surprising, therefore, that the Lozi are the only people in Zambia who have a bilateral system.

After the 1838 conquest, the Lozi split into three factions, one group under Mubukwanu stayed in the valley and tried unsuccessfully to repel Sebitwane and his men. The second faction fled to Lukwakwa near
Kabompo in Northwestern Province and the third group went to Nyengo in Western Kalabo. The third faction which fled to Nyengo made Imbua, the younger brother to Mubukwanu, their king. The Makololo asserted their authority on the plain and appointed one or two of their families to live in the conquered villages as lords.

Revival of the Lozi Kingship on the Plain

When Sebitwane died in 1851, none of his successors could measure up to his skill. Sekeletu, Sebitwane's son, took over but could not match the impartiality that endeared his father to his people. By 1863, when Sekeletu died, the Makololo Empire had begun to crumble. A successful rebellion was organized in 1864, leaving most Makololo men dead and the women taken as wives by the victors.

Sipopa was installed as first king of the Lozi after the insurrection. Unfortunately, the disunity that led to the previous downfall of the Lozi Kingdom was far from resolved. Each group that had gone into exile had a prince whom they wanted to be King. When Sipopa was overthrown in 1876, Mwanawina II took over but was forced to flee two years later. Mwanawina II was succeeded by King Lubosi, who later came to be known as Lewanika. Lubosi was not spared the customary infighting, and like Mwanawina II was forced to flee for his life to Mashi across the Zambezi River near the border with Angola. After raising an army in Mashi, he returned to regain control of his kingdom in 1884.
The Coming of White Rule

Lewanika's insecurity did not come from the internal instability alone. He was also plagued by threats of external invasion from the Ndebele. The Ndebele had actually played havoc in the Makololo Kingdom during the reign of Sebitwane. Worried by these threats to his kingdom, Lewanika asked Chief Khama of the Bamangwato (in present-day Botswana) about how he could best protect his kingdom from the marauding Ndebele. This was perhaps suggested to Lewanika by the missionaries. Khama did not hesitate to advise Lewanika that he could get protection from the "Great White Queen."

Consequently, Lewanika gave a mining concession to Harry Ware to prospect and mine for minerals in the area outside Barotseland proper. This was an area lying north of the Zembezi River, from Katanga running down the railroad line to Victoria Falls, and encompassing Lamba, Ila, Tonga, Toka, and Lenje countries. This concession was bought by the British South Africa Company in 1889.

In 1889, the British South Africa Company sent their first representative to Barotseland and signed a treaty with Lewanika as "representative" of the Queen. A resident representative did not arrive in Barotseland until 1897, much to the disappointment of Lewanika. When Coryndon finally arrived, he set about negotiating for a new agreement which would give the British South Africa Company powers to try cases and other administrative powers. No such powers were included in the 1890 Treaty.

The 1900 Treaty, however, gave the Company powers to try cases between the natives and whites, reserving cases between natives for
the King. The treaty also embraced the setting up of industries in
Barotseland for the civilization of the natives. Lewanika was con-
sequently invited to England to attend the coronation of King Edward VII
in 1902.

In 1905, the Western Border between Barotseland and Angola was
defined by arbitration. Six years later, by an Order in Council, in
1911, North Eastern Rhodesia and North Western Rhodesia were amalga-
mated into Northern Rhodesia. Barotseland, however, entered Northern
Rhodesia with special status.

Administration of Justice among the Lozi

Prior to Independence, Barotseland was divided into five adminis-
trative districts: Mongu, Kalabo, Senanga, Sesheke, and Mankoya. The
districts were determined by population and geographical size to
facilitate administrative convenience. The special status of Barotse-
land as a protectorate within a protectorate provided a healthy environ-
ment for the undisrupted development of customary law.

Whereas ordinances catering to native authorities in Northern
Rhodesia had uniform application, the Lozi people in Barotseland were
always excepted. Unlike the other native authorities in the country,
Barotseland had a well-defined system of local government. The Para-
mount Chief, on the advice of the Sikalo, acted as the Superior
Native Authority. He promulgated orders and rules enforced by the native
courts throughout Barotseland.

Any dispute between individuals came before the village headman.
He presided over the dispute with the help of other elders in the
village. It could be a breach of contract or indeed the commission of a common tort.

The Barotse Native Authority recognized the village headman (though without remuneration) as a de jure member of the native authority judiciary. All appeals from the village headman were heard by the Silalo Kuta\textsuperscript{10} and were presided over by Silalo Indunas.\textsuperscript{11}

Each district had a Kuta, located in the Chief's capital. All appeals from the Silalo Kutas came before the District Kuta, which was presided over by the District Ngambela,\textsuperscript{12} assisted by Indunas. Anyone aggrieved by a decision of the District Kuta could appeal to the Saa-Sikalo Kuta in Lealui.\textsuperscript{13} The Saa-Sikalo was the final court of appeal within the native authority judicial structure.

In land matters, no appeal could be made against a decision of the Saa-Sikalo without its leave. This was provided for in Section 57(1)(2) of the Local Courts Act:

1. Subject to the provisions of this section, no appeal shall lie from a decision of a local court situated in the Western Province\textsuperscript{14} relating to land.

2. The Saa-Sikalo Kuta may, subject to any rules made in that behalf under section sixty-eight, grant leave to an interested party who is aggrieved by a decision referred to in Sub-section (1) appeal to the High Court against such decision.

The spirit of the foregoing section was also embodied in the Barotse Native Courts Ordinance, where it provided:

Notwithstanding the provisions of this or any other Ordinance no appeal shall lie to the High Court from any order or decision of a native court in any civil proceedings relating to rights in or over land.\textsuperscript{15}
Other non-land appeals could be made to the High Court. Statistics show, however, that until October, 1966, very few appeals had actually been made to the High Court from the Saa-Sikalo. This could be attributed to several factors. First, the High Court procedure was alien to most Lozi litigants. Second, appealing to the High Court in most cases entailed hiring a legal practitioner, and the ordinary litigant could not afford the expenses involved.

Orders and rules made by the Superior Native Authority in Lealui passed through the district Kutais and reached the ordinary Lozi in the village via the Silalo Kutais. Whenever new rules or amendments were made by the Superior Native Authority, each Silalo Kuta sent a representative and an Induna to Lealui for briefings. On their return, the Silalo Kutais summoned the village headmen or their representatives to the Kutais and briefed them on the new rules. In turn, the village headmen convened general meetings in their respective villages to explain the new rules to their subjects. The system worked so smoothly that, despite the high rate of illiteracy and scarcity of printed copies of the rules, every adult Lozi in Barotseland was conversant with every law as soon as it was promulgated.

The law administered in Barotseland was provided for in Section 12:

Subject to the provisions of this Ordinance a Native Court shall administer:

(a) the native law, and custom prevailing in the area of the jurisdiction of the court, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any written law;
(b) the provisions of all rules or orders made by the Litunga16 or a native authority under the Barotse Native Authority Ordinance and in force in the area of the jurisdiction of the court;

(c) the provisions of any Ordinance which the court is by or under such Ordinance authorized to administer, and

(d) the provisions of any law which the court may be authorized to administer by an order of the President under section thirteen.17

Except where the rules and orders were repugnant to justice and morality, the High Court took judicial notice of them. The question of applicability of native rules, orders, and proclamations made by the Native Superior Authority in Lealui was discussed in Mayungo v Induna Nalubutu.18 It was held that the High Court could take judicial notice of Orders and Rules made by the Barotse Native Government.

Integration of the Barotse Judiciary into

The National Legal System

On November 7, 1965, barely a year after Independence, Parliament passed the Local Government Act19 which in essence changed the status of Native Authorities in the whole country. All Native Authorities were converted to Rural Councils. The Rural Councils were charged with developing the areas in which they were situated. Section 113 provides:

The provisions of this Act shall apply in the Western Province and the powers contained herein may be exercised in relation to the Western Province notwithstanding anything to the contrary contained in any other law.20

The effect of the Local Government Act was to bring the administration of justice in the Western Province in line with the other Native Authorities in the country. All rules and orders made by the five
Native Authorities in the Western Province could apply only insofar as they were consistent with the Local Government Act and had not been revoked by that Act. The Native Authority rules applied only transitionally, pending revocation. The Local Government Act was followed by the Local Courts Act, which in Section 70 provided that the Act would also apply to the Western Province. As a result of the Local Courts Act, the Barotse Native Courts Ordinance was repealed. That, in effect, ended the special status of Barotseland. Land in the area of Barotseland was vested in the President by the Western Province (Miscellaneous Provisions) Act of 1970.

Barotseland's status, which was unique among Native Authorities in the country, was conducive to the development of customary law. Whereas the colonial administration interfered in the customary laws of the other Native Authorities, the Barotse Native Government enjoyed almost unfettered powers to enact laws which are contained in the various Barotse Native Orders Volumes. This was made possible by the various treaties King Lewanika signed with the British South Africa Company. In those treaties the authority of the Paramount Chief was recognized and powers were reserved for him to make laws for his people.

Social Background

Although the Lozi inhabit the Barotse Plain and other valleys of the tributaries of the Zambezi River, other Lozi do not stay in river valleys; for example, the Kwangwa in Mongu, the Ba-Imilangu in Kalabo, and the K wandi in Senenga. An outsider might think of the Lozi as a homogeneous group but, while this may be true to some extent, there are variations among the Lozi.
The variations are pronounced in their staple foods, dialects, and dances. Whereas the Lozi inhabiting the Barotse Plain and the tributaries of the Zambezi use maize as their staple food, the Lozi living on the forest margin depend on cassava and millet. (This is particularly true of the Ba-Imilangu and the Kwangwa.) Generally, all Lozi speak Silozi, a dialect of the Makololo who invaded in the nineteenth century, but there are various dialects. In Kalabo, for example, there are Simakoma, Simwenyi, Sinyengo, and Si-Imilangu. Similarly, in Mongu we have the Sikwangwa; in Lukulu, Simbowe; in Senanga, Sikwandi, and so on. All these dialects are closely related to the original Siluyana, the Lozi language spoken before the Makololo conquest. Various dances are associated with these dialect groups. In Kalabo, for example, the Kayowe is danced by the Makoma, and Ba-Imilangu and Kandemba by the Nyengo.

Despite these differences, the Lozi are united by the Silozi language and common allegiance to the Paramount Chief in Lealui. Because of this common allegiance, the rules made by the Superior Native Authority in Lealui apply to Lozi throughout Barotseland; hence the uniform development of customary law. The centralized characteristic of the Lozi kingship was conducive to the development of uniform customary law. Orders came from Lealui and permeated the district Kutas and all villages in the countryside.

Villages

The Lozi on the plain live on mounds. Because the plain floods annually the Lozi employ transhumance during the flood season, which is normally from January to the beginning of June. The inhabitants of the
plain, together with their cattle, move from the flooded plain to
villages on the forest margin.

All the people from one village may not move to the same village
on the forest margin. Some may move to villages on the Eastern side
of the plain, while others may move to the Western side. The Paramount
Chief, together with the residents of his capital, moves to Limulunga
near Mongu during the famous Kuomboka Ceremony.

Agriculture on the plain is limited to patches of highland where
maize can be grown in fields called mazulu; otherwise maize is grown on
the alluvial soil near the villages in the lishanjo gardens and litapa.
The farming is mainly for subsistence. Cattle are raised on a large
scale, and the Barotse Plain, with its plentiful grass and readily
available water, is ideal for ranching.

Previously, cattle were a symbol of status and were rarely sold.
Because of the importance attached to cattle, the value of Sionda was
always calculated in the number of cattle paid. This had tremendous
bearing on the customary marriage law, because unless the cattle demanded
as Sionda were paid, no marital rights could arise.

**Economic and Political Changes**

Since the Lozi are subsistence farmers, little money is earned
from agriculture. However, the government policy banning importation
of beef has stimulated cattle sales among the Lozi. The high prices
offered by the Cold Storage Board have been too much to resist, and now
many people are selling their cattle for cash.

Fishing is also an important economic activity. The ponds and
rivers of the Barotse Plain abound in fish and attract fishermen from all parts of the Province. Completion of the tarred Lusaka-Mongu Road has made transportation much easier and has opened up the line of rail markets to the fishermen in the Province. The increase of people in the money economy is beginning to affect the customary law. Marriage payment (sionda) and compensation for adultery have gone up tremendously. Similarly, damages for pregnancies of unmarried girls have also increased.

Independence has opened up to Africans opportunities hitherto reserved for white people. Education is free, and Africans can get housing on merit in urban areas. Jobs are open to all qualified, regardless of colour. Restrictions on the movements of Africans from their villages to urban areas have been removed.

These economic and social changes are beginning to have an impact on customary law. For example, it is not uncommon now to find a couple who arrange their own marriage without the prior consent of the wife's parents. Although consent is sought eventually, this reverses the marriage process under customary law. This could be explained by the economic and social security brought about by independence. Because many young people now go to school and get jobs after their studies, they feel that they can lead their lives without depending on their parents. A working girl can provide for herself without looking to the parents for support. Should she decide to enter a marriage that later fails she will not need to go back to her parents for support. She may instead return the marriage payment on her own and terminate the marriage. The same applies to the young man. Because he is working, he can raise the
marriage payment without the support of his parents. In addition to economic security, the urbanization process draws the young people away from the village lifestyle and thus they pay less attention to customary rites.

However, as will be explained later, where consent is later denied by refusing to set the marriage payment, no valid marriage results from the relationship, and the man cannot sue for any marital rights based on the relationship. If the wife's parents, however, set the marriage payment, consent is implied and its effect is retroactive.

Another fast-developing institution is mapoto. Mapoto exists when a man and a woman live together without the man paying the marriage payment. It is an irregular relationship not sanctioned by the woman's parents. In most cases the woman is either a divorcee or a widow. When mapoto occurs with a young woman never married before, her parents can demand lushoko damages. Mapoto occurs in urban areas and around government administrative centers in the rural areas. Again, this is related to economic and social changes brought about by independence. Prior to independence no women were allowed to leave Barotseland for the urban areas without written authorization of the Barotse Native Authority. Such restrictions prevented mapoto. Many women now go to the urban areas in search of employment, and when they fail, enter into this kind of relationship as a means of support.

The mapoto relationship matures into a valid marriage when the man tenders the marriage payment to the woman's parents. Without the marriage payment mapoto cannot give rise to any marital rights. Unless the marriage payment is made, the relationship is no more than cohabitation.
Urbanization has also brought into focus the problems of conflict between internal laws. No longer are the Malozi marrying among themselves; they are more and more marrying across tribal lines. This immediately raises the problem of which customary law applies. Economic and social changes thus are influencing the direction and development of customary law.
NOTES TO CHAPTER ONE


2. "Aluyi" means "people of the water." They were probably given this name because they inhabited the Flood Plain.


7. Since independence, the number has increased to six with the creation of Lukulu (from Mongu) as a separate district. Mankoya has also changed its name to Kaoma.

8. Examples of such legislation are the Native Courts Ordinance and the Native Authorities Ordinance.

9. The Saa-Sikalo Kuta was the Supreme Court of the Barotse Native Government. It also advised the Paramount Chief on the formulation of rules and orders.

10. A Silalo Kuta is a sub-district court.

11. A Silalo Induna is a sub-district court judge.

12. Ngambela means spokesman. The district Ngambela was the presiding justice of the district Kuta and principal assistant to the district chief. Each of the five districts had its own Ngambela.

13. Lealui is the Capital of the Paramount Chief of the Malozi and the seat of the Saa-Sikalo Kuta.

14. "Western Province" is now the name of what was formerly Barotseland.

15. Section 21.

16. "Litunga" is the titular name of the Paramount Chief of the Malozi. "Litunga" literally means "the land" and in effect the Paramount Chief is regarded by his people as such.


20. Ibid.

PART 1

THE MARRIAGE CONTRACT
CHAPTER TWO

The Marriage Contract

Under Lozi customary law, the marriage contract may be entered into through one of two ways: the Ku beeleza (betrothal) or the ordinary contract. Ku beeleza may be defined as an offer to marry made by a male or his guardians, where the female subject of the offer is not of marriageable age. Although according to custom Ku beeleza is regarded as marriage legally it is no more than an offer because it does not meet the legal requirements of marriage under customary law. The relationship lacks the rights and obligations that are the natural consequences of marriage. As will be seen later, no marriage is valid under Lozi customary law without the payment of a sionda. No sionda is paid in establishing a Ku beeleza relationship.

Ku Beeleza (Betrothal)

Ku beeleza arises when a man offers to marry a minor. The offer is made to guarantee that the minor will be reserved as his future wife. Acceptance of the offer is signified by the minor's parents' acceptance of a token payment from the man. Previously, it was some beads, but now it is usually a small amount of money. This offer to marry may also be made by the parents of a minor on behalf of their son. Ku beeleza may therefore take place between two minors.

Unlike statutory marriages, where marital age is specified by law, age is a secondary consideration under customary law. The girl's marital age is determined by her first menstruation (Ku italeha), so
actual age is not of much importance. During her first menstruation a
girl undergoes a month long process of traditional education (Sikenge).
She is taught by elders how to care for the home, husband, and children.
Even after she is married she can still count on the help of her elder
sisters, who may come into her home and teach her the duties of a wife.
The mother-in-law also is expected to help her young daughter-in-law.
The need for the girl to reach the age of majority before she could get
married was minimal in the light of this help.

Parents of the male minor will insist that he be able to dis-
charge his responsibilities of an adult before he is allowed to marry.
Although there is no specified age, the capacity to run and maintain a
home is crucial to marrying. The parents' permission is required be-
cause they provide the marriage payment, without which the young man
could not conclude the marriage contract. This law, however, assumed
that the young man could not raise the marriage payment himself. Since
the attainment of independence and its attendant economic benefits,
many young men, especially those working in the urban areas away from
their parents, are marrying without seeking parental permission. It
should be noted that the consent of the young man's parents has no
legal effect on the marriage.

Where the relationship is between two minors, the Ku beeleza
agreement is negotiated by the minors' parents. The male's parents make
a token payment to signify agreement, the exact amount varying from one
family to another. It may be anything between two to ten kwacha, a
negligible fraction of the marriage payment. The girl will then either
go and live with the boy's parents or she may continue to reside with
her parents.
Whether the girl stays with her parents or not, the boy's parents are obliged to clothe her and give her gifts. This is both a social and legal obligation. It is legal to the extent that they are bound by the agreement of betrothal to treat the girl as their daughter-in-law. Because of this relationship, they must discharge the responsibilities their son would have discharged had he been an adult. It is a social obligation to the extent that, if the girl refuses to marry their son, the boy's parents have no right of action to recover the clothes and other gifts given to her during the betrothal period.

Ku beeleza may also take place between a girl who has not yet reached marital age and a male adult. In that case, the negotiations are conducted by the male himself. If negotiations are successful the girl goes to stay with her future husband, but they are not allowed to share the same bed. As soon as there are obvious signs that the girl may soon reach puberty, she goes back to her parents' home until she is ready for the marriage. This is done to avoid sexual abuse. It must be pointed out that betrothal is not very common today. Obviously, with boys and girls spending most of their time in school, Ku beeleza would be an intolerable inconvenience.

Consent of the girl is not necessary to a Ku beeleza agreement. First, there is an assumption that her parents would not conclude a Ku beeleza agreement against her interests. Second, and perhaps more importantly, the girl is usually too young to make up her mind in such matters. Finally, where the betrothed girl refuses to marry her fiance, her parents can do nothing but try to influence her to change her mind. In some cases the agreement may be concluded by the parents
Legal Effect of a Ku Beeleza Agreement

A Ku beeleza agreement cannot be enforced under Lozi law. It is simply an agreement of honour that binds the parties only to the extent that they are willing to effect it. Induna Matthews Sikufele\(^1\) of the Suulu Local Court says that even the gifts passed during the continuance of the agreement cannot be recovered. His views coincide with Local Court decisions, which state that the gifts are voluntarily given and the young recipient, who could not have made up her mind, cannot be penalized for them.

Although this may seem rather difficult to justify, the rationale lies in the nature of Ku beeleza itself. It is an agreement in which the boy and his parents must guarantee the girl a secure home when the marriage is finally concluded, and the girl's refusal to marry implies that the guarantee has not been provided. Second, because the boy or his parents gave the gifts voluntarily and with full knowledge of the risks involved, they cannot be heard to complain.

Where the betrothed girl refuses to marry her fiancé, her parents can do nothing but try to influence her to change her mind.

Where there have been no problems with the betrothal agreement, the marriage negotiations begin after the sikenge and follow the procedure of an ordinary marriage contract. The girl's parents inform the boy's parents about the first menstruation. This is notification that they should get ready for their daughter-in-law, who has become of age. Apart from the sionda, there is very little to negotiate because
everything else is covered in the Ku beeleza agreement. After the sionda has been determined, the procedure follows the ordinary marriage contract.

The Ordinary Marriage Contract

The problem in stating the customary law of marriage is that the distinction between law and custom is very unclear in some cases. There is always a temptation to discuss custom at the expense of the law, and this is especially true in the area of marriage negotiations.

In the ordinary marriage contract, either the man or his parents may approach the intended wife. The parents of the man take the initiative only if the marriage is arranged. Arranged marriages are not common now, and the general consensus of my interviewees is that arranged marriages are dying away because of the increased economic and social independence of young men today. Whereas young men in the past were solely dependent on their parents for the sionda (marriage payment), it is very common now for the young men to meet the payments on their own. Consequently, parents' roles in the marriage are becoming advisory.

In the past, before the young man approached the girl he wished to marry, he inquired in the surrounding villages about her character and whether she was a hard-worker. This investigation was very important, because it was the wife's duty to grow food for the family; if she were lazy her family would be ridiculed in the village. Lazy girls, therefore, found it difficult to get married. Today a girl's ability to work hard in the fields is no longer an indispensable asset.
Girls now work in offices and buy food for their families from earnings instead of growing it in the fields.

After the necessary inquiries have been made and the man is satisfied as to the girl's character, he meets the girl in her village. Usually the meeting takes place at the house of some elderly person, most preferably the girl's grandmother. The grandmother or other elderly person calls the girl to the house to meet the man. The man then makes his marriage proposal. The parents of the girl in theory do not know about the proposal. The man will make a payment to the girl (called tumelelano,² sepiso,³ or buitamo). That indicates an agreement has been reached. In some cases, but not as an obligation, the girl will also make a similar payment to the man. It may be five ngwee, ten ngwee, or one or two kwacha. Previously, the payment was made in beads. Although the tumelelano payment is made to the girl, it is eventually given to the grandmother. If some members of the family oppose the proposal when the grandmother informs them, the tumelelano payment is returned during the man's second visit. In this event, the man has no right of action against the girl for breach of agreement. If the tumelelano payment is accepted, a date is fixed for the man to meet the girl's parents.

Meeting the In-Laws

The girl or her grandmother informs her parents about the agreed date for the marriage negotiation. The man also informs his parents, and elder brothers or uncles about the proposal and asks them to accompany him; the man must be accompanied when going to meet his in-laws.
because custom does not allow him, as son-in-law, to argue with his in-laws about the marriage payment. Negotiation for the sionda (marriage payment) is the most difficult and important aspect of the marriage contract and as such it requires skill, patience, and tolerance. Each side wants the most favourable terms.

The first meeting, where possible, is attended not only by the girl's parents, but also other maternal and paternal relatives. At the meeting the subject is introduced by acceptable customary terms. For example, the person introducing the subject to the girl's parents will say, "We have come to ask for fire," a polite way of asking for the hand of their daughter in marriage. Although my informants could not give me the exact origin of this expression, they unanimously agreed that the expression is associated with the primary duty of a Lozi wife in the home, to sit by the fire and cook.

The girl's parents do not say anything until the sibulamulomo^4 payment is made. After the sibulamulomo has been paid, however, they call her from her hiding place and ask her whether she knows the man before them (the man proposing the girl for marriage). The girl must answer affirmatively and describe to her parents how she knows the man. For example, she may say that he is the man who has proposed marriage to her or that she met him at her grandmother's house and arranged for him to meet her parents. The girl's parents ask her questions until she tells the assembly that the man before them is her choice for a husband.

The girl's parents normally make up their minds whether to accept the man's proposal before the meeting. They always meet with relatives
and debate the proposal so that by the time they come to the meeting they have a common stand. If the marriage proposal is accepted by the girl's parents, the man makes a payment called lukusi. It is normally a token payment and does not in any way affect the validity of the marriage. Although payment of the lukusi is not a legal requirement, it is paid as a sign of respect for the in-laws.

Consent Of The Girl

While the man must approach the girl first, the marriage proposal may be made to the in-laws without the girl's prior consent. The marriage may be negotiated between the man and the girl's parents. Such a marriage is valid. One must point out, however, that such arrangements are not common now. Since most girls now go to work after school, and can support themselves, they can afford to refuse arranged marriages. Previously, this was not possible because girls stayed with their parents and had no independent means.

The marriage may also be arranged between the man's parents and those of the girl without his prior consent. There are, in fact, many instances when the husband first saw his wife when they met to consummate the marriage. This was common in Kalabo when many young people went to work in the gold mines in South Africa. The man's parents found a suitable wife for their son, paid the sionda, and brought her into their home. When he returned the young man found his wife already in the home. The young man usually did not object vigorously because the sionda had been paid by his parents. Even if he did protest, his parents would not provide another sionda to remarry because they had already made the "right" choice for him.
Consent of the Man's Parents

Consent of the man's parents is socially desirable and is required by custom, although not required legally. Their consent is necessary only if they provide the marriage payment. If the man has the means to make the payment himself, their consent is not required. In practice, custom requires that the man seek their consent as a sign of respect. Because it is merely a custom now, the young man frequently informs his parents after the marriage is completed. Parental consent is thus related mainly to the marriage payment when the young man is a minor. Under customary law, there is no legal marital age; if a minor can tender the marriage payment, provide shelter for the wife, and generally conduct himself as an adult, the absence of his parent's consent will not affect the marriage's validity. Usually, if the minor is too young, however, the girl's parents withhold their consent. Thus no valid marriage can take place.

Consent of the Girl's Parents

Consent of the girl's parents is essential to the marriage's validity. This consent may be expressed or implied. Consent is implied when in the absence of express consent the girl's parents accept the marriage payment. Consent is important from the girl's parents' view because it signifies accepting responsibility for the marriage. The term "parent" has a wider definition in this context. In Lozi, the term used is mushemi, which means both parent (as understood in western society) and guardian.

The consent must be given by both father and mother, by either
of them if the other is dead, or by the guardian (preferably an uncle). The consent is accompanied by the setting of the sionda (marriage payment). Nowadays in urban areas couples arrange their marriages before consulting their parents. Such relationships, however, cannot give rise to valid marriages without the girl's parents' consent and subsequent payment of sionda. Unless this is done the man cannot sue for his marital rights (e.g., compensation for adultery) irrespective of how long they have stayed together. Under Lozi customary law, such a relationship amounts to no more than cohabitation.

Ku Tobisa

Ku Tobisa is another means of contracting a marriage. It is essentially different from Ku beeleza and the ordinary marriage contract because of the absence of the girl's parents' prior consent. The arrangement is informal. The man proposes to the girl and, without informing her parents, the girl runs away with the man to his home. Normally the girl informally tells her grandmother about the arrangement so she can inform the girl's parents when they start looking for her. After a week has elapsed, the girl's parents go to the man's home and demand damages for ku tobisa. This payment is different from the sionda, which may also be demanded. If the ku tobisa damages are included in the sionda, the sionda is higher than normal.

There are various reasons for the ku tobisa. If there are other men proposing to the girl the man may run away with her to avoid losing the girl. Sometimes the young man may not have sufficient sionda so he runs away with the girl so she is in his home while he obtains the sionda. Indeed, the ku tobisa may occur after part of the sionda
some disdain. As a result of this unfavourable attitude, parents are reluctant to set sionda for such relationships; their refusal to set the sionda, as seen earlier, means no valid marriage can arise. Some parents even insist that their daughter return to her former husband in which case the eloper pays damages for adultery. If the parents of the woman refuse to set the sionda, but do not insist that she go back to her former husband, the woman stays with her parents. The parents' refusal to set the sionda does not affect the eloper's obligations to pay damages to the former husband. This obligation is only slightly altered if the woman is returned to her former husband.

In most yanga cases, the woman is unhappy with her husband but for various reasons can't secure a divorce. The ku yanga is therefore an alternative to divorce. Where there have been problems in the marriage, her parents are often more sympathetic with her and set the sionda so that she can contract another marriage.

Under Lozi customary law, marriage may therefore be contracted through the ku beeleza, the ordinary marriage contract, ku tobisa, or ku yanga. Because of the attitude of the people towards ku yanga, that process is not commonly used. As for ku beeleza, the social changes taking place among the Malozi do not seem to favour that process.
NOTES TO CHAPTER TWO

1. At the time of the interview in January, 1977, Matthews Sikufele was Court President of Suulu Grade A Court in Mongu. He has since retired and returned to his village at Limulunga. See notes on informants.

2. Tumelelano is a token payment made to the girl (woman) to signify agreement. It does not seem to have any legal effect except as an indication of agreement.

3. Ibid.

4. Sibulumulomo is the payment made to the girl's parents before they say whether or not they accept the marriage proposal made to their daughter.

5. This is a payment made by the man to thank the girl's parents for giving their consent to the marriage proposal.

6. Ku tobisa is running away with a girl with the intention of contracting a marriage without her parents' prior consent.
CHAPTER THREE

ESSENTIALS OF A VALID MARRIAGE

Various payments are made during negotiations for a marriage contract. Some are indispensable to the marriage's validity; others are necessary only to proceed with the negotiations. Indeed, some payments may be dispensed with at the option of the girl's parents. The Sibula-mulomo, for example, is only paid if the in-laws demand it. Payment of the lukusi is a mark of respect for the in-laws, but its nonpayment cannot invalidate the marriage. Similarly, the parties to the agreement can honour their obligations without paying the tumelelano or buitamo, and payment of buitamo or tumelelano in no way guarantees that the agreement will be honoured. Failure to honour these payment obligations does not entitle any party to a cause of action for breach of the agreement.

The Sionda (Marriage Payment)

Payment of the sionda, however, is indispensable to the validity of a Lozi marriage. Payment of the sionda immediately confers marital rights on the man. The woman is treated as "somebody's wife," and the man will be entitled to compensation if anybody commits adultery with her. This is so even though the marriage ceremony may not have taken place.

The amount of the sionda is not uniform throughout the Western Province. Paramount Chief Yeta III attempted to legislate for a uniform sionda, but was unsuccessful. Several factors accounted for the failure. Marriage is essentially a personal affair, and a man will go beyond the limits set by law to contract a marriage with a woman he loves. In South Africa, where there is legislation against inter-racial marriages, people have left the Republic to marry the person they love. Yeta III's
attempt to control sionda failed because people never bothered to com-
plain to the Kutas when they were overcharged. Many factors increase
the amount of the sionda among the Lozi. If a girl has many proposals
her parents will easily demand a high sionda because their daughter is
"marketable." Competition for the girl thus inflates the sionda. Al-
though the early missionaries saw payment of sionda as tantamount to
selling the bride, sionda differs from payments made in ordinary trans-
actions. The husband who pays the sionda does not in any way acquire
any proprietary rights in the woman; he cannot dispose of her as he
would a chattel.

A further argument advanced against the payment of a high sionda
is that it tempts the husband to illtreat his wife. The women them-

...
protracted bargaining. For this reason, the man must be accompanied by seasoned elders who can negotiate tactfully: the harder one bargains, the lower the sionda. The value of the sionda will be determined also by whether it is the woman's first or second marriage. Subsequent marriages always attract a lower sionda.

Payment of the Sionda

Generally, the sionda must be paid to the girl's father and mother. In practice, however, there may be only one parent present when the sionda is paid, either the father or mother. In the absence of the parents, a guardian may accept it.

Payment of the sionda need not be made in one payment to validate the marriage. It is subject to negotiation and depends on the understanding of the girl's parents, who may accept partial payment. If they agree on partial payment, the husband is entitled to all rights at first payment as though he had paid the sionda in full.

If an agreement for partial payment is not honoured, the woman's parents have two options; they may take an action against their son-in-law in the Kuta or they make take their daughter from him. Taking the woman from the matrimonial home terminates the marriage, but the husband may not sue for part of the payment made. He is estopped from suing because he has breached the agreement to pay the sionda.

If there is partial payment and the husband divorces his wife before full payment is made, the parents of the divorced woman can sue for the balance. This is also the case when either the wife or the husband has passed away, although in practice the woman's parents rarely sue
for the remainder of the sionda if either party has died. There is no
legal bar against this custom, however.

When the sionda has been paid but either the father or mother dies
before it is shared, the relatives of the deceased take his or her share.
In any case, the relatives on either side get their share after the
sionda has been distributed between the father and mother.

Recent developments clearly show that the sionda has been af-
fected by inflation. Whereas a sionda of five hundred kwacha was un-
known earlier, it is now common. Advancement in education may explain
this in part. Induna Alibandila\textsuperscript{2} of the Suulu Grade A Local Court
argues that the high sionda demanded today is traceable to the advance-
ment in education since Independence. Whereas in the past the girl was
married to be a fulltime housewife, today's girls are also a source of
income. A working girl boosts the husband's income and this increased
status of the girl is reflected in the sionda. In fact, there is a
marked difference between the sionda demanded for nonworking girls and
that charged for the working class. The justification lies in the con-
tribution made by the parents towards the girl's education. One may
argue as a matter of interest that, since education in Zambia is free
from primary school through the university, the sionda for educated girls
should not increase because the cost of educating them is borne by the
Government. The husband of a working girl is therefore made to pay a
high sionda because he is assumed to be the beneficiary of the girl's
earnings. The high sionda is therefore intended to compensate her
parents, who will lose her earnings to their son-in-law. Whether this
argument has any merits is outside the scope of our discussion.
The sionda is also high if there has been ku tobisa (running away with the girl without her parents' consent). As noted in Chapter Two, the ku tobisa payment is sometimes charged separately from the sionda. In some cases, the ku tobisa payment is added to the sionda, so it appears unusually high. The ku tobisa payment is not, however, part of the sionda, so it can never be returned in the event of dissolution of the marriage. The payment is only demanded if the girl was not married before. If she was previously married, there could be ku tobisa, but no payment may be demanded apart from the sionda.

*Marriage Payment Preceded by Pregnancy*

Damages for pregnancy under Lozi law are only demanded if the pregnant woman has never been married. If the pregnant woman has never been married, but had a child outside marriage before, the damages are not demanded. When the man responsible for the pregnancy chooses to marry the girl, the damages are much lower, between sixty to eighty kwacha. The damages payment precedes the sionda. When determining the sionda, account is taken of the damages paid, so that sionda does not become unreasonably high. When the money for the damages is paid, it is shared equally between the girl's father and mother. Both the father and mother then share with their relatives. The damages demanded for pregnancy are not uniform; they vary between a girl who has never been to school and one whose pregnancy has terminated her education.

The damages are called lushoko payment or ku sinya. Especially where the girl was at school, the parents can demand very high damages. Legally, there is a technical problem in that the local court's powers to
impose fines are restricted by the Local Courts Act. I raised this
problem with Mr. Mubanga, the Provincial Local Courts Officer in Mongu.
Grade A Courts can impose fines up to a maximum of two hundred kwacha.
The Grade B Courts are limited to a hundred kwacha. In the event of a
parent demanding lushoko payment in the excess of the Court's powers,
the Local Court refers the matter to the Subordinate Court. It appears
that the Subordinate Court is always sympathetic to the parents making
such a demand, but even the Subordinate Court has limitations on its
powers in relation to fines that may be imposed. Mr. Mubanga said that,
in fact, many Local Courts in cases of lushoko impose fines in excess
of their powers and are reversed only on review. The temptation to
impose a severe fine is great because of the sentiments involved. Most
girls involved in lushoko payments are students who have been expelled
from school. Because their chances of going back to school are slim,
their parents want to punish the man responsible for the girl's expulsion
by demanding a high lushoko payment. In the lushoko action, the girl
involved must not have had a previous pregnancy.

The Marriage Ceremony

The marriage ceremony has no legal effect on the validity of the
marriage. Its absence cannot affect the validity of the marriage. There-
fore its only significance seems to be notification to the general public
that the hitherto unmarried girl is henceforth somebody's wife.

Because the marriage ceremony is of no legal consequence, it is not
uncommon now for young men to dispense with the ceremony rather than take
leave from their jobs in the urban areas to get married in their villages.
Also, customary marriages contracted in the urban areas rarely go through the marriage ceremony because of the lack of enough people to arrange it, according to custom. Sometimes the particular municipal council may not grant the permit necessary to conduct the ceremony because the area in which it is to be conducted is a restricted noise area. Despite the absence of the marriage ceremony, the contracted marriage is valid.

Payment of Sinanulo³ and Mukaba⁴

Before the girl can actually leave her parental home, the mukaba payment must be made. Like the buitamo payment, mukaba has no fixed value, but may be any reasonable amount. The payment is made by placing the money or something of equal worth on the mat on which the bride is seated. The bride's family then decides who takes the money. Normally, the mukaba payment goes to the bride's mother. If the bride's mother is dead whoever acts as her "mother" will take it.

Immediately before the bride stands up to leave her parental home, a payment called sinanulo must be made. Both this payment and mukaba are made as a sign of respect for the in-laws. They can be dispensed with at the option of the girl's parents. However, if payment of the sinanulo is not waived and the other side fails to pay it, the girl cannot leave the parental home. The consequences of failing to make the sinanulo and mukaba payments go to the marriage contract, itself. The bride's parents can refuse to allow her to leave the parental home and can eventually return the sionda and end the marriage. Although this is supposed to happen, in practice there is always some compromise, and non-payment terminates the intended marriage very rarely.
Both Sinanulo and mukaba are subject to negotiation. It is even permissible to take the bride first and make the payments later. Although the mukaba eventually goes to the mother, it is the grandmother or another delegated woman who demands it. The same applies to sinanulo. The parents would intervene only if there is no compromise.

Munyembu

Apart from the sinanulo and mukaba, the girl's relatives will also demand payment of munyembu. The girl's parents are not involved in this payment. It is not even taken to the girl's parents because it is shared among those who escort the girl to her matrimonial home.

Munyembu is not normally paid as one lump sum. It is paid in portions as it is demanded along the way. When a road junction is reached, when they pass under a big tree, or when they pass through a village, payment must be made. The amount varies; it can be ten, five, or even two ngwee at a time depending on how hard the man's relatives have bargained.

If the distance to be covered is very long an agreement is made to pay the munyembu as a lump sum. Sometimes, after payment of the sinanulo and mukaba, one man from the bridegroom's side lifts the bride and runs away with her to the matrimonial home. If running away with the bride has been done successfully, the bridegroom later pays the munyembu as a lump sum, after negotiations.

Legally, the munyembu has no effect on the marriage contract; the courts would not entertain an action for munyembu. This is so because there are many other ways the munyembu can be required without going to court.
The bride can refuse to move into the matrimonial home, or the group accompanying her her can refuse to move until payment is made. If they willingly accompany the bride to the matrimonial home, they cannot be heard to complain later.

When validity of the marriage is an issue, however, payment of munyembo can be used as evidence to establish the marriage's existence. For example, it could be argued that munyembo is only paid where there is an agreement to marry; lack of consent could not thus be raised where there was payment of munyembo.

**Consummation of the Marriage**

Consummation of the marriage is of utmost importance in Lozi law. Non-consummation may arise in a variety of ways. On the first night, before the bride can enter the man's house, the man puts a gift in the doorway. This is a payment akin to munyembo and the value of the gift varies between the bride's first marriage and subsequent marriages. Though this is custom, it has some legal consequence, because if the gift is not placed in the doorway, the bride cannot enter the house and consumption, which would validate the marriage, cannot occur.

After the gift has been placed in the doorway, the bride enters the matrimonial house. Until she enters the house, she must remain in the company of a female relative, preferably her sister. The sister then informs her brother-in-law that she has brought his bride and that he should report to her the following morning if he is "satisfied" with her. Similarly, the bride is also asked by her sister to report the following morning if she does not find "satisfaction" with her husband.
There were many cases in the past, according to my informants, where the marriage contract would be terminated because the wife was not "good in bed." Being "good in bed" meant a lot of things. According to custom, when a woman is having sexual intercourse with her husband, she is supposed to dance in bed. She must wriggle her waist to arouse her husband's sexual desires so that he can reach his orgasm quickly. This is just part of custom, but the woman must adhere to it and the husband can sue for this right.

If the husband is satisfied with his bride, he will put a kwacha or two in the doorway very early in the morning. It is a token of appreciation for the bride's womanhood. The bride's sister, who comes to the house in the morning, must find this gift in the doorway. Immediately after the gift is discovered, the sister breaks into shouts of joy.

If there has been failure of consummation on the man's part, the bride will immediately inform her sister in the morning that she is not satisfied with her husband. The usual expression is in the form of a complaint that "she has been married to a fellow woman." The woman's relatives are always sympathetic and give the husband a period of grace to prove his manhood. This period may range between a week to four months. If it becomes evident that there is total failure of consummation, the sionda is returned and the marriage contract terminated.

Despite failure of consummation, the husband enjoys all his marital rights during this grace period. The relationship is equivalent to a conditional marriage. The wife's condoning of non-consummation confers full marital rights on the husband. The husband, therefore, can sue for compensation if the wife commits adultery with another man during this period.
My informants unanimously agreed that it is rare under Lozi customary law for the bride to be held liable for non-consummation of the marriage. The only time this happens is when the female spouse's sexual organs are biologically deformed so that she has difficulty having sexual intercourse. When there is such non-consummation, the marriage is terminated and the sionda returned.

**Prohibited Degrees of Relationship—Sindoye**

Section 32(1) of the Marriage Act provides:

No marriage in Zambia shall be valid—
(a) which if solemnized in England would,
under the law relating to prohibited degrees of marriage for the time being in force in England, be null and void on the ground of kindred or affinity."

The 1949 English Marriage Act provides a schedule of prohibited degrees of relationship identical to the Lozi prohibited degrees of relationship. The only difference lies in the fact that the degree of the effect of any breach depends on how far down the list the breach has been committed.

As provided above, if a marriage is contracted within the prohibited degrees of relationship, such a marriage is null and void; the marriage is deemed never to have existed. Although the marriage would be null and void if it is proved to be within the prohibited degrees under Lozi law, the effect could differ.

The marriage could either be void, voidable, or undesirable. Whether the marriage contracted within the prohibited degrees of relationship is any of the above depends on how closely the parties are
related. For example, a marriage between a son and mother, or a father and daughter is null and void. It is simply unacceptable. In the past, the parties to such a marriage were killed because they were regarded as having revolted against society.

If the marriage is between first cousins, it is voidable depending upon how insistent the parties are about the marriage. They are strongly advised to terminate it, but if they insist, the husband makes a special sindoye payment. This payment is in addition to the sionda charged. In theory, such a marriage is indissoluble, because Lozi law does not allow divorce in sindoye marriages. The reasons are clear. Divorces always raise problems for the families involved. There may be a need to go to court, the sionda may have to be returned, or a quarrel may develop during the sharing of the crops or other property of the marriage. To avoid such problems, divorce is refused if the marriage involves sindoye because the two families to the marriage are related and should not take each other into court. In the past, parties of a sindoye marriage were banished from the village.

The third type of sindoye arises from a marriage contracted by distant relations. Such a marriage is undesirable but tolerable. The parents on both sides object, but if the parties insist, they are allowed to marry. Even in this case, the husband must pay for sindoye in addition to the normal sionda.

The sindoye marriage is never contracted in the normal way, because the parents of both parties would not allow it if they followed the normal procedure. It is always contracted by ku tobisa. The man talks
to the woman and, when agreement is reached, they run away to the matrimonial home. The man's parents protest when they discover the marriage, but if the couple insist on marriage and the sindoye is tolerable, negotiations follow for the sionda and sindoye payments. Alternatively, sindoye arises from ku yanga. The man elopes with a relation already married to someone else. When this happens, the man makes three separate payments: compensation to the first husband, sindoye payment to the in-laws, and the sionda.

While this is the law among commoners, members of the royal family are excepted. There is a high tolerance regarding royal breach of the prohibited degrees of relationship. This relates to abundant superstitions reigning within the royal families where strenuous efforts are made to preserve royal blood. But even among royal families, marriage between those closely related is discouraged.

It has already been said that punishment for sindoye depends on how closely the couple is related. This is because of the family members' reactions to such a marriage. Induna Imangambwa, Prime Minister of Naliele in Kaoma, said that anybody who committed sindoye in the past could be killed on the grounds that he had rebelled against society. The rationale for this was that those rebelling against society must be forsaken by the same society.

Induna Litungi Kawewa, of the Imalyo Local Court in Mongu, said that couples committing sindoye who are brought to his court are fined twenty kwacha each, payable to the parents of the two parties to the marriage. It is always the couple's hope in such a marriage that, if they insist in their relationship, they will eventually gain acceptance.
NOTES TO CHAPTER THREE

1. "Mwalyanjo" is a girl who has never been married before.

2. Induna Alibandila was until March, 1977, a Local Court Justice at Suulu Local Court in Mongu. He has been on the bench for thirty-one years from 1946 to March, 1977. He was born in 1912 in Sitoko Village in the sub-district of Tungi, Chief Libumbu in the Mongu District.

3. Sinanulo is the payment made immediately before the girl leaves her parental home. It is a thank you payment to the in-laws for allowing their daughter to move into the matrimonial home.

4. This is a token payment made to the girl's mother before she leaves for the matrimonial home. Mukaba is the piece of cloth which a Lozi mother ties around her stomach after delivery. Failure to pay the mukaba is a sign of ungratefulness to the one who bore him a wife.

5. Munyembu are the payments made to the relatives who accompany the bride. The payments are made on the way to the matrimonial home.

6. "Sindoye" means marrying or having sexual relations with someone within the prohibited degrees of relationship. For example, if a man has intercourse with his daughter, he is said to have committed sindoye.

6(b) Laws of Zambia, Cap. 211.

7. Interviewed in the presence of Mulena Litia Mbikusita (Chief) of the Malele in Kaoma district at his palace on January 24, 1977.
CHAPTER FOUR

INCIDENTS OF A VALID MARRIAGE

Under the Marriage Act, once a valid marriage has been contracted certain incidents automatically follow. For example, during the marriage's duration, the parties are incapable of contracting another valid marriage unless the former marriage was annulled or dissolved by a court of competent jurisdiction. In this regard, Section 38 of the said Act provides:

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 offense and liable on conviction to imprisonment for a period not exceeding five years; provided that this section shall not extend to any person who contracts a marriage during the life of a husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time.

A problem arising from this section of law came before the High Court in 1969 in the case of The People v. Chitambala. The accused, a high ranking member of the Zambian Government, married under Bemba customary law. In 1964, he converted his Bemba customary law marriage to a statutory marriage by complying with the relevant provisions of the Marriage Act. Four years later, the accused contracted another marriage in accordance with the Marriage Act.
Records showed that the 1964 marriage had not been dissolved at the time of contracting the second marriage in 1968. Consequently, the accused was charged with bigamy. The court had the task of determining the effect of converting a customary law marriage to a statutory marriage. The accused argued that he only registered the customary law marriage to satisfy his wife. The wife, on the other hand, maintained that he registered the customary law marriage so that it could be a "one-husband-one-wife marriage." The court found as fact that the first marriage had not been dissolved and that, since the first marriage had not been dissolved, the second marriage had been contracted during the continuance of the first marriage. The accused was accordingly convicted of bigamy and sentenced to twelve months imprisonment at hard labor.

The above decision is in line with the Christian concept of marriage, which was stated by Lord Penzance thus:

I conceive that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all.

This concept of marriage differs sharply from the Lozi marriage. Lozi marriage is potentially polygamous. The husband has the unlimited right of marrying as many wives as he can afford to provide sionda for. The manner in which the second wife may be brought into the matrimonial village is left to the subjective determination of the husband. It is regarded as a sign of good manners and in keeping with custom to inform the first wife about the intended
second marriage. The first wife cannot, however, in any way stop her husband from contracting the second marriage.

To the contrary, it is not unusual for the first wife to ask her husband to take a second wife. This is especially true in cases where the husband has a large extended family which is dependent on him. A second wife can relieve the first wife of much of the burden. Village headmen, for example, are usually polygamists. They have to provide food for visitors and other members of the clan who visit them and one wife cannot effectively provide for all such visitors.

Second, the mode of agriculture provides an incentive for polygamy. Apart from manuring gardens and cutting down trees in the gardens, most agricultural activities are the wife's responsibility. The more wives a man has, the more labourers he has for his gardens. Polygamy, therefore, provides the labour necessary for agriculture.

Apart from providing a source of labour, polygamy is a factor in a man's status. A polygamist is always accorded great respect as a man of means. Only those who are well-off can afford the lionda (plural of sionda) required for polygamy. The more wives he has, the more children he will have and, hence he is respected in the community. Children among the Lozi are treated as a sacred investment indispensable for old age. It is even more rewarding if the children are girls, because they are a source of wealth when the lionda are paid.

Be that as it may, things are quickly changing because of the effects of the money economy. Many people now, especially the young, leave their villages to live in towns where they can secure employment. With the acute housing shortage polygamy is inconvenient. This is
not in any way to suggest that there are no Lozi polygamists in towns. The wives of Lozi polygamists alternate staying in town with their husbands. Some strongly argue that polygamy today is more advantageous than in the past because the polygamous husband can pool his wives' earnings together to combat inflation and the higher cost of living.

One right the first wife enjoys is that, without her consent, the husband cannot bring another wife into the same matrimonial home; the wives cannot share the same house unless the first wife gives her consent. Consent may be express or implied. It is implied if, without the wife's prior consent, the husband brings the second wife into the matrimonial home and the first wife does not protest.

The first wife is entitled for the duration of the marriage, to all fields given to her; the husband cannot re-allocate her gardens to any subsequent wife. Any tampering with the wife's gardens gives her a right of action for divorce. If the first wife grants her permission, however, the husband may give some already allocated fields to a second wife.

Property Rights of A Married Woman

Lozi customary law regarding ownership of property by married women, except for minor variations, coincides with Section 5 of the Law Reform (Miscellaneous Provisions) Act, which provides:

Subject to the provisions of this Part, and subject, as respects actions in tort between husband and wife, to the provisions of Section 12 of the Married Women's Property Act, 1882, of the United Kingdom, a married woman shall---
(a) be capable of acquiring, holding, and disposing of, any property; and
(b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation; and
(c) be capable of suing and being sued, either in tort or in contract or otherwise; and
(d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders; in all respects as if she were femme sole.

A woman can own property before or after the marriage; her capacity to own property is in no way impaired by any marriage contract. It is not uncommon for a newlywed to bring into her matrimonial home cups and plates that personally she owns. Although such personal effects are brought into the matrimonial home, they still vest in the wife and no question of joint ownership can arise.

Fields

Every newly married woman is allocated a field or fields by her husband, but this allocation does not vest the fields in the wife. They remain the property of the clan that gave them to her husband. Crops cultivated in the gardens, however, belong jointly to the husband and wife.

In addition to the gardens, the husband must also provide accommodation for his wife. The house serving as the matrimonial home remains the husband's property during the marriage and after. This is the case even when the wife has contributed materially to the value of the house. The wife in turn can demand accommodation as a right, and failure to accommodate her is ground for divorce. There
is, however, a growing decline in the enjoyment of this right, especially in the urban areas: because of the housing shortage, not all people can find accommodation as and when they want it. Consequently, no divorce suit based on lack of accommodation in the urban areas is entertained. Similarly, in urban areas, a first wife will not petition for divorce because of sharing a house with another wife.

These changes in Lozi customary law have been dictated by social and economic changes, and no reasonable wife expects her husband to provide a separate house for every subsequent wife. This is also occurring in rural areas with husbands living in brick houses. The first wife does not expect her husband to build a brick house for every subsequent wife, because it would be too expensive. Wives sharing the same house, however, cannot share the same bedroom. My informants explained that women have "bad hearts" and can bewitch each other if put in the same bedroom. This, entangled with superstition, falls outside the scope of this paper.

Because of the property problems arising during subsequent marriages, Lozi law provides for solume\(^5\) property. This is property which, although kept in the matrimonial home, belongs solely to the husband. The right to have solume property is recognized by both the wives and the community as a whole. Although this is true, a wife can petition for divorce if her husband appropriates most of his property to solume, leaving very little for her. A wife is
always suspicious about the status of the marriage if the husband
suddenly accumulates solume property. Thus property already given to
the wife for use in the matrimonial home cannot be converted to
solume by the husband, and any conversion of such property gives
the wife right of action for divorce.

When allocating fields to his wife, a husband normally
leaves a field or two for solume. Such fields are cultivated by the
husband or his unmarried sisters, or sometimes by the wife on her
husband's behalf. The produce from the solume field(s) belongs to
the husband and he has the discretion to dispose of the produce as
he wishes. This food is often given to his female relatives who get
divorced and come to stay with him. The fields may also be allocated
to his sisters or other female relatives who decide to stay with him.
The husband cannot, however, give his female relatives gardens al-
ready allocated to his wife unless the wife gives her consent.
Solume fields may also be reserved for a subsequent marriage. Once a
solume field or other property has been allocated to a subsequent
wife, it is no longer a solume property. The second wife has a right
of action against the husband for divorce if he attempts to convert
the property to solume.

Solume extends to movable property. A man, for example, may
set aside a few blankets as solume, and the wife will have no rights
in such blankets. Again, this is an area of Lozi law undergoing
changes because of changing social and economic circumstances.
Couples now increasingly contribute towards the upkeep of their home.
A wife who has contributed towards the cost of a bed will not agree for it to be set aside for the exclusive use of the husband with the possibility that it might be given to a "rival." Similarly, a working wife will not agree to pay the cost of maintaining their home while her husband's income is spent accumulating solume property. The question of solume property where both the husband and wife are working has not yet come before the Local Courts for adjudication. However, some informants believed that it would be unfair to rule that property was solume if the wife indirectly contributed to its purchase.

Property Acquired by the Husband After Marriage

In Lozi law, as opposed to Roman, Dutch, or other legal systems, there is no community in property. When a wife is brought into the matrimonial home, the husband gives her whatever property she is going to use in the home but such property does not belong to the wife. Ownership is only possessive and reversion vests in the husband. When the marriage is dissolved, the man may, however, give the woman some of the chattels used in the home. Property acquired by the husband after marriage belongs exclusively to him (unless he specifically gives it to the wife).

There are certain types of property that the husband may not give to his wife. These are properties of a communal nature. For example, the husband cannot give a fishing pond or a grazing ground to his wife, irrespective of his status in the community. However
much a man may love his wife, he cannot give her a field exclusively, because, although a man may own fields, ultimate reversion of ownership belongs to the clan. A man may be given a piece of land by the chief. Even then, however, the holder of the land cannot give it to his wife. Once a man is given land, members of his clan automatically acquire reversionary interest, for land is acquired through blood relationship and not through marriage. Land, therefore, generally belongs to the clan (mba or mukowa), and no one can give away the clan's rights.

In order for a person to cultivate fields, he must belong to the village in which the fields are situated. A divorced wife cannot therefore continue cultivating her matrimonial fields because, once divorced, her rights in the village are extinguished. In other words, she is not only divorced from her marriage, but from everything pertaining to the matrimonial home.

In exceptional cases, the divorced wife may stay in the matrimonial village. Her right to stay in the matrimonial village does not arise from the extinguished marriage relationship, but from the fact that she has grown children in the village. She then stays with her children, but cannot continue to cultivate her matrimonial fields. She must be given fields by her children.

Fishing ponds are also an important form of property among the Lozi. A woman cannot be given a fishing pond in the matrimonial village. As in the case of fields, rights in fishing ponds belong to a clan and no one has the power to give away clan rights.
The Wife and Property Rights

There are many ways a wife can acquire property after marriage. When there is an excess crop, it is used to brew beer for sale, and the money raised is shared between the husband and wife. Whatever the wife buys with this money belongs exclusively to her. Because of the problems arising in the event of death of either party, the wife always takes such property to her parental home. Lozi women also weave beautiful mats and the money from sales of these mats belongs to the wife; she can use it to buy anything she wants. Generally, a married woman keeps most of her property at her parental village.

Beast of Fire

When a marriage is successful, it is customary among the Lozi that the husband show his appreciation by giving the wife a cow called "beast of fire." The name refers to the cooking and other kitchen chores the wife performs for her husband.

The beast of fire is taken to her parental village for safekeeping to avoid ownership problems when the marriage is terminated either by divorce or death of the husband. The beast of fire is not given at a ceremony and therefore few people in the village know about it. Because of this, if the husband dies, it is difficult to prove the widow's ownership if the cow is not kept at her parental home.

The Sionda

Both the mother and father have equal rights in their daughter's sionda, and it is therefore shared equally. Necessarily, either party
may sanction sharing the sionda. In most cases, because of the respect a wife accords her husband, she waits for her husband to decide when the sionda can be shared. If the father is dead, his brother will step in; similarly, if the mother is dead, the deceased's brother will take her place. The person who takes the place of the deceased parent assumes full responsibility for the marriage; he is liable for the return of the sionda should that be necessary.

Although nothing obliges the parents to wait before sharing the sionda, they always wait a while to ensure that the marriage is a success before sharing it. The parents do not share the sionda if, not long after getting married, the couple begin quarreling and fighting. In some cases, if the parents are satisfied that their son-in-law is responsible for the trouble, they will return the sionda and terminate the marriage.

Professor Evans-Pritchard has argued that retention of sionda after the marriage has lasted for two years is not an incentive to the stability of customary marriage. While his argument cannot be wholly dismissed, other factors beyond the retention of the sionda provide incentives for the stability of customary marriage. When a marriage has lasted for two years, or more, unless some misfortune happens, there are always children of the marriage. The presence of children of the marriage is a far greater stabilizing factor than the fear of the return of the sionda.

The sionda is not shared by the mother and the father alone, because as the saying goes, "a child belongs to the whole stomach."
This is reflected in the way in which a Lozi child is raised. Raising a child is not the sole responsibility of the father and mother. The paternal and maternal grandparents, uncles, aunts, and cousins share responsibility. Thus, when the girl marries, all those people who in one way or another contributed to her upbringing expect a share of the sionda, even if just a token. The grandparents, for example, are interested in the munyembu, and others expect particular portions of the sionda. If cattle is paid as sionda, it may be sold for money, and shared, or the cattle may be allowed to reproduce before they share.

The fact that many relatives benefit from the sionda helps stabilize the marriage, since the relatives would not allow their female relative to unreasonably terminate a marriage and precipitate a return of the sionda. Professor Evans-Pritchard suggests that the sionda plays a considerable role in maintaining a stable marriage because the wife is constantly under pressure from her parents to maintain the marriage to avoid repayment of the sionda.\(^8\)

Professor Gluckman has gone even farther to suggest that, because of the instability of marriages among the Lozi, marriage payment has been relatively low despite their large herds of cattle.\(^9\) By implication, Gluckman argues that it is much easier to repay a low Sionda than a high one. Until 1900, Sionda among the Lozi consisted only of a few hoes. After 1900, Lewanika tried to standardize sionda throughout Barotseland, but was not successful. Yeta III also tried to legislate a uniform sionda but could not succeed. People ignored
the order and they continued to pay whatever the parents of the girl demanded.

Be that as it may, the sionda serves as a deterrent against divorce. It plays a dual role in maintaining customary marriages. From the husband's point of view, if the sionda paid was high he will be hesitant to divorce his wife because he would like to get maximum services from his sionda. On the other hand, the wife will not simply divorce her husband for no good reason because her parents would have to return the sionda. Either way, the sionda is a major factor in the stability of Lozi marriages.
1. *op. cit.*


5. "Solume" literally means "that of a man." It is the husband's property to which the wife has no rights. The husband may dispose of it without consulting his wife.

6. The beast of fire is the cow given to a wife by her husband to thank her for the good work she has done during the subsistence of their marriage.

7. The Lozi are bilateral; the offspring belong to both the maternal and paternal sides. This contrasts with other ethnic groups in which the offspring belong to one side only, e.g., paternal side for patrilineals and maternal side for matrilineals.


9. E. Colson and M. Gluckman (Eds.), *Seven tribes of British Central Africa* (Manchester University Press, 1968) p. 82.
PART II

MATRIMONIAL RIGHTS AND OBLIGATIONS
CHAPTER V

MATRIMONIAL OBLIGATIONS AND RIGHTS OF HUSBAND AND WIFE

As in statutory marriage, customary marriage under Lozi law gives rise to rights and obligations both for the wife and the husband. Such rights and obligations are upheld by local courts. The extent to which a right or obligation is upheld by a local court depends on the nature of that obligation or right.

Sexual Rights

Marriage under Lozi Law confers exclusive sexual rights on the husband in relation to his wife without exception. Any sexual relationship with the wife outside the marriage entitles the husband to compensation. The compensation is claimed as of right.

Until November 1, 1965, when the Local Government Act converted the Barotse Native Authority into Rural Councils, the compensation for adultery was fixed at K10.00 (ten kwacha). The husband was entitled to the compensation provided he had paid the sionda. This was specifically provided for by the Barotse Superior Native Authority under Section 8 of Ordinance 25 of 1917, which was revised in 1946. It provided:

1. Any person who marries a girl or woman and pays no dowry for her to the parents or guardian will have no legal redress and such marriage is null and void.

2. (a) Any person who shall have or attempt to have sexual relations with another man's wife shall, if the husband is a commoner, pay him £5 (five pounds) for abducting
a married wife, and in addition in the case
of adultery be liable to a fine of £1 (one
pound) and in the case of abduction to a
fine of £2 (two pounds).

The Lozi draw a clear distinction between the ordinary Lozi on
the one hand and members of the royal family and judiciary on the
other. Under Lozi customary law, members of the Royal Family and the
judiciary are supposed to be the mirror of the society. Therefore,
if they fall short of the expected standards, they must pay more
heavily for it than ordinary members of the society. The rationale
for this discrimination was the notion that the law was made by the
Indunas and members of the Royal Family, who comprised the bulk of the
Superior Native Authority, and they, having made the law, are obliged
to be even more law-abiding than ordinary citizens.

Commoners were also expected to give respect to their leaders,
that is, members of the Royal Family and Indunas. Failure to show
such respect was viewed seriously and erring commoners were fined more
than would have been the case if it was a matter between commoners.

Section 2(c) of Order No. 16 of the Barotse Native Government pro-
vided the following:

If the injured husband is a Silalo Induna;
for adultery £10 (ten pounds) compensation
is awarded Kuta Induna or Kuta President £15
(fifteen pounds) is awarded. For abduction
Silalo Induna £20 (twenty pounds) is awarded,
Kuta Induna or Kuta President £30 (thirty
pounds) is awarded. In like
manner, if such Silalo Induna, Kuta Induna,
Kuta President, Natamoyo, Solami, Sambi,
Member of Royal Family or Ngambela who shall have sexual relations with any married woman shall pay any injured husband the same amount in compensation.

These orders were enforced by the Barotse Native Courts. Following the Local Government Act, the Local Courts Act\(^3\) was enacted, which repealed the Barotse Native Courts Ordinance\(^4\) by implication of its provisions. Nevertheless, most of these rules and orders still apply as customary law, insofar as they are not "repugnant to natural justice or morality or incompatible with the provisions of any written law."\(^5\)

Currently adultery is regarded as a crime under Lozi customary law, and the injured husband is entitled to compensation. Under statutory law, however, the claim cannot be maintained because adultery has been abolished as a crime. Whereas the compensation for adultery was previously fixed by the Barotse Native Government, this is no longer the case and compensation now varies depending on several factors, such as the length of time the couple has been married, whether the wife has previously committed adultery, and whether there has been any connivance or condonation of the wife's adultery by the injured party. The longer the parties have been married, the greater the compensation.

**Defenses to Adultery**

There is no absolute defense to adultery under Lozi law, but there are defenses which reduce the compensation that may be imposed. The defenses available are mitigating factors. First, ignorance of
the married woman's status is a strong mitigating factor that helps reduce the compensation that may be imposed. Whether the defendant was really ignorant about the status of the married woman is a question of fact. Second, when connivance by the husband or one of his relatives is proven, the compensation that is imposed is minimal. Connivance in adultery is strongly resented in Lozi society because it erodes the people's morals. The husband or relatives who have connived in the adultery are therefore strongly reprimanded by the court. Third, if the husband condones his wife's adulterous behaviour he is estopped when trying to demand a large compensation. As in the case of connivance, condoning adultery is strongly resented, and the husband cannot expect any sympathy from the public through their courts.

What Constitutes Adultery

Adultery has a much wider meaning under Lozi customary law than statutory law. Under statutory law adultery is the act of voluntary sexual intercourse between a married person and some one other than his or her spouse. Adultery under Lozi law goes beyond this definition. According to Lozi law, one may be liable for adultery even though there was no sexual contact. For example, a man is guilty of adultery if he writes a love letter to a married woman, or if he invites someone's wife to have a beer without the husband's consent. There is no need to prove sexual intercourse. This was the issue in LEARNARD NYAMBE vs TIMOTHY MUYOMBO, MBEKISE LOCAL COURT; heard before Local Court Justices: K. Liambango and S. Mulobela in the Mbekise Local Court of the Mongu District.
In November, 1970, the defendant was alleged to have written a letter to the plaintiff's wife proposing love to her. The plaintiff's wife replied to the proposal, but the letter was caught by the defendant's wife who took it to the plaintiff. The full text of the letter was as follows:

Dear Brother-in-Law:

Please darling, I am sorry, I was ready for you yesterday but I was not prepared for you today and I could not even prepare something for you to eat. I am sorry that I could not get a nice place for you to talk to me and you had to visit me under a tree as if we were strangers.

Whenever you want to visit me please just write a letter and give it to either Monde or Sililo and there is nothing for you to fear. I left your letter at Kasika Village. I waited for you on Friday but you were nowhere to be seen and I was so surprised.

I am,

Christina.

The complaint as stated by the plaintiff was based solely on the letter. He did not have to allege sexual intercourse since proof of the letter was sufficient to prove liability for adultery. This fact was also reflected in the court's cross-examination of the defendant and co-defendant.

Plaintiff: I am suing for compensation from Namangolwa (defendant) because he wrote a letter to my wife proposing love to her. That is all.

Defendant: I agree to committing adultery with his wife because she wrote me a love letter and that letter was caught by my wife who took it to the plaintiff.

Co-Defendant: I committed adultery with the defendant because I wrote him a love letter. He proposed to me first and that is when I replied. That is all.

Court: Do you agree that she is your lover?
Defendant: Yes.

Court: Do you agree that he is your lover?

CoDefendant: Yes.

Court: When did you start your relationship?

CoDefendant: On the 22nd of September, 1970.

Court: Did you write only one letter?

Defendant: Yes.

The court then held "The defendant has admitted that he wrote a letter to the plaintiff's wife. He is therefore guilty of adultery and liable for compensation to the plaintiff for K60.00."

Although the issue was adultery, the court did not seek to prove sexual intercourse. It was concerned with proving whether the defendant was the addressee of the letter in question. It is even conceded by the defendant that writing a letter to someone's wife alone constitutes adultery.

In discussing constructive adultery Professor Gluckman has observed:

By Lozi standards if a man walks along a path with another's wife who is not related to him, or gives her snuff or a drink of beer, or even speaks to her when no one is by, he commits "adultery" even if he does not sleep with her. Men are always afraid to work gardens for, or help, the wives of their brothers who are labour migrants, lest their brothers charge them with being lovers of their sisters-in-law."

This wide interpretation of adultery is now receiving less sympathy from the courts. While it is still the law that writing a love letter to a married person constitutes adultery the courts are less likely to find adultery where the only evidence is that the defendant
drank beer with someone's wife or that he offered her a ride in his car. These changes which are the result of social and economic changes are taking place among the Malozi. Since independence, public drinking places and use of motor vehicles have increased. Sharing a beer with a married woman in a public drinking place has become acceptable and, unless there is something more to it, that act does not constitute adultery. The same applies to giving a married woman a ride; unless there is evidence of a love proposal, the ride alone will not give rise to an action for adultery. Holding otherwise would make it extremely difficult for married women to travel in areas where private vehicles are the only means of transportation. When the main transportation was canoes, a married woman could on her own paddle the canoe; she did not need to own a canoe since all the canoes in the village were accessible to all the people in the village, provided the owner did not want to use it at the time. This is not the case with vehicles, however; a licence is required to drive one, and in any case the owner will not be willing to allow members of the village to drive his vehicle.

**Aggravated Adultery**

This is an extreme form of adultery that materially affects the uxorial rights of the husband. It is adultery which results in the married woman either contracting venereal disease or getting pregnant. It is extreme adultery because the husband has to refrain from sexual intercourse while the wife is undergoing treatment (in the case of venereal disease) or recovering from childbirth.

Aggravated adultery is viewed as serious by Lozi law and
substantial compensation is awarded for it as a deterrent. In most cases involving aggravated adultery, the husband terminates the marriage because of the shame his wife has brought upon him. In awarding such damages, the length of the marriage is an important factor. Damages are much higher if the couple has been married for a long time, and are relatively lower if the couple has not been married for a long time. When the couple has been married for a long time, the court blames the adultery more on the man (defendant) than the woman (co-defendant). The implication is that if she has been married for a long time, she must be a good woman and was enticed into the adultery by the man. If the couple has not been married for a long time, the court does not seem to be sure whether the man should be blamed more than the woman.

The child of the adultery belongs to the man who made the woman pregnant; the husband has no rights in the child. This is another reason why aggravated adulteries end in divorce. It is hard to raise a child conceived outside the marriage.

The courts are, however, reluctant to award substantial damages if the wife persistently commits adultery. In that case, the court implies that the husband condones the adultery; he is estopped from denying that he has condoned his wife's adulterous behaviour because he has not divorced her. The law expects the husband to divorce his wife because she is a "tusa Bulozi" (sexual helper of Bulozi).

Pending actions for adultery compensation cannot survive any party; but where the compensation has been determined, the actual fine imposed survives the parties, and if need be, is paid out of the
Elopement with Another Man - Ku Yanga

Elopement, another form of adultery, is more serious than ordinary adultery because the man not only wants sexual satisfaction but also takes the married woman permanently as a wife. Therefore when a married woman elopes with another man, the injured husband is entitled to compensation by the offending party. The compensation is measured by the sionda paid when the parties got married. The court's intention in such matters is to put the injured husband in the position he would have been in if he had not married the woman.

The compensation is usually sufficient for a sionda if he decides to marry another woman. As a matter of fact, the man committing ku yanga pays sionda twice. He must pay compensation equivalent to a sionda to the injured husband, and sionda to the in-laws.

Payment of compensation to the injured husband alone does not confer marital rights on the eloping man. He must also pay sionda to the woman's parents. For all intents and purposes, the new relationship creates a separate and new marriage and therefore the parents are entitled to sionda. If the second husband does not compensate the injured husband, the injured husband cannot make his claim against the in-laws.

Domestic Duties

The wife has the full charge of the domestic duties in her home. She raises the children, welcomes all visitors coming into the home, and looks after her husband's relatives. The wife does the cooking and ensures that the husband and children have enough food to eat. She also
attends to her fields and grows food for the family. Although this may be looked at as custom, it gives rise to legal implications which can lead to termination of the marriage. Induna Mwanamungela said he has adjudicated over the termination of many marriages the grounds of which were no more than failure to provide food for the family. Agriculture among the Lozi is mainly an occupation for women and, as noted earlier, if a woman is not hardworking, she has difficulties in getting a husband. Similarly, if a woman is lazy and doesn't till her fields, the husband has good grounds for divorce. Mwana Mulena Litia Mbikusita reinforces this idea. Furthermore, if the husband is dissatisfied with his wife's cooking, he can petition for divorce. Domestic duties, although within the realm of custom, thus have legal consequences.

Right to Maintenance

While the wife does most of the domestic chores, the husband is obliged to maintain his wife and family. He must provide fish and meat for his family. If the husband does not provide relish for his family, the wife can have a right of action against her husband. It is not, however, an action entitling her to divorce. Instead, the headman and his council censure the husband who fails to provide his family with relish. The wife can use the husband's failure to provide relish, together with other complaints, as evidence of negligence.

Admittedly, there are some changes now, especially among working class families. The husband cannot be expected to catch fish for his family, but he is under an obligation to provide enough money for his family to buy relish. Induna Alibandila of the Suulu Local Court in
Mongu said that petitions by wives whose husbands fail to provide adequate money for buying relish are frequent. In such cases, the court takes into account the husband’s earnings to determine whether or not he has failed to maintain his family.

That the husband provides shelter for his family is crucial in a Lozi marriage. The wife is entitled to divorce if the husband does not provide her with a house. The wife claims this right irrespective of whether the husband can actually build a house or not. There is an irrefutable presumption in the wife’s favour that a man who marries is capable of providing a house. This presumption also extends to clothing. The husband is obliged to buy clothing for his wife. Failure to provide her with adequate clothing gives grounds for a divorce action. The argument is that the privilege of having a wife must be accompanied by the obligation to clothe her. Mr. Moffat Muyatwa said that it was a question of fact as to what would amount to enough clothing. The court looks at the means of the husband and the wife’s requirements. In *Maungwelo Kakenenwa V. Lindunda Mulobela*, December 8, 1970, a case brought before court justices K. Liambango and S. Mulobela in the Mbekise Local Court of the Mongu District, the petition was based on the failure to provide enough clothes.

Plaintiff:

I am suing for divorce from my husband who does not dress me. Since he married me, I have no hoe, plates, pots and other household utensils. When I asked him one day, he said, "That is why you see people committing suicide because you women speak too much." He only bought me one malesu (java print cloth) and a sitenge (cotton cloth) and a small dress which
I can't even put on because it is too small.
When I asked him to come to court he said that he did not care whether or not he bought me clothes. That is all.

Defendant: I am sorry, I bought her a hoe, but she never planted our garden. I have no food. She stays at her parent's home. It is true that she has no clothes, but I bought her one dress and not knowing her size it was small. I bought her the malesu which she is wearing in court today.

Court: Did you agree that she has no clothes when you said she should excuse you?

Defendant: Yes.

Court: Is it because she does not stay at your home?

Defendant: No, that is not the reason why.

Court: Do you have the clothes at home?

Defendant: Yes.

Court: Do you know them (referring to the plaintiff)?

Plaintiff: Not even one.

Court: She said she has no pots or plates; is that so?

Defendant: She has.

Court: How many does she have?

Defendant: One strong one and one broken one.

Kandela, witness for the plaintiff: My name is Kandela. The plaintiff always complains about hoes, plates, and the clothes which she has are from other people.

Court: The defendant has no witness. There is overwhelming evidence that he does not maintain his wife and failure to maintain one's wife entitles her to divorce and divorce is granted.

Failure to maintain one's wife is viewed seriously by the courts. If failure to maintain is proven the wife is granted a divorce. The obligation to provide clothing perhaps stems from the fact that it is always the husband who goes to town for employment, and therefore he is better placed to buy clothes for the family. In addition to clothes,
the husband must provide his wife with plates, hoes, and pots. This is the most important aspect of maintenance under Lozi law.

Kanziba Jenasi vs. Paul Kamonga, a case brought before Local Court Justice W. Libinga and B. Mikosa in the Mulamatila Local Court of the Kaoma District, November 15, 1970.

The defendant married the plaintiff in 1968, but since that time had been insufficiently dressed.

**Plaintiff:** I got married to this defendant in 1968, but since that time he has failed to buy me clothes. Whenever I ask him to buy me clothes, he tells me that if I wanted clothes I should go back to my parents' home and he would remain with his senior wives who loved him. The dresses which I am putting on are from my sister. Due to these difficulties I am petitioning the court for a divorce. That is all.

**Defendant:** It is true that I married the plaintiff in 1968 and I am now two years with her. As I am a villager, I do buy this plaintiff a dress once a year. In 1968 I bought two dresses for the plaintiff but she refused them. In the same year, my brother gave me a dress which I gave to the plaintiff but she refused it again. I also gave K8.00 to this plaintiff but still she refused it. That is all I can say in this case.

**Plaintiff's Father:** It is true that my son-in-law does not dress my daughter. My daughte puts on clothes from her son. This is all I can say in this matter.

**Mpasela Mandevu (Defendant's Witness)** When the defendant married the plaintiff he gave her K4.00 (four Kwacha). Again for the second time, the defendant gave the plaintiff K4.00 (four Kwacha) but she refused on both occasions. The defendant bought two dresses for the plaintiff but she refused them and gave the dresses to her relatives. The defendant again bought a sitenge (a piece of cotton cloth) valued at K3.00 (three Kwacha) for the plaintiff. The defendant's sister gave him a dress to give to his wife but the plaintiff gave it to my daughter. Further, the defendant went to Nyambilo, his sister, who gave him a dress to give to the plaintiff but she refused it. That is all I know.
Court: Do you have any witnesses to help you?
Plaintiff: No I don't have.

Court: Do you still love the plaintiff?
Defendant: Yes, she is still my wife.

Court: Do you still love the defendant?
Plaintiff: No I don't love him.

Court: Did you see the three dresses?
Plaintiff: No I did not see them.

Court: Were you given K8.00 (eight Kwacha)?
Plaintiff: No, I did not see it.

Court: To whom did you take your report when the plaintiff refused to accept what you gave her?
Defendant: I took the case to the village headman.

Court: Why didn't you report this case to the father-in-law?
Defendant: No answer.

Court: Divorce granted on the ground that the defendant has failed to maintain his wife by not buying clothes.

Whether the clothes in a particular case are sufficient is a question of fact. The court looks at the defendant's means. In the foregoing case, reference was made to the fact that the defendant was a villager, and buying one dress a year was not unreasonable, but evidence given by the defendant's witness was not believed, otherwise the petition would have been determined differently.
NOTES TO CHAPTER FIVE


2. Ibid.

3. Laws of Zambia, Cap. 54.


7. See notes on informants.

8. Ibid.

9. Ibid.

10. Ibid.
PART 3

TERMINATION OF THE MARRIAGE CONTRACT
CHAPTER SIX

TERMINATION OF THE MARRIAGE CONTRACT

In Loziland today people discuss divorce all the time. On the other hand, divorce is almost unknown in Zululand. It can be obtained in a magistrate's court, but men do not want to divorce their wives and women rarely seek divorce. In native opinion a woman should be released only if her husband is intolerably cruel. I never heard divorce discussed as a social problem in Zululand; the problem was always illegitimacy.

Professor Gluckman, in this quote, contrasts the Lozi marriage with that of the Zulu of Natal. While Gluckman may be right, he has overlooked the fact that most of the discussion he refers to is intended to maintain the marriage. Lozi courts in matters of divorce often operate as mediators. The courts strive as much as possible to reconcile the parties, and divorce is only granted when reconciliation appears unattainable. It has to be conceded that in contrast to statutory marriage the grounds for termination of marriage under customary law are almost endless, but the procedures for reconciliation under customary law are informal and conducive to maintaining the marriage.

The facts that must be alleged and proved for a statutory dissolution of marriage are specific and circumscribed. These facts are contained in Section 1:

The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts; that is to say:
(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as 'two years' separation) and the respondent consents to a decree being granted;
(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as 'five years' separation).

To obtain a divorce, the petitioner in a statutory marriage must prove at least one of the facts. In contrast, Lozi law has no rigidly specified facts that must be proved. Numerous grounds must be proved before divorce can be granted. But, even if the grounds have been proved, the court will attempt to reconcile the parties, and divorce would be granted only if there is no possibility of reconciliation. Ngambela Imangambwa is of the view that the attempt to reconcile the parties is not a legal requirement, but is the custom because society does not want many divorces, which make marriages look like a profit-making business.³

**SEPARATION - KU IPAHEKA**

Separation under Lozi law differs in form and effect from statutory separation. In statutory separation, the Matrimonial Causes Act of 1973 provides:

(1) A petition for judicial separation may be presented to the court by either party to the marriage on the ground that any such fact as is mentioned in Section 1(2) above exists,
and the provisions of Section 2 above shall apply accordingly for the purposes of a petition for judicial separation alleging any such fact, as they apply in relation to a petition for divorce alleging that fact.

(2) On a petition for judicial separation, it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the respondent, but the court shall not be concerned to consider whether the marriage has broken down irretrievably, and if it is satisfied on the evidence of any such fact as is mentioned in Section 1(2) above it shall, subject to Section 41 below, grant a decree of judicial separation.

Whereas either party to a statutory marriage may petition for judicial separation, Lozi law does not entertain a separation petition from the husband. Under Lozi law, the wife could be granted a divorce if the husband petitioned for separation. The rationale seems to be that a wife must always live in the matrimonial home, and asking her to leave the matrimonial home (the effect of separation) terminates the marriage. Even the wife can attain separation status only as a result of an unsuccessful divorce petition. Separation is obtained informally as a unilateral act of the wife. After separation, the court notifies the wife that her husband has a claim for compensation against any man who marries her. The notice is entered on record and the woman is separated. During the period of separation, the husband is entitled to damages if the woman commits adultery, and she can return to her matrimonial home at any time. The marriage will only be terminated by returning the sionda or marrying another man. If she marries another man, the former husband is entitled to compensation equal to the sionda he paid for the marriage. If the marriage has been terminated by returning the sionda, the local court issues a certificate of divorce to
evidence the marriage's termination.

The husband may, however, sue his in-laws for his sionda if there is evidence of their connivance in the separation. If the in-laws return the sionda, the marriage is terminated and the woman is free to remarry. The second husband will however be liable to the woman's parents for payment of sionda. The extent of the compensation payable to the former husband by the second husband would depend on the sionda paid by the first husband.

There are, however, rare cases where the first husband may sue for his sionda from his in-laws. Such a right would only arise if there is overwhelming evidence that the parents-in-law are guilty of connivance in the separation. In most cases, instead of returning the sionda, the parents of the woman would put pressure on her to return to her matrimonial home. Separation under Lozi law is not therefore granted by the court but it is a unilateral act of the woman after notifying the court.

GROUNDs FOR DIVORCE

As Professor Gluckman observed, people in Loziland discuss divorce all the time, and the grounds for divorce under Lozi law are many. It is only possible here to discuss some of the very important ones.

1. Impotency of the Husband

Impotency is a ground for divorce. A woman is always released from marriage to an impotent man who is "just another woman." As discussed in the Chapter on The Marriage Contract, the marriage may be terminated if consummation does not take place within weeks of the
Defendant: She wants to or is rejecting me.
Court: Have you got a witness?
Plaintiff: No.
Court: Have you got a witness?
Defendant: Yes, the village headman.
Court: If court says you go back to your husband, will you go back?
Plaintiff: No, I won't go; he is useless.
Held: Judgment for the defendant on the ground that the plaintiff has no witnesses and that the defendant has been married to the plaintiff for five years without any complaint.

As can be seen in this case, the court plays an advisory role and pleads with the wife to give her husband a chance to regain or prove his manhood. The man is normally advised to seek treatment. The problem with impotency, especially where there are children of the marriage, is that the male spouse will not admit it. The court is then left in a dilemma as to how the impotency can be proved. In one case, the Suulu Local Court in Mongu sent a male respondent to the Lewanika General Hospital for a medical report to determine his impotency. The medical officer, however, refused to sign the medical forms, arguing that such an examination was ultravires his duties as a government medical practitioner.

The normal procedure is for the wife to make a formal complaint to the husband's brother or grandfather before the matter can go to court. This facilitates evidence and alerts the husband's relatives so they can give him medicine to cure the impotency.

When there are children of the marriage, the wife is usually tolerant and helps her husband to find treatment. If she rushes to court for a divorce, the court is likely to decide against her unless
the evidence is so overwhelming as to leave no doubt about the impotency. It is common for the couple to arrange for the impotent husband to tolerate extra-marital relations, provided the wife forgoes her right of action for divorce against her husband. This tolerance shows that, contrary to Gluckman's views, the Lozi are not eager for divorce.

2. Barrenness

It has already been observed that the Lozi regard children as an important investment. Parents look to their children during their old age, and an adult without children feels insecure. This insecurity is, among other things, a result of the subsistence economy which does not allow for savings. People live from hand to mouth, and there is very little saved for "rainy days." Even those who invest in cattle are not immune from the worries of old age because without children there is no one to look after the cattle. Children are dutybound as a matter of custom to care for their parents during old age.

It is not surprising therefore that the marriage is terminated if the wife cannot bear children. I must point out here that in many cases a woman is innocently blamed for her failure to have children. There is no medical examination conducted to determine the barrenness, and the usual mistaken presumption is that the husband, provided he can achieve orgasm, is capable of fathering children. This presumption is only rebutted if the wife had children from a previous marriage.

When the husband terminates the marriage on the ground of barrenness, he cannot have his sionda returned. While it is usually the husband who petitions for divorce on grounds of barrenness, the wife can also apply for divorce if there is evidence that the husband is incapable of fathering children. Procedurally, the wife must ask
her parents to return the sionda and, once it is returned, the marriage is terminated.

3. Illness

General illness, however persistent, is not a ground for divorce. Although this is a general rule, in practice, if the illness has persisted a long time, and there are no signs of quick recovery, the wife's parents may ask their son-in-law to marry another wife and they then keep their daughter. The husband is under obligation to care for his wife during illness. Failure to care for her creates grounds for divorce. If it is proved that the husband's failure to care for his wife amounted to gross negligence, the court can grant divorce.

Lozi law provides for divorce for certain specified illnesses. For example, Order 16, Section 6, of the Barotse Native Government Orders and Rules provided:

It shall be customary law for any Native Court to dissolve any marriage or marriages on the following grounds:
(a) Leprosy
(b) Epileptic fits
(c) Insanity

If it is the husband who suffers from the disease, the wife applies to the court for divorce. The marriage is not regarded as having been terminated until the application has been granted. Sometimes, without applying to the court, the husband's family may arrange to terminate the marriage. After the marriage has been terminated, the sionda cannot be reclaimed. Normally, where the marriage has been dissolved by arrangement, the husband's family writes a letter dissolving the marriage and the wife, accompanied by her relatives, takes the letter to court for authentication.
This procedure does not arise when the wife is ill, because the husband simply escorts her to her parental home and this terminates the marriage. Dissolution of marriage can also occur by implication. The husband may simply ignore his wife who is ill and provide no assistance. When she recovers, she can sue for divorce.

4. Desertion - Ku Chona

In the past desertion, as a ground for divorce, was almost unknown in Lozi law. People married and stayed in their communities, and it was very rare for a man to desert his wife and live in a different village. One can only stay in a village if he is a member of that clan.

But with the coming of the money economy and the eventual introduction of tax in Barotseland, it became imperative for men to leave their communities to find employment. Africans were at first not allowed to move with their wives outside Barotseland, and additionally conditions for African workers were not conducive to staying with women. Migrant workers in the South African gold mines slept in dormitories specially made for single male workers, and no females were allowed in the compounds. Even if workers had been allowed to travel with their wives, they were so poorly paid that they could not have afforded to do so.

Also, the subsistence economy meant that the wife had to remain behind to grow food for the family and to look after the children. As a result, family life in most cases was severely strained during the long absences of the husbands. Not only did the workers work in the
gold mines where the contract period was fixed, but they also worked in such areas as Salisbury and Bulawayo, where they stayed for indefinite periods.

Lozi law was gradually forced by these circumstances to recognise ku chona as grounds for divorce. Initially no marriage could be dissolved because of ku chona unless the husband had been away from the family for a continuous period of three years. Now, in determining whether divorce should be granted, the court considers the entire conduct of the husband during his period of absence. For example, if he has written regularly and has sent clothes and money to his family, the court will not grant divorce. But if the husband has never written and is rarely heard from, the court will grant divorce.

A case in point is Namungolwa Simutanyiva, Aggrey Kangwanda, brought on April 6, 1971, before K. Liambango and S. Mulobela in the Mbekise Local Court, Mongu District. The defendant left his wife in Mongu for Kalabo (Kalabo District borders Mongu and both are in the Western Province). After leaving, he wrote only one letter home and sent back only a blanket and two pieces of cloth. The plaintiff petitioned for divorce on the grounds that she had been deserted and was not getting any maintenance. The defendant's father counterclaimed that the applicant was continuously staying at her parent's home. The court held that, by staying at Kalabo and by failing to maintain the applicant, the defendant had deserted his wife within the meaning of the law and the applicant was entitled to divorce. Here, the court did not attach much weight to the blanket and two pieces of cloth sent home. The decision would
have perhaps been otherwise if the defendant had gone away to some far place, but Kalabo is so near to Mongu that staying away from his family for so long amounted to desertion.

Provided the three year period has been satisfied, the deserted woman has good grounds for divorce, as shown in *Musipili Nashaka vs. Mwitumwa Mulobela*, a case brought on December 8, 1970, before Local Court Justices K. Liambango and S. Mulobela of the Mbekise Local Court in the Mongu District:

**Plaintiff:** I am petitioning for divorce because my husband has been away from home for three years and during all that time he has not written me even a single time. Lozi law says, "If a man has been away for three years from home, the wife can be granted divorce." I have waited for my husband for three years but he has not come back. I want this court to apply the law and grant me a divorce.

After cross-examining the applicant, the court granted a divorce on the grounds of desertion.

When divorce is granted on the grounds of desertion, the husband loses the right to claim his sionda. Since Independence in 1964, there has been a growing tendency to shorten the three-year period required for desertion. Divorce now may be granted on the grounds of desertion even though the period does not equal three years. The rationale for this is that there are no longer any restrictions on husbands moving their wives to town while looking for employment. Leaving one's spouse in the village for a long period indicates that the husband does not love his wife, and therefore a divorce petition is entertained even if three years has not elapsed.
5. Cruelty - Situhu

It is difficult to define cruelty in Lozi law, because the husband has the right to chastise his wife. Whether such chastisement amounts to cruelty is a question of degree.

The court treats chastisement as cruelty if it is done for no good reason. Induna Lioko\textsuperscript{7} said that the right to chastisement is not without limits. If the man is so unreasonable that he can't advise his wife without beating her, the court will terminate the marriage because a "woman is also a human being who can feel pain." He went on further to say that the force used in chastisement must be reasonable because unreasonable force is not chastisement, but cruelty within the meaning of Lozi law. This view was also expressed by Induna Sikufele,\textsuperscript{8} who said he would not hesitate to grant the divorce petition if, instead of slapping his wife, the husband used a knobkerrie.

Cruelty also arises from improper manners, or sikebenga: if the husband treats his family members poorly, if he does not welcome visitors from his wife's family, or if he does not allow people from his wife's family to eat in his home, his wife can petition for divorce on grounds of cruelty. Mushele,\textsuperscript{9} for example, said that a man notoriously known for meanness usually found it difficult to get married because no woman would accept his marriage proposal. Divorce is also granted if the husband's behaviour is so intolerable that the wife cannot reasonably be expected to stay with him. Cruelty can also be grounds for the husband.

The intolerable behaviour of other sorts provides valid grounds,
as is shown in the case of **Ngambo V. Likonge**, brought in May, 1970,
before Local Court Justices W. Libinga and B. Mikosa in the
Mulamatila Local Court of the Kaoma District.

**Plaintiff:** Ever since I got married to the defendant in 1953 at his home in Lukulu, we have
shifted four times and all my crops have been eaten by his relatives. When we came
here this defendant also had no proper home. We have now been in five villages in which we
have stayed at one time or another. As a result of his movements, I have decided to petition
for divorce. I have three children with him and if he keeps on shifting they will never
be able to go to school.

**Plaintiff's Brother:** This defendant got married to my sister in 1953 and at that time he was staying
at Siyowe area of Imamuna (Mongu District). In 1965 he moved from Siyowe to Mayankwa area
in the Kaoma District. In 1966 he moved from Mayankwa to Lukulu. From that time to 1967,
the defendant moved from Lukulu to Kaoma Boma.

**Defendant:** At first I was staying in Siyowe but later on I moved from that place to Mayankwa. In 1966, I moved
from Mayankwa to Lukulu Boma to look for employment but in that year, I was unemployed and so I went
to settle in my cousin's village.

**Court:** When did you get married to the plaintiff?

**Defendant:** I got married to her in 1953.

**Court:** Is it true that you are now seventeen years with the petitioner?

**Defendant:** Yes, that is true.

**Court:** Where did you find her?

**Defendant:** I found her in the village.

**Court:** How much did you pay?

**Defendant:** I paid twenty-six kwacha.

**Court:** Is that true?

**Plaintiff's Brother:** Yes, that is true. I charged him forty
kwacha but he just paid twenty-six kwacha.

**Court:** Is it true that you have moved four times, Mongu,
Mayankwa, Lukulu, and Kaoma?
Defendant: Yes, it is true that I have shifted four times.
Court: How long have you been here?
Defendant: I have been here in this district for three years.
Court: Is it true that you want to move again to Mimbwa?
Defendant: No, I am not going there.
Court: Did you not settle at Mulamatila when you shifted from Lukulu?
Defendant: Yes, I did.
Court: Where are you now?
Defendant: I am at Malilo.
Court: Why did you shift from Mulamatila to Malilo?
Defendant: I simply wanted to move.
Court: Why do you want a divorce from your husband?
Plaintiff: I want a divorce because my husband is always moving.
Court: Would you seek a divorce if your husband was not ever shifting.
Plaintiff: No I wouldn't.

Held, the plaintiff is entitled to divorce because the husband is always moving and such behaviour is intolerable and the wife could not be reasonably expected to live with him. He is always moving from one place to another.

The above illustrates one of the various forms of cruelty.

The parents of the petitioner could also have sued to dissolve the marriage on the ground that the fourteen kwacha balance from the sionda had not been paid.

6. Adultery - Buhule

A husband can terminate the marriage if his wife has committed adultery. To divorce an adulterous wife, the husband need not even go to court, but may simply write her a divorce letter. The wife then takes the letter to court to have it authorized.

Adultery by the husband, however, cannot be grounds for divorce. It is, however, evidence which may help the success of a
7. **Other Grounds for Divorce**

Economic and social changes among the Lozi are creating many new grounds for divorce, which are replacing old ones. For example, in the past a husband could divorce his wife for laziness, but this is now rarely used, especially in the urban areas where people live on earnings instead of working the land. Furthermore, it is seldom used because those engaged in commercial farming use machines to work their land and rarely regard women as a source of cheap labour. Other once popular grounds, such as a wife's readiness or failure to carry out her husband's orders are losing favour because of the advent of equality in marriages. The idea is slowly being accepted that a wife is a partner in life and therefore should be treated as an equal. Many Lozi husbands today, especially those exposed to western culture tolerate their wives' behaviour more than in the past. Where the husband finds his wife's behaviour intolerable, however, he can divorce her in writing. Here is an example of such a letter.

Mukanga School
Mongu
15th October, 1970

To my Parents-in-Law at Luandui (Mongu)-
Mukoma and R. Sishekanu:

Here is your daughter. I have divorced her. I cannot marry a wife who cannot carry out my orders. She does not follow whatever I order her to do. Moreover, she is always quarrelling and arguing whenever ordered to do something. I married your daughter without scars and I am returning her to you without scars. I have tried all I could but I have failed to live with your daughter. Let her marry anybody who will love her, be he tall or short.

I am,

H. K. Lukonga
Previously, an oral divorce was enough to terminate the marriage, but it is now necessary for evidentiary purposes that the divorce be in writing. To avoid wives' producing fraudulent letters of divorce, the divorce letter must be stamped by the court in the presence of the author or a person authorized by him. Once the letter of divorce has been stamped, the addressee is free to contract another marriage.
NOTES TO CHAPTER 6


3. District Prime Minister of Kaoma. "Profit" here refers to the sionda, which is paid to the parents of the woman every time marriage is contracted. See notes on informants.

4. See Matrimonial Causes Act, Sec. 17.


7. Court President, Litapuya Local Court; See notes on informants.

8. Court President, Suulu Local Court; See notes on informants.

9. See notes on informants.
determine divorce matters because, if a divorce petition by-passed the village hadman, unless cause could be shown why the petition should not appear before the village headman, the Silalo Kuta redirected the matter to him. The District Kutas were then Libonda for Kalabo, Nalolo for Senanga, Mwandi for Sesheke, Naliele for Kaoma, and Mongu-Lealui for Mongu. All the District Kutas were headed by District Prime Ministers assisted by Indunas. Appeals in divorce matters followed the diagram below:

This hierarchical structure operated only in the Barotse Native
matters followed the diagram below:

This hierarchical structure operated only in the Barotse Native
Government. The Barotse Native Government maintained a parallel judiciary within the Colonial judicial system, and a dual judiciary was incompatible with the idea of building a united nation. Consequently, integration of the Barotse judicial system was a priority for the Independence Government.

After Independence on November 1, 1965, barely a year after Independence, the Local Government Act was passed and, among other things, it converted the Barotse Native Authority into Rural Councils. The Local Government Act was immediately followed by the Local Courts Act\(^4\) converting the Barotse Native Courts into Local Courts. This Act introduced profound changes in the administration of justice in the Western Province. Whereas previously village headmen formed part of the Barotse judiciary, the Local Courts Act by implication kept them out. Section 50(1) provides:

Any person who, not being duly authorized under this Act or any other written law, for the time being in force purports to exercise judicial functions as a local court justice, or falsely holds himself out to be a local court justice, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one hundred kwacha, or imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.

Provided that nothing in this subsection shall be deemed to prohibit any African customary arbitration or settlement in any matter with the consent of the parties thereto if such arbitration or settlement is conducted in the manner recognized by the appropriate customary law.
Village headmen, unless parties to the dispute granted consent, could no longer settle divorce matters. It must be pointed out that in practice, because of their ignorance of the law, village headmen still exercise the judicial functions they performed before the Local Courts Act and, insofar as the parties do not dispute his jurisdiction, the headman's powers conform to the proviso in Section 50(1).\(^6\) Officially, however, the power to grant divorce now rests with the Local Courts presided over by Indunas (Local Court Justices).

Another profound change in the judicial structure is categorization of Local Courts, and structure of appeals. Before the Local Courts Act, no appeal made from the Silalo Kuta could bypass the District Kuta in the chief's capital to appeal to the Saa-Sikalo. All appeals had to follow the hierarchical structure shown in the previous diagram. Pursuant to the Local Courts Act, appeals from the Local Courts go directly to the Subordinate Courts. Similarly, appeals from the District Kutas and other Grade A Courts go to the Subordinate Courts. The Local Courts are either Grade A or B, and the grade is determined by the powers and jurisdiction of the court.

Appeals from the Subordinate Court go to the High Court and finally to the Supreme Court. There were in the past few appeals going to the High Court from the Saa-Sikalo. Previously, except in special circumstances, the Saa-Sikalo was the final court. In land matters, for example, an appeal from the Saa-Sikalo to the High Court was not made as of right.

The Local court now enjoys original jurisdiction in a customary
law divorce. The Local Court's decision may be revised by an authorized officer to ensure that it conforms to legality and that the proceedings were not irregular. These review powers are intended to check against nonconformity to regular procedures as set out in the Local Courts Handbook. Section 54 provides:

Every authorized officer shall at all times have access to the records of Local Courts within the area of his jurisdiction, and may send for and inspect the record of any proceedings before such court and require the production to him of such evidence as he may deem necessary for the purpose of satisfying himself as to the correctness, legality, or propriety of any judgment, order, decision, or sentence recorded, made, or imposed by such court, or as to the regularity of such proceedings.

An authorized officer shall, before exercising the powers conferred by Subsection (3) carry out such inspection and other action under the provisions of Section (1) as shall to him appear necessary and if he considers that undue delay would not be caused, he may, before exercising such powers, also hear submissions by the interested parties on the matters in issue between them in the local court concerned, and on the judgment, order or decision of such court thereon, as if he were hearing an appeal from the same, and a hearing of submissions shall be deemed to have been carried out if the said parties have been given reasonable notice thereof and have either failed, without giving good reasons therefore, to attend for the purpose, or have offered, in lieu of such attendance, written submissions for the purpose which have been give due consideration by the authorized officer.

The authorized officer is defined by the Act to include local courts officers, senior resident magistrates, resident magistrates, and other such magistrates as the Chief Justice may designate for the purpose of the Act. In this regard, therefore, a divorce started in a local court can come before any of these officers in the exercise
of their review powers. In addition to coming before these reviewers, divorce proceedings under customary law may come before the subordinate court on appeal. Section 56 provides:

1. Subject to the provisions of subsection (a) any interested party who is aggrieved by any judgment, order, or decision of a local court given or made in the case in which he was concerned, and which has not been revised, may appeal therefrom to a Subordinate Court of the first or second class within whose area of jurisdiction such local court is situated.

2. Any interested party who is aggrieved by any judgment, order, or decision, including any order on review made with or without submissions under Section Fifty-four, in the case in which he was concerned, given or made
   (a) by an authorized officer in the exercise of his powers under Section Fifty-four may appeal therefrom
      (i) in the case of an authorized officer who is a local courts officer or a magistrate empowered to hold a Subordinate Court of the third class, to a Subordinate Court of the first class or second class within whose jurisdiction the local court which heard the original proceedings is situated or
      (ii) in the case of any other authorized officer to the High Court; or
   (b) by the adviser in the exercise of his powers under Sections Fifty-Four and Fifty-Five, may appeal therefrom to the High Court, or
   (c) by a Subordinate Court of the first or second class in the exercise of its appellate jurisdiction under this section, may appeal therefrom to the Court of Appeal with the leave of a judge or when such leave is refused with the leave of the Court of Appeal.
By way of appeal, the High Court has jurisdiction in customary law marriages. Since the Court of Appeal has been abolished and replaced by the Supreme Court, one could deduce from the provisions of Section 56 of the Local Courts Act that, where a party has been aggrieved by the decision of the High Court, an appeal can be made to the Supreme Court.

The Courts of Jurisdiction and Hierarchy of Appeals are shown in the diagram below:

Although the wife may petition for divorce, the local court may under certain conditions, especially when the local court's attempt to reconcile the parties fails, decide on divorce. Divorce may also be made applicable by agreement of the parties.
As the diagram shows, the village headman no longer exercises express jurisdiction in divorce matters. He may, however, gain jurisdiction if the parties to the dispute submit to his jurisdiction, provided for in the Local Courts Act. 9

Extra-Legal Requirements

To provide evidence, although not a legal requirement, a woman petitioning for divorce must be accompanied by her parents or relatives. Apart from this procedural requirement, there are no restrictions on the wife's right to bring divorce proceedings against her husband. Although the husband's presence is desirable, it is not required except for evidentiary purposes; the petition hearing may proceed without his presence. A petition for divorce arising out of desertion, for example, is determined without the husband's presence.

Although the wife may petition for divorce, the Local Court may order compensation in its stead, another example of the local court's attempt to reconcile the parties when possible.

If the petitioner's parents oppose the divorce, the court is unlikely to grant it, especially when the wife is the petitioner. Having outlined the courts of jurisdiction, it is necessary to note that divorce may also be made simply by agreement of both parties.
NOTES TO CHAPTER SEVEN


2. Interview held at Naliele; see notes on informants.

3. Induna Kawewa stated that, for all intents and purposes, the village headman was part of the Barotse Judicial System and his decision in a divorce matter was binding.

4. Laws of Zambia, Cap. 54.

5. Ibid.

6. Ibid.

7. Ibid.

8. Ibid.

9. See proviso to Cap. 54, Sec. 50(1).
CHAPTER EIGHT

EFFECT OF TERMINATION OF THE MARRIAGE CONTRACT

Termination of the marriage contract frees the parties from all rights and obligations pertaining to the marriage except the sionda. Once the amount has been agreed upon and the marriage contracted, the sionda becomes the vested right of the wife's parents and an obligation for the husband.

Ideally, the full sionda is paid before the marriage, but in practice, and with the wife's parents' permission, the marriage may take place with only partial payment. When the marriage has been contracted, with only partial payment, the husband is still liable for the remainder even if he terminates the marriage. Whether he is liable for the full remainder of the sionda depends on how long the marriage lasted. If it has lasted for a reasonable length of time, for instance more than two years, he is liable for the full amount. The husband will not be liable for the remainder, however, if the wife terminates the marriage. In fact, he may have a claim for return of part of the sionda depending on how long the marriage lasted and on whether children were born during the marriage.

RIGHT TO MARRY

Once the marriage is dissolved, both parties are free to marry. This is only of significance for the wife because the husband can contract a second marriage during the first marriage. The woman cannot,
however, contract a valid second marriage during the first. A second marriage automatically dissolves the first marriage and requires the return of the sionda. Her right to contract a second marriage after the marriage is dissolved is not always without restrictions. It is not unknown under Lozi law for conditional divorces to be granted on application by the husband if he suspects that someone wants to marry his wife. If there is suspicion without sufficient evidence to institute proceedings, the husband applies for a conditional divorce. The court may stipulate that the divorced wife does not contract a marriage with anyone from a specific area.

The condition may be obtained in one of two ways. During the court proceedings, the husband may lodge a formal complaint that he suspects his wife is petitioning for divorce or is misbehaving deliberately because she wants to marry someone from a specified area. He then tells the court that he would have no objection to dissolution of the marriage, provided his wife does not get married to someone from that area. If such an application is granted, the husband is invested with a right of action for damages against anyone from the specified area who contracts a marriage with his divorced wife. Alternatively, the husband may divorce his wife and specify in the letter of divorce that the divorce is granted on the condition that his divorced wife not marry one from a specified area. Once the divorce letter is stamped by the court, the condition binds the woman and the husband has a right of action for damages against any man from the specified area who contracts a marriage with her.
One such letter was written by Kapalu Siyangwa of the Nasiyembe area in Mongu, who divorced his wife, Muyewa Mutanuka. Before the divorce, the husband suspected that a Mr. Imutowana was having sexual relations with his wife and this caused problems in the matrimonial home. To avoid the problems, Kapalu Siyangwa divorced his wife and wrote a letter to his in-laws stating that his divorced wife should not marry Imutowana or anyone in the Nasiyembe area.

Apparently, there is no doubt about the legal effect of such conditions. Chief Litia Mbikusita of Mallele confirmed that it was law and no local court would question such a condition unless it was frivolous.

I questioned Mr. Mubanga about the validity of such conditions restricting the right to marry in light of common law. His view was that even common law itself respects the sanctity of marriage and that is exactly what the conditional divorce intends to achieve. Unfortunately, this question is yet to be determined by the Subordinate Court. One would be inclined to think that conditions appearing repugnant to natural justice as provided for in Section 12 would not be enforced:

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

Be that as it may, the conditions are enforced by Local Courts. As a matter of evidence, the conditions must be brought to the court's attention. If a condition incorporated in the dissolution of the marriage is violated, the first husband is entitled to damages against the second husband.
In the case of Namakando Musialela v. Likanduko Mubita, brought before Local Court Justices K. Liambango and S. Mulobela on November 16, 1971, in the Mbekise Local Court of the Mongu District, the petitioner's husband went to town in search of employment and she terminated the marriage before the mandatory two-year period. She wrote her husband a letter terminating the marriage and the matter came to court. The letter read as follows:

Dear Mr. Likanduko:

I no longer love you. You are free to marry anybody of your choice. I have returned your sionda to your father. There is nothing more for me to say.

I am,
Namakando

Under cross-examination by the court, the petitioner said:

 Plaintiff: I have divorced my husband because he has not written me letters since he went to town. He has also not sent me money to buy things for the house.

It is now more than a year since he left but whenever I write him he doesn't answer back. It is therefore of no use to be called his wife, when I do not "eat his money." I have decided to return his K66.00 sionda and divorce him. I am suffering as though I was not under someone's house. What is the use of saying that I am married when I am suffering like this?

Have you anything to say, Likanduko's father?

Likanduko's Father: I have nothing to say because she has already returned the sionda. What she has done is right. I cannot force her to marry my son. That is all I have to say.

Court: How much was the sionda?

Likanduko's Sixty-six kwacha.
Father: Court: By returning the sionda the marriage has been dissolved and the court has recognized the dissolution since the petitioner cannot be returned to her husband by force.
This is evidence of termination of marriage on no valid ground by returning the sionda, since the wife could not have petitioned for divorce on the ground of desertion because the husband had not been away for the minimum two years. If the wife terminates the marriage on no valid ground the husband is entitled to the sionda. In fact, the return of the sionda itself effectively terminates the marriage. This case also shows how the wife can terminate the marriage by saying that she no longer loves the husband, accompanied by the return of the sionda. Should the wife's parents refuse to return the sionda the marriage will not be considered terminated even if the wife stays away from the matrimonial home. The husband is then entitled to compensation should she commit adultery during this period. Also, if she should get married before the sionda is returned, the second husband will be liable for the first husband's sionda. The husband does not have to wait for his wife to contract a second marriage to get back his sionda; however, he can sue her parents for it.

**EFFECT OF DIVORCE ON CHILDREN OF THE MARRIAGE**

The Lozi have an extended family system; the responsibility of raising the children rests primarily on the parents, but is extended to relatives also.

Insofar as rights of children are concerned, divorce has no effect. Depending on their age, children may remain with their father or they may go with their mother. Although age is the most important factor in determining custody, the parties' situation is also considered. If the father is married to a cruel or uncompromising stepmother,
the children will stay with their mother. Similarly, if the mother mar-
ries a cruel man, the children may stay with their father. Children may
also stay with either the paternal or maternal grandparents, or even
uncles. All the children need not stay with the same parent at the
same time.

Even where the children decide to stay with their mother, the
father is still under an obligation to visit them, buy them clothes,
and provide them with food occasionally. The same applies to the
mother of the children if they stay with their father. Failure by
the father or his relatives to visit and assist children staying
with their mother or maternal relatives entitles the mother or whomever
is looking after them to compensation when they have grown, or the
father forfeits his rights in the children.

This is especially true when the children are girls. The father
or his relatives may be deprived of their share of the sionda if
they have neglected the children. The same penalty applies to the
mother or maternal relatives if they have neglected the children.

When the children have grown they choose where to build houses and
stay. Usually the children will stay with those relatives who
raised them. They cannot, however, build houses in their step-
father's village because they are not members of his clan, and it is
rare for children to stay with their stepfather.
EFFECT OF DIVORCE ON THE SPOUSE'S PROPERTY

THE DIVORCED WOMAN

As we have seen earlier, the woman's property normally is kept in her parental village. There are exceptions like pots, plates, hoes, and other items required in everyday life. She cannot acquire such properties as houses, fishing ponds, and other land since they can only be acquired through membership to the clan.

The property kept at her matrimonial home, as it is held in her personal capacity, is not affected by termination of the marriage. The woman may, during the marriage, build a house at her parental village and, despite the fact that it is built during the marriage, the husband has no rights in it.

Sometimes problems arise in ascertaining ownership of personal property. For example, money earned from the sale of an excess crop may be used to buy some pots or even furniture before it is shared. If the marriage is terminated, who owns the pots or furniture? This confusion is the reason the wife always keeps her property at her parental home.

THE HUSBAND

The matrimonial home is always in the husband's village. Necessarily, then, the husband owns the fields, fish ponds, and houses. This type of property, since it cannot be given to the woman, is not affected by divorce.

Chattels acquired by the husband during marriage and not part of solume, however, can raise problems. Although the divorced wife cannot
claim such property as of right, she may have a right of action for part of it. Pots, dresses, plates, cooking sticks, blankets, and such items used by the wife in the matrimonial home must be shared. Failure to share gives the wife a right of action against the husband. Whether the particular items given to the divorced wife are sufficient is a question of fact that must be determined by taking into account the total number of items subject to sharing. The court may order a re-sharing based on the specific facts of the situation.

Although the husband may have acquired property during marriage, the divorced wife has no legal interest in it if they form part of solume.

MATRIMONIAL RESIDENCE AND CROPS

The matrimonial home is the husband's property and the wife has no rights in it, even if the wife has contributed to its construction. The presumption is that the wife who contributes does so with the understanding that in divorce she would not be heard to complain about her contribution. This is hard on the woman, because the Lozi woman contributes substantially to the construction of the house by putting clay on the walls and decorating it. The decorations greatly add to the value of the house, but she cannot be reimbursed for this contribution. In extreme cases, a wife may be allowed to take a shutter away if she bought it, but otherwise she cannot tamper with the house.

Regarding crops grown during the marriage, Professor Gluckman accurately explains Lozi law:

In Lozi law, husband and wife have equal rights in the crops she has worked—the land is his but the labour is hers. They and their children
In practice, the sionda may be shared between the mother and father as soon as they are satisfied that their daughter is "properly married." The sharing may be deferred until a two-year period has elapsed if there is likelihood of early termination of the marriage, for example, if there are persistent quarrels, unreasonable chastisements, or if the girl's parents are not familiar with their son-in-law's background.

The girl's mother invites her relatives to be present when the sionda is shared. If the girl's mother is dead, the girl's uncle may take her place and share with the girl's father.

**EFFECT OF DEATH ON THE MARRIAGE**

Death of either spouse terminates a Lozi marriage, but there are certain customs that must be observed before the surviving spouse can remarry. If the husband dies, the widow must be cleansed before she can go to her parental home. After cleansing, she must be escorted to her parental home by the deceased's relatives. It is taboo for her to return home unescorted. This is only custom, but can be accompanied by legal sanctions. If, for instance, the deceased's relatives refuse to cleanse the widow, she can have an action against them for compensation. The action is based on the fact that ununcleansed widow cannot remarry and therefore failure to cleanse her is a restriction of her right to marry.

Thus under Lozi law the husband's death terminates the marriage and the widow has no marital obligations binding her to her in-laws. In the past, the deceased husband's family could choose another man
to marry the widow. The widow was under no obligation to marry the chosen man, but it was regarded as lack of appreciation for the deceased husband if the widow turned down the offer. The offer of a second husband is now very rare and is made only in extreme cases where the deceased husband has left behind many children who need the assistance and care of a loving father. The second husband, a relative of the deceased, volunteers to look after the children and treat them as his own. Sometimes, the offer of a second husband is also made because the widow has been extremely good to the deceased's family and they do not want to lose her. It must be emphasized that the choice of a second husband is merely custom, and the deceased's family has no right of action against the widow if she turns down the offer.

**SHARING THE DECEASED'S PROPERTY**

The widow cannot have any interest in the deceased husband's real property. Since she is not a member of the deceased's clan, she cannot inherit any of the deceased's fish ponds, gardens, or houses. It makes no difference whether the deceased had actually given her the gardens. The principle involved is clear: ownership of real property vests in the clan and individual ownership is merely possessive. That being the case, the deceased cannot give reversionary rights belonging to the clan away to a non-member.

The deceased, during his lifetime, however, may give some of his property to his children. Such devises are valid and are recognized by the deceased's relatives. In some cases, the husband may make an
oral will at his deathbed. Provided there is evidence proving the oral will, his relatives will honour the disposition as long as it is not contrary to customary law. For example, if the oral will gives fields to the deceased's wife, the disposition is invalid and will not be recognized by the relatives of the deceased when distributing his estate.

The administrator, appointed by elders of the clan, distributes the estate to the deceased's children according to their needs. The children enjoy first priority in distribution of the estate. Second priority will be given to the parents of the deceased and to all others whose livelihood was entirely dependent on him. If the deceased's children are too young to stand on their own, in which case the mother, if willing is given the deceased's fields to grow food for them. She may even be allowed to stay in the matrimonial village and be looked after by the deceased's relatives. If the child or children she is looking after in the matrimonial village die, she is obliged to go back to her parental village. Similarly, if she remarries or commits adultery, she forfeits her right to stay in the matrimonial village.

Regarding personal property, when marriage is terminated by death of the husband, the widow is entitled to half of the crops. In some cases, she may be given more if there are children of the marriage. The remainder of the crops go to the deceased's relatives. Other items (clothes, plates, hoes, blankets, and other personal effects) are shared in the same manner. The personal property
of the widow is not affected by the husband's death.

DEATH OF THE WIFE

Death of the wife terminates the marriage. My informants, however, said that in the distant past replacements would be made for the surviving husband by relatives of the deceased wife, but I could find no recent example. In any case, it was a custom not in any way accompanied by a legal obligation. Since the replacement was always a sister to the deceased, she was more likely to care for the children better than any stepmother. As a matter of fact, replacements were made only in cases where the deceased was survived by very young children. Before making the replacement, the woman taking the place of the deceased had to give her consent, and the widower was under no obligation to accept the replacement. According to the late Mushele, however, nearly all replacements were accepted because it was awkward to reject the offer.

The surviving husband has no proprietary interest in the wife's personal property. If there is sionda of their children not yet shared, the surviving spouse shares it with relatives of the deceased.

EFFECT OF DEATH OF EITHER SPOUSE ON THEIR CHILDREN

The Lozi maintain a bilateral system in which inheritance rights exist for both the paternal and maternal sides. Similarly, the responsibility to look after the children falls to both lineages. This is an advantage for the Lozi because, unlike other ethnic groupings in Zambia, children of the marriage can be looked after by both families to the marriage.
If the deceased is the mother of the children, they stay with their maternal grandparents, their paternal ones, their father, or any uncle or aunt. Custody is a question of fact determined by the circumstances of the case. It will depend on the age of the children and their requirements at the time. If the children are in school, they will stay with relatives nearer the school and spend holidays with those who cannot keep them during the school term. If either family fails to discharge its responsibility towards the children, it, by default, forfeits its rights to the children. When the children are grown, they choose where to settle. Those who did not look after them while young cannot claim a share of the sionda. Induna Lioko⁷ said that the family which fails to discharge their responsibility towards children must pay the family who raised the children before they can claim a share of the sionda. This right to claim compensation before granting rights in such children is recognized by the courts.
1. See notes on informants.

2. Provincial Local Courts Officer in the Western Province at the time of the interview. See notes on informants.

3. Laws of Zambia, Cap. 54.


6. See notes on informants.

7. See notes on informants.
PART IV

CUSTOMARY MARRIAGE AND THE CONFLICT OF LAWS
CHAPTER 9

INTERTRIBAL MARRIAGES AND THE INTERNAL CONFLICT OF LAWS

Before Independence in 1964, the incidence of intertribal marriages, especially among the Lozi, was almost negligible. This was attributable to a variety of factors. The only Lozi who had contacts outside Barotseland were migrant workers working in the gold mines in South Africa, where living conditions did not encourage integrated social intercourse. Migrant workers were subjected to stringent pass laws, their movements were restricted, and accommodation was such that it was almost impossible to stay with a woman. The Mining Authorities deliberately created a policy to keep migrant workers single.¹

Even assuming that a migrant worker could get married there, it was impossible to get the wife to Barotseland because the South African Government would not give her travel documents.²

A few people in Barotseland went to work along the line of rail in Northern Rhodesia as migrant workers working on white farms for short contracts. This was also not conducive to getting married outside Barotseland.

The Lozi are renowned for their strict adherence to tradition. Consequently, contact with people outside Barotseland was restricted to a minimum and the elders discouraged contact with people from outside Barotseland for fear that it might affect their traditions. The elders employed many sanctions to discourage contact with people from
outside Barotseland. Parents would not pay sionda for a son who wanted to marry someone who was non-Lozi. Similarly, they would not accept the sionda if their daughter wanted to get married to someone from outside Barotseland. Even when the young man could provide his own sionda, the elders refused to allocate gardens to the couple, thus making it difficult for them to live in the area.

DISCRIMINATORY LEGISLATION

It was the deliberate policy of the Barotse Native Government to discourage migrants into Barotseland. Laws with onerous provisions were enacted by the Superior Native Authority to make migration to Barotseland cumbersome and time consuming. This legislation greatly contributed to the low incidence of inter-tribal marriages among the Lozi. For example, Order No. 25 of 1936 of the Barotse Native Government provided:

1. No African male shall move from one village to another without first obtaining permission from his Silalo Induna and reporting to the Boma.

2. No African adult male shall move from one district to another or from one Silalo to another without first obtaining permission from both Silalo Indunas and a removal permit from the District Commissioner of the District where he has been residing.

3. No African male shall permanently reside at any village unless he is registered there.

4. No Africans shall cultivate lands unless these have been assigned to them in accordance with customary law.

5. Any African adult male who wishes to move from one Silalo to another must first obtain permission from his Silalo Induna. He must then obtain permission from the Silalo Induna of the area in which he wishes
to settle. Finally, he must report to the Boma and register with his new Headman. Provided that where Africans have been away at work and wish to settle in another district, of Barotseland, without returning to their district of domicile, they may ask permission through the District Commissioner of the District to the District Commissioner of the home district who will seek permission for them from their Silalo Induna. Such Africans should first obtain permission from the local Induna to settle in his area.

This legislation was intended to restrict the movements of Africans within Barotseland as well as those coming from outside. The village headmen were reluctant to admit new people into their villages for obvious reasons. They were the custodians of clan land and were constantly under pressure from clan members not to open land to outsiders. Secondly, the village headman was charged with maintaining peace in the village. That being the case, he would not admit someone whose background he did not know. The Silalo Indunas would grant permission to settle in their Silalos only on the advice of the appropriate village headman, so if the headman did not give consent there was nothing the Silalo Induna can do.

Since it was difficult for migrants to settle in Barotseland, the alternative means for intertribal marriages was for the Lozi women to venture outside Barotseland and marry there. This was even more difficult. In the first place, the woman's parents would not sanction such an adventure and would not allow their daughter to marry someone whose customs they did not know. Besides this withdrawal of parental consent, the Barotse Native Government, through legislation, made it extremely difficult for a Lozi woman to leave Barotseland. Order No. 6 of the Barotseland Native Government provided:
1. Any woman unaccompanied by her father or her lawful husband, leaving Barotseland without having in her possession written permission from her Native Authority to do so, shall be liable on conviction to a fine not exceeding £1 (one pound) or to imprisonment not exceeding one month I.H.L., and in lieu of such penalties or in addition to them the court may order the repatriation of any woman convicted of an offence against this order.

2. Any person soliciting or aiding any woman to commit an offence against this order shall be liable on conviction to a fine not exceeding £2 or imprisonment not exceeding two months I.H.L.

In view of this legislation and the adherence to strict tradition, the climate before Independence was not conducive to inter-tribal marriages. People were rather suspicious about non-Lozi customs and traditions and, in sum, inter-tribal marriages were not a problem among the Lozi before Independence.

**POST-INDEPENDENCE PERIOD**

Independence brought with it many social changes including changes in the judiciary. The Barotse Native Government, which was incompatible with the national aspiration of a united Zambia, was immediately replaced by a system of Rural Councils and the Barotse judicial system was incorporated into the national judiciary. The Barotse Orders and Rules, which formed the basis of the Barotse Judiciary, was replaced by the Local Government Act and other relevant enactments.

As a result, in 1966 the Zambian Government in keeping with its policy of anti-racism, banned the export of labour to the apartheid Republic of South Africa. Contingent plans were designed to utilize
the idled skilled migrant Lozi labour in the Copperbelt. This created a migration to the mining towns on the Copperbelt of many Lozi migrant workers seeking employment. Because of the integration of the Barotse Native Government into the national government, the discriminatory laws discussed above could no longer apply, and people from outside the Western Province could come in with much ease. The many secondary schools built during the Transitional Development also began to produce graduates for the labour market. In the Western Province, for example, each district was allocated a secondary school, and all opened in 1966. These changes introduced inter-tribal social intercourse, especially among the young people of the Lozi and other tribes. Slowly, young men began to assert their independence as they could live comfortably away from their parents. Many young men rarely bothered to go home and marry the village girl chosen by their parents. Intertribal marriages between the Lozi and other tribes subsequently became common.

Undoubtedly, intertribal marriages have inherent problems. First, there are questions created by the conflicting customs prevailing among the various ethnic groups. Second, there are problems regarding the applicable customary law. Prima facie, one would argue that there are only three bodies of customary law in Zambia: the matrilineal customary laws, the patrilineal customary laws, and the bilateral customary law. There are, however, many more bodies of customary law than these. In considering this question of internal conflict of laws, Mr. McClain has observed:
Within the borders of Zambia there are a number of different bodies of customary law dealing with family law, that is, marriage, divorce, custody of children, etc. It is commonly said that there are seventy-two tribes in Zambia. That is very doubtful. Certainly there are not seventy-two distinct bodies of customary law. It is difficult to go beyond the statement that between the various peoples of Zambia, speaking one language or another, their customary laws have many points in common and some important differences. The well-known division between matrilineal and patrilineal people marks the greatest difference between laws. Thus the patrilineal Ngoni or Mambwe differ from the matrilineal Bemba or Tonga to a greater degree than other matrilineal.

This explains the magnitude of the problem. Within the same language group there can be important differences in laws. If there can be such differences within the same tribal group, then differences between different tribal groups must be even greater.

In many respects, these differences play a major role in an inter-tribal marriage, because the differences largely determine the success or failure of the marriage. The differences may impinge on such important matters as rights in the children of the marriage, extent of the marriage payment, administration of property in the event of death, and the general relationship of the two families to the marriage.

**INTERIAL CONFLICT OF LAWS**
the surviving spouse are affected by those customs.

The applicable law is affected by various factors. McClain has suggested, and I think it is correct, that the applicable law in an intertribal marriage should be the law applied at the time the marriage is contracted. For example, a person born of Lozi parents living in Senanga under Lozi law would be obliged to conform to Lozi law. The problem arises when the girl from Senanga born of Lozi parents marries a Mambwe living in Kasama in the Northern Province.

Depending on the circumstances under which the marriage was contracted, the marriage could be governed by Mambwe law. The problem is further complicated by the fact that, since the couple lives in Kasama, they might be subjected to Bemba personal laws. In the event of the wife's death the applicable law would be Lozi, since it is the law that applied at birth. The same would be true if the husband died; Mambwe law would apply.

It would, of course, be different if the marriage was terminated by divorce. Serious conflict of laws arises because it may not be clear what law applied at the time the marriage was contracted. There is a general presumption in favour of the wife's customary law, but it is a rebuttable presumption, if evidence to the contrary can be provided.

Internal conflict of law problems often involve dual applicability of laws. These may arise when a marriage contracted under customary law is converted to a statutory marriage in accordance with the Marriage Act. The problem is not so much which law applies as the status of the rights accrued when the marriage was contracted under customary law. One example is a marriage contracted between a Lozi and a Bemba satisfying
Lozi customary law but converted to statutory marriage. Under Lozi law, if the marriage is dissolved at the wife's instigation, the husband is entitled to the sionda, but under statutory law no question of repayment of the sionda arises. The husband's rights to the sionda are then at issue. If the marriage is converted to a statutory marriage, it can no longer be entertained by the Local Court and hence rights cannot be enforced unless they are recognized by the High Court.

Legislation is required to correct the anomalies. In this regard, the government through the Law Development Commission headed by the former Chief Justice\(^7\) has proposed legislation on customary law of succession. The Commission has organized seminars in the major urban centers to stimulate discussion of the proposals and to invite opinions and suggestions.

**IMPACT OF INTERTRIBAL MARRIAGES ON LOZI MARRIAGE LAW**

Although intertribal marriages before independence were few, the impact within the thirteen years of Zambia's independence is already affecting Lozi marriage.

Because of constant contact with other tribes in the urban centers, marriages arranged by parents are **less common**. Young men and women spend their time in school away from their parents. During that time they associate with people from various parts of the country. This social intercourse has dispelled the myth, widely held by the pre-independence Lozi elders, that intertribal marriages can never succeed. In fact, some people take advantage of the good points prevailing in intertribal marriages. For example, among the Ngoni and Bemba, the
marriage payment is so small compared to the sums demanded by the Tongas and Lozis. Lozi young men find this as an attraction to marry across tribal lines. Furthermore, some parents exposed to intertribal marriages no longer regard them with hostility; it is being increasingly tolerated as a normal occurrence.

Lozi young men working along the line of rail lead lives independent of their parents and no longer look to them for sionda. They can afford to ignore their views about intertribal marriages, and their parents' opinion is merely advisory.

Perhaps a more disturbing factor arising from the impact of intertribal marriages is the introduction of mapoto in Lozi customary law. This is a union which does not satisfy the prerequisites of customary marriage. The parties live together as though they are husband and wife but, under customary law, they are not married and are denied the usual rights arising from marriage. Under Lozi law, such a union entitles the girl's parents to damages if she has never been married before. Although this right still exists in principle, it is rarely exercised along the line of rail.

This is the result of economic changes taking place in the urban centers. Because life is increasingly dependent on money, a girl who cannot make ends meet is easily tempted to live with her boyfriend even
to her parents. In other rare cases contrary to customary law, the
girl may contribute to the sionda to assist her husband. There does
not appear to be any means in Lozi law to check such developments.
Young Lozis no longer look to their parents for assistance. Mainly,
they live on their earnings and do not need the financial assistance
of their parents in order to get married.

With these changes slowly gaining acceptance, Lozi customary
law is destined for an evolution dictated by changing economic and social
circumstances in the country. Law does not operate in a vacuum, but
responds to changes taking place in society.
CHAPTER TEN

CUSTOMARY MARRIAGE CONTRASTED WITH STATUTORY MARRIAGE

By now it is clear that Zambia has a dual family law. There is the statutory family law applying to all non-Zambians and Zambians who in one way or another have chosen it, and there is customary family law which applies to all Zambians of African descent from the time of birth. It can be seen from the previous chapters that customary law is not uniform throughout the country, but varies from one tribe to another. This can cause internal legal conflicts if an intertribal marriage is contracted. Problems arise regarding the applicable customary law, and some problems stem from conflict between the statutory law and customary law. For example, problems arise in determining the status of rights arising from various customary laws. In this chapter customary marriage is contrasted to statutory marriage.

LOZI MARRIAGE CONTRASTED WITH STATUTORY MARRIAGE

Statutory marriage is a replica of the Christian concept of marriage. The definition was coined in the Nineteenth Century by Lord Penzance in the famous case of Hyde Vs. Hyde, and he described it as "the voluntary union for life of one man and one woman to the exclusion of all others." This marks a great departure from the Lozi concept of marriage, since the Lozi marriage is potentially polygamous. While the wife must be married to one man at one time, the husband has no limit as to the number of wives he may have at any given time.

Another distinction arises from the ingredients making a valid
Lozi marriage. As seen earlier the sionda is an indispensable pre-
requisite to a valid marriage, that once paid confers marital rights
and obligations on both spouses. Conversely, whatever the parties' inten-
tions, the rights which they would have otherwise enjoyed do not arise, if the sionda is not paid. In statutory marriage, the essentials of a valid statutory marriage are set out in the Marriage Act. Age is of particular importance to a valid marriage contracted under the statute; if the age requirement is not satisfied, unless a High Court Judge upon application has given his consent, the marriage is void. Age, however, is of no legal significance under Lozi law. Provided the wife is a mwalanjo,2 her actual age is immaterial.

To contract a valid marriage under the Act, both parties to the mar-
riage must be single at the time of contracting the marriage. The marriage is invalid if either party was married at the time of con-
tracting the second marriage. Under Lozi law, however, a second marriage by the husband during the continuance of the first marriage would not affect its validity. The validity of the first marriage would only be affected if a wife already married contracts a second marriage during the continuance of the first. Even then, the second marriage will be valid after the second husband has compensated the first husband. In any event, if the wife contracts a second marriage during the first, that act terminates the first marriage.

Marriage under the statute will also be null and void if it is solemnized or wilfully acquiesced to in any place other than the office of a Registrar, licensed place of worship, or place authorized by the special licence; it is void if solemnized under a false name, without
the Registrar's Certificate of Notice or duly issued special licence, or by a person not a minister licensed by some religious denomination or a Registrar. In any case, the effect of invalidity in Lozi law is very different from invalidity or nullity under the statute. Nullity under the statute means that the marriage is deemed never to have existed at all. Under Lozi law, although a marriage may be invalid, the existence of the union, though irregular, is recognized. There are two choices in such a situation; either the irregular union is terminated or it is regularized by making the necessary payment of sionda. In some cases, the irregularity may, through passage of time become regularized and accepted. For example, under Section 32(1), it is provided

No marriage in Zambia shall be valid
(a) which if solemnized in England would, under the law relating to prohibited degrees of marriage for the time being in force in England, be null and void on the ground of kindred or affinity;

The effect of such a union under the Act is that it is null and void. Under Lozi law, there is provision for sindoye arising out of either affinity or consanguinity, so that after making the sindoye payment, the parties may persist in their union and eventually be recognized as man and wife. This is not the case under the statute, for, once the marriage is null and void, it is void at all times and in all circumstances.
IMPACT OF STATUTORY MARRIAGE ON LOZI MARRIAGE

Unfortunately, this is a very difficult area in which to obtain statistics. The only statistics available cover all customary marriages, and it is difficult to separate Lozi customary marriages statistically. All the same, it is hoped that those statistics available will suggest the impact of statutory marriage on Lozi marriage.

Before 1963, no African could contract a statutory marriage. Towards the end of 1963, an amendment was made to the Marriage Ordinance that permitted Africans to contract marriages outside customary law. The table below shows the number of marriages per year contracted under the statute.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Statutory Marriages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>41</td>
</tr>
<tr>
<td>1965</td>
<td>89</td>
</tr>
<tr>
<td>1966</td>
<td>122</td>
</tr>
<tr>
<td>1967</td>
<td>195</td>
</tr>
<tr>
<td>1968</td>
<td>252</td>
</tr>
<tr>
<td>1969</td>
<td>225</td>
</tr>
<tr>
<td>1970 (Jan.-March)</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>954</td>
</tr>
</tbody>
</table>

From 1961 to 1970, in contrast to these figures, there were 7,000 marriages contracted under the statute by Europeans, Euro-Africans, and Indians. It will be noted from the table above that the figures for the year 1969 are lower than those for 1968. This may be attributed to the case of a Government Minister (The *People vs. Chitambala*) who was convicted of bigamy and imprisoned with hard labour for eighteen months.
As the table shows, there has been little numerical impact on customary marriages. In other respects, however, statutory marriages have affected customary marriages. Section 38 of the Marriage Act provides:

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.

Once a party contracts a marriage under statutory law, he cannot again contract another marriage under customary law. It is also an offence under the Act to contract a marriage under the statute during the continuance of another marriage contracted under the statute.

COURTS OF JURISDICTION AND THE APPLICABLE LAW

Section 11(1) of the High Court Act provides:

The jurisdiction of the Court in divorce and matrimonial causes and matters shall, subject to this Act and any other rules of Court, be exercised in substantial conformity with the law and practice for the time being in force in England.

Pursuant to the foregoing, all matrimonial causes arising from statutory marriages are subject to the matrimonial law currently enforced in England. This is distinguishable from customary marriage, where the High Court has no original jurisdiction; jurisdiction in marriages contracted under customary law is reserved for local courts.
The high court can, however, exercise appellate jurisdiction. The applicable law and the courts administering that law thus distinguish customary marriage from statutory marriage. In discussing termination of marriage under Lozi customary law, we saw that grounds for termination are almost endless. In statutory marriages dissolution is not granted unless proof is made of certain specified statutory allegations. Not every allegation gives rise to a divorce; the allegations must conform to the grounds provided by law. Section 2 of the Matrimonial Causes Act provides:

The Court hearing a petition for divorce shall not hold the marriage to have broken down irrevocably unless the petitioner satisfies the court of one or more of the following facts, that is to say:

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as 'two years' separation') and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petitioner (hereafter in this Act referred to as 'five years' separation').
It is not enough for a party seeking divorce in a statutory marriage to allege any of these facts; the party must prove it to the court’s satisfaction. Once the marriage has been contracted under the Act, it becomes amenable to these provisions insofar as divorce is concerned.

The right to petition for divorce under the Matrimonial Causes Act is limited. Section 3(1) and (2) provides that:

1. Subject to subsection (2) below, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage (hereinafter in this section referred to as 'the specified period');

2. A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent; but in determining the application the judge shall have regard to the question of whether there is reasonable probability of a reconciliation between the parties during the specified period.

Lozi law, in contrast, does not place any restrictions on the right to petition for divorce. There is no specified period within which a petition for divorce must be made. The petition may be made at any time, irrespective of how long the marriage has lasted.

As the previous table shows, few marriages are contracted under the statute; the majority of Zambians marry under customary law. Necessarily, matrimonial causes handled by the High Court are relatively few, as the majority of the cases go on to the local courts. As one of my informants observed, many Lozi are reluctant to take their matrimonial causes to Subordinate Courts because they are not sure whether the bench is conversant with Lozi law.
This study has attempted to state the principles of law that govern marriage and divorce among the Malozi. Effort has been made to isolate principles of law from mere custom.

Under Lozi Law, marriage is usually contracted in one of two ways: ku beeleza (betrothal) or ordinary marriage contract. Two irregular ways are ku yanga (elopement) and ku tobisa (running away with the bride without her parents' consent).

Whichever way the marriage proposal is initiated, no Lozi marriage is valid unless sionda is paid. Sionda is an indispensable element of a valid Lozi marriage. Even in cases where the couple have lived together and had children, if no sionda has been paid, the relationship cannot constitute a marriage. However, the sionda need not be paid in full. Partial payment is sufficient to validate the marriage provided the wife's parents have consented to the payment arrangement.

In addition to the sionda, other payments are also made. These are sinanulo, mukaba, and munyaebu and they are paid in that order. The payments are ceremonial in nature and may be waived by the bride's parents; nonpayment would not affect the validity of the marriage. After the sionda is paid, the marriage is preceded by a marriage ceremony. The ceremony is optional at the discretion of the bridegroom. The ceremony serves only as an announcement to the public that the previously single woman has become someone's wife.
Marriage does not affect the spouse's rights to own property in their individual capacities. The only exception is that under Lozi law, the wife cannot own real property in the matrimonial village. The rationale for the restriction is the limitation placed on the title to real property under Lozi law. Ownership of real property vests in the clan. Individual title to such property is limited only to usage and only insofar as they are clan members and reside in the village. The wife's residence in the matrimonial village is limited to the life of the marriage. In the event of divorce or the death of her husband, she is obliged to return to her parental village. In addition, since the wife is not a member of her husband's clan and since the right to real property is tied to clan membership, she cannot have real property rights in the matrimonial village.

The husband enjoys the exclusive right to own solume property. Solume property may include anything from kitchen utensils to gardens. The only restriction on solume property is that the wife's needs must be sufficiently satisfied before the husband can allocate property to solume.

Once the sionda is paid, the husband has exclusive sexual rights over his wife. Any violation of such rights entitles him to damages. Because Lozi marriage is potentially polygamous, the wife does not have exclusive sexual rights over her husband. Extramarital affairs by the husband are permissible provided he does not ignore or ill-treat his wife as a result of such affairs.
The meaning of adultery under Lozi law goes beyond the statutory definition. Lozi law classifies adultery into three categories: ordinary adultery, constructive adultery, and aggravated adultery. Ordinary adultery is a love affair in which sexual intercourse takes place. Constructive adultery is adultery by conduct. For example, writing a love letter to a married woman constitutes constructive adultery. Aggravated adultery is adultery that results in pregnancy or transmission of venereal disease. Courts impose stiff penalties for aggravated adultery.

There are many grounds for divorce under Lozi law. Primarily, the court's priority is to reconcile the couple, and divorce is granted only when there is no hope for reconciliation. Generally, the husband initiates the divorce, but the wife may start the proceedings if she finds the husband intolerable. The marital relationship may be terminated for impotency, barrenness, desertion, cruelty, persistent adultery (by the wife), insanity, or leprosy. With regard to the last two grounds, divorce is granted because of the concern for the safety or health of the other spouse.

The court with primary jurisdiction in dissolving customary law marriages is the local court. However, once a customary law marriage is registered and converted to statutory law marriage, the local court ceases to have jurisdiction, and dissolution of such marriage is a matter for the High Court.

It was noted in this study that since independence, many changes have occurred that have had a direct or indirect impact on
customary law. The improvement in the economic status of many Lozi young men and women has meant that they have become less dependent on their parents. As a result, an increasing number of young people are making marital decisions without prior parental consent. This is likely to affect the future of customary law because it concerns such matters as sionda and divorce. The general improvement in the standard of living has given rise to a corresponding rise in the value of the sionda and damages. Pieces of legislation enacted after independence, such as the Local Government Act and the Local Courts Act, have affected the character and direction of customary law. For example, legislation has changed the role of chiefs, the appointment of local court justices, and the structure and jurisdiction of customary law courts in the Western Province and other parts of Zambia.

For this study to be complete, there is an urgent need to re-search into the impact of political independence on customary law. I hope that this will be the subject of my next study.
NOTES TO CHAPTER TEN

1. (1886) L. R.

2. A Mwalanje is a girl who has had her first menstruation but has never married.

3. Laws of Zambia, Cap. 211, Sec. 32(1).

4. Ibid.


7. Laws of Zambia, Cap. 50.


9. Ibid.
<table>
<thead>
<tr>
<th>Paramount Chief</th>
<th>Years Served</th>
<th>His Prime Minister(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Mbuywamwambwa</td>
<td>-</td>
<td>Ndopu Akalondo</td>
</tr>
<tr>
<td>2. Mboo Muyunda</td>
<td>-</td>
<td>Ing'uwa and Imbala</td>
</tr>
<tr>
<td>3. Inyambo</td>
<td>-</td>
<td>Imandi Liomba</td>
</tr>
<tr>
<td>4. Yeta I. NMalute</td>
<td>-</td>
<td>Angulu</td>
</tr>
<tr>
<td>5. Ngalama</td>
<td>-</td>
<td>Iwake and Namunda</td>
</tr>
<tr>
<td>6. Yeta II</td>
<td>-</td>
<td>Iwake</td>
</tr>
<tr>
<td>7. Ngombala</td>
<td>-</td>
<td>Namunda Katanekwa</td>
</tr>
<tr>
<td>8. Yunya Lukama</td>
<td>-</td>
<td>Nambayo</td>
</tr>
<tr>
<td>9. Mwanawina I</td>
<td>-</td>
<td>Namuyamba</td>
</tr>
<tr>
<td>10. Mwananyanda</td>
<td>-</td>
<td>Muswa</td>
</tr>
<tr>
<td>11. Mulanbwa Santulu</td>
<td>-</td>
<td>Muswa</td>
</tr>
<tr>
<td>12. Silumelune</td>
<td>-</td>
<td>Muswa</td>
</tr>
<tr>
<td>13. Mubukwanu</td>
<td>-</td>
<td>Omei</td>
</tr>
<tr>
<td>14. Sipopa Lutangu</td>
<td>1864-1876</td>
<td>Njekwa</td>
</tr>
<tr>
<td>15. Mwanawina II</td>
<td>1876-1878</td>
<td>Namili</td>
</tr>
<tr>
<td>16. Lubosi Lewanika</td>
<td>1878-1884</td>
<td>Silumbu</td>
</tr>
<tr>
<td>17. Tatila Akufuna</td>
<td>1884-1885</td>
<td>Mataa</td>
</tr>
<tr>
<td>18. Lubosi Lewanika</td>
<td>1886-1916</td>
<td>Mwauluka and Mukamba</td>
</tr>
<tr>
<td>20. Imwiko</td>
<td>1946-1948</td>
<td>Wina</td>
</tr>
<tr>
<td>23. Ilute Yeta</td>
<td>1977-</td>
<td>Suu</td>
</tr>
</tbody>
</table>
## APPENDIX 2

### SCHEDULE OF THE PROHIBITED DEGREES OF RELATIONSHIP

#### AS CONTAINED IN THE 1949 UNITED KINGDOM MARRIAGE ACT

<table>
<thead>
<tr>
<th>LOZI MAN</th>
<th>LOZI WOMAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mother</td>
<td>Father</td>
</tr>
<tr>
<td>Father's mother</td>
<td>Father's father</td>
</tr>
<tr>
<td>Mother's mother</td>
<td>Mother's father</td>
</tr>
<tr>
<td>Son's daughter</td>
<td>Son's sons</td>
</tr>
<tr>
<td>Daughter's daughter</td>
<td>Daughter's son</td>
</tr>
<tr>
<td>Sister</td>
<td>Brother</td>
</tr>
<tr>
<td>Wife's mother</td>
<td>Husband's father</td>
</tr>
<tr>
<td>Father's wife</td>
<td>Mother's husband</td>
</tr>
<tr>
<td>Son's wife</td>
<td>Daughter's husband</td>
</tr>
<tr>
<td>Father's father's wife</td>
<td>Father's mother's husband</td>
</tr>
<tr>
<td>Mother's father's wife</td>
<td>Mother's mother's husband</td>
</tr>
<tr>
<td>Wife's father's mother</td>
<td>Husband's father's father</td>
</tr>
<tr>
<td>Wife's mother's mother</td>
<td>Husband's mother's father</td>
</tr>
<tr>
<td>Wife's son's daughter</td>
<td>Husband's son's son</td>
</tr>
<tr>
<td>Wife's father's daughter</td>
<td>Husband's daughter's son</td>
</tr>
<tr>
<td>Son's son's wife</td>
<td>Son's daughter's husband</td>
</tr>
<tr>
<td>Daughter's son's wife</td>
<td>Daughter's son's husband</td>
</tr>
<tr>
<td>Father's sister</td>
<td>Father's brother</td>
</tr>
<tr>
<td>Mother's sister</td>
<td>Mother's brother</td>
</tr>
<tr>
<td>Brother's daughter</td>
<td>Brother's son</td>
</tr>
<tr>
<td>Sister's daughter</td>
<td>Sister's son</td>
</tr>
</tbody>
</table>

It is rather difficult to draw up a list of the Lozi prohibited degrees of relationship because of the extended family system which favours a wider family relationship. Because of the extended family system, the prohibited degrees of relationship are included in the term shumwa, which means "a relative with whom one cannot have sexual relationship." The term is in contradistinction to sindoye, which is a more serious breach involving a close relative. Marriage between lishumwa (plural), though not approved, is tolerated.
REFERENCES


Jalla, A. *Initiation Schools for Girls in Barotseland*. (General Missionary Conference of Northern Rhodesia, 1927).


Kakula, L. "Customary Land Acquisition among the Amakona of Kalabo District in the Western Province, Zambia." Research paper presented to the University of Zambia in partial satisfaction of the requirements for the award of the Degree of Bachelor of Laws, n.d.


Richards, I. A. Bemba Marriage and Present Economic Conditions. Rhodes-Livingstone Paper No. 4, 1940.


1. KSH 2/1       District Notebooks
2. KDE 2/44     Barotse Native Laws, Custom and
               Administration, 24th August, 1929.
3. A3/24/4      Lewanika and His Family
4. 1/5/2/1/6    District and Sub-District Annual Reports
               - Barotseland, 1908-1910.
5. B1/3/688     Native Affairs Barotseland 1928
6. KDE 2/431/1/3 Native Affairs and Customs
7. KDE 10/2     Barotse Provincial Notebook 1912-1936.
8. KSH/2/1      Kalabo District Notebook
10. K.S.R. 2    Senanga District Notebook 1907-1963
11. K.S.X. 4/1  Mankoya District Notebook 1907-1963
12. K.T.O. 3    Sesheke District Notebook 1909-1963
13. BOX 356     Miscellaneous Historical Notes on Barotseland
15. B1/2/301    Jurisdiction of Magistrates Courts
               of Political System
17. B1/3/423    Appointment and Dismissal of Chiefs and
               Headmen
18. IN 1/5 (1-8) Barotse Representative Indunas
IMPORTANT PUBLICATIONS CONSULTED IN LOZI


Ikacana, N. S. Litaba Za Makwangwa (The History of the Kwangwa). Northern Rhodesia Publications Bureau, 1964.


NOTES ON INFORMANTS

Part of the information used in this paper was gathered before I prepared the thesis outline. Consequently, the notes from my informants spread over a period of four years.

1. Mwana Mulena Mutemwa L. Imasiku (Prince Imasiku)

Mr. Imasiku is the son of the late Ngambela (Prime Minister) Imasiku. His father was Ngambela to the late Litunga Sir Mwanavina III. He grew up in Lealui, the Capital of Barotseland, where his father was Ngambela. Mr. Imasiku is about fifty one. Since childhood Mr. Imasiku has been associated with the Lozi Royal Family Affairs and is very knowledgeable about Lozi kingship. After finishing school, Mr. Imasiku worked for the Forest Department in Mongu. He later moved to Lusaka, where he is currently working in the office of the Administrator-General. I interviewed Mr. Imasiku on November 24, 1974.
2. Induna Mwanamungela

Induna Mwanamungela was until recently Local Court President of Mutala Local Court in Kalabo District. The Induna is one of the early people in the Kalabo District to go to school. He attended Rusangu Seventh Day Adventist School where he completed his Standard VI. After finishing school Induna Mwanamungela became a teacher, but later resigned to assume his father's position as Induna of Mutala Local Court. He has been an Induna for over thirty years. It was evident during the long discussions I had with him that he is widely experienced in Lozi customary law. Since his retirement from the bench, Induna Mwanamungela has joined the Kalabo Rural Council as a Councillor. I interviewed him in November, 1973.

3. Moffat Muyatwa Sinasiku

Mr. Sinasiku comes from Sietiana Village in the Mutala Area of the Kalabo District. He is about fifty years of age. He struck me as a talented man, knowledgeable in customary law. After working in the gold mines of South Africa for some time, he is currently with the Kalabo Rural Council as Deputy Head Messenger. I interviewed him in November, 1973, and again in March, 1977, in Mongu.

4. Induna Lioko Sitenge

Induna Lioko is the Judge President of the Litapuva Local Court in the Kalabo District. He assumed Indunaship when his father died, and has now been on the bench for thirty-four years. He has been associated with the administration of customary law ever since he joined the bench. He is an experienced Local Court Justice and historian. I interviewed Induna Lioko in November, 1973, and he
gave me details about the marriage contract and rights in land. Mr. Lioko is about sixty-four years of age.

5. Simon Nyambe Mushele

The late Mr. Mushele came from Manandela Village, Headman Kahema, Litapuya Local Court in Makoma-Kalabo District. He assumed the leadership of the Nyuwe Clan in his area from his father. Being the head of the Nyuwe Clan in his area, he was very involved in inter-clan disputes and participated in negotiating marriage contracts for members of the clan in his area. I interviewed him in November, 1973, and he helped me with detailed accounts of the customary law of marriage. Unfortunately Mr. Mushele died in August, 1974, at the age of fifty.

6. Mulena Litia Mbikusita Lewanika

Chief Litia Mbikusita, of Naliele in Kaoma District, is a grandson of the late King Lewanika, who brought Barotseland under British Protection. His father is the late Litunga of the Western Province, an eminent scholar and politician. I had the rare opportunity of obtaining an audience with Chief Litia at his palace in Naliele on the morning of January 24, 1977. This is rare, because, under Lozi law, commoners' access to the chief is restricted. In the company of Ngambela Imangambwa (Prime Minister) of Kaoma, I interviewed the chief and was impressed by his immense knowledge of Lozi Law, especially on marriage and divorce. He was kind enough to allow a panel discussion between himself on the one hand and Sikombwa (steward) Lubasi and Ngambela Imangambwa, on the other.
7. Ngambela (Prime Minister) Imangambwa

I interviewed the Ngambela on January 25, 1977, at Maliele. Ngambela Imangambwa, about eighty years of age, joined the Barotse Native Authority during the early colonial days. In 1966, when the Barotse Native Courts were merged with the Central Government Judiciary, he opted to serve with the Royal Establishment. He is the principal assistant to the Chief at Maliele and is, as it were, keeper of Lozi Law in Kaoma. His long service on the bench is evidenced in his wide knowledge about Lozi Law. He speaks fluent English, and has read widely, which has helped him understand and analyze his society. The Ngambela's contribution was in the form of a panel discussion with members of the bench at Maliele and stewards at the Chief's palace.

8. D. K. Sitali

At the time of the interview Mr. Sitali was Senior Clerk of Court at Mongu. He gave a detailed outline of the structure of appeals under Lozi Law and was most helpful in alerting me to recent changes that have taken place in the administration of Justice in the Western Province. I interviewed Mr. Sitali on January 26, 1977.

9. Mubanga

I interviewed Mr. Mubanga on February 2, 1977. He was then Provincial Local Courts Officer for the Western Province. He was most helpful and gave me insights about problems facing the administration of justice in the Province at the Local Courts level. His duties mainly entailed reviewing all cases decided by the Local Courts in the province. As with Mr. Sitali I was able to learn from
Mr. Hubanga about changes in the structure of appeals, especially changes in applicable customary law.

10. **Induna Kawewa Litungi**

Induna Litungi is the Court President of the Imalyo Local Court in Mongu. He joined the Barotse Native Courts in 1948 and has since served on the bench. The number of years he has been on the bench speak volumes about his associations with the administration of justice among the Lozi. He has been an Induna at Liande, Nakato, and is now Court President of Imalyo. He told me he was born in 1906 in Puunyi village in the Lyaande Silalo of the Mongu District. He was interviewed on January 30, 1977.

11. **Matthew Sikufele**

When interviewed on February 8, 1977, at Suulu Local Court in Mongu, Induna Sikufele told me he was born in 1910 in Nakabu Village, Silalo Siwito, Chief Kandala in Mongu District of the Western Province. He joined the bench in 1957, and, when the Barotse Native Courts were merged with the judiciary, he opted to work for the judiciary. He was Court President of Suulu Local Court when I interviewed him. He is widely read and reads the Constitution and Penal Code. Induna Sikufele could be termed a reformist. On the many occasions while I observed his court, he reminded litigants about changes in court procedure. He confirmed this to me and said that the current aim of members of the bench in the Western Province is to do away with those aspects of customary law not in keeping with modern trends. He went further to point out that this mandate
came from a Local Courts Conference held at Namushakende-Mongu. Undoubtedly, despite his comparatively short tenure on the bench, he is a storehouse of Lozi Customary Law.

On my second visit to Mongu in April, 1977, I found that Mr. Sikufele had retired and now lives in his village in Limulunga. 13. Mr. Alibandila was born in 1912 in Sitoko Village, Silalo Tungi, Chief Libumbu in Mongu. He joined the Darotse Native Courts in 1946 and has served on the bench since then. At the time of the interview, he was Local Court Justice at Suulu Local Court in Mongu.

Induna Alibandila gave me detailed accounts of the Lozi Law of marriage and divorce. He led the panel discussion on the subject and impressed the panelists with his immense knowledge of Lozi Law. Like Induna Sikufele, Induna Alibandila can also write. I interviewed him on February 8, 1977.

During my second visit to Mongu, I found that Induna Alibandila had retired at the same time as Sikufele, former Presiding Justice of Suulu Local Court.
LEGISLATION CITED

1. CAP 45  The Subordinate Courts Act, Chapter 45 of the Laws of Zambia.

2. CAP 50  The High Court Act, Chapter 50 of the Laws of Zambia

3. CAP 54  The Local Courts Act, Chapter 54 of the Laws of Zambia


8. CAP 211 The Marriage Act, Chapter 211 of the Laws of Zambia.