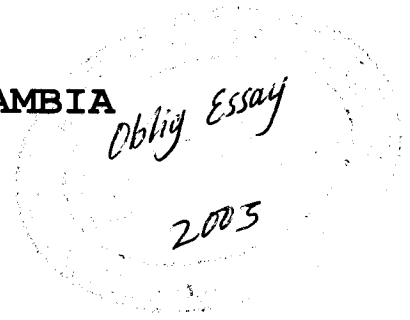


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



I recommend that the directed research essay prepared under my supervision by Catherine Mulenga Lombe

entitled

**RESTATEMENT OF CUSTOMARY LAW IN RELATION TO
FAMILY LAW**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing directed research essays.

C. Mulenga Lombe
.....

SUPERVISOR

26/11/03
.....

DATE

**RESTATEMENT OF CUSTOMARY LAW IN RELATION TO
FAMILY LAW**

BY

CATHERINE MULENGA LOMBE

A directed research essay submitted to the School of Law of the University of Zambia in partial fulfilment of the requirements for the award of Degree of Bachelor of Laws (LLB)

DECLARATION

I, Catherine Mulenga Lombe, solemnly declare that this work represents my own ideas and is not a production of any other work produced or submitted by any person to the University of Zambia or any other institution.

DEDICATION

PHILIPPIANS 4:13 - I CAN DO ALL THINGS THROUGH CHRIST WHO STRENGTHENS ME.

DAD (BANNIE MWAMBWA LOMBE) AND MUM (BEAUTY STEPHANIA MUYEBA LOMBE): YOU HAVE MADE ME WHO I AM AND HAVE MADE IT POSSIBLE FOR ME TO DREAM DREAMS AND WAKE UP TO LIVE THEM. GOD BLESS YOU ALWAYS.

MY SIBLINGS: ANNIE KAOMA, BANNIE MWANGO AND DOROTHY CHILAMBE FOR ALWAYS ENCOURAGING ME TO REACH FOR GREATER HEIGHTS.

ACKNOWLEDGEMENTS

I wish to thank all the people that have made it possible for me to see this piece of work through.

Firstly, I wish to thank the Almighty God for giving me the strength and will to do this research and write the whole essay. There were times when all strength and hope was gone and only prayer restored my will.

I'd also like to thank my supervisor **Mrs Hope Ndhlovu-Chanda** for giving me a chance to write exactly what I wanted to. For being a guide and not a dictator. God Bless You pretty lady.

I also wish to thank all my lecturers and tutors past and present for helping me understand the world in a whole new light. I promise your knowledge has been well invested.

Many thanks to my friends most especially; Nancy Chola Chileshe, for the everything, for being a big sister; Mutumu Nzala for always standing by my side through good and bad times; Mwape Bwalya, for the groove in you; and Cuthbert Tembo for all the challenges you have placed in my path.

The boys: Lubinda Linyama, Lombe Mbalashi, Kabamba Stanley Mumba and Augustine Hamweela, thanks for letting me see things in myself that no one else ever saw.

Mutinta, Harriet and Kahumbu :- "Am so Lucky!!!! Yalipasa bigge!"

Lombe Mwambwa and Kaluba Kabemba, thanks so much for always being there when I needed a shoulder to lean on. You are the best cousins in the world.

Also for all the other friends I have not mentioned, for they are indeed too numerous, you have made my stay and hence my work on campus manageable.

My classmates, for all the trying moments you put me through, I wish to thank you for it has made me a stronger person.

Lastly but not the least I wish to thank Mrs Stella Sakala Manda Kayope, Secretary ZESCO Litigation Department, for all the material support she has rendered. My work would have been difficult without you.

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CHAPTER ONE

INTRODUCTION

The pluralistic nature of the Zambian legal system renders both statutory and customary law applicable. Statutory law is applicable to as a result of the law as was adopted from the colonial masters.¹ The British influence over Zambia was initially felt from about 1889, during the administrative reign of the British South African Company (hereinafter called the BSA Co.) and is still evident from statutory laws in existence today.² Customary Law, on the other hand, comprises ~~of~~ practices and usages of indigenous peoples. It is recognised in the Zambian Constitution³. Section 2 of the Local Courts Act and section 6 of the Subordinate Courts Act also grants recognition to the use of Customary law.

1.1 NATURE OF CUSTOMARY LAW

From the onset it is important to get a clear understanding of the nature of Customary law. It has been defined as

“the unwritten laws which regulate the rights, duties and liabilities of Africans living in

¹ British Extent of Application Act, Chapter of the Laws of Zambia.

² Gann L. H. A History of Northern Rhodesia, Early Days to 1953. (1964)

³ Chapter One of the Laws of Zambia

various communities, usually composed of one tribe resident in one area in Zambia"⁴

The definition given above is a subjective. However, numerous jurists have pondered on the nature and form of customary law and have come up with an objective standard. It is now generally appreciated that for a particular custom to be considered as law it must satisfy the following benchmarks:

1. The custom must be of immemorial antiquity
2. The custom must have been enjoyed continuously. This refers not to the active exercise of the custom but rather to the claim to enjoy it;
3. The custom must have been enjoyed as of right
4. The custom must be certain and precise
5. The custom must be reasonable
6. The custom must be local i.e. it has for its scope a class of persons limited by inhabitancy and right whose subject matter lies in the same defined district⁵

The qualities listed above are not exhaustive with reference to the nature of customary law. However, they set out a minimum standard on which to judge whether a particular practice qualifies as a custom or not.

In present day Zambia it must be stated that there is no one uniform application of customary marriage laws as these vary from locality to locality. As Ndulo states,

⁴ Elias T. O. The Nature of African Customary Law. (1972) p.3

"There is nothing like a customary marriage law prescribed for the whole of Zambia. Rather it is correct to state that there are as many customary laws as there are tribes. The various customary laws in their patterns, principles and concepts do (however) exhibit broad similarities and characteristics"⁶

Another characteristic feature of Customary law is that it is not static. It evolves to encompass the social and economic changes in society. For instance, under Customary law marriages in Zambia today women can sue for "marriage interference" and succeed - a concept that 10 -15 years ago did not exist. For example it was reported in the Sunday Mail (February 17, 2002) that one Naomi Phiri of Avondale in Lusaka sued Mwambwa Yuyi for marriage interference. Ms. Yuyi was found guilty of marriage interference and adultery and was ordered to pay compensation of K 2 million. In another case reported in the Sunday Mail (June 15, 2003) a woman, Justina Mulonga, of Old Kanyama compound sued Mainala Lungu of the same compound for marriage interference. The presiding justice ordered the accused to pay compensation of K 500,000.

It is also evident that the coming of the missionaries and colonialists to Central Africa had an adverse impact on the

⁵ Dias RVM. Jurisprudence. (1964) p.142-143

⁶ Ndulo. M. Changing Nature of Customary Marriage p.144 (1984) Ndulo (ed)

social and economic set up of African societies. These effects will be discussed with particular reference to family law.

1. 2 NATURE OF CUSTOMARY MARRIAGE LAW BEFORE COLONIAL INFLUENCE - BRIEF OVERVIEW.

A number of historians generally appreciate that the African's way of life, before the Western influence, was largely pastoral and agricultural.⁷ The African society was such that there was no lasting focus of wealth capable of being passed on from generation to generation. Hence, the possession of numerous wives was one of the ways in which a successful man could exhibit his standing in society.⁸ Due to the agricultural nature of the society, a man needed extra hands to help him cultivate his farm or milk his cattle. This need was easily satisfied by a plurality of wives and children rather than by hired labour.⁹

As this study focuses on the Customary Law surrounding marriage it is necessary to form an appreciation of the way in which marriage is conducted. In order to do so it is imperative to arrive at an understanding of the social and

⁷ Supra note 2 above at p. 1

⁸ *ibid*

kinship organization of the society in which this paper is set.

The smallest unit in any society other than in its extended form is the family.¹⁰ Basically, the family consists of father, mother and children. This basic unit then cooperates with many other like units in order to produce the basic needs of society.¹¹ In the African society the organization of the group depended very much on whether the ethnic group involved was patrilineal or matrilineal. For instance the Lozi people of Western Zambia are patrilineal whilst the Tonga people of Southern Zambia are matrilineal.¹² The patrilineal kinship system is traced through the father while the matrilineal system is based on inheritance through the mother.¹³ However, in spite of the system that was practised, it is commonly agreed that the process of marriage was a long one and it was difficult to determine at exactly what point the marriage became a valid marriage.¹⁴

⁹ In his first Chapter Gann gives a detailed account of the tribal organization of the Bantu society before the influence of the colonialists. See also Elias T. O. Supra note 3 at p. 5 above.

¹⁰ Giddens. Introduction to Sociology. (1998) p.125

¹¹ Supra note 6 at p.145

¹² Colson E. Seven Tribes of Northern Rhodesia. (1957)

¹³ The two kinship systems will be discussed in further detail in Chapter 2 of this obligatory essay.

It is also largely accepted amongst both kinship systems that marriage is

" a social institution of remote antiquity. (That) it establishes a relationship between a man and a woman, regulates their sexual behaviour, locates their children in the kinship system and influences the inheritance of their property. Traditionally, marriage is regarded primarily as an institution of procreation."¹⁵

1.3 COLONIAL INFLUENCE - BRIEF OVERVIEW

Another issue worth taking into consideration when attempting to arrive at recommendations for this study is the influence of the colonialists on the African society. Initially, the colonialist's policy towards indigenous law was not rigidly established as each colonizing power was still busy trying to subdue the local people and establish a colonial government.¹⁶ The Africans were allowed to practice their law so long as it was not repugnant to justice and morality or inconsistent with any enactment. Already the colonialists influence could be seen, considering that they expected African Customary Law not to contravene with any of its enactments. However, as interaction between the colonialists and the natives

¹⁴ Kapasa M. A Critical Analysis As to Why Customary Law Customs and Practices Continue to Influence English Law Marriages. (2001)

increases, especially due to mining activity, the Europeans saw it fit to extend their influence vis a vis criminal law and some aspects of civil law.¹⁷ The influence of the colonial government on the natives was espoused as follows by Professor Anayangwe,

“By initially leaving judicial administration of Africans to Africans themselves indigenous law and judicial institutions continued as in the days before the colonial conquest, with only occasional interference from the colonial authorities. However, as each colonial government consolidated its tenuous hold over its territory and as contact with traditional peoples and authorities increased, a kind of *Pax Europa* was finally imposed. The policy of benign neglect of the indigenous law and courts was abandoned and, under the ‘enlightened’ control of colonial administration and judges, indigenous law became subject to civilizing restrictions.”¹⁸

After Independence, Zambia adopted a dual legal system.

This entailed the observance of customary law and statutory law in tandem. The government of the day did not formulate a whole new set of legislation but instead merely changed the nomenclature of the statutes. Hence, were there existed terms such as ‘native’ or ‘tribal’ these were merely changed to ‘local’.¹⁹ The substance of the law remained the same. During the first decade of independence the new

¹⁵ Supra note 6 at p. 147

¹⁶ Anayangwe, C. The Whittling Away of Indigenous Legal and Judicial System. p. 47 (1998)

¹⁷ Supra note 2 at p.50. At this stage the laws were mostly regulatory and affected those natives that had now come to work the mines and were living in localities established for them by the Colonial Government.

¹⁸ Supra note 16 at p. 49

governors, eager to rule with an iron fist and to prevail over their internal political foes, betrayed a great deal of interest in public law (constitutional law, administrative law, criminal law) to the total neglect of private law.²⁰ The jurisdiction as regards marriage remained the same²¹ except that instead of strictly applying to the settlers it now applied to those that considered themselves as 'elite'.²² However, even these elite did not seem to understand the and appreciate the implications of contracting a marriage under statute.²³

1.4 MARRIAGES AFTER INDEPENDENCE - BRIEF OVERVIEW

Furthermore, the rural urban drift has brought about an interaction of many different cultures and hence there has been an intermingling of various customary laws. This has resulted in the modification of the application of customary laws as regards marriage. People contracting marriages outside the Marriage Act²⁴ have now adopted a mixture of the laws drawing from different cultures in

¹⁹ Supra note 6 at p.157

²⁰ Supra note 16 at p

²¹ Customary Law marriages were going to continue being administered in the Local Courts.

²² By the time Zambia had attained its Independence there were very few people that had attained a level of education beyond the basic elementary education. Those that had obtained O' Level education and above considered themselves to be the elite of the society.

²³ See the cases of The People v Chitambala (1969) ZR 142 (HC) and The People v Nkhoma (1978) ZR 4: In both cases the defendants were convicted for bigamy. The accused persons were seemingly ignorant of the effect of contracting a statutory marriage and the procedure to be taken in nullifying a Customary marriage.

order to arrive at a balance.²⁵ It has become common that before a couple actually undergo the statutory marriage ceremony undergo ceremonies such as the 'amatebeto'. Also there is payment of bride price in most cases. Also unlike in the past where it was quite acceptable for a man to have more than one wife, it has become unacceptable for a man to have more than one wife. The newspapers have numerous reports of women suing their husbands and other women for marriage interference.²⁶ For marriages contracted under the Act, polygamy has been criminalized and is referred to as bigamy.²⁷ On the other hand the state recognises the potentially polygamous nature of customary marriages. This is reflected in Section 34 of the Marriage Act and Section 10 of the Intestate Succession Act²⁸. The statutes , however, fail to give a basic definition or even minimum requirements as to what constitutes a Customary marriage. This leads to a disparity in the administration of marriage law s those that marry under 'custom' are judged on a lower standard than those marrying under statute. Even though it is obvious that the laws governing the two types of

²⁴ Chapter 50 of the Laws of Zambia

²⁵ Ngulube N. Some Aspects of Growing Up in Zambia (1989) . p4

²⁶ Supra p.2

²⁷ See Section of the Marriage Act, CAP 50 and section of the Penal Code, CAP 87

²⁸ Chapter 59 of the Laws of Zambia

marriage are different there should be basic standards of evidence that must prevail. This is not the case.

1.5 PURPOSE OF STUDY

This obligatory essay endeavours to revisit the general ruled in the broadest sense that form the basis of customary marriage law in Zambia. It attempts to illustrate how the colonial government, the ruled Zambia for almost eighty years contributed in a significant way in distorting the Customary Law framework. The effects on the Zambian family is the illustrative means used in showing this. The colonial government in its quest to subdue local people tried to impose their law and in a large way succeeded. Furthermore, the effects of globalisation on the institution of the family are quite significant, especially the concept of the nuclear family. This has posed a challenge to the administrators of the law to take in to account the application of customary and statutory law depending on the case at hand. However, to date the government has failed to appreciate the various social and economic advances that have occurred and hence fashion the law in such a manner to make it applicable in a just and equitable manner. The lack of a clearly defined framework within which to administer, especially, customary law, has

led Local Court Justices to use their general knowledge of customary laws in arriving at judgements. Furthermore, this lack of commitment to revisiting the law has resulted in injustices especially against women and children as the society at large is highly based on what suits the man and other members thereof are merely appenditures.²⁹

Finally, this obligatory essay will attempt to arrive at recommendations as to how best customary marriage laws can be administered in modern day Zambia. The conclusion will also attempt to address the feasibility of having a uniform code of laws as regards marriage law in which customary law may be incorporated. This standard code can be modelled around the Intestate Succession Act³⁰, which has tried to come to a balance as regards inheritance laws. It should be taken into account that Customary Law is largely based on morality which depends on the whims and feelings of society and it is extremely subjective.

²⁹ Law Development Commission Research Proposal on the Current Customary Laws in Zambia

³⁰ Supra note 28

CHAPTER TWO

HISTORY OF AFRICAN CUSTOMARY LAW AND THE COLONIAL INFLUENCE

This chapter will be tackled in two parts. The first part will discuss the traditions and practices surrounding the African Customary marriage before the coming of the colonial masters in the late nineteenth century. The second part will discuss the influence of the colonial masters on the system of adjudication in the Customary setting.

2. HISTORY OF AFRICAN CUSTOMARY LAW.

The history of African Customary law in the pre - colonial and colonial era is best described according to the kinship system. The kinship system provides a definite pattern of social order in which any two persons or classes of persons of the same sex, closely or remotely related superiority or subordination. For instance in each clan there would be a distinction between members on a different generation level.³¹

³¹ Ndulo, M. Supra note 6. p.146

Basically, in Zambia, there were two types of kinship systems that existed. These were the matrilineal and patrilineal kinship systems. The matrilineal system has been viewed as the more indigenous system to Zambia. The tribes that were patrilineal had always had contacts with groups either from the South, East or to the North of Zambia.³² For example the Ngoni of Eastern Province have a conspicuous South African connection, the Lozi of the Western Province have had a clearly defined contact with the Kololo of South Africa and the Namwanga of the Northern Province can also be traced to the influence from Tanzania as people intermingled through trade.³³

Generally, Gann observes that in a typical village setting, in spite of the kinship system, the following existed:

"there was always a clean-cut division of labour between the sexes. The woman did the usual domestic chores, looked after the small children and performed many jobs in the gardens such as hoeing and weeding. The men went out hunting, deliberated public affairs and fought as members of their tribal levies."³⁴

³² Ngulube, N. Supra note 25 at p.1

³³ *ibid.*

³⁴ Gann, L. H. Supra note 2 at p.6

Already it is evident that the precinct of the law was a preserve of the malefolk, bearing in mind that they were responsible for administrative matters.

Another common feature in both kinship systems was the nature of marriage. Basically, customary marriage was deemed as a union of a man who could or could not have been married and a woman who must have been unmarried at the time of entering into a marriage.³⁵ In both systems marriage served three major functions i.e.

a) The continuation of the lineage group through natural reproduction

b) The provision of domestic labour by the wife

c) As a means by which wider political and economic alliances (were) established between the families of the wife and that of the husband."³⁶

Another common factor in relation to customary marriage law dealt with the dissolution of the marriage. In traditional African society divorce was sparingly resorted to. A number of practices had been set up to ensure the saving of a marriage such as levirate³⁷, sororate³⁸ and even to a

³⁵ Ndulo. Opcit. p.147

³⁶ Kapasa M. supra note 14 at P.11

³⁷ This is a case where a 'proxy' husband is introduced into the family where a husband is impotent

³⁸ This refers to the woman's family providing another woman for the purpose of child bearing, where a wife is barren.

limited extent bride price.³⁹ However, there were certain instances that divorce became inevitable and the following were some of the reasons that were advanced:

- a) Barrenness or impotence
- b) Adultery
- c) Desertion by either party
- d) Laziness of either party
- e) Negligence
- f) Cruelty, theft and witchcraft
- g) Incompatibility⁴⁰

As regards adultery, it was generally believed in most traditional societies that there was no possibility for a platonic friendship between a man and an unrelated woman. Adultery by the wife was regarded as an automatic ground for divorce as it was an injury to the man's integrity.⁴¹ For women one act of sexual intercourse with her partner was enough to amount to adultery. This ground extended to other acts of misconduct short of adultery such as the mere

³⁹ Chanda E. 1996. Customary Law Marriage, Divorce, Inheritance and Child Maintenance as Practiced Among the Bemba of Kasama in the Northern Province. P.30

⁴⁰ *ibid.*

⁴¹ It is interesting to note that today adultery is actionable for an award of damages by husbands only as it is regarded as 'trespass to property'. See Sunday Mail (June 16, 2002) p. 2 'Man fined K300,000 for adultery' and Sunday Mail (January 13, 2002) p.2 'Man caught pants down' (In this case the adulterous man was ordered to pay K2 million as compensation)

touching of the wife's waist beads by another man.⁴² Furthermore, a woman's possession of an unaccounted for gift could be held sufficient for her to be convicted of adultery.⁴³

It must also be noted here that adultery charges were frequently decided by use of the presumption that a woman can not lie in cases of sex. Thus when a Bemba chief was asked why he placed so much reliance upon the testimony of the woman he responded: "*mwanakashi e mwafi* - the woman is the poison ordeal."⁴⁴ This was drawn from the presumption that a woman need no corroboration in giving evidence.

Having endeavoured to give the common aspects in the two kinship systems with regard to marriage and its dissolution thereof the paper now turns focus to the distinct practices in each system.

2.A.1. MATRILINEAL KINSHIP SYSTEM

The concept of matrilinealism can best be understood in the concept of inheritance, where inheritance covers the whole

⁴² *ibid*

⁴³ Epstein, A. L.. Juridical Techniques and the Judicial Process. A study in African Customary Law. (1954)

p.14

⁴⁴ *ibid*

spectrum of the community's wealth, status, wives and power. The maternal side of the family will be the ultimate beneficiary in each inheritance. This meant that the group on the mother's side headed by uncles who have their heirs apparent nephews (sons of their sisters)⁴⁵. For instance amongst the Tonga the children of sisters in the family at large are so closely linked that they all have equal rights to all the possible inheritances in the event of an uncle's death. As regards marriage these are virilocal⁴⁶ at first but ultimately they become uxorilocal⁴⁷. The man (husband) left his village and/or home. After the man had proven himself at the wife's village by way of hard work and good behaviour coupled with the ability to produce children, he would be allowed to take the wife to his village at a small fee.⁴⁸

Basically, the matrilineal system valued the place of the woman in society and held her in high esteem as the means of enlarging the clan. The origin of the significance of the uncle in matrilineal societies lay in the belief that women should not override men in authority and power. This

⁴⁵ Ngulube. Supra note 25. p.2

⁴⁶ This implies that the new husband stays in the village of his bride

⁴⁷ This entails the newly wed bride to move to her husbands village

authority of the women was vested in the belief that only a woman knew the true father of her children and hence on she could have a true claim to them.⁴⁹ However, due to her sex, a woman could not administer this authority in the family hence it being delegated to her brother or any other male relative.

Wrongdoing in a matrilineal society was an offence not only against the wronged, but more serious against the community in which one lived. Even causes of wrongful behaviour were seen to be outside the individual's control but should have been understood as emanating from the community itself.⁵⁰

In general practice, matrilineal societies did not charge very big amounts of money for a man to get a wife. The Kaondes, Bemba, Lamba and Lunda are evidence of this practice.⁵¹ However, a departure from this practice worth taking note of was found amongst the Tonga people of Southern Zambia. These people charged a lot of cattle for

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ *ibid.*

⁵¹ *ibid.* p.71

lobola or bride price.⁵² The rationale behind this was that the number of cattle a man owned reflected the value of wealth in the Tonga Society.

2.A.2. THE PATRILINEAL KINSHIP SYSTEM

The patrilineal kinship system entails that the father had total and complete control over his children. One of the main distinctions from matrilinealism in this system was the status of children. Unlike in the matrilineal societies where children had no right to their father's wealth but to their uncle's, children in patrilineal societies belonged to their fathers in all respects.⁵³

Marriage in a patrilineal society was regarded as the backbone of the clan. It defined who should stay where, respect who, join which residence. Amongst the Ngoni for instance, marriage, apart from its progenerational function, established a relationship between a man and a woman, thereby regulated their sexual activities.⁵⁴

⁵² *ibid*

⁵³ *ibid*.

⁵⁴ Ngulube. *Supra* note 25. p.95

As regards wealth, the Lozi, Ngoni, Tumbuka and Ila had a very rich tradition of cattle owning. It was around cattle that a lot of social issues revolved and through which they were resolved. A man had to part with some cattle to get himself a wife. This therefore entailed that the payment of lobola was an essential part of their marriage system.

Another departure point of the patrilineal system from the matrilineal system is that the patrilineal society emphasised on a girl's virginity. For example the Ngoni emphasised the importance of virginity and even had elderly women conduct physical examinations on the girls before entering marriage. This was in sharp contrast with matrilineal societies were for instance the Chewa, who strongly believed that a girl would die if she did not copulate at puberty.⁵⁵ Among the matrilineal Bemba, if a man married a virgin he paid an extra charge called the *mpya sha cisungu*. This payment was not returnable unless the husband could establish conclusively that he was not in

⁵⁵ *ibid.*

fact the first man to have intercourse with the girl after her initiation.⁵⁶

Another, noteworthy feature of the patrilineal system was their established system of polygamy. The plurality of wives was seen as another symbol of wealth.⁵⁷ Concubinage was an acceptable form of regulation of sexual activities.⁵⁸ Writers on the Ila, for instance, indicate that they had the most free and flexible attitude and approach towards sexual activity. For the Ila, concubinage was spread even to those women who were other men's wives. A married man could have recognised and accepted relationship with another man's wife without the complications of adultery being involved. According to the Ila, this was called *Lubambo*.⁵⁹

In order to minimize the negative aspects of life for co-wives, where polygamy subsisted, a kind of social organization existed i.e. the senior wife was given a leadership status and role for all other subsequent wives.

⁵⁶ Supra note 43 at p.13

⁵⁷ We have already mentioned that cattle were a central feature in the evidencing of a man's wealth

⁵⁸ opcit p.99

2.B THE COLONIAL INFLUENCE

The first influences of European existence in Central Africa can be traced back to the early sixteenth century. The first Europeans to penetrate the Central African forests were the Portuguese.⁶⁰ However, for the purposes of this paper focus will be had on the era beginning the late nineteenth century, the beginning of the British rule in Central Africa. This was the time around which many European powers were trying to spread their wings and acquire more territories for various economic and military purposes.⁶¹

The British took particular interest in Northern Rhodesia due to the exploration activities of the British South Africa Company (BSA Co.) The BSA Co. under the leadership of Cecil Rhodes pledged itself to spend money for the purpose of maintaining law and order north of the Zambezi and for the protection of the mission stations.⁶²

From its inception, the system of judicial administration introduced by the British in Northern Rhodesia

⁵⁹ *ibid.*

⁶⁰ Gann. *Supra* note 2.p.10

⁶¹ *ibid.*

differentiated between Europeans and Native Africans. Section 14 of the Royal Charter of October 29, 1889, entrusting the administration of Rhodesia to the BSA Company authorized this differentiation.⁶³ The following was stated in the Charter,

"In the administration of justice to the said peoples or inhabitants careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties responsible belong especially with regard to the holding, possession, transfer and disposition of lands and marriages, divorces, legitimacy and other rights but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the people or inhabitants thereof."

This was the insert recognition of the existence of African Customary Law. In strictest reality the BSA Co. left the judicial administration of Africans to Africans. The size of the territory and the small number of administrators permitted visits to each tribe once or at most twice a year. It may be supposed that so long as tribal bonds remained strong the decisions of the tribal courts would not often be challenged by appeal to the administrators.⁶⁴

⁶² *ibid*

⁶³ Hoover et al. The Evolution of the Zambian Court System. in *Law in Zambia*

⁶⁴ *ibid*

From 1900 to 1911 the British developed infrastructure in the two territories for their administration. By 1911 they realised that the two territories, North Western Rhodesia and Northern Eastern Rhodesia, could be administered better by merging them as one. This was done by enacting of the Northern Rhodesia Order - in - Council. With respect to the courts the Northern Rhodesia Order - in - Council followed closely the pattern of the North Eastern Rhodesia Order - in - Council of 1900. While the statutory changes were being made in the officially recognised courts the tribal courts continued to administer justice with relatively little interference from the British. The *defacto* courts were a convenient, economical method by which the BSA Co. could control the native population without having to support a large administrative staff.⁶⁵

The tribal courts or native tribunal, however, constituted by the very fact that it was a court of law, was confronted by problems essentially similar to those with which the courts in more developed legal systems had to deal. The court had to listen to the complaints of the parties, it had to find ways through the tangle of conflicting

⁶⁵ *ibid*

testimony and in the end to arrive at some conclusions on the case before it.⁶⁶ The primary goal of the adjudicating bodies was to reach a decision that would satisfy not only the parties, but also the kinship group to which were essentially internal family issues, that is matters whose outcome of which the family or kinship group was considered to have a stronger interest were typically brought before the head of the family for conciliation.⁶⁷

During the late 1920's and early 1930's new pressures arose which inadvertently affect the existing judicial structure. No adequate machinery existed at the time for the handling of the large number of petty disputes that were daily brought to the local Government office.⁶⁸ The labour migrants looked to their employers for protection, rather than to a chief or their family. Litigants were generally not inclined to bring their disputes before someone who was not their own and who, in all probability, would apply customs different from their own. Nor were the native courts, unfamiliar with the customs of other tribes and inexperienced in dealing with conflict of laws problems, anxious to hear such cases.⁶⁹ These problems necessitated

⁶⁶ Epstein. Supra note 43.p2

⁶⁷ Anyangwe. C. supra note 25 . p.56

⁶⁸ opcit p3

⁶⁹ Hoover etal. Supra note 63. p51. See also Anyangwe (supra note 16) and Epstein (supra note 43)

the establishment of customary courts in the urban centres and in the peri-urban areas and these became known as statutory urban customary courts and statutory rural customary courts respectively.⁷⁰ The Natives Court's Ordinance of 1929 was the first piece of legislation that extended recognition to native courts. The ordinance did not elaborate on the jurisdiction of these courts nor did it establish a system of appeals from the native courts. At this stage the Western Courts could now observe a rule of indigenous law only if the customary rule in question passed the so called 'repugnancy' and 'incompatibility' tests. This in effect, meant that the rule should not have been offensive or pernicious from a Eurocentric perspective. Only those rules which are not 'repugnant to natural justice, equity and good conscience nor incompatible with any legislation for the time being in force'⁷¹ passed as law that could be administered in the Native Courts.

During the colonial period, it must be observed that many aspects of customary law were either legislated out of existence, mutilated or cut down. The colonialists made laws that were meant to regulate all aspects of the social

⁷⁰ Anyangwe. Supra note 16 p. 54

life of the natives. For example laws prohibiting witchcraft practices, child marriages, polygamy, marriage by proxy, dowry, levirate, sororate etc were enacted.⁷² This was in an effort to 'civilise' the Africans, whom they thought, if left to their ways would never fit into the dynamic global culture.⁷³ In making legislation so general, the British colonialists failed to take into account the kinship systems that existed. Furthermore, by restricting the statutory marriage laws to only the white settlers the colonialists failed to take into account the effect of 'modernizing' the Africans. That they too might want to marry under statute now that they had embraced the western way of life.

⁷¹ *ibid.* p.55

⁷² *ibid*

⁷³ *ibid*

CHAPTER THREE

APPLICATION OF CUSTOMARY LAW IN ZAMBIA TODAY

In the previous chapter we have tried to show the importance of the family as an institution in the customary setting. This chapter will endeavour to show how Customary Law has evolved since Independence in 1964 to date. Also to be discussed is how due to this evolution the administration of family law has consequently changed. Further, the discussion will be based on the role of the local courts in the administration of Customary Law. Whether the courts have been flexible enough to embrace and appreciate the changes that have occurred in society necessitating a change in the dispensation of justice. Lastly, a brief look will be had at the efforts of the Government to provide for a uniform means of administration of certain aspects of family law by studying the Interstate Succession Act.⁷⁴

⁷⁴ Chapter 59 of the Laws of Zambia. This piece of legislation was enacted in response to the high rates of property grabbing. It was seen as cure to the problem, although in the further analysis that will be made later in the paper it will be evident that the act was more favourable to the patrilineal kinship system.

3.A. TWO TYPES OF MARRIAGE LAWS IN ZAMBIA - CUSTOMARY AND STATUTORY

After the attainment of independence in 1964, the Zambian Government adopted a dual legal system in order to allow for the application of Statutory Law and Customary law concurrently. The applicability of British Laws to Zambia was made possible by two pieces of legislation namely; the British Acts Extension Act⁷⁵ and the English Law (Extent of Application) Act⁷⁶. Furthermore, as regards divorce and probate matters, English Law is applicable to Zambia by virtue of section 11 of the High Court Act⁷⁷. This provision states that the law in England concerning these matters at a given time is the law that applies to Zambia.

On the other hand customary law is applicable to Zambia as it is first of all recognized in the Constitution, which is the fundamental law of the land. This applicability is supported by the conditionality that the customary law should not be repugnant to natural justice or morality or incompatible with any written law. The extent of application of Customary laws is further supported by the

⁷⁵ Chapter 3 of the Laws of Zambia

⁷⁶ Chapter 11 of the Laws of Zambia

Courts Legislation i.e. the Local Courts Act, section 12 (1), the Subordinate Courts Act⁷⁸, section 16 and the High Court Act⁷⁹ in section.

Due to the duality in the laws it is imperative that there are two types of marriages in Zambia, namely; statutory and customary marriages. An individual has choice to enter into either type of marriage. A brief comparison of the two types of the two types of marriage and the rights accrued there under is necessary in order for one to appreciate the different standards that exist. Once a person enters into statutory marriage he or she is barred from entering any other type of marriage. On the other hand the customary marriage is generally accepted to be potentially polygamous. Recognition of this has been given in various statutes such as the Intestate Succession Act⁸⁰ and the Marriage Act⁸¹. In the Intestate Succession Act section 10 provides for the devolution of the homestead and common property were the marriage was polygamous. Section 34 of the Marriage Act gives recognition of Customary marriage and further in the Marriage Act section 38 states

⁷⁷ Chapter 27 of the Laws of Zambia

⁷⁸ Chapter 28 of the Laws of Zambia

⁷⁹ Supra note 77

⁸⁰ Chapter 59 of Laws of Zambia

⁸¹ Chapter 50 of the Laws of Zambia

that if a person had contracted a marriage under the customary law he may not contract another marriage under statute and vice versa.

Matrimonial causes arising out of the statutory law are an exclusive responsibility of the High Court, sitting as a court of original jurisdiction.⁸² On the other hand the local courts are given jurisdiction pertaining to Customary marriages. Already a disparity may be seen between the two types of marriages, the statutory marriage assuming a superior position over customary marriage. This manifests through the higher standards of evidence demanded by the High Court as compared to the lack of any rules of evidence in the Local Courts. For instance the burden of proof is not weighed and essential documents are not proved in order to support allegations that are levelled against the litigants. Furthermore, witnesses are present throughout the entire proceedings.⁸³ It was assumed right from the onset that Customary marriages were likely to be contracted by individuals in the lower bracket of society hence the need for a cheap and uncomplicated method of administering

⁸² See Section 11(1) of the High Court Act. Section 19 of the Subordinate Courts Act, however, empowers subordinate courts to make maintenance orders arising out of statutory marriages.

⁸³ Zambia Law Development Commission. Review of the Local Courts, Lusaka Province. Preliminary Findings, March 2003.

disputes arising thereof.⁸⁴ However, this is not to say that those higher bracket of society do not contract marriages under customary laws. Those that do are privileged enough to appeal to the higher courts when they are dissatisfied with the court's judgement as was the case in *Chibwe v Chibwe*⁸⁵. This is not true of those in the lower bracket of society as they cannot afford the high costs of litigation.

3.B THE REPUGNANCY CLAUSE

It is of relevance to this paper to briefly discuss the implications of the qualification that is attached to the application of Customary law. This qualification has widely been referred to as the "repugnancy clause". Generally, it reads as follows,

"the African Customary law is applicable to any matter before (it) in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law"⁸⁶

This clause, as earlier alluded to in chapter two, first took form in the Orders in Council that were introduced during the late 1920s by the colonial government. This same clause has been repeated again in post- independence

⁸⁴ Anayangwe. Supra note 16

⁸⁵ SCZ 38/2000

legislation although the governing regime has been changed. The atmosphere within which this clause was first enacted was very different from what it is now. The question, which more than often arises is that on whose standard of morality, justice and good conscious, is this based. The controversy basically revolves around the fact that there is no standard subjective test on which to base this test of repugnancy. Generally, the following concepts have been described as follows:

- a) Repugnant: against, contrary, abominable (distasteful), something that turns you off (*icha muselu* in Bemba)
- b) Natural Justice: Rules natural to a certain group of people's rights of that particular group of people. This assumes that every group has rules that are natural to them.
- c) Morality: Behaviour or discipline of up bringing or expected standard of rightness and decency. Anything that offends a sense of rightness or decency.⁸⁷

3.C ADMINISTRATION OF CUSTOMARY LAW IN THE LOCAL COURTS

Before independence the native affairs were handled by Native courts as created under various orders- in - council. Furthermore, tribal courts even though not

⁸⁶ Supra note 83

⁸⁷ These definitions were given during a plenary session of a workshop conducted by the Zambia Law Development Commission in Mpika in June 2003.

presented with recognition by the law operated in tandem with the native courts. These tribal courts have however, been given some form of recognition in post- independence legislation. In the Local Courts Act, Section 50 (1) it is stated,

“Provided that nothing in this subsection shall be deemed to prohibit any African Customary arbitration or settlement of any matter with the consent of the parties thereto if such arbitration or settlement is conducted in a manner recognized by the appropriate African customary law.”

The main purpose of the traditional courts is to promote reconciliation among the members of the community in an effort to maintain peace and harmony as well as make rulings on how to observe customary law.

Practice and procedure in the Local Courts Act is provided for under Part IV as read with Section 68. The process begins with the complainant coming to the local courts and explaining the claim to the clerk of court who decides whether these is actionable or not and whether the court has jurisdiction to hear the case. When he is satisfied as to the merits of the claim, he issues summons, which are served on the defendant.

A research conducted by the Zambia Law Development Commission⁸⁸ registers that when the testimony of both parties are heard, the Court retires to its chambers to deliberate and arrive at a verdict. This is delivered immediately. The local courts officers state that cases last between 15 to 30 minutes. The only reason for delay is the requirement for witnesses, who might not readily be available.

The court is usually composed of two justices although one presiding justice may sit alone and this is provided for under Section 6 of the Local Courts Act.

Below are some examples of cases that have been adjudicated upon in the Local Courts:

- a) Nyambezi Nkhata v Manase Kanenga , Case 176/02,
Chipata Local Court

The claim was that the Plaintiff alleged that the Defendant should legally divorce her due to marital disputes arising in their home since November, 2002 when the defendant pronounced that their marriage was over without apparent reason. The dispute arose when

⁸⁸ Review of the Local Courts System in Zambia, March 2003.

the Plaintiff decided to administer African medicine on herself in order to conceive. This was contrary to the religious beliefs of the defendant who was a Jehovah's Witness. The divorce was granted.

b) Beatrice Phiri v Eliza Zulu Case No. 30/2003, Nyimba Local Court.

The plaintiff alleged that the defendant should divorce her on behalf of her brother, Andrew Banda, who had deserted her in June 2002, at Chimpange Village. The alleged husband had bad behaviour i.e. insulting the plaintiff and her parents and was chased from the village. The plaintiff sued for adultery and paid up. However, dowry had been returned before the adultery occurred. The Defendant urged to divorce the plaintiff on her brother's behalf. Divorce was granted.

c) Gladys Shibwiimbe v Fredrick Shibwela Case No. 120/2000 and Gladys Nshingwe v Alan Muldongo Case No. 420/92

Both these cases were heard at Mungaila Local Court in the Southern Province. They concerned widows who had not been inherited or cleansed by their deceased

husband's relatives. They found some traditional healers to cleanse them and now sought to be divorced from their deceased husband's family so that they could remarry. In both cases the court granted 'divorce'.

As is evident from the cases above the court has not strictly adhered to the Customary Law as some of these practices do not have a place therein. In the first instance the idea of religion comes in. Some Zambians have adopted their religious beliefs and have had them entrenched in their way of life that a diversion from them may cause a breakdown in marriage. In the second instance we see a woman appearing before the court on behalf of her brother. This is a diversion, as in the past only men could appear before the court.⁸⁹

3.D DIFFERENT STANDARD OF JUSTICE

There is clearly a different standard of justice especially when it comes to the requirements for a valid marriage and the grounds of divorce.

⁸⁹ Sampa A. (etal) Gender Bias in the Zambian Court System: A Report Based on Research Findings. June 1994 p. 13

3.D.1.a. VALID STATUTORY MARRIAGE

Under Statutory law, for a marriage to be valid the requirements that must be satisfied are clearly stipulated in the Marriage Act. Non-observance of certain requirements may deem the marriage either void or voidable. Basically, marriage under the Act entails a union between one man and woman to the exclusion of all others. This is may be construed from the provisions in the Act outlawing polygamy.⁹⁰ Primarily the marriage is a monogamous one in nature. The union is freely and voluntarily entered into by the parties provided they observe the legal requirements as to age, consent (if under 21 or 16 from the parents or a high court judge respectively), due publicity of banns of marriage and solemnisation by a competent authority.⁹¹

3.D.1.b. VALID CUSTOMARY MARRIAGE

Even in modern day Zambia, a Customary marriage is potentially polygamous. However, polygamy is only available to men. Whereas statutory marriage is between two people to the exclusion of all others up to today a

⁹⁰ *Infra* at page 30

⁹¹ Sections 6, 17 -19 and 20, Marriage Act, Chapter 50 of the Laws of Zambia.

customary marriage involves the extended family. Also another important pre - requisite to marriage is that the prospective bride must have attained puberty. Other considerations are bride price (*lobola*)⁹² and consent of the women's competent relatives. It must be noted here that a valid marriage may be contracted without the payment of *lobola* as long as the woman's relatives permit this. This was alluded to in the case of Rachel Banda vs Sithole (nO.1540/82) the mother of the Plaintiff stated that although no *lobola* was paid " we consented" to the marriage.⁹³ Therefore, it may be construed that the non-observance of some of the traditional requirements do not necessarily make the marriage void but merely voidable.

Generally, it must be stated here that the observance of customary marriages are more prevalent amongst people living in high density areas.⁹⁴ These people have not fully embraced the western way of life and do not wish to go through the lengthy process of registration of the marriage and the costs that come with it. Elopement has become a very common phenomenon in Zambia today.⁹⁵ Often in newspapers it is reported that two individuals simply

⁹² Although this is highly dependent on the girl's parents.

⁹³ WLSA Research Project. Inheritance In Zambia: Law and Practice.

started living together without fulfilling the requisite requirements under customary law. For instance it was reported in the Sunday Mail (September 16, 2001) that a Mufulira court found a United Church of Zambia youth secretary guilty of elopement. This came to light when Edgar Nangoyi sued Davy Chola for allegedly eloping and infecting her daughter, Agness Nakazwe with a disease. The court ordered Chola to pay compensation of K415,000 for elopement and medical expenses. In another case a young man who was sued for elopement admitted to having kept a girl in his house for a week. In defence he stated that the girl was his fiancée whom he intended to marry but had never paid anything to signify that the relation was official. In passing judgment the court justices advised the man to consult elders if he wanted to marry the girl and that he should get approval from the girl's parents.⁹⁶

3.D.2.GROUNDS FOR DIVORCE IN STATUTORY MARRIAGE V CUSTOMARY MARRIAGE

The ground for divorce in a statutory marriage are provided for by the Matrimonial Causes Act of 1973 in section 1 (1) which reads that

⁹⁴ Supra note 25 at p.142

⁹⁵ See Chondoka Y.A. 1988. Traditional Marriages in Zambia. Chapter 4

"Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably."

Furthermore the Act provides for five facts, one or more of which must be proved before irretrievable breakdown may be adduced. These are

- 2 (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

Unless these facts are satisfied the divorce cannot be granted. The strict rules of evidence are followed so that

⁹⁶ Sunday Mail (June 16, 2001).p.2

the court will not entertain certain facts. The standard of proof is that the case must be proved "beyond reasonable doubt". For instance in the case of Chibwe v Chibwe⁹⁷ the court refused to admit the evidence as regards adultery as all the evidence was circumstantial. The brief facts of this case are that the respondent sued the appellant for divorce before the Local Court in Mufulira under Customary Law alleging inter alia unreasonable behaviour and adultery with some unknown person. The Local Court granted the prayer based on the grounds stated above. The Supreme Court took note that the appellant did not pursue the fact that she had been divorced on unproved grounds but however, took note of this. They stated as follows,

"We accept that looking at the record of the proceedings before the local court and Magistrate court it was common ground that the marriage, which is subject to this litigation, was conducted under Ushi Customary Law. We are therefore surprised that both the local court and magistrate court which sat with the assessors who are the experts of the Ushi Customary law, made no reference to Ushi Customary law in dissolving the marriage and property adjustments. This was improper and a misdirection. Also both the local court and magistrate's court made certain findings of fact that were not supported by evidence... In our view this would have been a proper case for us to interfere with the findings of both the local court and the Magistrate court had it not been for the fact that the appellant in both these courts, granted reluctantly,

⁹⁷ SCZ 38/2000

conceded to the fact that she and her former husband could no longer live together and that the marriage had broken down irretrievably.

Just from this case it is evident that there is a level of laxity where divorce can be granted. In this case, had the appellant pursued her case further, she would have prevailed as adultery was never proved. An important point to note here is that proceedings in the courts high in the hierarchy of the court system are expensive. Hence the poor people that find injustice in the local court, because of their disadvantaged economic positions do not appeal. Instead, they merely accept the outcome of the proceedings.

As was seen in the two Chipata cases that have been cited earlier the grounds of divorce were not fully satisfied. Secondly there was a phenomenon of divorce by proxy. This was done without the consent of the alleged husband that deserted his wife, only for one year. Such would not be tolerated under Statutory marriage.

3.E A STANDARD MARRIAGE CODE?

It is an undisputed fact that the nature of customary marriage has changed both in rural and urban Zambia.

Various social and economic factors are at play in society which can not be ignored. The high levels of inflation, poverty, the HIV/AIDS pandemic are among the few that have a direct effect on marriages. Law, as an instrument of social change, should take up the challenge and address the problem at hand. An example of the way law has come to regulate a part of customary law is evident in the enactment of the Intestate Succession Act.⁹⁸ This Act basically governs the administration of the estate of an individual who dies without leaving a will. It recognises both Customary and Statutory marriages. This law was enacted with the problem of property grabbing in view. The problems arose from rapid changes in the way society is organised; new forms of wealth that were absent before, and the move towards individualism, away from the communal style of life. This was further compounded by differences in educational values.⁹⁹ Various women's groups lobbied for a law to be enacted to meet the socio-economic changes in society and achieved this by bringing about the enactment of the Act.¹⁰⁰ The purpose of the Act was described as follows in the case of Mooboola v Muweza¹⁰¹,

⁹⁸

⁹⁹ Inheritance in Zambia, Law and Practice. Women and Law in Southern Africa p. 12

"the Intestate Succession Act (Number 5 of 1989), (which) was a law enacted to alleviate the plight of, especially, widows and children who would otherwise be at the mercy of the vagaries of the largely ambiguous and malleable customary inheritance practices."

This act is being referred to more and more by various people who believe their rights in the estate have been trampled on. Original jurisdiction of this Act is vested in the Local Courts. As has been stated earlier the local courts are the most preferred court by the lower bracket of society due to their accessibility and flexibility in adjudicating matters. Therefore, the rationale here was that when it came to issues of inheritance, and if the system was to be accessible then the Local Courts are the best courts in administering the Act. This is not to suggest the 'bourgeoisie' do not need the protection of the Act.

It must be stated here that the Intestate Succession Act has its shortcomings. Among them are:

- i) The sanctions surrounding non-compliance of the Act are not deterrent enough
- ii) Fear by women of the reprisals if they enforce their right to their husband's property. Rights of which they are actually not convinced they possess.

¹⁰⁰ *ibid*

¹⁰¹ SCZ Judgment No.3 of 1991

iii) Failure by the administrator to acknowledge that his position is merely one of trustee rather than heir.¹⁰²

From the foregoing, it seems that the act assumes that there is a lot of property left by deceased persons, yet the reality is that for most people that definition could constitute the entire estate leaving out other beneficiaries. In both rural and urban Zambia surviving spouses, both male and female, expected the deceased's clothing to be taken by the deceased's relatives, and when there were delays in their removal of those clothes, this caused anxiety.¹⁰³

The shortcomings of the Intestate Succession Act can be a lesson and may act as a guideline in an effort to enact a standard code for marriage in Zambia.

¹⁰² Inheritance in Zambia. p. 87

¹⁰³ *ibid.*

CHAPTER FOUR

CONCLUSION

The purpose of this paper was to outline the customary laws surrounding marriage and divorce and the judicial institutions surrounding the administration of their formation and dissolution, as the case may be. Of fundamental importance to this paper was the influence that the colonisation of the territory had on the evolution of the administration of customary law. Also the continued influence of the current social and economic factors on the interpretation and subsequent 'misadministration' of customary law.

The coming of the British to the southern part of Africa brought about massive changes in the way the Africans conducted themselves. The establishment of copper mines inadvertently caused a distortion to the institution of the family. The colonialists had intended that the Africans who worked the mines would merely come to do so on a temporary basis. And that at the end of a certain period they would return to their villages and continue their family lives there. The colonialists never foresaw the

problems that would arise from mixing men from different tribal and cultural affiliations. Laws therefore had to be enacted to regulate the relations of these men. Furthermore, to the colonialists in an effort to 'modernize' the Africans made a qualification to the application of customary law, that it should not be repugnant to justice, morality and must not conflict with any enactment. This standard was based on their understanding and culture, therefore various practices that went to regulate behaviour in a traditional African setting were outlawed as repugnant, for example wife inheritance, proxy husbands served as a means of continuing of the clans existence but were deemed as barbaric by the colonial masters.¹⁰⁴ Ironically enough the repugnancy clause has been repeated in post - independence legislation. It still has not been given a standard of judgment and seems to be judged in comparison with the former colonialist's standards. This clause seems to have lost its relevance, and maintenance of it just goes to prove that customary law is treated at a lower standard than statutory law.

Another, worthy aspect to note from this is the lack of formal recognition of traditional courts. When cases

¹⁰⁴ Suora note 16

appear before these courts and a person is dissatisfied he may appeal to the chief, after that if the judgment is undesirable there is no further recourse. If the person decides to go to the local courts then the case will have to be began right from the beginning. This lack of formal integration of traditional courts to the formal court structure takes away from the importance of these courts. It seems that these courts have merely been maintained so as not to disturb the balance of the chief's powers.

Society is not static and litigation is not as localised as it was at independence; the outcry for change in both the formal and traditional delivery of justice cannot be ignored. Questions have arisen as to the practicability of excluding traditional rulers in the local system, despite their role as custodians of customs and norms which the local courts also use.

Government's lack of interest in the future of Customary Law in Zambia has led to this adverse disparity and subsequent injustice in the administration of it thereof. The social and economic problems being faced in customary marriages should not be ignored but studied in depth to arrive at a favourable code. Family law touches upon

deeply entrenched customs and habits, which cannot be changed by a stroke of the legislative pen. In spite of what has been said, it might be possible to introduce a single and integrated body of marriage law which would make uniform regulations for consent, publicity and the basic marital obligations and at the same time allow for a range of options for marriage in church, or in civil or by customary formalities.¹⁰⁵

Another phenomenon we can not escape from is the shift from dependence on the extended family to a setting where there is a predominance of the nuclear family setting. Parents, even of a matrilineal heritage, now prefer to leave their wealth to their own offspring than to leave to members of the extended family. The extended family has been replaced by the nuclear or immediate family which is a relatively small group of persons, closely related to one another in descent as well as physical location. Therefore, when a person dies his family more or less become alienated from his/ her family. This is compounded when there were no children born to the couple.¹⁰⁶

¹⁰⁵ Supra note 6

¹⁰⁶ Zambia Law Development Commission Report. June, 2003.

Many studies have been conducted vis a vis customary law. However, these studies have focused more on the restructuring of local courts to make them more viable administrators of customary law. Also the aspect of inheritance has been concentrated on. The standards surrounding the transaction of marriage has been sidelined and this has led to a disparity in the administration of justice especially towards women. The arbitrariness with which divorce is granted is something to question taking into account the HIV/AIDS pandemic. The local court justices have been known to grant divorce on flimsy grounds which have no bearing or connection with customary law, whatsoever.¹⁰⁷

It is imperative to state here that the government restates the administration of customary law especially in relation to family law. This is to allow people make informed decisions when they decide to transact under it. It will also help local court justices make informed decisions. Of course the help of experts on Customary Law must be consulted. In providing for a standard code it is my considered opinion that those who will be given the task of enacting such a law must take into account the dynamic

¹⁰⁷ See Supreme Court's dicta in the case of Chibwe v Chibwe already referred to in Chapter 3

nature of customary law. They must not so much concentrate on the specificities but instead structure a general framework within which to derive guidance. Lastly the government must not neglect to fish out the common characteristics of the two kinship systems and use these to come up with a valid code.

RECOMMENDATIONS

The following are the recommendations which I wish to propose in achieving the restatement of customary law in relation with family law.

- 1) Marriage law in Zambia should be standardized so that they is one code that is applicable to both customary and statutory marriages.
- 2) The government should take into account the kinship system when arriving at a standard code. In the urban areas it may appear as though the concept of kinship system has been done away with but in the rural areas this is still a reality.

- 3) The Repugnancy clause must be restated in such a way as to give it a definite objective test. As it stands at the moment it is too open ended and leaves too much leeway for arbitrariness on the part of adjudicators.
- 4) Local court justices should receive training as regards the carrying out of their duties especially as regards the treatment of litigants, admittance of evidence and recording of the proceedings. Training should also draw from the fundamental principles of human rights as is pertaining on the global scene.
- 5) Traditional courts should be given official recognition by the law. There should be an appellate system from the traditional courts.
- 6) Traditional Courts should be given powers to mete out punitive sentences to reinforce their influence in society.
- 7) There should be some form of precedent system set up in the Local courts so that the decisions that are made can be consistent. This will ensure some sort of uniformity in the judgments that come out of the local courts.

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