TUMBUKA CUSTOMARY LAW OF MARRIAGE

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A THESIS SUBMITTED FOR THE LL.M DEGREE

OF THE UNIVERSITY OF ZAMBIA

DECEMBER, 1981

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ACKNOWLEDGEMENTS

This thesis would not have been completed had it not been for the willing assistance I was afforded in the process of the research and writing by institutions and persons in the villages I toured in Lundazi. I wish to express my gratitude to all these institutions and persons I interviewed.

I would like to thank, in particular, without singling out anyone, the staff at the Institute for African Studies, University of Zambia, the National Archives of Zambia and the Tumbuka Local Court for making available material which facilitated my research programme.

My special thanks go to Professor Mvunga, School of Law, University of Zambia who as one of my supervisors, did not only read through the manuscript, but discussed the whole thesis with me page by page. I found his suggestions invaluable. I also wish to thank Professor Hussain and Mrs. Chirwa for reading through the manuscript. Professor Hussain's comments on Islamic law relating to marriage proved useful when I was revising the manuscript.

I am also extremely grateful to Mr. J.E. Ntonga of the Public Service Commission who, despite his many commitments, found time to discuss with me at length

types of Tumbuka customary marriage as well as the concept of divorce.

I found the Librarian, High Court Library, very helpful. I thank her for all the assistance she rendered whenever I visited the Library.

To all those, too numerous to mention, who assisted me in the difficult task of material collection in Lusaka and during my extensive tours of Lundazi, I extend my gratitude. The ultimate responsibility, however, for the analysis and compilation of data contained in this thesis is mine.

It is my earnest hope that students of Tumbuka customary law relating to marriage will find this thesis both interesting and rewarding to read. Local Courts that administer customary law will also derive inspiration from this thesis although the thesis does not, in any way, pretend to be exhaustive.

TABLE OF STATUTES

Hindu Marriage Act, India, 1955

Local Courts Act, Cap. 54, Revised Laws of Zambia

Marriage Act, Cap. 50 of the Laws of Zambia

Ordinance No. 10 of 1957

Subordinate Courts Act, Cap. 45, Revised Laws of Zambia

Witchcraft Act, Cap. 105 Revised Laws of Zambia.

TABLE OF CASES

Aaron Langa V. Onua (1956)
Achim Mukandawire V. Jesinaza Tembo (1958)
Beluti Kaniki V. Lot Jairus (1967)
Bikere V. Keti (1940)
Chilumbu V. Kapula (1977)
Chiluwa V. Takwebana (1958)
Chimala V. David (1977)
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Daniel Samwala V. [illegible] (1951)
Dimire V. Sam (1[illegible])
Fumba Mkandawire V. [illegible] Banda (1961)
Hyde V. Hyde (1866)
Jairos V. Headman Chimbwi (1933)
Jesinaza Mwandila V. Johnson (1963)
Kalukoso V. Keti (1937)
Kajuwani V. Mainesi (1958)
Katemanga V. Phillip Banda (1960)
Kayungo V. Tadumu Mukabeta (1960)
Kiapula V. Dongoro (1956)
Mpokoko V. Imilamba (1935)
Nchemiah Banda V. Nelemiya Gondwe (1942)
Siria V. Yotam (1[illegible])
Tepa Teja V. S[illegible] (1958)
Yalawani V. [illegible]
John [illegible] V. [illegible] Mwale Laya (1946)
[illegible] V. Chi[illegible] (1[illegible])

Panels of informants as White[1] warns may be influenced by extra legal ideas of morality or reasonableness in purely hypothetical situations put to them, and such views can never carry as much weight as actual decisions of the courts. Panels must, therefore, be used with caution.

I supplemented this method of gathering information by researching into books and by relying on decided cases as sources from which to extract and generalise enforceable rules of Tumbuka customary law. Case records are the most reliable source for determining what rules of customary law can be expected to

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1. White C.M.N., Principles of customary civil law (unpublished), P 11.

be enforced by the courts although they too have their limitations. One of these limitations is that in civil cases involving related persons in rural situations, the courts do bend the legal principles at times in order to achieve what they feel is a just solution. Unfortunately, there are very few reported cases. I was, however, able to ascertain the existence of Tumbuka customary law relating to marriage by reading through case notebooks in which are recorded matrimonial disputes and decisions taken by the local courts. I shall cite some of these unreported cases in the chapters that follow.

At this point it is necessary to warn that customary law has such a capacity to change and adapt rapidly that any record can only describe the position at the time of its compilation.

The Tumbuka-speaking peoples live in the Lundazi district of Zambia. The 1979 mid-year population estimates show the population of the district as 116,000.[1] This is approximately one quarter of the population of Tumbuka - speaking peoples of Malawi. As the Chewa, Bisa and Senga of Lundazi all speak Tumbuka with, of course, marked dialectical variations,

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1. Monthly Digest of Statistics Vol. XV NOS 4 to 6 April/June 1979 - Government Printer, Lusaka.

it will be necessary for the purpose of this thesis to distinguish clearly between the Tumbuka tribe and those peoples who, although not belonging to the Tumbuka tribe, speak Tumbuka. In this thesis it is proposed to look at the law of persons relating to marriage and how that branch of law, conventionally referred to as customary law, governs members of the Tumbuka tribe.

Tribal labels in Zambia are a means of designating categories for the organisation of political or social relationships with strangers. Approaching customary law in terms of the many tribal labels is, however, likely to be unprofitable and elusive for it will certainly involve a great deal of duplication and will blur the all-important exercise of finding essential principles by over-concentration on looking for differences in the various tribes.

A law of persons anywhere in Africa is a reflection of the social structure of the persons to whom it is applicable. In Zambia personal law is a law of patrilineal or matrilineal social structures and descent systems. A proper understanding of Tumbuka Customary Law is not possible unless one is aware of what patrilineal and matrilineal systems mean and how they operate. The Tumbuka are a patrilineal society. Their customary law relating to marriage differs from that of the Tonga, every Tonga belongs to a group of matrilineally related kin i.e. they are related through females.[1] The Bemba of Northern Province and Nsenga of Petauke, Eastern

1. M. Gluckman, Politics, law and ritual in tribal society, Basil Blackwell, Oxford, 1967, P 93.

Province are further examples of tribes that belong to the matrilineal group.

In a patrilineal society descent is traced through the male line i.e., to be more specific, through fathers and sons. As C.M.N. White has observed one may extract from a person's cognatic group a male ancestor, and trace descent through males only. This is agnatic or patrilineal descent.[1] This system of descent is in contrast to matrilineal systems where descent is traced through the female line. In a matrilineal system, one may take as a starting point a female ancestor and trace descent through the female only i.e. males and females descended by female links from a female ancestor. This is matrilineal descent[2].

It is worth noting that both patrilineal and matrilineal systems of descent are said to be unilinear. By unilinear system of descent is meant a method of tracing descent consistently along a single line[3]. Patrilineal and matrilineal descent systems are, therefore, both essentially similar unilinear systems only differing in the line along which descent is traced.

One notable feature of patrilineal societies is that in these societies, a husband acquires what are referred to as genetricial rights in addition to uxorial rights.[4]

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1. White C.M.N. Principles of customary civil law in Zambia, op.cit.
2. White C.M.N. Op.cit.
3. White C.M.N. Circular No. 2 issued by the Native Courts Department, Ministry of Justice, Lusaka, August 20th, 1964.
4. White C.M.N., Op.cit.

It will be necessary at this point to draw a distinction between genetricial rights and uxorial rights. Genetricial rights are rights over a woman's reproductive powers and the consequent location of her children in descent groups. As will be noted later in this chapter, these rights are not personal but are held by descent groups.[1]

Genetricial rights when created, by payment of lowola - bride price, are held by members of the patrilineage and not by individuals. A husband, therefore, holds such genetricial rights as a member of a patrilineage. These rights are an essential characteristic of all tribes that belong to the patrilineal group such as the Tumbuka and Ngoni of the Lundazi and Chipata districts respectively. As we have already seen these rights are acquired by the appropriate payment of lowola - bride price, in the form of cash, livestock (especially cattle), goods or services as may be asked for by the guardians of the wife. Such payments are distinct from payments which create uxorial rights.

White defines uxorial rights as rights of a man in respect of his wife's domestic and sexual services (and his corresponding duties of maintenance and proper care of his wife)[2]. These rights and duties, which are personal to the husband, are central to the marriage relationship and form the subject of numerous matrimonial cases. The rights include the right by the husband to

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1. White C.M.N. Matrimonial cases in Local Courts in Zambia, 1971 J.A.L. Vol. 15 No. 3, P 256
2. White C.M.N. Op. cit., P 256

sue for damages for adultery.

As will be revealed later in the following chapter, a Tumbuka husband, as a member of a patrilineal group, makes the marriage payment necessary to establish genetricial rights at any time after the marriage negotiations have begun up to its dissolution or termination. This concept of customary law will be located more fully when we consider the institution of bride price.

One interesting feature relating to genetricial rights is that when created, as already pointed out, they are held by corporate patrilineages and not by the husband as an individual. Patrilineage is lineal descent traced through the male line. Lineal has been defined as:

> "being in the direct line, as a descendant, ancestor, etc., or in a direct line, as descent, succession etc.; of or transmitted by lineal descent."[1]

Members of a lineage are, therefore, descended from the same ancestry. One may belong to either a patrilineage or a matrilineage depending on whether one's descent is traced through the father's line or the mother's line. Gluckman says a lineage system as a system of organised social relations embodies a fixed stretch of

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1. The Random House Dictionary of the English Language:
The Cambridge Edition, Random House/New York 1966.

time, from the origin of men to their present-day descendants. The essential characteristics of the lineage system are unbroken continuity of descent, persistence of self-identical corporate units and stability of settlement.[1]

As already stated genetricial rights, in a patrilineal community, are held by corporate patrilineages and not by the husband as an individual. This is in line with the concept of Tumbuka customary marriage. It will be observed later that a Tumbuka marriage is a contract not only between two spouses but also between the family of the husband and that of the wife. It follows, therefore, that when a marriage contract between the two families has been concluded, genetricial rights acquired by the husband are held not only by him but by his lineage as a whole. A husband holds such genetricial rights as a member of the group or patrilineage. This distinguishes genetricial rights from uxorial rights which, as already stated above, are personal to the husband. It is a matter of legal interest that according to Tumbuka customary law payments for genetricial rights are not waived. One reason for this is that they determine who will have the custody of the children. The only exception

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1. Gluckman M. Op. cit.

to this requirement is with cross-cousin marriages. A cross-cousin marriage is a marriage between a son of a sister and a daughter of her brother or between a son of a brother and a daughter of his sister. Payment of bride price may be waived when a contract for a cross-cousin marriage is concluded. In matrilineal communities such as the Bemba, descent is traced through the female line. C.M.N. White states that genetricial rights in such communities vest in a woman's matrilineage in any female mmember ab initio at the time of her birth and are not transferred at marriage.[1]

It is important to have a fuller understanding and appreciation of the above differences between patrilineal and matrilineal groups if a proper study has to be made of Tumbuka customary marriage. Before concluding these introductory remarks it will be pertinent to discuss briefly the role of customary law in the legal system of Zambia.

It is appropriate to commence our brief discussion on the role of customary law in our legal system by attempting to define law.

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1. White C.M.N. Op. cit. P 256.

> "Probably the most difficult problem with which jurisprudence has to deal is that of evolving a valid description of law.
> .... there has been much disagreement among jurists and sociologists about the nature of their subject ....."1

A more acceptable definition of law must deal with the nature and purpose of law in human society. It is not intended, however, in this thesis to discuss the definition of law as propounded by jurists like John Austin, Goodhart, Laine Malinowski and Pound. This is the task of jurisprudence. For the purpose of our study, a reference to Llias and Schapera who both researched into African customary law will suffice. Schapera in an attempt to define law writes:

> "We may, therefore, regard as law any rule of conduct likely to be enforced by the courts if and when it is brought before them"2.

This definition is not without difficulties as Schapera himself admits since it necessarily includes some rules the courts will not enforce if put to the test. It is, however, a sound definition of law in my view.

Llias, on the other hand, defines the law of a given community as "the body of rules which are

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1. Llias; T.O: The Nature of African Customary Law.
Manchester University Press, 1962, P 37.
2. Schapera I. A Handbook of Tswana Law and Custom, Oxford University Press, 1937, Chapter 11 P 357.

recognised as obligatory by its members"[1]. This definition recognises the principle that operating in every community are accepted norms of behaviour which the vast majority of its members regard as absolutely necessary for the common well-being of members of the community. These norms of behaviour are found in every community. It may readily be deduced from this definition that customary law which embodies accepted norms and rules that regulate the behaviour of individuals in a given community is part and parcel of the legal system. In Zambia customary law is nowhere defined. Mvunga in his paper on customary law in Zambia states:

> "Although customary law is nowhere defined, it has been recognised as a system of law in Zambia even as far back as 1911 when the British Protectorate of Northern Rhodesia was formally constituted. There appears to be very little dispute as to what this law is, namely an indigenous system of law arising from local custom."2

If, indeed, customary law is recognised as a system of law in Zambia it will be of interest to examine how it is applied and administered. African customary law is today expressly recognised by the Subordinate Courts Act and the Local Courts Act. Section 16 of

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1. Elias T.O., Op. cit. Supra.
2. Application and Administration of Customary Law in Zambia, Mvunga M.P., 1980 (unpublished).

(a) The African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law;"[1]

Three significant legal points emerge from the provisions cited above. The three points point to the conditions of validity from which customary law derives its application.

The first condition stipulated for the application of customary law is that such customary law should not be repugnant to justice, equity or good conscience. As Church argues "morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality"[2]. To what standard has the Act refer - the Zambian standard of justice and morality or the British standard. Church argues that the only standard of justice and morality which a British court in Africa can apply is its own British standard.[3] This condition as Professor A.N. Allott has observed has been used by courts in its application to "test African law to strike down any customary rule they disapproved."[4]

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1. Local Courts Act, Cap. 54, Revised Laws of Zambia
2. An introduction to the law of Zambia by William L. Church, 1974 (unpublished)
3. Op. cit. Supra.
4. Allott A.N. Essays in African Law: London, 1960, PP 197-198.

Conflicts between African customary law and the imposed laws from Europe were of course inevitable.

A few cases will illustrate how the repugnant clause has been applied in our courts in Zambia.

In Regina v. Mubanga[1] and Sakeni the repugnant clause was applied. The accused, who were African men, appeared, together with three other African men, (all being members of the Bemba tribe) before the Ituna Rural Native Court upon the complaint of the Bemba Nati e Authority, on a charge of contempt of Bemba traditional law. They were all found guilty of "not following the Bemba customary law of contributing grain towards the ceremony of the country." They were sentenced to fines with imprisonment in default of payment. It appeared that the Rural Native Court found the accused guilty of contravening the Bemba customary law in the respect that when the Chief asked all the people in his area to bring finger millet as usual for the purpose of the worship of certain tribal spirits, the accused, who were christians, persuaded certain fellow - christians, who were members of the tribe, to decline to contribute millet for the worship of tribal spirits or the like.

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1. Rhodesia and Nyasaland Law Reports Volume 1 High Court of Northern Rhodesia, Ndola 1959 September 8, 9, 18

The case was argued before the High Court in revision.

Held, (1) that it was clear that all the courts which had dealt with this case had done so on the footing (which seemed to be correct) that what was charged there was, and was intended to be, a breach of Bemba tribal customary law; and

(2) that the position appeared to be that a refusal by a Bemba tribesman to contribute finger millet for the purpose of the spirit ceremony no longer constituted an offence under Bemba customary law;

(3) that there was insufficient basis for the view, apparently taken by the courts below, that by Bemba customary law, notwithstanding that it was no offence to refuse to contribute finger millet for the ceremony of the worship of the tribal spirits, it was an offence peacefully to persuade others not to contribute for that purpose; and in any event

(4) that if such peaceful persuasion did indeed purport to constitute an offence under Bemba customary law, it would be inconsistent with the common law and the Penal Code, as also with other laws in force in the Territory, and would be repugnant to justice. Findings of guilty accordingly reversed, and Accused acquitted.

Then there is the Beluti Kaniki V Lot Jairus case.[1] This case came before the High Court for review. The Lala custom known as "Chamutwe" was in issue. Under this custom a surviving spouse pays a sum of compensation to relatives of the deceased. The payment of compensation is regarded as a means of purifying or releasing the surviving spouse from the deceased spouse's spirit so that the surviving spouse is free to

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1. S.J.Z. No. 12 of 1967.

remary. In the case in issue, the surviving spouse was the widow. Relatives of the deceased proceeded to recover compensation from the surviving widow by bringing action in the local court. The court awarded compensation, upon which the appellant appealed to the Resident Magistrate's court arguing that the sum awarded was excessive. The magistrate allowed the appeal, dismissing the claim for compensation as being repugnant to natural justice. On review by the High Court, the Resident Magistrate's holding was upheld. In this respect J.R. Blagden, C.J., said:

> "... I think the learned Resident Magistrate could come to the conclusion that the compulsory observance of the [illegible] custom - that is, its [illegible] - was contrary to natural justice, even though its voluntary observance might not be."[1]

Another interesting case illustrative of the application of the repugnant clause in our courts is that of Mayuma V Induna Nalubutu.[2] The appellant, a man of seventy-eight, was a member of a tribe originating in Portuguese West Africa, many members of which settled in Barotseland (Western Province). He was born in the village of Livala and was formerly a slave of the then headman. After obtaining his freedom in 1906 he was appointed headman of the village by the Induna Nalubutu. In later years

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1. Op. cit. Supra.
   High Court, Northern Rhodesia, Lusaka 1959, March 12.
2. /1960/ R & N P. 39.

Appellant's conduct became offensive to the Induna Nalubutu and the latter's family as a result of which Appellant was brought before the Mongu - Lealui District Native Court, deprived of his headmanship and expelled from the village. On the question of expulsion only, he appealed to the Saa - Sikalo Native Court. His appeal was dismissed and he appealed to the High Court. It was held by Paterson, C.J.:

> "I find that the order of the Saa-Sikalo Native Court made on the 3rd February, 1958 expelling Mayungo from the village of Liyala and requiring him to remove himself to the Kalabo district is repugnant to natural justice and morality. The order of this court, therefore, is that the judgement of the Saa-Sikalo Native Court appealed against in so far as it relates to the expulsion of Mayungo shall be reversed with costs against the Respondent."

In R. Chilumbu V W. Kapula[1], a case which came before a local court, purification was as in the Kaniki V Jairus[2] case, again in issue. This time it was under the Aushi customary law. The plaintiff was the surviving spouse after his wife passed away. The plaintiff brought suit against the defendant, father of the deceased. The plaintiff sued the defendant for allegedly refusing to purify him. The plaintiff was thus seeking the court's intervention to have

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1. L.C.A. No. 29/1977. (Unreported)
2. Op. cit. Supra.

purification enforced. The defendant, on the other hand, denied having refused to purify the plaintiff. He stated that it was in fact the plaintiff who refused the invitation to go to the deceased wife's home village for the purification ceremony. The local court, satisfied with the defendant's version, dismissed the plaintiff's claim because the "plaintiff was ordered to go home for purification, and he refused to do so". On appeal to a magistrate's court the appeal was dismissed on the same grounds given by the local court. Mvunga states:

> "Implicit in this ruling is a recognition of the Lushi custom of purification of a surviving spouse. Ironically both the local court and the magistrate's court did not address themselves to the question whether the custom in issue was repugnant to "natural justice or morality" in terms of the Local Court's Act. In this regard there is even a lack of evidence on record as to what the custom actually involves. The decisions of the courts could presumably be supported on the ground that the facts of the case did not necessarily invite a consideration of whether the custom was repugnant to natural justice or equity."[1]

It must now be evident that African customary law is administered in Zambia by the local courts on condition that it is not repugnant to natural justice or morality. Moffat had this to say on the subject:

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1. Mvunga M.P., Op. cit., Supra. P 4.

> Native customary law is administered by the native courts, but there is one condition, that it must not be repugnant to natural justice or morality. This is not easy to explain and is best done by taking examples. When convictions are obtained by means of witchcraft and/or torture, or where any cruel punishment follows a conviction, that is contrary to natural justice or morality. Each question of this nature has to be decided on its merits. A native custom which prevented a woman from obtaining a divorce from her husband without his consent, has been held to be contrary to natural justice. In another case it was held that a native custom which enabled a husband refuse to accept compensation when his wife had committed adultery, thus depriving the father of his right to the children, was held to be contrary to natural justice. In this particular case the husband had neglected his wife and the man had lived with her for about ten years and had several children. That was the real ground upon which the decision was given. If he had lived with her for only a week or a month he would have had no right at all to a child. In yet another case the judge said: 'Native customs should not be interfered with unless they impress us with some abhorrence or are obviously immoral in their incidence'. That is the test which is usually applied now.1

The second condition of the validity of customary law is that for African customary law to be applicable it must not be incompatible with any written law for the time being in force in Zambia. "There are practically no known instances in Zambia in which it can be said that difficulties have been posed in the administration of customary law on account of this requirement."[2] It is interesting to observe, however, that in the

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1. Moffat, Native Authorities and the Law, Chapter III in Justice and the Law, P 27-Oxford, Capetown: 1956.
2. Mvunga M.P., Op. cit., Supra.

Regina V Mubanga and Sakeni case[1], the High Court of Northern Rhodesia sitting at Ndola on 18th September had this to say:

> "It seems clear to this court that all the courts that have dealt with Joseph Mubanga and Fitaliano Sakeni have done so on the basis that by their persuasions they were in effect, undermining the authority of the Chief. But if that were to be averred, authority should have been sought to take proceedings under Section 13 of Cap. 157 instead of under colour of a breach of Native law and custom.
>
> In the result, however, this court finds that the so-called native customary law was never established and that even if it had been established, it would have been inconsistent with other laws in force in the Territory and repugnant to justice".

This is only one reported case where had native customary law been established, it would not have been sustained because of the "incompatible clause."

In accordance with the Local Courts Act, local courts have jurisdiction to administer customary law. It is striking to note that there is no express provision in the High Court Act authorising the High Court to administer customary law in the exercise of original jurisdiction. All that the High Court has is reviews and appellate jurisdiction. Initially, the High Court had original jurisdiction in matters of customary law. The Northern Rhodesia Order in Council of 1911 provided:

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1. Op. cit.

> "In civil causes between natives the High Court and the Magistrates' courts shall be guided by native law so far as that law is not repugnant to natural justice or morality...."

The High Court Ordinance in 1933[1] went further by conferring on the High Court original jurisdiction to administer customary law. The provision to administer customary law was retained till 1958. The prsent High Court Act as noted above does not, surprisingly enough, have a similar provision. I submit that the question of original jurisdiction in matters involving customary law should be extended to the High Court so that claimants can have the benefits of judicial opinion of a superior court.[2]

It will be evident from the arguments outlined in this chapter that customary law has a role and place in the legal system of Zambia. Customary law will, however, only be sustained if it is not repugnant to natural justice or morality. Another condition is that it must not be incompatible with the existing written laws in force in Zambia. In the next chapter, we shall examine the nature of Tumbuka customary law marriage.

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1. Section 17, Ordinance No. 18 of 1933.
2. Mvunga M.P., Op. cit., Supra. P 5.

CHAPTER II

THE NATURE OF TUMBUKA CUSTOMARY LAW MARRIAGE

Marriage, as an institution, is fully recognised in Tumbuka customary law. Any society to attain some degree of stability needs to regulate and control relations between sexes. Tumbuka customary law treats marriage as a contract.[1] Unlike marriage contracts in England and other Western countries, the marriage contract among the Tumbuka is between the bridegroom and his family on one hand and the bride and her father on the other. The law of England regards marriage as a contract between two spouses. Bromley describing marriage as a contract has stated:

> "In English law at least, marriage is an agreement by which a man and woman enter into a certain legal relationship with each other and which creates and imposes mutual rights and duties. Looked at from this point of view, marriage is clearly a contract. It presents similar problems to other contracts for example, of form and capacity; and like other contracts it may be void or voidable. But it is, of course, quite unlike any commercial contract, and consequently it is sui generis in many respects ...."[2]

Thus marriage according to English law is a contract between two spouses. This concept is alien to most African marriage contracts including the Tumbuka. Elias points out that marriage in African societies is a contract ostensibly between two families, in which the individual interests of the groom and

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1. White C.M.N., Principles of customary civil law in Zambia, P 50.
2. Bromley P.M., Family Law, London: Butterworths, 1976, P 14.

bride, though implicity or formally recognised, are but a subordinate element of the wider dominating interests of their families.[1] He continues:

> "for purposes of legal analysis, however, one must take a closer view of the African marriage. If it is a valid one, it will be seen to consist of two inseparable elements:-
>
> (a) a contract comprising an exchange of promises between the boy and the girl to marry, followed by
>
> (b) the ceremony of marriage, to which members of the community are invited as witnesses.....
>
> An African contract of marriage is in fact a triple agreement. First, there is the primary, legal contract between the boy and the girl as the only true partners to the marriage relationship. Then, there is the secondary, social contract between the two families of the couple. Finally, there is the ancillary, socio-legal contract for the settlement of the marriage payment which puts the seal of enforceability on the entire transaction."

Schapera, describing marriage among the Tswana, also refers to this concept of marriage as a contract between spouses and their two families.[2]

In this regard, it is significant to comprehend this difference if we have to understand why the consent of the families of the spouses is necessary before a marriage contract can be concluded and if we have, moreover, to understand the role that the parents or guardians of the spouses play in cementing and stabilising customary marriages.

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1. Elias T.O., The Nature of African Customary Law, Manchester University Press, 1962, PP 145-6.
2. Schapera I., A Handbook of Tswana a Law and custom, Oxford University Press, 1937, P 125.

Tumbuka customary law marriage, like most customary law marriages, is potentially polygamous[2]. This means that a man is permitted by customary law to marry more than one wife. Nwogugu defines a polygamous marriage as a voluntary union for life of one man with several wives.[2] Its essential characteristic is the capacity of the man to take as many wives as he pleases. The mere fact that at a given moment he has only one wife does not affect the character of the marriage so long as the capacity of taking more wives is retained. Generally, there is no limit to the number of wives a husband could take under the polygamous system. This invariably depends on his affluence. One weakness with Nwogugu's definition in my view is that it refers to a polygamous marriage as a 'union for life.' It must be disputed that there can be no union for life in a marriage system that condones divorce.

In its polygamous nature, customary marriage is similar to a moslem marriage, for a moslem husband may marry up to four wives. The Holy Quran provides:

> "And if you fear that you will not be fair in dealing with the orphans, then marry of women as may be agreeable to you, two or three or four; and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice."3

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1. Out of twenty men I interviewed in five villages, eight were polygamists. Refer also to Schapera, op.cit, P 13.
2. Nwogugu E.I., Family Law in Nigeria, Heinemann Educational Books (Nigeria)Ltd., Ibadan, 1974 P XXIII.
3. The Holy Quran, Evergreen Press, Lahore, 1972, Chapter 4 Verse 4.

It is clear from the above provision that moslem marriages are as potentially polygamous as customary law marriages.

Under modern conditions, polygamy in most African societies is declining. Schapera, writing about the Tswana family and household, affirms that the practice of polygamy was rife among some of the Tswana tribes. He hastens to point out, however, that "large polygamous households, of four wives or more were met with only among the chiefs, their relatives, important headmen, and other prominent or wealthy people." To emphasise the fact that polygamy is on the decline and to support this view he states:

> "Under modern conditions, polygamy is obviously declining. This is due in the main to the spread of christianity. All Mission Societies operating in the protectorate forbid their converts to have more than one wife, nor will they allow a woman belonging to the church to become the wife of a polygamist.
>
> The administration, by imposing additional taxation upon polygamists, has made it even more difficult for them to exist in large numbers, at least openly. Educational progress, and contact with western civilization generally, have also contributed to the widespread abandonment of the practice."1

During my research tours that covered the three chief's areas that constitute the Tumbuka Local Authority I discovered that polygamous marriage among the Tumbuka are regarded not only as a symbol of prestige but as a source of wealth. More wives mean

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1. Schapera I., Op.cit., PP 13-14.

more gardens and, weather conditions being favourable, the more gardens a man's wives cultivate, the more food is produced. Such a husband is also likely to have many children if he and his wives are not impotent. The children are regarded as a further source of wealth although male children are looked upon as a drain on such wealth when the time to pay bride price in order to marry draws near. The son's wives are, nevertheless a welcome addition to the father's family. It has already been observed above that the picture has slightly changed today. Economic pressures which are a result of the advent of a modern money economy have, to some extent, contributed to this change. And thus we find today, rural areas excepted, more and more de facto monogamous marriages.

It is both interesting and striking to note that there are certain 'rules' of conduct which a polygamist must observe in regard to his wives. A breach of some of these 'rules' would not, however, be followed by sanctions. One may, therefore, regard some of these 'rules' more as 'rules' of etiquette rather than as binding. One of these 'rules' is that when a man first marries he should seek the permission of his mother and when he has received her consent he should give her a present known as Mubingo. Mubingo may take the form of cash or a chicken. Similarly,

before he marries his second wife he should seek the permission of his first wife and then give her the mubingo present. A breach of these 'rules' would be frowned upon by members of the village community although such an act would not be visited by sanctions. Another 'rule of etiquette' is that a polygamous marriage imposes an obligation on the man to spend an equal amount of time with each wife and to perform equal services to them. This rule is, in my opinion, more than a rule of etiquette for a second wife who does not have equal services of her husband with the first wife may enforce her rights. She may seek a divorce on the grounds of negligence or cruelty. Another rule of etiquettee is that when all of a polygamist's wives have prepared meals for him, he must take an equal share from each plate of food. As a practice, a polygamist usually has a private garden of his own which is not shared with his wives. Should he, however, inadvertently get one wife to help him in his garden she can, as of right, claim her share of the produce.

Polygamy is thus an essential element of Tumbuka customary law marriage. Indeed, this practice is not confined to the Tumbuka only. Barnes, writing about the institution of marriage among the Ngoni of Fort Jameson (Chipata), states:

> "About one man in seven has two wives or more wives. Although the Christian Missions do not tolerate polygamy, and punish their members who take additional wives, there are still a number of christian polygamists who for most purposes align themselves with the christian group".1

According to my informants, the only constraint among the Ngoni and Tumbuka that prevents a man from contracting a polygamous marriage is poverty i.e. lack of money or cattle to pay bride price coupled with modern economic pressures and forces. That monogamy is deplored is epitomised by the Tumbuka saying tenga yumo mbulanda - marrying one woman is a sign of poverty. It is a matter of legal interest that in Tumbuka customary marriages seniority of wives ordinarily follows the order of marriage. Should a man marry sisters, seniority is determined by the seniority of sisters inter se and not by the order of marriages. This ranking of wives was not a peculiar feature of the Tumbuka. Among the Ngoni the first wife married with bridewealth was the great wife. If there was a wife married earlier for whom no bridewealth had been paid, perhaps a cross-cousin or a recently captured woman, then she became subordinate to the chief's wife and was regarded as

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1. Barnes J.A., Marriage in a changing society: A study in structural change among the Fort Jameson Ngoni, Published for the Rhodes - Livingstone Institute by Oxford University Press: 1951, PP 55-6.

a member of her band.[1] "With the decline in polygamy the system of ranking that was used to organise large compound households has fallen into decay, and except where the issue has been complicated by the payment of bridewealth, wives are simply ranked in chronological order of marriage".[2]

For a Tumbuka customary law marriage to be valid, certain customary law requirements must be satisfied. Some of these requirements which will be discussed in the chapters that follow are similar to those that must be satisfied in a statutory marriage. Where a man and a woman live together without fulfilling such requirements, the relationship is not only irregular but legal incidents of marriage that flow from a valid union, for instance the acquisition of genetricial and uxorial rights, are denied such a union. In such a marriage rights over children and claims for damages by the husband for adultery by the wife do not arise.

Before concluding this chapter and before we proceed to discuss these requirements in some detail, it will be necessary to refer again, for the sake of emphasis, to the distinction between a customary law marriage and a statutory marriage.

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1. Barnes J.A., Op. cit. P 14
2. Hyde V Hyde (1866), L.R. 1 P & D 130-132.

Firstly, a customary law marriage as already pointed out, is potentially polygamous. Secondly, customary marriage is a contract not only between spouses but between their families as well. Under English law, on the other hand, and Cap. 211 - Revised Laws of Zambia - is a product of English law, marriage as a contract is an agreement by which a man and a woman enter into certain legal relationship with each other and which creates and imposes mutual rights and duties.[1] A man who contracts a statutory marriage according to either Zambian law or English law may not marry another woman for a statutory marriage is a voluntary union of one man and one woman, to the exclusion of all others. It is this meaning of marriage that Lord Penzance endeavoured to convey in the celebrated case of Hyde V Hyde.[2] In this case the petitioner, who was originally domiciled in England, embraced the Mormon faith and went out to Utah at a time when polygamy was still being practised by Mormons. He there married the respondent. Some years later he renounced Mormonism and, having returned to England, asked his wife to join him. This she refused to do, and since the excommunication which had followed the petitioner's renunciation left her free to remarry by Mormon law, she went through a form of marriage with

1. Bromley P.M., Op. cit. P 14
2. (1866), L.R. 1 P & D. 130 - 132.

the co-respondent. The husband then petitioned for divorce on the ground of the respondent's adultery. Lord Penzance held that this marriage was polygamous and therefore not a marriage within the definition cited earlier,[1] and consequently held that he had no jurisdiction to entertain divorce proceedings. Our marriage Act, like the English statutory law, similarly provides for monogamous marriages.[2]

It is worth noting that in most cases Africans who got through a statutory marriage inadvertently go through a double marriage. This is so because the requirements of a statutory marriage, which they must comply with for a statutory marriage to be valid, also apply to customary law.

Having spelt out briefly the difference between a statutory marriage and a customary marriage, we shall proceed in the chapter that follows to examine the requirements that must be satisfied for a Tumbuka customary law marriage to be valid.

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1. Supra, P 35.
2. The Marriage Act, Cap. 211 of the Laws of Zambia; S. 32.

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1. Supra, P 35.
2. The marriage Act, Cap. 211 of the Laws of Zambia; S. 32.

CHAPTER III

REQUIREMENTS OF A CONTRACT OF MARRIAGE

As already pointed out in the last chapter, Tumbuka customary law regards marriage as a contract entered into by a man and his family on one hand and a woman and her family on the other. For such a contract to be valid, certain conditions must be complied with. These conditions determine the law for contracting a customary marriage. It is traditional to discuss the law for contracting a customary marriage under three broad heads, namely: personal capacity to marry, consent and prohibited degrees of relationship. I have no intention of discussing the contract of marriage strictly under the three heads enumerated above. To simplify the analysis, I shall analyse the concept of the contract of marriage under the following heads:-

1. Personal capacity to marry.
2. Consent to marry.
3. Prohibited degrees of relationship.
4. Bride price and other marriage payments.
5. The role of ceremonies in Tumbuka Customary marriage.

After a brief survey of the requirements of a valid customary marriage under the heads listed above, I

shall proceed to devote the chapter that follows to the classification of marriage.

1. Personal capacity to marry

Any reference to a person's capacity to marry in customary law, and indeed any system of law for that matter, is concerned with a person's standing in law to marry. A person's age, his or her physical conditions, puberty ceremony, marital status and other religious and class factors determine whether such a person has capacity to marry. According to the law of England, in order that a person domiciled in England should have capacity to contract a valid marriage, the following conditions must be satisfied:-

(a) One party must be male and the other female;

(b) Neither party must be already married;

(c) Both parties must be over the age of 16; and

(d) The parties must not be related within the prohibited degrees of consanguinity or affinity.[1]

Further prohibition is to be found in the Royal Marriages Act, 1772 which provides, inter alia, that no descendant of King George II (other than the issue of princesses who have married into foreign families) may marry without

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1. Bromley P.M., Op. cit. P 29.

the previous consent of the Sovereign formally granted under the great seal and declared in Council. These provisions are somewhat similar to those contained in the marriage Act of Zambia.

The marriage Act of Zambia[1] provides in S 10 (1) that:

> "The Registrar of Marriages shall not issue a marriage certificate until he has been satisfied by affidavit -
>
> (i) that one of the parties has been resident within the district in which the marriage is intended to be solemnised for at least fifteen days immediately preceding the granting of the certificate;
>
> (ii) that each of the parties to the intended marriage (not being a widower or widow) is not less than twenty-one years old or that he or she is under that age the consent hereinafter made requisite has been obtained (which consent must be in writing and annexed to such affidavit).
>
> (iii) that there is not any impediment of kindred or affinity or any other lawful hindrance to the marriage.
>
> (iv) that neither of the partners to the intended marriage is married by African customary law to any person other than the person with whom such marriage is proposed to be contracted.

It is a matter of legal interest that both the law of England and the Marriage Act of Zambia provide for monogamous marriages. As has already been observed, a Tumbuka customary marriage is potentially polygamous. Most of the requirements stipulated above in relation to English law marriages and Zambian statutory

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1. Cap. 211, Revised Laws of Zambia, Op.cit.

marriages do not apply to customary law marriages. For instance, there is no fixed specific age at which a girl or boy may contract a customary marriage. A girl may be betrothed in childhood, but cannot be taken in marriage until after her puberty ceremony. This means that a girl must have reached puberty to qualify to marry. Maturity measured by puberty spells out the minimum age. This qualification applies also to boys.

As for physical handicaps, they are not a legal bar to a Tumbuka customary law marriage although they may be socially disadvantageous. We thus have cases of dumb, deaf or blind persons contracting customary marriages. There is, however, one notable exception to this. An insane person is incapable of contracting a marriage. Marriages contracted during lucid intervals of insanity are, nonetheless, valid. As we have already seen, the marital status of a man is not a bar to a valid marriage because customary law recognises polygamy.

Among the Tswana, boys and girls in the olden days could not get married until they had passed through the initiation ceremonies conferring upon them the status of adults, i.e. until they had become members of a regiment. Nowadays this restriction no longer prevails in the case of girls.[1]

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1. Schapera I., Op. cit., P 127.

From the foregoing it will be readily deduced that personal capacity to marry is an essential requirement for a valid customary or statutory marriage.

All my investigations were unable to show the existence of polyandry among the Tumbuka. One effect of this is that a woman must be single in order to contract a valid marriage. In the past another restriction affecting a woman was that she was prohibited from marrying outside her society. There were thus no 'inter tribal' marriages. It was taboo for a Tumbuka woman to get married to a Senga or Cewa man. This restriction derived its inspiration from social and family pressures. It had no legal basis or significance. The position is different today for we find more and more inter-tribal marriages among the Tumbuka. It is also significant to note that bars dictated by differences of religion, class and occupation have disappeared altogether. A boy from a humble family can these days marry a chief's or a rich man's daughter provided, of course, he can satisfy the bride price requirements. Discussing marriage bars among the Tswana, Schapera states:

> "The Tswana also generally refrain from marrying women of inferior stocks, especially Barwa and other serfs. It is not actually forbidden, but a man who married such a woman would be greatly despised."[1]

It seems these marriage bars are not a peculiar feature of Tumbuka customary marriages. In point of fact, they are a common feature of a number of tribal marriages.

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1. Schapera I., Op. cit., supra.

We now proceed to look at the second requirement - consent.

2. Consent to marry

Consent to marry is a very important element of customary marriage. The consent of both spouses is required to contract a valid marriage. In the past arranged marriages were common. Today, however, young people insist upon consent. Moreover, a local court recently held that a woman cannot be forced by her parents or guardians to marry against her will, and has held that child betrothals create no legal rights. In Fumba Mkandawire V Costa Banda[1], Fumba's father arranged with Costa Banda's father so that Fumba would marry Costa soon after she had passed the age of puberty. At the time of making the arrangement Costa was an infant of ten years old and was attending Luchaya Primary School. One cow and one goat were delivered to Costa's family as marriage payments by Fumba's parents. When Costa left School and had passed the age of puberty she refused to marry Fumba, arguing that she had not consented to marry Fumba and that as a girl who had become enlightened as a result of attending school, she wanted to marry a boy of her own choice who could, like her read and write.

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1. Magodi Local Court, civil case No. 18 of 1961 (unreported).

All persuasion by the parents was of no avail whereupon the father renounced her as his daughter. The case was referred to senior Magodi's local court. It was held by Magodi's court that Costa could not be forced to marry without her consent and that when she was betrothed at the age of ten she was too young to appreciate the legal implications and consequences of her action. Costa's parents were ordered to return the cow and goat paid by Tumba Mwandawire's parents as bride price.

Elias, commenting on the requirement of consent, points out:

> "The number of cases in which girls defy all authority, and the futile attempts of the elders to insist on forced marriages being maintained, are proof that the law never provided for such events; it was not so foolishly designed that it did not recognise that a permanent relationship between man and woman must rest on mutual consent."[1]

From the foregoing it will be evident that consent is a sine qua non to a valid marriage. Payment, and not necessarily marriage payments which we shall consider later in this chapter, is the essential element. The general rule requiring marriage payments for a valid marriage has recognised exceptions. There are, to cite one instance, cross-cousin marriages in Tumbuka customary law in which a mother's brother waives payments when

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1. Elias T.O., Op. cit., P. 147.

his sister's son marries his daughter. It is said that no payments ought to be made, for are they not all one family? If payments were made it would mean that the family had split.[1]

Another instance relates to a case in which relatives of a woman returned marriage payments to a husband who was ill-treating his wife, but did not withdraw consent. It was held by the Magodi Local Court in Jesinala Mwandila V Zebron[2] that the marriage continued to be valid. Another example to show that marriage payments may be waived and yet the marriage remains valid is that of a woman who has a bad reputation. Her relatives whilst consenting may decline to receive marriage payments.

Consent may take one or two forms. Firstly, there must be consent of parties to a customary marriage and secondly, apart from the consent of the parties to a marriage, the consent of the parents or relatives or guardians of the young man and especially of the girl is generally essential. In Tumbuka customary law, a woman is under perpetual guardianship. An unmarried woman is under the guardianship of her parents or guardians. If she accepts a man's proposal to join him in matrimony, the parents' consent must be obtained. To remove a woman without first obtaining the consent of her family is an actionable wrong known

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1. Barnes J.A., Op.cit., P 26
2. Magodi Local Court, Civil case No. 11 of 1963 (Unreported)

in Tumbuka customary law as Chikumu - abduction. The consent of the woman to the removal is no defence. The circumstances in which a man may not remove or abduct - sompola - his wife were discussed in Yobe Mtonga V Headman Temba and Meya[1]. Headman Temba abducted Meya, daughter of Yobe Mtonga without the latter's consent. Although Meya had consented to being removed by Temba, the local court held that Temba should have obtained Mtonga's consent before abducting Meya. It is clear from this case that the woman's consent was a sine qua non. After her consent had been obtained the man should have approached the woman's guardians formally through the agency of a go - between despatched by his family. Only after obtaining the guardian's consent in addition to a woman's own is marriage validated.

In Kalukomo V Loti[2] the Native Commissioner, Hall, held that there had been no marriage between Ambisa and Loti because they had come together privately and without the knowledge or consent of Kalukomo who was Ambisa's guardian. Chief Mpezeni of the Tumbuka who sat as an assessor declared that in his opinion a marriage is only valid when the suitor sends a representative (Mtenga) to the guardians of the woman who he wishes to marry and obtained their approval of his suit; he then either sends cattle as lowolo - bride price to these guardians

1. Magodi Local Court, civil case No. 45 of 1946 (unreported).
2. Nawalia Native Court (Lundazi), case No. 16 of 1907.

in the Ngoni fashion - or else after the manner of the a Tumbuka, aChewa and others, gives Matumba (presents) to the guardians, especially the mother. The consent of the parents is in this instance signified by their accepting the presents.

A valid marriage is formed, therefore, by the consent to it of competent relatives of the bride, agreeing to her marriage to her husband. Such consent is contingent upon agreement between these competent relatives of the bride and the husband as to the amount of marriage payments. Marriage payments are not made if the consenting relatives of the bride waive them.

It is worth mentioning that because the institution of polyandry is non-existent in Tumbuka customary law, the parents or guardians of a woman may not consent to her contracting a marriage during the period when she is married in a previous valid marriage.

Before concluding our discussion on the requirement of consent, it must be pointed out in passing that consent may be actual or constructive. Where a bride or her parents formally accept the bridegroom's proposal for marriage, the consent is said to be actual. In Yobe Ntonga V Headman Temba[1], Moya's consent to marry Headman Temba was actual. The marriage was, as we have noted, not valid though because Headman Temba abducted

1. Magodi Local Court, case No. 45, Op.cit.

Meya without her guardian's consent. On the other hand consent is said to be constructive when the bride or her parents receive and keep goods sent by the bridegroom's family. In Yokoniya V Chijemu Tembo[1], Fadilesi (daughter of Yokoniya) accepted Chijemu Tembo's proposal of marriage. Tembo's guardians sent two goats and three hoes to Fadilesi's father, Yokoniya. Yokoniya accepted the presents sent to him. Three months later, Fadilesi was abducted by Tembo. Yokoniya sued Tembo, arguing in Philamalaza's local court that the marriage was not valid because as father of Fadilesi, he had not given his consent. The court ruled that as Yokonia had accepted and kept the gifts sent to him by Tembo's guardians he had given his consent. This type of consent is said to be constructive. For the girl's family to accept gifts of goods, clothing and money on her behalf is prima facie evidence that they have consented, but to accept an invitation to a marriage beer party, the true nature of which was not revealed, has been held not to constitute such evidence and there must always be some overt act for silence per se can never afford evidence of consent.[2]

Consent is, therefore, constructive when the bride or her parents receive and keep goods sent by the bridegroom's family. Having discussed the second requirement of a contract of marriage we now proceed to

1. Philamalaza Local Court, civil case No. 9 of 1967.
2. Tumbuka customary marriages, School of African Oriental Studies, University of London, Op. cit., (unpublished).

examine the third requirement - prohibited degrees of relationship.

3. Prohibited degrees of relationship

According to the law of England, persons within the prohibited degrees may not enter into a lawful marriage and, even if they should go through a form of marriage, it is treated as void ab initio. Most, if not all, civilised states prohibit certain marriages as incestuous. The prohibited relationship may arise from consanguinity (i.e. blood relationship) or from affinity (i.e. relationship by marriage)[1]. That is the civil law of England.

S32 of the Marriage Act of Zambia provides:

"(1) No marriage in Zambia shall be valid -

(a) which if solemnised 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;"[2]

From the above provision it is abundantly clear that if certain persons closely related marry, their marriage would be null and void. But it is also stipulated in the Penal Code[3] that if certain persons closely

1. Bromley P.M., Op. cit., P 31
2. Cap. 211, Op. cit.
3. Cap 146, Revised Laws of Zambia.

related by blood should have sexual intercourse they may be punished for the criminal offence of incest. S159 of the Penal Code provides:

> "(1) Any male person who has carnal knowledge of a female person who is to his knowledge his grand-daughter, daughter, sister, or mother, is guilty of a felony and is liable to imprisonment for five years:"

and S161 provides:

> "Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother or son, as the case may be) is guilty of a felony and liable to imprisonment for five years."

These provisions are evidence of the fact that persons who are closely related may neither marry nor have sexual intercourse.

A study of the Hindu law of India reveals that even in Hindu society marriage between persons who are related is forbidden. By Hindu law:

> "No marriage may be solemnised between any two Hindus if the parties are not within the degrees of prohibited relationship".1

Another illustration of this point of law is made by Schapera. Discussing preliminaries to Tswana customary marriage, Schapera points out that a man's choice of a wife is limited to some extent by relationship. He is not allowed to marry his own mother, sister or half-sister, daughter, father's sister or mother's sister.[2]

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1. The Hindu Marriage Act, India, 1955 S5(V).
2. Schapera I., Op. Cit., P 127.

One inference that one draws from these prohibitions is that most people in civilised states view the idea of sexual intercourse (and therefore of marriage) between, say, father and daughter or brother and sister with abhorrence; at the same time, the more closely the parties are related, the greater will be the risk of their children inheriting undesirable genetic characteristics. Bromley lends support to the above inference.[1]

This concept of prohibited degrees of relationship has similar recognition and significance in Tumbuka customary law. The relevant provisions are outlined in the Marriage Act of Zambia.[2] According to Tumbuka customary law a man and a woman who are kin or closely related may not marry. The only exception is, as we have already seen, with cross-cousins. A man may for instance, marry the daughter of his mother's brother. But this similarity in prohibited degrees must not be pushed very far for African relationships are quite different from, say, English relationships. In Tumbuka kinship terminology, for example, relatives of the father's and mother's sides are clearly distinguished and lineal and collateral kin on either side are identified with one another in the first ascending generation. The father's

1. Bromley P.M., Op. cit., P 31
2. The Marriage Act of Zambia, Cap. 211, Revised Laws of Zambia.

brothers are fathers and his sisters are female fathers. In English the father's brothers are uncles. Similarly in Tumbuka kinship terminology the mother's sisters are mothers and her brothers are male brothers. It is important to understand these differences in the use of terminology if we have to appreciate the meaning of the phrase 'prohibited degrees' in Tumbuka customary law.

It is a matter of legal interest that the Tumbuka conception of relationship as already pointed out above[1] differs radically from that of other non-African systems of law e.g. Anglo-American. It is based on what is known as the classificatory system under which one must think of each generation as an extended line of relations all members of which are of the same comparative seniority and call each other brother' or 'sister'. The generation above are 'fathers' and 'mothers' while the ones below are 'sons' and 'daughters'. The classificatory system applies equally to both sides of the family so that one's uncles and aunts whether uterine or paternal are one's 'fathers' and 'Mothers'. The only apparent exceptions are sibweni, 'male mother' and nkazi, 'female father'.

Let us now examine the question of relations with whom sexual intercourse, let alone, marriages

1. Tumbuka Customary Marriages, University of London, Op. cit., (unpublished).

are prohibited. The relations with whom sexual intercourse and marriages are prohibited fall into three broad categories:

(a) Agnatic relations

(b) Blood relations

(c) Relations by marriage

(a) Agnatic relations

The Random House Dictionary of the English language defines 'agnate' as:

> a kinsman whose connection is traceable exclusively through males; any male relation on the father's side.

Agnatic relations are, therefore, relations belonging to the same clan. The rule here is that no two persons of the same clan no matter how distant, may have sexual intercourse with or marry each other.

(b) Blood relations

In marriages contracted under the Marriage Act the rules prohibiting sexual intercouse and marriage between blood relations state that no persons who are within two steps in the 'classificatory ladder' of each other may have sexual relations or marry. This means that a man may not marry his mother's daughter or his sister's daughter or his daughter or his daughter's daughter.[1] These rules are similar to the ones applicable in Tumbuka customary law.

In a Tumbuka case, Jairos V Headman Chimbavi[2], the defendant married his mother's

1. Cap. 211, Revised Laws of Zambia, Op. cit.
2. Magodi Local Court, case No. 15 of 1933.

classification applies to brothers, sisters, sons and daughters (brother-in-law, sister-in-law, son-in-law, daughter-in-law).

The general rule concerning marriages with affines is that a man may not marry up, that is he may not have sexual intercourse with or marry his mother-in-law or grand-mother-in-law. He may, however, marry on his own level in the classificatory system and in certain cases in the levels or generations below. He may, for instance, marry his wife's sister, real or classificatory as his second wife or on the death of his wife. It is a clearly established rule that a man may not marry 'mother' and 'daughter'.

In Chimala V David[1], the plaintiff asked the court to annul the marriage of his daughter, Malale, with the defendant on the grounds that they were within the prohibited degrees of relationship, Malale's sister being already married to the defendant's father. The Native Commissioner's court annulled the marriage, but, on review, both the Magistrate and the legal adviser commented unfavourably on the decision though the judgment was not upset. The legal adviser Macdonnel (who became the Chief Justice of Northern Rhodesia in 1924) said, inter alia,

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1. Nawalia Native Commissioner's Court, case No. 33 of 1907.

> "The parties have been living as man and wife for five years and so far as the evidence goes - Malale is not called - the union appears to have been a happy one. In these circumstances, I doubt if it was wise to upset it.
>
> After all 'consent' is the first consideration in marriage as in other contracts and although this particular union may have shocked native public opinion, there was nothing repugnant to natural justice or morality to it."

I do not agree with the comments of legal adviser Macdonnel for two reasons. Firstly, the validity of a marriage is not necessarily determined by the happiness derived from it by the spouses. The spouses may be happy with the union but as long as their relationship is within prohibited degrees their marriage cannot be sustained. Secondly, while it is accepted that consent of a spouse is a requirement of a valid marriage, under customary law as we have already seen, the consent of a girl's family is a prerequisite to a valid marriage. In Yobe Mtonga V Headman Temba[1], which we have already discussed, the local court held that although Meya, daughter of Yobe Mtonga, had consented to being removed by Temba, the latter should have obtained Mtonga's consent. It must also be pointed out that sexual intercourse or marriage between persons who are closely related is looked upon with disgust. Such an act is contrary to Tumbuka public opinion and morality. In my view the

1. Supra.

union was repugnant to the Tumbuka sense of justice, morality and good conscience. The Native Commissioner's court was perfectly justified in annulling the marriage.

It is worth noting that in Jairos V Headman Chimbavi,[1] which we have already discussed, the incestuous marriage was not annulled. Instead criminal proceedings were initiated and a fine for illicit sexual intercourse was imposed on Headman Chimbavi. While it was proper to fine Chimbavi for committing the crime of incest the court did not, in my view, go far enough. It should have, in a civil cause, declared the marriage void for Chimbavi and the woman he married were within the prohibited degrees of relationship and could, therefore, not enter into a lawful marriage.

Before concluding the discussion on prohibited degrees, it may be of interest to refer to what sociologists have come to recognise as sororal polygyny. Sororal polygyny may be defined as a practice where a man marries polygamously two sisters.[2] Although the practice does not, strictly speaking, fall within prohibited degrees, it is strongly disapproved of by the Tumbuka. White says sororal polygyny should be distinguished from cases where the man's parents-in-law ask him to marry a younger sister of his existing wife polygamously, the initiative coming from them because

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1. Supra.
2. White C.M.N., Op. cit.

they approve of him as a son-in-law. This custom seems to have fallen into desuetude for I never came across a single case of a man who had married two sisters in any of the villages in which I conducted my investigations. We now proceed to examine the fourth requirement - Bride price and other marriage payments.

3. Bride price and other marriage payments

Marriage payments constitute an important element in Tumbuka customary law. Indeed, in most African marriages, as in the early English marriages, the making of a payment of goods or services by the bridegroom to the bride's kin is an essential part of the establishment of legality.[1] This institution of bride price is an outstanding feature of Tumbuka customary marriage. In the olden days great importance was attached to bride price among the Tumbuka so much so that a young man from a poor family found it extremely difficult to marry, for the transfer or agreement to transfer cattle or other quid pro quo, was a precondition of the marriage contract. Elias states:

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1. Radcliffe-Brown, The African Systems of Kinship and Marriage, Oxford University Press, 1950, P46.

> "This element, without which no marriage contract can come into being, is governed by often elaborate rules as to both its initiation and its discharge; sometimes it must all be paid up before the marriage can take place but, at other times, a deposit is accepted by the girl's parents on condition that the balance is discharged at stated intervals or on the occurence of a particular event.1"

It is evident from the observation made by Elias that no marriage contract in most African communities can come into being without the necessary payment of bride price. This view is reiterated by Holleman who, analysing the marriage contract among the Shona, observes:

> "The institution of Kurovorana, (payment of marriage compensation) to marry a woman against payment of rovoro, (marriage compensation, bride price) conforms to the requirements of the Shona Kinship System.
>
> In about 98% of Shona marriages the payment of rovoro is either expressly stipulated or implied in the marriage agreement."2

Holleman emphasises the point made by Elias that many marriages are contracted and bear issue before sufficient rovoro has been delivered. The payment of bride price may, therefore, be made in full or in instalments. The payment takes the form of livestock, goods or money. These days, with the advent of a money economy, many parents prefer money to cattle.

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1. Elias T.O., Op., cit. P 147.
2. Holleman J.F., Shona customary law, Oxford University press, 1952, P 148.

The value of bride price varies from family to family. Most parents of brides charge exorbitant sums of money. Tumbuka Chiefs, meeting on 10th November, 1978 at Senior Chief Magodi's headquarters, resolved to recommend to the Central Government the need, not only to control bride price, lowola, but to make it uniform. This would curb the tendency of many parents to exploit poor bridegrooms. I shall return to this aspect of bride price in the last chapter of this thesis when I consider proposals for reform. At this juncture it will suffice to examine the significance of this institution of bride price which must, under normal circumstances, be paid before the bride is handed over to the bridegroom or during the handing-over ceremony or afterwards, if agreement has been reached to have it paid in instalments. There is a considerable difference of opinion as to the significance of the institution of bride price.

There is a school of thought that regards bride price as being a purchase of a wife in the sense a person purchases a shirt or a car. This notion is not only ludicrous but absurd. A human being cannot command a price like a commodity in a shop. The interpretation of bride price, mabeka/lowola/thumba, as a purchase of a wife is no longer excusable. Schapera refers to this school of thought:

> According to Tswana law, no marriage is regarded as complete unless bogadi (cattle) has been given by the husband's people to the wife's people. This transfer has often been looked upon by missionaries and others as constituting a purchase of the woman, and as involving her in many humiliating consequences.1

Schapera goes on to argue: "this conception of bogadi is altogether wrong as there is no bargaining over the number of cattle to be given: the husband's parents give as many as they like and can, which fact alone should dispel the idea of a purchase."

There is yet another school of thought that regards marriage payment as an indemnity or compensation given by the bridegroom to the bride's kin for the loss of their daughter. It is argued by exponents of this theory that since marriage ruptures relations between the bride and her immediate kin, it is both necessary and logical to pay compensation to the bride's family. One subscriber to this school of thought is Holleman.[2] In his book titled 'Shona Customary Law' he refers to bride price as rovoro and defines rovoro as "marriage compensation; nowadays more particularly the cattle element of the marriage compensation as distinguished from the cash element (rutsambo)."

Another aspect of legal marriage, made legal by payment of lowola, is that it gives the husband and

1. Schapera I., Op. cit., P 138
2. Holleman J.F. Op.cit., PP 148, 390.

his kin certain rights in relation to his wife and the children she bears. We have already referred to the concept of uxorial rights[1] which are rights acquired by a husband over his wife's domestic and sexual services after making an appropriate marriage payment. Rights to the services of his wife in the household are personal and are sometimes called rights *in personam.* But the husband usually acquires rights *in rem* over his wife. If anyone kills or injures her or commits adultery with her, he may claim to be indemnified for the injury to his rights. Such a claim would not, however, deter the state from taking criminal action against perpetrators of the crime of murder. In addition to uxorial rights, marriage payments entitle the husband to the acquisition of genetricial rights.[2] These, as we have already seen, are the husband's rights over his children. These rights which the husband acquires as a result of making the appropriate marriage payments, are held by him on behalf of the lineage. They are not rights *in personam.*

Marriage payments in both these situations must be viewed and regarded as a kind of 'consideration' by which the transfer of rights from the wife's kin to the husband is made legal. This is the objective instrument of the 'legal' transaction of the transfer of rights.[3]

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1. Supra.
2. Supra.
3. Radcliffe-Brown, op.cit, P 50.

A Tumbuka husband marries, like most other members of African tribes, primarily because he wants children. The most important value of a woman is her child - bearing capacity. Holleman refers to this notion in his argument that "the essential implications of the kurovorana agreement is that the woman who is transferred against the delivery of a full rovoro, should raise a reasonable number of children to her husband's family."[1] Schapera states:

> Marriage according to the Tswana is designed primarily for bearing children; and if a woman fails in this important duty her lot is hard; she receives little sympathy as a rule; her husband neglects or ill-treats her; she is scorned by other men and ridiculed by her own sex.2

It will be noted from the above that child-bearing is the most important duty of a woman in an African community. Thus if a woman proves to be barren, the wife's parents either return the marriage payment or provide another woman to bear children. I found this practice prevalent in all the three Chiefs' areas I toured. As children belong to the father the return of marriage payments where the woman is barren is seldom encouraged for if the second wife bears the husband some children, the original marriage payments will stand him in good stead in the acquisition of genetricial rights.

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1. Holleman J.F., op. cit. P 188.
2. Schapera I., op.cit. P 155.

In my view the significance of the institution of bride price, lowola, lies in the fact that marriage is not simply a union of a man and a woman but is an alliance between the families or bodies of kin. Marriage payment is a method of establishing or maintaining the alliance or friendly relation between separate groups or between individuals belonging to separate groups. Further, marriage payments act as an insurance designed to stabilise marriage. A woman from a poor family will think twice before contemplating to have her marriage dissolved when she realises her parents will be required to return the bride price after the dissolution of marriage. As a general rule, marriage payment may be regarded as a symbol to mark the conclusion of the marriage contract.

The whole question of the significance of the institution of bride price has been well summed up by Schapera in his handbook of Tswana law and custom. He observes:

> "The Tswana themselves speak of bogadi (bride price) as being a thanksgiving (tebogo) to the wife's parents for the care they have spent on her upbringing, and as a sign of gratitude for their kindness in now allowing her husband to marry her.
>
> Some say also that it is compensation to the wife's parents for the loss of her services, and others that it is a sort of register of the marriage, showing that the cohabitation of the man and woman meets with the full approval of their respective families.
>
> Others stress the fact that bogadi creates a special bond between the two family-groups, just as the transfer of cattle in other situations creates special relationships between

Chief and subject, or owner and herdsman.

> The payment of bogadi is further said to give the children of the union certain privileges at the home of their mother's people to which they are not otherwise entitled. They have the right, e.g. to go or be sent to their mother's home to grow up there, and to be supported from the cattle given out as her bogadi. But the main function of bogadi is to transfer the reproductive power of a woman from her own family into that of her husband."1

I endorse the opinion that the main function of bride price is to transfer the woman's reproductive power from her own family into that of her husband.

Having discussed the significance of bride price, I now propose to examine the various payments that must be made before a contract of marriage can be successfully concluded. It is worth noting that some of these marriage payments have little or no legal significance. It may be convenient, in these circumstances, to discuss marriage payments under two heads: (i) marriage payments that are legally required. (ii) marriage payments that are not legally required.

(i) Marriage payments that are legally required.

(a) Chikhole

Marriage involves choice and selection. Once the boy has selected the girl he wants to marry and she has given her consent, he hands her chikhole - engagement gift. Chikhole is similar to the English engagement ring. In the past chikhole took the form

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1. Schapera I., Op.cit., P 138.

of beads but today it takes the form of a small coin. The girl gives the boy chithembiso - acceptance gift - to reciprocate the boy's gift. A go-between (thenga) is then selected and appointed by the boy's parents to seek the consent of the girl's parents to the marriage. The legal significance of Chikhole lies in the fact that it binds the two parties. A girl cannot entertain another man's proposal in marriage after she has accepted chikhole from a boy unless she first returns it to him to indicate that she is no longer in love with him. In the event of breach of this requirement the girl is persuaded by her parents to marry the boy who first gave her chikhole. If the girl is adamant, the parents return chikhole. I was unable to find records of cases that came up for litigation on this point of law in the local courts.

(b) Mabeka/lowola/thumba

No marriage is regarded as complete unless payment of bride price - mabeka/lowola/thumba - has been made by the boy's parents to the girl's parents. Mabeka almost invariably takes the form of cattle. Goats or sheep are seldom given as mabeka. Money payments are a common substitute nowadays. The cattle delivered may be heifers, oxen or cows. These animals are normally fairly young. There is no fixed number of cattle which must be transferred to the girl's

parents as mabeka. In Chief Nagodi's area a minimum number of three head of cattle is transferred to the girl's parents as mabeka.

Mabeka may be paid either in full or in instalments. Where the latter is the case, the bridegroom's family, after paying part of mabeka, asks for the daughter-in-law undertaking, meanwhile, to pay the remaining amount of mabeka later. Mutikolenge mawoko malundi tendenge "tie our hands but leave our feet free so that we may go out and look for the remaining amount of bride price."

All the Tumbuka I interviewed and who took part in the panel discussions were both emphatic and unanimous that mabeka/lowola, constitutes the essence of a valid customary law marriage. All disputes, whether they be about custody of children or divorce hinge on mabeka. For instance, when a divorce takes place, cattle transferred to the girl's family as mabeka must be returned unless there are children in the marriage who, according to Tumbuka custom, belong to the father. Bride price confirms the acquisition of genetricial rights by the husband.

In Siria of Kampasa Village V Yotamu[1], Siria petitioned his wife Vundiri for a divorce on the grounds that his wife had committed adultery with Yotamu. The divorce petition was allowed by the

1. Lundazi Native Court, case No. 15 of 1948.

Lundazi Native Court and as Siria had paid bride price to Vundiri's parents, Notham was ordered to pay Siria £1 (K2) damages. The court further ruled that Siria should have custody of the only child of the marriage.

It is worth noting that Chikhole (engagement gift) and mabeka (bride price) are the only marriage payments that have legal significance.

We shall now proceed to discuss marriage payments that have hardly any legal basis, let alone legal significance.

(ii) Marriage payments that are not legally required

(a) Fuko - Snuff bottle.

This payment is made by the boy's parents to the girl's parents as soon as the latter have consented to the marriage. An ox or its equivalent in cash suffices as fuko. The payment signifies the beginning of an alliance between the two families. The delivery of an ox to the girl's parents is followed by an exchange of bottles of snuff to symbolise the beginning of the marriage alliance. Non-payment of fuko does not invalidate a marriage. If a marriage blessed by

fuko payment is dissolved, the payment is not refunded.

(b) Chivulamulomo

Chivulamulomo literally means: "a payment which opens a girl's parents' mouth". The go-between, thenga, delivers to the girl's parents a nominal sum called chivulamulomo or chamulomo as an indication that marriage negotiations have commenced. On receipt of chamulomo, the girl's parents call a meeting of the family to consider the boy's proposal to marry their daughter. The payment of chamulomo is not very common these days. Very few parents in fact insist on having it paid. When a divorce takes place chamulomo like fuko is not returned.

(c) Chiwiza

When the bride price has been paid in full, the bridegroom's family pays chiwiza (a payment which calls) to the bride's family. The payment may take the form of a small amount of money. When chiwiza has been

received, arrangements are made for the bride to join the bridegroom in his village.

(d) Mukhuzi (belt)

This payment is made to the bride's mother or grandmother. Mukhuzi is a symbol meant to 'flatten the girl's belly' now that the girl who once made the mother's womb big has left the womb and is being given away in marriage. Non-payment of mukhuzi does not invalidate Tumbuka customary marriage.

(e) Chiwinga

Whereas chiwinga and mukhuzi are paid to the girl's family by the boy's family, the girl herself asks the boy to give her chiwinga - the act of weaning. The girl, through chiwinga, accepts that she has been weaned and that she will soon leave her parent's home. The boy will be her new guardian. Any sum of money will suffice as chiwinga. By accepting chiwinga the bride confesses:

> "I am a virgin, I shall soon leave my parents, I shall join my husband as a healthy person and any illness that might befall me will not be the concern of my family but that of my husband's family."

All my informants failed to give reasonable explanation as to why these marriage payments must be made. They were all agreed, though, that non-payment does not invalidate the union between a man and a woman. My own conclusion, after listening to the discussions that took place in the villages that responded to my research programme, is that these payments are an indication and a token that both families in the alliance are happy and satisfied with the marriage negotiations.

(5) Marriage ceremonies

I propose to conclude this chapter on the contract of marriage by referring to the role that ceremonies play in Zunbuk customary law marriages. Almost without exception, marriage ceremonies have no legal significance. For this reason, not every marriage is preceded by a ceremony. I.e. ceremonies need not be held at all. The absence of ceremonies does not invalidate the legal rights of husband and wife. Ceremonies have, however, a social and moral value. The most important ceremony is the Muthimba - Wedding ceremony.

Kuthimba marks the climax of marriage negotiations. Preparations are set in motion soon after the two families have agreed upon the date of the wedding ceremony. On the eve of the wedding day, the girl's party, excluding her father and mother, escorts her to the boy's home. They normally arrive in the evening and are met at the cattle kraal by the boy's party. A snuff bottle, fuko, is handed to the elderly men in the boy's village, ndoda. The bride herself performs the act of handing in the snuff bottle. The act so performed is called kutyanda. Meanwhile, the whole village is turned into a hive of activities. Men, women, boys and girls perform traditional dances all night. The following day both the bride's family and the bridegroom's family offer each other an ox or a goat. The beasts so offered are slaughtered to feed the visitors attending the ceremony. Beers are drunk and this is an occasion for end of great rejoicing, let alone, conviviality. At special ceremonies held in the early hours of the day attended by both the bride and the bridegroom separately, lectures are delivered on the need to preserve the sacredness of the institution of marriage.

In the evening of the day of the wedding festival, the bride is escorted to the bridegroom's house. Cohabitation takes place after which marriage

is consummated. The husband reports to his family the following day whether the girl was a virgin or whether she had allegedly been deflowered prior to his cohabiting with her. On her part the wife returns to her parents' home to report how many times during the first night the husband cohabited with her. The wife's report serves to indicate whether her husband is sexually potent or whether there is need to administer medicine to the husband to make him virile.

One fascinating observation about a typical customary law mwthimba ceremony is that custom does not require the bride and the bridegroom to wear special attire for the occasion. This is in clear contrast to wedding ceremonies associated with statutory marriages where in many cases, decorum calls for special attire for the occasion.

As already discussed, not all families opt for mwthimba ceremonies. Some parents arrange for their daughter to be escorted to the boy's home without elaborate ceremony. This is called chilinda - escorting. Little pomp and pageantry attend the chilinda ceremony. Sometimes a boy arranges with the girl to elope. If a boy abducts a girl without first obtaining her consent, such action is called chikumu - abduction. Abduction is a serious actionable wrong which is seldom condoned by Tumbuka customary law.

Great force is applied in abducting a girl and as force is used, chikumu has been described as applying the law of the jungle.

A chikumu marriage is seldom validated; the girl abducted is collected back by her parents and no negotiations to validate the marriage contract are entertained. Strictly speaking, chikumu is not classified as a marriage ceremony for the element of consent is absent. In Nehemiya Banda V Yokoniya Gondwe,[1] Gondwe abducted Neliya Banda, daughter of Nehemiya, without obtaining Neliya's consent. Phikamalaza Local Court sitting in November, 1942, upheld Nehemiya Banda's refusal to negotiate so as to give her daughter away in marriage to Gondwe and in this way validate the contract. One local court justice observed:

> "Women must be free to move about without molestation. They must be free to choose [illegible] they want to marry. It is, the [illegible] chikumu [illegible] marriage - leave police."

Nehemiya was ordered to deliver to Banda an ox as damages.

Having concluded our discussion on ceremonies and their place in customary marriages I now proceed to examine types of marriage.

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1. Phikamalaza Local Court, case No. 18, 1942 (unreported).

CHAPTER IV

TYPES OF MARRIAGE

Under the law of England a marriage is valid if it satisfies the requirements of a valid marriage. These requirements are capacity to marry, consent and marrying outside prohibited degrees of relationship. On the other hand, "a marriage will be void if either party lacks capacity to contract it or if the ceremony is formally defective. It is voidable if it needs a decree to annul it while the former being void ab initio needs no decree to annul it."[1]

It is apparent from the above that the classification of marriage under English law is largely determined by the conditions which must be satisfied before a marriage can be said to be valid, void or voidable. Under Tumbuka customary law, marriages are classified on one ground only namely, ceremony. We have thus:

(a) Muthimba marriage

(b) Chilinda marriage

(c) Chisompola marriage and

(d) Chikumu marriage

Let us briefly examine each type of marriage.

(a) Muthimba marriage

This is a marriage which is climaxed by a wedding ceremony for muthimba means 'wedding.'

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1. Bromley P.M. Op. cit., P 71

As we have already noted in the preceding chapter, muthimba is the most accepted type of Tumbuka customary marriage. When the boy has obtained the consent of the girl he wishes to marry and the two families have also given their consent, a go-between is sent by the boy's family to the girl's family to start marriage negotiations. The negotiations are sealed by the payment of chamulomo, fuko and mabeka as already indicated. These marriage payments, which have been fully described in the preceding chapter, are a necessary pre-requisite to the arrangements for a muthimba ceremony. It is worth noting, though, that mabeka - bride price, need not be paid in full. The girl's parents may agree to have mabeka paid in instalments long after the wedding ceremony. As will be seen from table 1, divorce action by one of the spouses in a marriage blessed with a muthimba ceremony is rare for such an action is viewed as a disgrace. Whenever there is some misunderstanding, therefore, between a husband and his wife that is likely to give rise to divorce action, the two families in the alliance make every effort to reconcile the spouses so that divorce action is prevented. The publicity given to the wedding ceremony is such that any divorce petition by either party is frowned upon by members of the community that attended the wedding ceremony and who by their very attendance gave their moral and

public support to the union. Most of the men and women I interviewed and who took part in the group discussions were agreed that muthimba marriages are not easily dissolved.

If a muthimba marriage is not blessed with children because the woman is barren, the young sister of the woman is given to the husband in marriage so as to raise seed for the family. This is the institution of mbiligha. By providing a girl who is related to the wife divorce is obviated. Mbiligha may also be provided in situations where the family of the wife is satisfied that their son-in-law looks after their daughter well. Similarly, if the husband is sterile, arrangements are made whereby a relative of the husband is made to enter his house. Any children born belong to the family. Tumbuka elders and local court justices are usually very reluctant to terminate muthimba marriages. The measures described above are intended to stabilise such marriages.

We have already noted that according to Tumbuka custom an impotent husband asks a relative to copulate with his wife so that she may have children. This course of action is justified partly on the grounds that it saves a muthimba marriage from disintegrating. It may be argued that this custom is a violation of the 'Repugnant Clause' which gives

validity to customary law. We have observed that Tumbuka men and women conclude a marriage contract primarily because they want to produce children. They will, therefore, connive at any measure that will make a woman have children. There is no doubt in my mind, though, that this custom is repugnant to natural justice and morality as it does appear to encourage promiscuity. Ironically, my inquiries revealed that there has been practically no litigation in this field.

This abhorrent custom is not peculiar to the Tumbuka. The Ngoni of Chipata and the Tswana of Botswana have a similar custom. It must be emphasised that although custom requires a sterile man to call in a seed-raiser, the whole matter must remain secret. Barnes in Marriage in a changing society observes:

> "A man may be impotent and may ask someone to copulate with his wife so that she may have children. This man coming to copulate with his wife comes in secret as it is considered a disgraceful thing among the people of the family and the rest of the village if they know, yet the people in the village know very well sometimes."[1]

Schapera in Tswana Law and custom refers to the existence of this custom among the Tswana.[2]

This custom is, however, dying out among the Tumbuka, Ngoni and Tswana.

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1. Barnes J.A. Op. cit., P 13.
2. Ibid PP 13, 94.

It is appropriate at this stage to refer to levirate and sororate institutions. Levirate is exemplified by the customs of the Hebrews. When a man dies and his wife has not passed the age of child-bearing, it is the duty of the man's brother to cohabit with the widow in order to raise children, who will be counted, not as his, but as children of the deceased. The widow remains the wife of the dead man, for whom the brother is a surrogate and this not strictly speaking her husband.[1] Widow inheritance is a different Tumbuka custom in which a brother takes over the position of husband and father to the widow and her children in a muthimba marriage. On the other hand, if a woman proves to be barren as already seen under Tumbuka customary law her kin will provide a sister to bear children who will be counted as children of the barren wife. This is the sororate institution[2] which is also designed to safeguard the sanctity of muthimba marriages. As a result of these measures, in traditional Tumbuka Society divorce was, as will be discovered later, either unknown or very rare indeed. This picture has, however, slightly changed today as Table 1 shows.

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1. Barnes J.A. Op.cit., P 13
2. Ibid PP 13, 94.

Table 1 Incidence of divorce at 22nd December 1980

Muthimba Marriages

Chief's Area	No. of Marriages Studied	No. of Muthimba Marriages	No. of Divorce Muthimba Marriages	No. of Other Divorces	Total No. of Divorces
Magodi	15	7	2	2	4
Phikamalaza	8	4	1	2	3
Mphamba	7	4	2	1	3
TOTAL	30	15	5	5	10

Informants used	Potential	% used
Men 30	60	50
Women 20	25	80
TOTAL: 50	85	65

It will be concluded from the above table that divorce in muthimba marriages, although rare in olden days, has become a common phenomenon today.

(b) Chilinda Marriage

The second type of marriage is the Chilinda - escort/ accompany - marriage. The ceremony in this type of marriage simply comprises the escorting of the bride by a few specially selected elderly women to the bridegroom's home. To avoid unnecessary lavishness that is associated with Muthimba marriages, arrangements are made by both families

to have the girl transferred to the man's house without much ado. In the evening the bride is escorted to her husband's village or home if the spouses live in the same village. Less elaborate preparations are made for this ceremony. The elderly women who accompany the girl take basic items such as cooking utensils mealie meal, chickens and other food stuffs to start the girl off in her new home. She is also lectured to on basic issues that she must observe to keep her marriage happy and prosperous. Chilinda marriages are as sacred and as valid as muthimba marriages. Out of fifteen families that I interviewed in chief Magodi's area, eight testified that their marriages were chilinda marriages. It would be safe to conclude from the foregoing that with the advent of a modern money economy most young men in rural areas opt for chilinda marriages. Traditional muthimba marriages are becoming fewer and fewer. The third type of marriage is the chisompola marriage.

(c) Chisompola marriage

This is the third type of marriage under Tumbuka customary law. Chisompola means 'elopement'. The man runs away with the girl who has given her consent to marry him. Sometimes the consent of the parents to marry the girl will not have been obtained.

The boy discusses his intentions with the girl and the two arrange mutually the day when the boy should take her away, sompola, from her parent's home. As soon as the elopement has taken place, the girl's parents despatch a messenger to the boy's home. The boy's family acknowledges the presence of the girl in their village by sending through this messenger, who may turn out to be the go-between, a cow or a goat to the girl's family. This action is followed by the usual negotiations for marriage payments, that may be outstanding at the time of the elopement. The settlement and payment of bride price conclude the marriage contract. This type of marriage is as valid as the other two types already discussed. We shall now examine the fourth type of marriage - chikumu marriage.

(d) Chikumu Marriage

It is a contradiction in terms to refer to chikumu - abduction - marriage as a valid marriage. This is a 'marriage' where a man runs away with a woman without obtaining either her consent or that of her parents. Force characterizes the ceremony. The boy waylays the girl he loves and admires but without first obtaining her consent. In rare cases this may be the girl the boy proposed love to but whose proposal was turned down by the girl. Using physical force the girl is abducted away. A search for the girl is organised by her parents. If the search has been successful, a party of men from the girl's village is

sent to the boy's village to go and 'rescue' the girl. If the girl has been away for a night or more, it will be presumed that she has been deflowered. Arising from possible deflowerment the girl may be unwilling to return to her parent's home. The boy is nonetheless ordered by elders at the local court to pay damages. This usually takes the form of an ox. The damages are paid for chiranga - audacity to abduct. Chiranga is regarded as an insult to the integrity of the girl's family and it is for this reason that attempts to validate this type of marriage are usually met with stern opposition. If, however, the girl is a chikuya - mother of an illegitimate child - the validating of a chikumu marriage becomes one of formality.

Under Tumbuka customary law we have, therefore, four types of marriage. The fourth type is, strictly speaking, not a type of marriage. It is in fact the validation after the consent of the girl's parents has been obtained.

We now proceed to analyse fully the rights and duties, that devolve upon spouses who contract such types of marriage.

CHAPTER V

RIGHTS AND DUTIES OF SPOUSES

As we have already noted, Tumbuka customary law treats marriage as a contract. It has also been noted that marriage under customary law is more than a contract between two individuals being more in the nature of an association of two families. This means that the customary law does not know individuals and, therefore, a union between a man and a woman, even though they be of full age and consenting, can at best only be a de facto marriage until it is formally ratified by both families.

But, although the families are the contracting parties, husband and wife also have mutual rights and duties that flow from the marriage contract. 'Marriage, like any other social relationship, establishes special rights and duties among the people concerned. As between husband and wife, it involves community of daily life and economic interests, exclusiveness of sexual relations, and mutual services of various kinds. It further creates a series of reciprocal obligations between the wife and her husband's people, and between the husband and his wife's people'.[1] It is these different rights and duties that devolve upon spouses that must now be considered.

1. Schapera I., Op.cit., P 148.

Marriage is a contract of a dual nature, for both families and their nominees engage themselves to perform duties, as well as to enjoy rights. This is the essence of any contract. Most of the terms of the contract arise ex lege, that is they are not the subject of negotiation but form part of the customary law itself and are read into every contract of marriage other than a written contract. Some few, on the other hand, arise ex contractu and the majority of the ex contractu obligations occur in the family portion of the contract. For instance, the actual agreement to marry and the amount of the bride price are all matters to be settled by negotiation. On the other hand, each family, by Tumbuka custom, impliedly warrants that their representative (boy or girl) is insane, potent and suffers from no serious latent physical defect. Breach of any of these warranties is good ground for setting the contract aside. At one time, as already established, it was the duty placed on the wife's family to provide a substitute on her death or if the wife was proved barren. All these obligations occur in the family portion of the contract. Our main concern in this chapter is to examine rights and duties of a more personal nature binding the husband and wife individually and inter se.

The husband's general position vis-a-vis his wife or wives is that he is the founder and legal

head of the family. Chinwuba Obi argues that it is against this background that he, the husband, never considers himself obliged to obey his wife. On the other hand, he demands that his wife obey him.[1] Under Tumbuka customary law a husband has a right to chastise or otherwise correct his wife, if this is called for, for misconduct which infringes his rights or threatens his position as husband and head of the household. Examples of such misconduct are indolence or keeping bad company in spite of his admonition. On the other hand, the husband is under a duty to protect his wife. This duty is not the monopoly of the husband for each spouse owes the other a duty of protection from danger to life and limb according to their abilities.[2] The husband is also under a duty to clothe his wife, provide her with medicine in sickness. In this connection Barnes observes:

> "The obligation on a man to clothe his wife is the most clear - cut and obvious duty in marriage. It is the failure to clothe that is usually cited as evidence of desertion when a woman seeks a divorce"[3]

There is no specific standard to which a husband must clothe his wife, but she usually insists that she is not to be more poorly clad than her neighbours.

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1. Obi Chinwuba S.N., Modern Family Law in Southern Nigeria, Sweet and Maxwell, 1966 Edition, P 205
2. Chinwuba Obi, Op. cit., PP 205-6
3. Barnes, Op. cit., P 42

By far the most important duty the husband is expected to perform is to cohabit with his wife. This is generally referred to as the spouses' right to consortium. Rights to consortium are rights to share a common domestic life. Each spouse owes the other a duty to satisfy that other's reasonable demands for cohabitation. What are "reasonable demands" is a question of fact to be determined with reference to the ages, health, temperaments and biological needs of the parties. Discussing sexual relations among the Tswana Schapera states:

> "By marriage a man acquires the sole right to sexual intercourse with the woman who becomes his wife. At the same time it is the duty of a married man to avoid sexual relations with women, whether married or not, other than his wife or wives. Marriage thus imposes upon husband and wife certain rights and duties in regard to sex. Neither may refuse the other rights of sexual intercourse. The wife is explicitly told by the old women at marriage that she must always be willing to gratify the sexual desires of her husband; and according to custom she must always go to bed before him, so that when he comes into the hut he may find 'the blankets warm'."[1]

Schapera qualifies this statement by pointing out that "it is not infrequent that after a quarrel she will attempt to prevent her husband from cohabiting with her with the general result that he either beats her or visits a concubine."

"The husband in turn is expected to sleep regularly with his wife, so that she may have every opportunity of bearing children. Should he refuse

1. Schapera I., Op. cit, PP 153-4.

to consummate the marriage or neglect his wife for a concubine, he is failing in his duty towards her."

To return to our discussion on Tumbuka customary law, it is striking to observe that in the past Tumbuka customary law gave a husband the right to attain his legal rights to cohabitation by using, quite often, reasonable force. This was probably because a man would normally find it difficult to determine whether his wife's refusal, especially when young, was genuine intended to be final, or merely inspired by modesty, or else just a preliminary to extracting a favour from him. All my informants[1] gave this explanation to justify the use of reasonable force by the husband on his wife.

The husband is also under a duty to help his wife to cut trees and hoe in the common garden, to house her and generally to perform for her the tasks commonly alloted to men. As under any other African customary law, the duty to provide sustenance as well as shelter for the household under Tumbuka customary law is primarily that of the husband. Failure to provide shelter could lead to divorce as this act would be construed as an indication of the husband's unwillingness to cohabit with his wife.

The Lozi of Western Province regard the duty of a husband to give his wife at least one garden as

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1. See Appendix II.

paramount. Max Gluckman in "The ideas in Barotse Jurisprudence" makes an interesting observation:

> "A man is compelled to give each of his wives at least one garden of reasonable size or she can claim a divorce, but a wife does not transmit rights in her garden to her heirs - not even to her children by her husband as against his children by other wives, as is the case in South African tribes."

Once given a garden a wife has claims on the garden against her husband, and if he does not recognise his obligations to accept her "ownership" she is entitled to a divorce. The failure by a Lozi husband to provide a garden is, according to Lozi custom, a ground for divorce. Perhaps this is understandable. Fertile, arable land in Western Province is very scarce. Scarcity of fertile, arable land has enhanced the value of land in that part of Zambia.

One other interesting legal point I wish to refer to before leaving this subject of duties that a husband is supposed to perform in the matrimonial home is that under Tumbuka customary law a woman has a right to retain her maiden name. The notion of a married woman being referred to as "Mrs. Banda", for instance, is alien to customary law. She continues after marriage to be addressed by her parent's family name. What is the significance of this? My informants explained that a married woman is addressed

by her family name for the sole purpose of keeping her family or clan identity.

It is a truism in the law of contract that every duty has a corresponding right. As has already been pointed out the husband is under a duty:

(1) to protect his wife

(2) to clothe her

(3) to provide her with medicine in sickness

(4) to cohabit with her

(5) to help her to cut trees and hoe in the common garden

(6) to house her and

(7) generally to perform for her the tasks commonly alloted to men.

In return for performing the above duties, he has the right to cohabit with her to the exclusion of all others, to correct and, at the same time, to chastise her for good cause. We have already referred to this point in our discussion on the husband's general position vis-a-vis his wife or wives. The husband also has the right to have his food cooked for him, to have his wife help him in the common garden, to have her provide hospitality for his friends, and brew beer for him, to make pots for him and to perform such other duties as are commonly alloted to women.

The husband has the additional right to demand to cohabit with his wife and failure to do so is a ground for divorce.

One fascinating fact about this is that he does not, however, contract to cohabit with her to the exclusion of others and, therefore, his wife has no valid cause for complaint if he marries a second wife. In the converse case, however, the husband enjoys the exclusive right of cohabiting with his wife and her adultery affords ground for divorce. From the foregoing it will be readily deduced that what are normally considered a husband's duties towards his wife are his wife's rights and vice versa. It was revealed to me by my informants[1] that under the Tumbuka customary system, the higher the bride price paid, the more the husband is relieved from rendering services to his mother-in-law. The high lowola - bride price, cancels out the need to render service to his wife's parents such as hoeing in their garden. He is also under no liability, after paying high bride price, to pay 'blood money' on the death of the wife or her children.

Among the Chewa of Lundazi, marriage services are mandatory. The work required of the husband is that which is normally performed by men such as cutting poles, building huts, hoeing in the gardens

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1. See Appendix 11.

and so forth. The services rendered are not computable in terms of money and no allowance is, therefore, made for them on divorce. It has been suggested that the need for a Chewa husband to render marriage services arises as a result of the requirement that he stays at the wife's home. As for 'blood money', the liability of the husband to pay mtupa, blood money, on the death of his wife or child arises from the doctrine that anyone who actually has, or is deemed to have, another in his care is absolutely responsible for any ill which may befall his charge. Marriage is thought of as such a relationship.

As we have already seen one effect of marriage payments is that the husband acquires rights over his wife's domestic and sexual services including the rights to sue for damages for adultery. Under Tumbuka customary law two remedies are open to a husband whose wife is guilty of adultery. These are reasonable chastisement and divorce. We shall return to divorce when we discuss termination of a customary marriage. The third remedy that is available to a husband whose wife has committed adultery is difficult to classify as a legal remedy. This consists in sending the wife to coventry, that is to say, refusing to eat or sleep with her.

In cases where the remedy of chastisement or divorce is resorted to, claims for damages are made. It is generally agreed that damages for adultery are compensatory, not punitive. They are designed to compensate a husband for the loss of his wife's society and comfort which inevitably flows from the adulterer's wrongful act, for the injury to his feelings, for the blow to his marital honour, for the hurt to his matrimonial and family life, and for any economic loss sustained by him as a result of co-respondent's breaking up his marriage.

It is difficult to assess damages for adultery for no amount of money, however substantial, can compensate a husband adequately for the injury he has suffered as a result of the co-respondent's wrongful act. The essential points to be considered, however, in assessing such damages are:

The value of the woman concerned as a wife, mother, house-keeper and source of income; the nature and extent of the injury to the husband's feelings - this is difficult to determine; the conduct of the parties. In this regard it is necessary to determine whether the woman had been the prime mover in the illicit relationship and finally any other aggravating or extenuating circumstances, such as the adulterer's knowledge or ignorance of the fact that the woman was married, whether, in particular the woman had put herself up as a single woman. Some of the aggravating circumstances that may influence the assessment of damages are adultery with a chief's or a headman's wife. Adultery with a school girl has similarly, in most cases, resulted in heavy damages.

In the past it was firmly believed that under Tumbuka customary law the prime duty of a wife was to bear and bring up children. The law on this point has undergone some slight modification. While the bearing and bringing-up of children is still accepted as one of the duties of a woman, the bringing-up of children is today the responsibility of both the husband and the wife.

In the following chapter I intend to discuss termination of a customary marriage.

CHAPTER VI

TERMINATION OF CUSTOMARY LAW MARRIAGE

Discussing the basic principles and tendencies involved in the dissolution of the Shona marriage, Holleman states:

> "The dissolution of a marriage according to Shona law is based upon an agreement between the two families who originally concluded the affinition agreement, to terminate their relationship by a liquidation of the assets involved in the marriage. A marriage can under no circumstances be dissolved by the unilateral action of one of the families or individual spouses."[1]

Whereas this is the position regarding the dissolution of a Shona marriage, the same principle cannot be said to be a dominant feature in the dissolution of a Tumbuka customary marriage. A husband, acting in concurrence with his family, can by unilateral action repudiate his wife and in this way cause the marriage to be dissolved. I shall now discuss the various reasons which may lead to the dissolution of a Tumbuka marriage.

The Statutory marriage[2] in Zambia may be terminated by death of either spouse or by a decree of dissolution or divorce pronounced by a court of competent jurisdiction. Under customary law, however, death per se is not recognised as a cause for terminating marriage. Marriage provides the basis of the contract

1. Holleman J.F., Op. cit. P265
2. Cap. 211, Op. cit.

not only between spouses but between the family of the bride and that of the bridegroom. Death of one of the spouses does not, therefore, automatically dissolve marriage which is a family contract.

According to Tumbuka custom, on the death of the wife, a substitute known as mbirigha is provided and when a husband dies, it is the accepted practice among the Tumbuka to give the wife a substitute. If the widow refuses to be inherited, she must take proceedings to obtain a divorce and the rules as to divorce then apply. At one time the death of the wife likewise did not disturb the marriage. If there was already a mbirigha in the house, she succeeded to her deceased kinswoman; if there was not; a substitute was provided without additional payment. In the cases where they are provided, the Tumbuka custom of requiring an additional bride price payment known as the chakuwonga (thank you), usually consisting of one beast, is insisted upon. Where no substitute is provided the return of lowola becomes an issue. The amount which is returnable depends on whether or not there are living children of the marriage, how long the marriage had been in existence and what proportion of the lowola/thumba has already been paid. Taking first the case where there are no children, the wife's guardians are entitled to a sum of money, not it is said, by way of blood money but in recognition of the services rendered by the wife to her husband. As to

how much money must be paid varies from family to family but if the marriage has been in being for some considerable time, the sum of money involved is much greater. If the husband has paid lowola/thumba in full he is entitled to its return less the money mentioned above. If he has paid nothing he is obliged to make up the deficit. This payment is known as Ng'ombe ya masozi, 'the beast of tears.' Where there is living issue at the time of the wife's death and the husband has already paid the lowola/thumba in full, he retains the custody of the children but is not entitled to any return of the marriage payment. If he has not paid in full, he has the option of either making up the balance and having the custody of the children or paying what has wrongly been referred to as 'blood money' and losing the children.

It is debatable whether the mbirigha practice is a violation of the 'Repugnant Clause' already discussed. As long as the girl consents to become a co-wife, it is difficult to sustain the contention that the practice is a violation of the 'Repugnant clause'. Unfortunately there has been practically no litigation in this area to throw some light on this point of law.

Barnes states that among the Ngoni the death of a wife brings the marriage to an end. This is so because the institution which obtained in the old days whereby the dead woman was replaced by a linked co-wife, has now all but disappeared.[1]

1. Barnes J.A., Op. cit., P94.

Before concluding these general introductory remarks on termination of a customary marriage, I wish to cite White's statement: Death, in instances where it terminates marriage, does not involve any judicial act unless a death sentence is involved. "Divorce can be accomplished without recourse to a Local Court, but most divorces do take place through judicial action, and even if the divorce is arranged without formal judicial proceedings..... the divorced wife would normally wish to have the safeguard of a divorce certificate."[1]

I now propose to discuss the concept of divorce itself. Divorce, in traditional African society was either unknown or very rare indeed. The institutions of bride price and inheritance were factors that made divorce a rare phenomenon. If a wife, for example, was barren a girl who was related to the wife, as we have already noted, was provided to the husband and children born by the said girl were regarded as children of the barren wife. We have also noted that similar arrangements were made in instances where a husband was sterile - a relative of the husband would have sexual intercourse with the wife. Because of these arrangements, elders were very reluctant to terminate a marriage. One of the elders' roles in marriage was first and foremost to try and reconcile the parties. What is divorce, it may be asked?

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1. White C.M.N., Op. cit., P94.

Divorce is a rescission of the original contract and, as the original contract is a family contract, it follows that both the contracting parties should participate in the annulment. But this does not rule out the possibility of a husband taking unilateral divorce action, contrary to Holleman's[1] view that the two families and spouses must always participate in the annulment. Under Tumbuka customary law in divorce by mutual consent, both families meet formally and the wife hands her husband a string of white beads, while the husband drives an arrow-head into the ground as formal evidence of renunciation. This formal act is known as kusuzula, to untie, and signifies the loosening of the bond hitherto binding the families. This procedure has undergone some modifications and the modern practice is for all divorce proceedings to go before a Local Court. Where a divorce is allowed, it is usually the party seeking it who pays the court fee which is called the musuzule - you divorce him/her, and is the modern equivalent of the beads or the arrow-head that used to characterise the former divorce proceedings. After a divorce has been granted, a woman is given a certificate and is free to re-marry.

Upon divorce a man is entitled to claim repayment of the whole or part of any money, goods or stock which he paid in consideration of the uxorial and genetricial rights granted to him provided,

1. Holleman J.F. Op. cit. P265.

however, as already discussed that a court may disallow part or the whole of any such claim where there are children of the marriage. This means that in principle upon divorce a man may recover payments in respect of uxorial rights, but it is becoming increasingly common for him to forego them where there are children of the marriage.

At the time of divorce a court may order either spouse to pay such compensation to the other as it considers that the justice of the case requires. A woman takes any property which she has acquired by her own efforts or from persons other than her husband.

Having discussed the concept of divorce, it will now be necessary to examine in some detail specific grounds for divorce although these grounds, per se, may not lead to the dissolution of marriage. A court may order divorce if it is satisfied that the marriage is no longer capable of continuing, that is to say when the marriage has irretrievably broken down. While circumstances such as

(a) persistent cruelty or misconduct,

(b) failure to maintain a wife or

(c) failure to cook for a husband or

(d) impotence or

(e) adultery by the wife are not individual and specific grounds for divorce, they are factors which may make a Local Court conclude that the marriage can not be allowed to continue. The court may reach such

a conclusion after an overal assessment of the reciprocal relations between husband and wife without any more specific single grounds. A husband's grounds for divorce need not be the same as those for the wife. Let us examine each spouse's possible grounds for divorce:

(a) Husband

As a general rule a husband is entitled to claim a divorce if his wife:

(i) has committed adultery or

(ii) if she has refused to cohabit with him - the ground in this instance is one of desertion; or

(iii) if she is persistently cruel or if she

(iv) is barren and no sustitute has been provided by the wife's family or

(v) if she has been accused of being a witch or if she

(vii) has failed to perform her domestic duties including failure to help in the common garden.

(b) Wife

The wife on her part, can claim a divorce if

(i) her husband fails to cohabit with her or deserts her. She may also claim a divorce if she has been asked to be inherited more than once or

(ii) if her husband does not provide her with clothing or medicine when sick i.e. if he is cruel or

(iii) if he fails to do his part of the work in the household or in the common garden or if

(iv) the husband is impotent or

(v) if her husband has been guilty of revolting or immoral practices including breaches of taboo. Let us now consider these factors in some detail although not necessarily in the above order.

(a) A husband's grounds for seeking divorce

(i) Adultery

Adultery is the most prevalent ground for seeking a divorce. A husband is entitled to claim a divorce if his wife has committed adultery. What is adultery? Under English law adultery is defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other. In order that adultery should constitute a ground for a divorce, therefore, the defendant must have had sexual intercourse with someone other than the complainant since the celebration of marriage.[1] Under customary law, however, adultery is defined as sexual intercourse between a married woman and a man who is not her husband.[2] Sexual intercourse between a married man and an unmarried woman is not regarded as adultery under customary law. Writing on adultery White observes:[3]

> "Adultery cases are based upon the principle that a man may seek compensation for an infringement of his exclusive right to the sexual services of his wife."

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1. Bromley P.M. Op. cit. P 181.
2. White C.M.N. matrimonial cases in Local Courts in Zambia: 1971: J. AL. Vol. 15 No. 3 P255
3. White C.M.N. Op. cit. P255.

It is pertinent to note that "evidence of actual sexual intercourse is rarely available in adultery cases, and the courts must rely on circumstantial evidence and presumption". Among circumstantial evidence and presumptions White cites the following:

(a) Giving a man's wife a lift on a bicycle or in a car;

(b) Giving presents to a woman without her husband's knowledge.

The Courts have, however, largely, relied on a woman's admission of adultery with a named man. The woman's admission raises a presumption which would be very difficult to rebut even if it is uncorroborated. This point was accepted by the High Court in an appeal in Daniel Samuzala V Saulo Ngonga.[1] The facts of the case were as follows:

> "The respondent charged the appellant in the Manyinga Native Court with adultery with his, the respondent's wife. The Court found for the respondent and fined both the appellant and the woman. During the trial the wife had given evidence to the effect that the appellant had committed adultery with her; the trial Court accepted this evidence rejecting the appellant's denial.
>
> The appellant appealed to the District Commissioner's court, his appeal was dismissed and he now appealed to the High Court. One of the grounds of appeal was denial of the adultery. In dealing with this point the District Commissioner had pointed out that it is customary in Native Courts in cases of adultery to accept the evidence of the woman unless clearly shown to be untrue".

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1. (1951), 5 N.R.L.R., 781.

On appeal before the High Court held on 5th May, 1951 it was held:

"(1) The High Court will not upset the decision of a trial Court on a question involving the credibility of witnesses without strong reasons for doing so.

(2) In an appeal from a Native Court it is not for the appeal Court to substitute English rules of evidence for native law and custom. Accordingly, as the evidence of the woman had not clearly been shown to be false it was impossible to hold that the decision of the Native Court was wrong on that point".

In this connection, it is pertinent to refer to the observations made by Resident Magistrate J.G. Fearnley Scarr on this point of customary law:

> "It is understood that the native custom is based upon the fact that it is so shameful a thing for a native woman to stand up publicly in Court and admit adultery, an offence which in native eyes may possibly bring bad luck and misfortune to the person confessing thereto, that it is unlikely such a confession would be made unless it was true."[1]

Scarr's observations sum up the stand taken by most Native Courts in cases of adultery regarding a woman's evidence.

Gluckman makes a similar observation when he points out that generally in charges of adultery

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1. Resident Magistrate of Northern Rhodesia - Editor of the law Reports.

a wife's admission that a man is her lover requires rebutting, but if he denies the allegation other circumstances should convict him.[1] He cites the case of A who committed adultery with H's wife. H seized A's stockings to keep as proof. When H reported the admitted adultery to the Kuta, local court, the Kuta convicted A on the evidence of the defendant's stockings. Presumptions in Lozi customary law play a significant role in cases of adultery. Men have been convicted for merely talking to other people's wives. A man who behaves familiarly with another's wife is usually found guilty of 'adultery' whether or not he is proved to have slept with her. Convictions for adultery rest on the presumption that no man can have platonic relations of acquaintanceship, let alone friendship, with an unrelated woman.

In Tumbuka customary law, adultery may not, per se, lead to divorce. The husband may pardon his wife or connive at her act of adultery and if the spouses have reconciled, divorce proceedings are not necessary. But actions for adultery are always liable to turn into divorce cases, and the amount of damages awarded depends on whether, or not a divorce is granted. If adultery is proved, and it is easier to prove than to disprove it as we have already noted

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1. Gluckman M., The Judicial process among Barotse of Northern Rhodesia: 1955: Manchester University Press, P 106.

the woman and her lover pay damages to the husband and a fine to the court. In Dinira V Sani[1], Dinira, wife of Chirungamtewa, complained that Sani of Musolola's Village had committed adultery with her in the bush near Chirungamtewa's village. She had gone out to look for mushrooms for cooking. District Commissioner Hall ramarked:

> "I feel certain that Sani did lie that day with Dinira. Whether the circumstances amounted to an actual rape I do not feel at all sure; it is a question of the amount of pressure to which Dinira yielded. I sentence Sani to 6 months imprisonment with hard labour."

Chirungamtewa told the court that he did not want to divorce his wife. It is ironical that the court awarded him no damages.

In Mlapula V Dengere[2], Mlapula complained that Dengere of Kapalakonje's Village had committed adultery with his wife Lukonde. Lukonde admitted that Dengere caught her one day at her rice plot and had connection with her by force. As force was used in this case, the act did not constitute, strictly speaking, adultery. For adultery to be established there must be a degree of consent. The court ordered Dengere to pay 10/- (K1) compensation to Mlapula and 2/6 (50n) costs to the court. The petition for divorce on the grounds of adultery was dismissed.

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1. Lundazi Native Court, Case No. 145 of 1939.
2. Lundazi Native Court; Case No. 272 of 1950.

Another adultery case is worth citing. In Siria of Kampasa Village V Yotamu,[1] Siria Vundiri brought an action against his wife on the grounds that his wife had not only deserted him but committed adultery with Yotamu. Siria stated that he had married his wife Vundiri when she was young. She had borne him a female child who at the time of the petition was 3 years old. He had gone to Harare, Zimbabwe, to work and when he returned he found his wife with Yotamu. Yotamu admitted he had married Vundiri because for two years she was without a husband. The court allowed the divorce petition on the grounds of adultery and Yotamu was ordered to pay Siria £1 (K2) damage. Siria was to have custody of the only child of the marriage.

It may now be stated that while adultery may be a factor that might lead to a dissolution of marriage, it is not necessarily a ground by itself for divorce - Dinira V Sani and Mlapula V Dengere cases already cited are illustrative of this point.

(ii) Desertion

A husband is entitled to claim a divorce in Tumbuka customary law if his wife has refused to cohabit with him. The ground in this instance is one of desertion.

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1. Lundazi Native Court, Case No. 15 of 1960

In Chinyunje V Chisenga[1], Chinyunje petitioned his wife for a divorce on the grounds that his wife had left him to go and live with her father because "I am now blind". Chisenga stated that she had left her husband because he was continually ill-treating her and she was afraid that some day he would kill her.

The Acting Native Commissioner gave the plaintiff custody of one child, Mlopa, when it was old enough to leave its mother. The other child, Chiwalo, was to remain in the custody of the mother who might remarry if she wanted to. The divorce petition was granted on the ground that the wife had deserted the husband. Desertion as a ground for divorce does not always succeed. An illustration of a petition for divorce by a husband on the ground of desertion by a wife which was not allowed is Mpokoko V Mulemela[2].

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1. Lundazi Native Court, Case No. 188 of 1908.
2. Lundazi Native Court, Case No. 201 of 1908.

The defendant deserted the plaintiff and went off to her home at Tembo's Village. The defendant stated that she had left her husband because he had neglected her by not buying her clothes and other necessities, and by not eating food at her house. The defendant's evidence was rebutted by the plaintiff's father. The acting Native Commissioner refused to divorce Mulemela because she had no grounds that he could see for leaving her husband. On the other hand, the divorce was granted in Tepa Tepa V Chirutizka[1] on the ground that the wife had deserted the husband and got married to another man. The plaintiff complained that his wife had gone to visit her mother at Mtiwa's Village in Nyasaland (Malawi), but she did not return and was now married to Mandowa - a man of that village. Although she had deserted he wanted her back. The wife averred that she left her husband because he was not looking after her well. The court held that Chirutizka should remain with her present husband and retain custody of her child by sitoro, her present husband. Sitoro was ordered to pay Tepa Tepa six shillings - 60n - as refund of the amount expended by Tepa Tepa in taxes on her, Chirutizka's hut. It is surprising that no other damages were awarded to Tepa Tepa. A local court today would not only have allowed the petition for divorce but would have awarded damages to Tepa Tepa.

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1. Phikamalaza Local Court, case No. 3 of 1958.

As will be discussed later desertion as a ground for divorce is not a monopoly of men alone. A woman may also petition her husband for divorce if her husband has deserted her. In point of fact it is easier for a woman to prove desertion than a man. As Barnes observes, the woman who pleads for divorce under Ngoni customary law on the ground of desertion is usually the wife of a labour migrant.[1] Several Ngoni men migrate from rural to urban areas for work leaving their wives for considerably long periods in rural areas. On this point, and indeed on a number of points, Ngoni customary law is similar to Tumbuka customary law. It has already been stated that both the Ngoni and Tumbuka are patrilineal. In this regard, White has noted:

> "Historically the Tumbuka have passed through two or three periods of culture change. The last of these was due to Ngoni influence which resulted in a patrilineal society..... As a result, present day Tumbuka exhibit more obvious traditional Ngoni features than the Ngoni themselves. From a study of some 40 case histories the pattern which emerges indicates that Tumbuka have retained more Ngoni practices than the Ngoni themselves."[2]

It may be deduced from the above that Tumbuka customary law is, in essence, similar to Ngoni customary law.

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1. Barnes J.A., Op. cit., P49.
2. White C.M.N., Op.cit., P144.

We now proceed to examine another ground available to a man who seeks to petition his wife for divorce namely, cruelty.

(iii) Cruelty

Cruelty under customary law may be defined as conduct by either spouse which makes the continued living together of spouses not only intolerable but a threat to each other's life. Though chastisement of the wife by the husband is allowed under Tumbuka customary law, frequent beatings of the wife by the husband may constitute cruelty. This may become a ground for divorce if it can be demonstrated that the ill-treatment is so persistent that the spouses can no longer continue to live together.

Among the matrilineal Tonga, chastisement of the wife by the husband is accepted as a husband's right to discipline her. But there are recognized limits which the husband should not exceed. Thus he should not beat his wife with a stick, nor may he beat her when she is naked[1]. Such action would constitute cruelty.

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1. Colson E., Op. cit., P143.

Cruelty, in Ngoni and Tumbuka law, has been defined as conduct by either spouse which makes the continued living together of spouses intolerable and a threat to life. Barnes states that a woman is more likely to get a divorce if she can prove that her husband is continually beating her or that he does not clothe her although he has the money to do so.[1]

White investigated 32,000 cases of matrimonial disputes which were heard by the local courts in 1968. In 143 cases a wife complained about beating. These statistics, he observed, throw some doubt upon the supposed customary law right of a husband to chastise his wife.[2] The inference drawn from White's observations is that chastisement constitutes cruelty.

Having briefly described the law of cruelty we shall now proceed to examine cruelty as a ground which a husband may invoke if he wishes to divorce his wife. In my investigations I never came across any cases for divorce which were settled in the villages by tribal elders or sent to local courts on the grounds that a wife had behaved cruelly towards her husband. On the other hand there were ample illustrations of petitions for divorce filed by wives who alleged their husbands had persistently treated them cruelly. Cruelty as a ground for divorce would, therefore, seem to be more available to women than men. Occasionally, a woman who does not look after her husband's

1. Barnes J.A., Op. cit., P48
2. White C.M.N., Matrimonial cases in local courts in Zambia, Op. cit. P253.

relatives well or who is greedy would be said to be conducting herself cruelly towards her husband's family. I found, however, no cases of a man seeking divorce on the grounds of his wife's cruelty. We shall cite cases of cruelty later in this chapter when we discuss grounds that are available to a woman who seeks to divorce her husband. At the moment we shall continue our discussion on the grounds of divorce available to a husband by examining the fourth ground - barrenness.

(iv) Impotence or barrenness, per se, is not a strong ground for divorce. As we shall discuss later, if a husband is impotent arrangements are made for his brother or relative to cohabit with the wife so as to raise seed[1]. Similarly, if a woman is barren, a sister of the wife or a girl related to the wife but who is not within the prohibited degrees of relationship is given to the husband. Where no substitute is available the husband may petition his wife for a divorce on the grounds of barrenness. This is Tumbuka customary law.

Among the Tswana if a woman fails in this important task of bearing children, she receives little

1. Barnes J.A., op. cit., P34.

sympathy as a rule and her husband neglects or ill-treats her[1]. As a result he may decide to divorce her. Tswana law on this point is analogous to Tumbuka customary law.

White observed, however, that failure by a woman to bear children is infrequently cited in Local Courts as a reason for divorce. He states:

> "Despite the commonly expressed view that failure to procreate is a frequent reason for divorce, it is infrequently cited in court as the reason.
>
> Certainly 30 to 40% of divorce cases involved childless marriages, which suggests that this may be an important factor in divorce, but childlessness is rarely cited as a reason and cases would have to be studied in relation to the duration of marriages before a correlation could be established, for many divorces occur in marriages of very short duration, often less than a year. There is no evidence that childlessness is normally a specific reason for divorce."[2]

While these observations may be said to be pertinent it cannot be disputed that sterility is an important factor in divorce. Childless marriages are not always happy marriages. They are characterised by incessant matrimonial disputes which eventually may end in divorce.

In Akimu Mukandawire V Jesinala Nya Tembo,[3] the plaintiff married the defendant in 1955. The two lived together happily for the first two years although they had no child. In 1957 the plaintiff sent the

1. Schapera I., Op. cit., P155
2. White C.M.N., Op. cit., P259
3. Magodi Local Court, case No. 70 of 1958.

defendant to her parent's home blaming her for bearing no children. He told her not to return to his village unless her parents had given him mbirigha, a substitute wife to bear him children. The defendant's parents were unable to meet this demand for Jesinala had no young sister. In 1958 the plaintiff petitioned his wife for a divorce. The Magodi Local Court allowed the petition and the divorce was granted.

It is surprising that the court granted the divorce without first adducing evidence as to whether the woman had tried to look for medicines to make her fertile but had failed. The traditional solution, as Barnes points out, for barrenness is "to introduce a linked co-wife." If this is not practicable "a woman can either look for medicines to make her fertile, or, if she is unsuccessful, she may beg children from a fertile sister."[1] It is significant to note that this is rarely done these days. No husband would be keen, just for the sake of keeping his infertile wife in the matrimonial home, to bring up children of another man. Bringing-up children in modern times is more expensive than it was in the past involving, as it does, providing them with adequate education, let alone, food and clothing.

Having examined sterility on the part of a woman as a ground a husband may cite if he seeks to divorce his barren wife, we shall proceed to discuss the fifth

1. Barnes J.A., Op. cit., P34.

ground for divorce namely, laziness.

(v) Laziness

As we have already seen, it is a wife's duty to work for her husband, to cultivate her fields, to brew beer for her husband and prepare food for him. She must occupy herself with the many domestic duties which family life entails. Neglect or refusal to carry out these duties leads almost invariably to domestic quarrels. If carried to extremes, this may give the husband grounds for divorce.

I was unable to trace any written records at Senior Chief Magodi's Local Court of a woman who had been divorced by her husband solely on the ground of laziness. At Mwata's village, however, I interviewed a man called Mwantumwe[1], who married another wife after he had unilaterally divorced his first wife on the ground of laziness. "I divorced my first wife after my family as well as her family had failed to persuade her to keep my house clean and to cook for me and my children. She was always out drinking beer in the neighbouring villages returning home late at night. My children and my mother did most of the cooking."

1. Mwantumwe of Mwata Village - see Appendix II

Apart from this case, I found no record of cases of divorce based on this ground which had been adjudicated upon in the Tumbuka Local Courts since the beginning of this century. This is hardly surprising for laziness, per se, is not a ground for divorce. Attempts are often made by elderly women to teach a lazy wife to mend her ways. It is only when these attempts have failed to produce tangible results that a man resorts to divorce action. The sixth ground for divorce that we shall now consider is witchcraft.

(vi) Witchcraft

The practice of witchcraft by a spouse, once substantiated, may be a strong ground for divorce. It will be necessary to give some background information as to why witchcraft or sorcery plays such an important role in Tumbuka customary law.

According to popular Tumbuka belief, sorcerers are said to go about at night in groups trying to kill or harm other people. They are said to use poison or magic to inflict harm upon people or their property. Witchcraft is, therefore, one of the things most dreaded by the Tumbuka. To the Tumbuka death cannot be regarded as a natural phenomenon. Any death that occurs in a village is said to be due to witchcraft.

It is, therefore, considered imprudent for a husband to keep a wife if she has been accused of practising witchcraft. The evidence must, however, be overwhelming in order that a Local Court may grant the divorce. If the accusation is not supported by adequate evidence, the case is dismissed.

In Binere V Keti[1], the plaintiff's petition for a divorce was dismissed owing to insufficient evidence that Keti [illegible] was a witch. One of the court elders observed:

> "It is unusual for a spouse to go out at night in pursuit of witchcraft without the knowledge of the other spouse. The defendant could not have been practising witchcraft without the plaintiff's knowledge or connivance. The petition must be dismissed on the grounds of insufficient evidence to support the claim that the defendant was a witch."

The belief in witchcraft, although somewhat on the decline in recent years owing to education, christian and other civilizing influences, is still a vigorous factor in Tumbuka tribal life.

The fear of witchcraft is by no means unfounded. It may have a solid basis in fact. In support of this view, the Government of the Republic of Zambia has

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1. Magodi Local Court, case No. 17 of 1940.

passed legislation which provides for penalties for the practice of witchcraft[1].

S4 of the Act provides:

> "Whoever shall be proved to be by habit or profession a witch doctor or witch finder shall be liable upon conviction to a fine not exceeding one hundred Kwacha or to imprisonment with or without hard labour for any term not exceeding two years or to both such fine and imprisonment."

To protect innocent members of the public from vexatious accusations the Act provides in S3:

> "Whoever -
>
> (a) names or indicates or accuses or threatens to accuse any person as being a wizard or witch; or
>
> (b) imputes to any person the use of non-natural means in causing any death, injury, damage or calamity; or
>
> (c) asserts that any person has, by committing adultery, caused in some non-natural way death, injury, damage or calamity;
>
> Shall be liable upon conviction to a fine not exceeding fifty Kwacha or to imprisonment with or without hard labour for any term not exceeding one year, or to both such fine and imprisonment:"

The Act has a proviso to the effect that S3 shall not apply to any person who makes a report to a police officer or to a District Secretary.

The customary belief in witchcraft has the backing of and is thus not in conflict with our written laws and, therefore, meets the requirements of the 'Repugnant Clause' which gives validity to customary law.

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1. Cap 145, Revised Laws of Zambia.

Having disposed of the fifth ground which a husband may invoke to divorce his wife, I shall conclude my discussion on grounds for divorce available to a husband by examining the seventh ground - Failure by a wife to perform her domestic duties.

(vii) Failure by a wife to perform her domestic duties

This ground for divorce is similar in substance to the fifth ground already considered viz. laziness. It is listed as a separate ground for divorce for the simple reason that a wife may fail to perform her domestic duties such as cooking or helping in the common garden solely because she does not have the necessary skills. No amount of training may make her a better housewife or cook. This should not be construed as laziness but rather as lack of technical know-how. After several years of tolerance and patience, a husband may feel compelled to petition his wife on the grounds that she is a bad wife who has failed lamentably to perform her domestic duties. Such a woman would not, have the sympathies of the husband's family. The husband's family looks to the man's wife to feed

> him on well prepared food, and it is considered a bad reflection on her performance of domestic duties if he does not get enough good food to eat.

It ought to be pointed out in passing that beer brewing is the work of women, and is a process lasting at least six days. A good wife must muster all the correct ingredients. Failure to brew beer is failure to perform her domestic duties and this may be good cause for divorce in that it may lead to a breakdown of marriage.

We shall now proceed to examine grounds which a wife may resort to if she seeks to divorce her husband.

(b) A wife's grounds for seeking divorce

(i) Desertion

As we have already established one of the most prevalent grounds for seeking divorce is desertion. This is a common occurrence on account of the fact that many men stay away at work in urban areas for long periods. If the husband has been away for many years and has ceased to correspond with his wife and send her money for clothes, she is entitled to a divorce on the grounds that he has put her away. Barnes states:

> "The woman who pleads for divorce on the ground of desertion is usually the wife of a labour migrant. Her struggle is not with her husband himself but with her affines, his kinsfolk who try to protect his interests for him while he is away. .... It will suffice to say that provided the man has been away for about four years without writing the divorce is usually granted."1

Under Tumbuka customary law three years is generally considered long enough a period to be away from one's wife. That desertion is accepted as a ground for divorce by a number of tribes in Zambia will be evident if we refer to one other tribe in Zambia viz. the Lozi. Gluckman writing in The Judicial Process among the Barotse of Northern Rhodesia states:

> "..... a wife usually seeks a divorce by asking the Kuta to declare that her husband has behaved so unreasonably that he no longer regards or treats her as a wife. This, in Lozi thinking, is why they have passed statutes to divorce women from men who have gone to white country for more than a certain number of years, a number which has steadily been reduced. It is unreasonable for a man to expect his wife to live alone for too long a period."2

Gluckman cites the case of a migrant husband in which one absent husband's kin opposed the divorce claimed after the statutory three years on the grounds that he constantly sent his wife money, clothes, and blankets. The Ngambela's kuta granted the divorce and one local justice retorted: 'This woman did not marry a blanket'.

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1. Barnes J.A., Op. cit., P49
2. Gluckman M., Op. cit. PP 140-1.

It is apparent from the case cited by Gluckman that according to customary law the wife may claim a divorce if her husband has been away for a long period. The fact that he has been maintaining her during his absence is no defence.

Under Tumbuka customary law, it is the custom, however, in such cases to presume the death of the husband and for his family to offer the wife a substitute husband, as would be done if death really had supervened. If the wife accepts, a new marriage is recognised and should the first husband return, he has strictly speaking, no claim to his wife. If, on the other hand, the wife refuses all substitutes she is deemed to be putting away her husband and she must restore the lowola. In Aaron Lonra V Guza[1], Longa who was away from home for more than fifteen years was allowed by the Local Court to claim his wife Nyatepo back. The wife had been inherited by his brother Guza. It is difficult to account for the [illegible] of this case. But perhaps Gluckman's example of the migrant husband already cited is worth referring to again:

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1. Magodi Local Court, case No. 13 of 1956.

> "Within a month of the divorce the husband returned home: he had in fact been on his way back from Johannesburg when the suit was brought. He found his wife gone and went to reclaim her. She wished to return to him but her father said she had been divorced by the Kuta (res judicata - tabiatuzwi, the case has been judged) and her husband must give a new marriage - payment to remarry her. He was willing to do this, but his guardian, his dead father's elder brother, objected, saying a man could not marry a woman twice and that if the Kuta had known the husband was on his way home, it would not have granted the divorce. He upbraided the father-in-law for being greedy. The father-in-law insisted on his demand, and the husband, to get his wife back, paid a beast."

It is apparent from Longa V Guza's case and Gluckman's case of the migrant husband that a husband whose wife has been granted a divorce on the grounds of desertion may claim his wife back on his return home. The Local Courts seem in this regard, to disregard the res judicata rule.

It is necessary to cite two more cases of desertion to illustrate the fact that a wife may be granted a divorce if her husband has deserted her.

In Majuwani V Maines[1], the Native Court in Lundazi held that there appeared to be no doubt that Majuwani had, for all practical purposes, deserted his wife for six years. Therefore, he could not expect to get compensation and custody of his children now that she had married another husband.

The District Commissioner commented:

"I suspect his case is just a 'try on' to get money. The comment could not have been more appropriate. A woman, whose husband has deserted her for three years or more, is entitled to seek a divorce on the grounds of desertion. Since Majuwani had deserted his wife for six years, he could not have expected her to wait for him for six years without filing a suit for divorce. Her decision to divorce Majuwani and marry another husband was in accordance with Tumbuka customary law relating to desertion hence the comment by the District Commissioner that Majuwani's case was a "try on" to get money by way of compensation. Majuwani must have been aware that according to the law on this point, his wife's action was proper and justified.

Another case to illustrate desertion as a ground for divorce is Yalondozi V Kapembe[2].

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1. Lundazi Native Court; case No. 48 of 1938
2. Lundazi Native Court; case No. 289 of 1941

On January 4, 1941 at Lundazi before the District Commissioner, Yalondozi, daughter of Kazirondo of Bulaimu's village asked for a divorce from Kapembe on the ground of desertion. It was stated that Kapembe had not visited nor done anything for her for two years or more. Mtanira, Kapotwe, Chidiaki and Kazirondo, all gave evidence to the effect that Kapembe had entirely deserted his wife and had been living all the time at Chifunda's village, a short day's journey away. It was held that Yalondozi may remarry. Desertion was in this case established and the court granted a divorce.

"It is easier", Barnes observes[1], "for a woman to prove desertion in a case like this where the man is living in the rural area, than when he is away in the town working and writes sporadically if at all. The court feels that it is under an obligation to the migrant labourers of the tribe not to divorce their wives too easily. But if a husband is in the area and could perfectly easily go and see his wife, it is much easier to demonstrate that the desertion is deliberate and sustained, and not merely forced on a man by the exigencies of earning a living."

In conclusion it may be stated that the constant absence of men away at work leaving their wives behind has made for a preponderance of women

1. Barnes J.A., Op. cit., P54.

over men in the rural area and has led to the emergence of pleas for divorce on the ground of desertion. Unfortunately, not many wives accompany their husbands. We shall now consider the next ground for divorce available to a wife - cruelty.

(ii) Cruelty

We have already defined the meaning of cruelty under Tumbuka customary law. A woman usually seeks divorce on the grounds of the husband's cruelty.

It is a recognized fact and common ground that when a woman gets married, she passes from the legal control of her parents into that of her husband who now becomes her guardian and as such responsible for her actions. But, although a wife is thus under the legal tutelage of her husband, "the husband's power over his wife is by no means absolute."[1] He may beat her if she has misconducted herself but wife-beating must not be carried to an extreme. Frequent beatings of the wife by the husband, or the husband's not treating the wife kindly and considerately may constitute cruelty and a woman who constantly finds herself exposed to such ill-treatment may return to her parent's home and petition the husband for divorce on the grounds of cruelty.

1. Schapera I., Op. cit., P 151.

In Chiluwa V Zakochera,[1] the plaintiff was allowed to divorce her husband in consequence of his repeated acts of ill-treatment. The plaintiff told the court that her husband, the defendant, often returned home from beer-drinking late at night. He woke her up and demanded to have food. If she was late in preparing food he would invariably beat her. His beatings were so frequent and severe that she feared he would some day kill her. Her parents, to whom she always appealed and fled, supported her statement. They were not prepared to allow the marriage to continue. The court granted the plaintiff a divorce. The plaintiff was also granted custody of all the children of the marriage. Ill-treatment amounting to cruelty was established and consequently accepted as a ground for divorce.

In a case already cited, Chisenga V Chinyunje[2], a divorce petition was allowed on the grounds of cruelty. Chisenga left her husband because he was continually beating her and it was feared that some day he would kill her. The husband always became annoyed with his wife because, he maintained, of her failure to cater and pander to his wishes. He would explode into violence and start beating her. The court found as a fact that the defendant was treating his wife like a 'slave' and so granted her a divorce on the grounds of cruelty.

1. Lundazi Native Court, case No. 172 of 1958.
2. Lundazi Native Court, op.cit.,

Another divorce case that throws light on cruelty as a ground for divorce is Matemanga V Philip Tembo[1]. The plaintiff's daughter married the defendant who so ill-treated her by frequent beatings and denying her clothes that she ran away from him. The plaintiff, therefore, summoned his son-in-law before Mbelwa's court. At the hearing both parties were pressed to disclose what they wanted. The plaintiff's daughter protested that she would only return to her husband if he stopped ill-treating her. The defendant, however, for his part, said she was a worthless woman and that he refused to have anything more to do with her. This outburst cost him his wife, his children and his thumba/lowola - bride price. The court granted the plaintiff's daughter a divorce on the grounds of cruelty.

It is pertinent to point out that in the three cases just cited cruelty and ill-treatment carry the same meaning. Nwogugu holds the same view. Defining cruelty in customary law he states:

> "Ill-treatment and cruelty are hardly distinguishable. They include physical assaults and failure to maintain a wife and her children"2

A husband who resorts to wife-beating whenever there is a dispute in the home or who fails to maintain his family when he has the means to do so or fails to provide clothing or medicine when the wife is sick, is correctly described as cruel. A wife of

1. Mbelwa's court, case No. 324 of 1960
2. Nwogugu E.I., Family Law in Nigeria; Heinemann Educational Books (Nigeria) Ltd., Ibadan, 1974 Edition, P182.

such a husband is entitled to claim a divorce on the grounds of her husband's cruelty. A wife may also petition her husband for divorce if he fails to do his part of the work in the household or in the common garden. Failure to do his part of the work in the household may include failure to produce children. I now propose to examine impotence as a ground for divorce.

(iii) Impotence

It has already been noted, and the statement must be repeated here for emphasis, that despite the commonly expressed view that failure to procreate is a frequent reason for divorce, it is seldom cited in court as the reason for seeking divorce. This view is supported by Holleman who, discussing termination of shona marriages states:

> "Impotence or sterility of the husband is not, in itself, sufficient reason to have the marriage dissolved at the instance of the wife or her family, because the woman is expected reasonably to submit to a secret arrangement whereby another man, approved of by her, raises issue with her on behalf of her husband. Indirectly, however, the husband's impotency or sterility may cause the dissolution of the marriage because the wife may find conjugal relations under the circumstances intolerable and may indulge in extra-marital relations not authorised by the husband, or she may desert him. In such an event the marriage may be dissolved at the instance of the husband on account of his wife's infidelity."[1]

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1. Holleman J.F., Op. cit. P273.

Impotence is not therefore, per se, a strong ground for divorce. If a husband is impotent arrangements are made for his brother or relative to have sexual intercourse with his wife. The children born as a result of this intercourse belong to the husband. This practice conforms to Tumbuka custom. It is disputed whether these days this custom complies with the 'Repugnant Clause' that gives validity to customary law for the secret arrangements whereby a wife of an impotent husband has sexual intercourse with a brother or relative of the husband seem, in my view, to encourage promiscuity - an act of immorality. Unfortunately, as we have already observed in the first chapter, there are practically no reported cases to throw light on this point of customary law.

A wife may also petition her husband for a divorce if her husband has been guilty of revolting or immoral practices including breaches of taboo. I now wish to discuss the role of taboos in the law of divorce.

(iv) Breaches of taboo - Muzilo

One aspect of Tumbuka customary law relates to taboo. The Tumbuka word muzilo means 'something forbidden' and is applied to any forbidden action.[1]

1. Gluckman M., The Ideas in Barotse Jurisprudence, Op. cit., PP220-1.

While some of the taboos are trifling in character and not taken very seriously by the people themselves, there are others to whose observance much greater weight is attached. These are taboos relating especially to sexual life. A husband is, for example, forbidden to have sexual intercourse with his wife during her menstruating period or while she is still suckling her baby. If the husband violates one of these taboos, the family makes arrangements so that he undergoes a process of purification. Purification usually takes the form of washing him in a 'solution of medicine' prepared by elders. Constant breaches of taboo may result in the wife petitioning the husband for a divorce. One other custom worth referring to, forbids sexual intercourse with a wife whose baby is still sucking for this is regarded as a bad omen that may not only bring bad luck to the child but may make the child sick. This is interpreted as sorcery and as we have already noted, in our discussion on witchcraft, sorcery may be invoked as a ground for divorce. I found no records, strange enough, of cases

that were brought before local courts involving husbands who had committed breaches of sacred rules - taboos.

The Lozi have a word, mwila, which describes all actions which are forbidden by customary practice. Gluckman states that breach of the taboo, mwila, by a man threatens "mystical danger to the society or to the party" according to Lozi belief and custom. He cites the case of a man who was ordered by local councillors to send his daughter, who had recently been bereaved of a baby, to wait on a princess. The man refused to do so because "her breasts of death" would harm the princess. His fellows refused to listen to him, and threatened to bind him. He ran away and took his gun to shoot himself, but his wife prevented him but urged him to go to the King, though it was at night. Early in the morning he entered the capital and instead of approaching the king through his councillor or steward, went straight to the Palace and insisted that the royal attendants take him to the king, to whom he reported what had happened. The King praised him and ordered that he be fed. When his fellows came to the capital to report his refusal to help "the child of the King", and his disappearance, the King summoned the accused to the council and upbraided the astonished neighbours for risking death to the princess, and he rewarded the alleged wrongdoer with gifts of cattle and honey.[1]

1. Gluckman M., Op. cit., PP 220-1

This is but one instance of the inherent liability and responsibility that fall on those who even inadvertently commit breaches of taboo. Gluckman is, however, silent on the question whether the violation of this taboo by the husband would have been considered as ample ground for divorce. He refers to one taboo, though, the breach of which led to a divorce. It is a sacred taboo among the Lozi for a husband to take food from the granary to feed the wife's visiting relatives. A man who took food from the wife's granary to feed her relatives was sued by the wife and she obtained a divorce.[1]

It is evident that taboos play a significant role in the customary law of divorce.

Before concluding this chapter on termination of marriage it will be necessary to refer to two other factors that play a role, no less significant, in divorce namely, polygamy and insanity.

(v) Polygamy

It has already been established that Tumbuka marriages are potentially polygamous. One effect of this is that polygamy as an accepted institution in customary law is, strictly speaking, not

1. Gluckman M. Op. cit., P 101.

a ground as such for divorce. However, it cannot be disputed that polygamy contributes to divorce. Since most divorces are a culmination of matrimonial disputes, one must expect to find that the reasons for divorce agree closely with the sources of matrimonial disputes. Neglect of the wife, failure to support her, feed or clothe her and neglect of children are common causes of matrimonial disputes. These causes of matrimonial disputes. These causes of matrimonial disputes. These causes of matrimonial disputes feature prominently in polygamous marriages.

White has revealed that 176 of the 400 marriages in Zambia he analysed in 1968 which ended in divorce were polygamous. This clearly supports the view that at least today polygamous marriages are a major factor in divorce. The study further reveals that complaints by a wife that the husband had driven her from the house was the reason for seeking divorce in 80 cases, and such conduct implies in most instances that the husband had a second wife.[1] One inference that one may draw from White's revelations is that polygamy has become today one of the most prevalent reasons cited as causing a breakdown of marriage and consequently leading to a divorce.

1. White C.M.N., Principles of Customary Civil Law in Zambia, Op. cit., P99.

A spouse is also entitled to claim a divorce if the other spouse is infirm of body or mind. Let us examine this ground in some detail.

(vi) Infirmity of body or mind

> As a general rule people who are mad or are seriously crippled never marry according to Tumbuka customs. They are regarded as not strong enough to look after themselves and to perform domestic duties that devolve upon a married couple. Barnes confirms this view. He states that among the Ngoni the only people who fail to marry belong to the "category of persons known as 'quite useless people', i.e. people who are mad or in some way deranged so that they are unable to settle down in any place and are always wandering about from village to village, begging shelter, beer and food."[1]

There are, however, instances of persons who become seriously crippled or insane after contracting marriage. What is the legal position of such persons vis-a-vis the customary law of divorce?

The general position is that a spouse does not seek divorce on the grounds of infirmity of body or mind of another spouse. According to Tumbuka custom it is not sufficient for a spouse to claim divorce because the other spouse is mad or physically incapacitated. As Barnes clearly states:[2]

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1. Barnes J.A., Op. cit., P22
2. Ibid., P48.

> "A woman usually seeks divorce on the grounds of cruelty or desertion. It is not sufficient for her to claim that her husband is a leper, or is mad, or has syphilis, for the court will argue that she ought to seek out the proper medicine to cure her husband."

If, however, attempts to cure the sick spouse have failed and the spouse is experiencing untold hardships such as constant starvation, lack of clothes, a woman may seek divorce on the grounds that her insane husband cannot take care of her. This is particularly the case with a young wife. She may desire to have more children which her sick husband cannot give her. In such circumstances both the wife's family and the husband's family may agree that divorce action would be the only appropriate course of action to take. Otherwise, it is considered a cruel act for a spouse to seek divorce simply on the grounds that the other spouse has become insane or has been seriously crippled.

[illegible] a woman [illegible] of a village, [illegible] village who wanted to divorce her husband who had become insane often cohabiting with him for approximately ten years. While appreciating her ordeal, both the spouses' families dissuaded her from divorcing her husband on the grounds of insanity. The husband needed her love and care now more than ever before.

Although the woman had not lost her fertility and she wanted to remarry and have more children she accepted her parents' ruling on the matter.

Having examined the grounds for divorce available to a husband as well as those available to a wife in some detail we shall now proceed to discuss two points of law that are associated with divorce viz., procedure for divorce and custody of children.

Procedure for divorce

If a marriage has irretrievably broken down it is usual for the spouses and their parents or guardians to negotiate the termination of the marriage between themselves without recourse to a local court. Attempts are initially made at reconciling the spouses. When such attempts have failed the marriage is terminated. [illegible] the parties [illegible] [illegible] [illegible]

Either spouse may petition in this way in a court. In the majority of cases it is the wife who does so, just as in matrimonial disputes it is usually the wife who takes out a summons against her husband." This is what White reveals in his study.[1] The reasons for this are obvious. Barnes explains:[2]

> "A man does not need any specific grounds for divorcing his wife and if the marriage has lasted only a short time he may just say that he does not like her or does not want her as a wife. If no marriage payments have been made a man may merely say he is tired of his wife and send her home."

Thus a husband does not need any good reasons for repudiating his wife, he can always get rid of his wife by merely repudiating her. "A wife cannot repudiate her husband in this way", as White observed.

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1. White C.M.N., Customary Civil law in Zambia, Op. cit., P100
2. Barnes J.A., Op. cit., P48

She has "to establish some reason whether very substantial or not".[1] Besides, it has now been well established that the commonest reasons leading to matrimonial disputes arise from a husband's actions namely:

(a) marrying a second wife

(b) sending his wife away, or

(c) neglecting his wife and children.

Although a husband could equally well divorce his wife for adultery, laziness, barrenness, witchcraft and constant disobedience, records show that very few husbands take the initiative to do so.

We shall now proceed to examine the effect of divorce on children by discussing the question of custody of children.

Custody of children

As we have already established in chapter 1, the Tumbuka are a patrilineal society. In most patrilineal societies a husband acquires genetricial rights on payment of bride price. Genetricial rights are rights a husband acquires over his children. When a couple are divorced and there are children by the marriage, the children almost invariably belong to the father. This, of course,

1. White C.M.N., Op. cit., P114.

depends on whether bride price has been paid in full. If bride price has not been paid in full, the husband is required to pay the wife's parents the remaining bride price if he has to take custody of the children.

However, if the children are small, they may go with their mother; but the father is expected to send them occasional presents of food and clothing and can reclaim them when they grow older. Local Courts sometimes allow some children even if not small, especially daughters, to go with their mother. The father must, though, continue to support these children. If the husband has altogether neglected the children, the wife may summon the husband to court which may vary its ruling on the custody of children in favour of the wife.

Thus, as a general rule, children belong to the husband's descent group once the bride price has been paid. Where the local court is satisfied that the father cannot look after them properly, a mother often retains actual i.e. physical custody of them.

Case histories compiled by White in 1968 support this view. They indicate that as long as a Tumbuka husband has paid bride price and has, in this way, acquired genetricial rights he assumes custody of the children.[1]

1. White C.M.N. Op. cit. P114

As present day Tumbuka exhibit more obvious traditional Ngoni features than the Ngoni themselves, a cursory reference to the Ngoni customs relating to custody of children will be relevant. Barnes states:[1]

> "It is clear that if a man has paid bride-wealth, he has custody of all the children borne by his wife, in adultery as well as in wedlock. If he has not paid bridewealth, then adulterine children like legitimate children belong in theory to his wife's relatives."

While this may be true so long as the marriage lasts, the position may be different when a couple are divorced. A husband does not automatically take custody of the children. The local court may be called upon to make an order about the custody of children. The disposal of the children of a divorced couple is regarded as a separate issue. It is treated on its own merits. The court may, therefore, order the wife to have custody of the children if the husband is at fault or if it is satisfied that the husband is not a suitable to look after the children properly. The court's order may be made to this effect notwithstanding the fact that the husband has paid bride price.

One conclusion one is likely to draw from this comparison is that Tumbuka customary law on this point is not materially different from Ngoni customary law relating to custody of children of a divorced couple.

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1. Barnes J.A., Op. cit., P95

I propose to conclude this charter on termination of customary marriage by examining the effects divorce has on each of the spouses.

Effects of divorce on parties

After divorce the woman is free to remarry. This partly explains why a woman attaches great importance to a divorce certificate. The divorce certificate is proof, if proof is required by men, that she is legally free to remarry. Divorce has, on the other hand, no effect upon the husband's capacity to marry since he could always contract polygamous marriages.

As for property acquired by each spouse during the life of the marriage, each spouse retains his or her personal property. Immovable property is retained by the husband.

I have already noted that in most patrilineal societies the wife is entitled to divorce if the marriage has been blessed with children. However, if there are no children, the husband may reclaim his bride price. This may be returned to him by the wife's parents or guardians by mutual agreement without petitioning a local court to make an order.

In conclusion I wish to reiterate for the sake of emphasis that whereas a statutory marriage in Zambia may be terminated either by divorce or by the death

of one of the spouses, a customary law marriage may be terminated only by divorce. The death of one of the spouses does not necessarily mean the automatic end of an alliance between the two families. We have already established that the death of a customary law wife terminates the marriage only if there is no substitute wife. A substituted marriage is usually adopted to continue the perpetuation of an existing good relationship between the two families concerned. Similarly, the death of a husband does not necessarily terminate the marriage. On the death of the husband his surviving widow has a number of options open to her. She may be inherited by a member of the husband's family or remain in the home as the 'wife' of her dead husband. She may decline to be inherited especially if she has passed the child-bearing age. While cautions against the indiscriminate use of the [illegible] when discussing widow in-

[illegible] marriage, in the strict sense of a widow being inherited by a relative of her deceased husband who is a surrogate (not a new husband), so that she continues to bear children to her dead husband, and not to the new genitor, does not occur in Zambia".1

Under customary law when a widow is inherited by a relative of her deceased husband, the substitute man

1. White C.M.N., Journal of African Law Vol. 15 of 1971, Matrimonial cases in the Local Courts of Zambia, P263.

becomes her actual husband and she bears children for him. He is not a surrogate. Widow inheritance is, therefore, not synonymous with leviratic marriage.

We now proceed to examine possible areas of customary law that may call for reforms. It is proposed to carry out this exercise in the last chapter devoted to conclusion.

CHAPTER VII

CONCLUSION AND PROPOSALS FOR REFORM

In this thesis I have attempted to examine Tumbuka customary law relating to marriage.

In this chapter I propose to summarise the preceding chapters. In chapter one, we have noted that the Tumbuka are a patrilineal society and that as such their customary law relating to marriage differs from that of tribes often classified as matrilineal. It has been shown that one characteristic of patrilineal societies is that in these societies a husband acquires rights over his wife's reproductive powers and the consequent location of her children in descent groups. These rights, as has been noted, are not personal but are held by the descent groups. It has also been established that in addition to these genetricial rights a husband acquires additional rights over his wife's domestic and sexual services. Unlike genetricial rights, the rights over his wife's domestic and sexual services are personal to the husband.

We have also noted that descent in patrilineal societies is traced through the male line whereas descent in matrilineal societies is traced through the female line.

Towards the end of chapter one I have tried to discuss the role that customary law plays in the legal system of Zambia. I have shown that although customary law is nowhere defined in our statutes, it is nevertheless recognized as a system of law applied and administered by local and subordinate courts. I have examined the conditions of validity from which customary law derives its application. In this connection we have noted that a local court shall administer African Customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

Chapter two deals with the nature of Tumbuka customary law of marriage. I have attempted to show that Tumbuka customary marriage is a contract but that unlike a marriage contract in England, for instance, where the contract is between a man and a woman, a Tumbuka marriage contract is between the bridegroom and his family on one hand and the bride and her father on the other. It has also been noted that according to Tumbuka customary law a man may marry more than one wife for a Tumbuka marriage is potentially polygamous. Polygamy, is, however, on the decline. This, as has been pointed out, has come about

partly as a result of the impact of western civilisation.

Chapter three covers the requirements of a contract of marriage. We have seen that for a Tumbuka customary law marriage contract to be valid a number of conditions must be satisfied. These conditions, namely, personal capacity to marry, consent and prohibited degrees of relationship have been fully discussed in chapter three. In our discussion on prohibited degrees of relationship, we have noted that the Tumbuka conception of relationship differs from that of other non-African systems of law such as Anglo-American, in that it is based on the classificatory system under which one must think of each generation as an extended line of relations all members of which are of the same comparative seniority. It has been shown that relations with whom marriages are prohibited are

(a) agnatic relations

(b) Blood relations and

(c) relations by marriage.

Cross-cousin marriages defy this rule.

Chapter three ends by discussing the all important institution of bride price and other marriage payments. We have noted that without bride price no Tumbuka marriage contract can come into being.

It has been observed that in patrilineal societies the acquisition of genetricial rights by a husband depends on the payment of bride price by the bridegroom to the bride's parents. In addition to bride price, there are marriage payments which are not legally required.

Chapter four is devoted to types of marriage. We have discovered that unlike the classification of marriage under English law which is determined by conditions to be satisfied before a marriage can be said to be valid, void or voidable, the classification of Tumbuka customary law marriages is determined by the type of ceremony that the bride and bridegroom go through. We have noted that using this criterion there are four types of marriage viz. muthimba, chilinda, chisompola and chikumu marriages.

Chapter five is relatively short. It discusses the rights and duties of spouses. It has been pointed out in chapter five that although, according to customary law, families and not spouses alone, are the contracting parties, husband and wife have mutual rights and duties that flow from the marriage contract. Marriage creates a series of reciprocal obligations between wife and husband. A comparative study has been made of the Lozi, Tswana, Chewa and Ngoni customary law in this area. Striking similarities have been revealed.

Chapter six is one of the longest chapters. This is not surprising for the chapter deals with the controversial and complex question of termination of customary law marriage. The chapter opens by making reference to basic principles and tendencies involved in the dissolution of customary marriage. Reference has been made to the termination of a statutory marriage in Zambia. For ease of reference Cap. 211, Marriage Act of Zambia, has been reproduced as appendix I.

We have noted that whereas a statutory marriage may be terminated by death of either spouse or by a decree of dissolution or divorce pronounced by a court of competent jurisdiction, death per se is not recognised under customary law as a cause for terminating marriage. Under Tumbuka customary law, the system of [illegible] - substitute, ensures that marriage is not [illegible] by the death of a wife. [illegible] a brother or [illegible] of the husband is called upon to [illegible] the widow.

The second part of the chapter deals with the concept of divorce and the causes of divorce. Although no comprehensive statistics are available to show the incidence of divorce among the Tumbuka, a few cases I have cited show that divorce is not

altogether a strange phenomenon among the Tumbuka. Local courts have granted divorce on grounds such as persistent cruelty, failure to maintain a wife, failure to cook for a husband, impotence, acultery, desertion, witchcraft and so on. Any one of the above may constitute a ground for divorce. We have seen that these grounds are in contrast to the only ground for terminating statutory marriages namely, irretrievable breakdown of marriage. The chapter concludes by discussing the question of custody of children and the effects divorce has on the spouses.

To sum up, we have in this thesis discussed Tumbuka customary law as it relates to marriage. One question emerges and this is whether there is need to introduce reforms so as to make the law conform to social change. We have already noted that customary law has a role to play in the legal system of Zambia. [illegible] vital role in our legal system. At the moment customary law is administered by local and subordinate courts. The High court has appellate jurisdiction. It would enhance the role of customary law in the legal system of Zambia if the High Court, whose staff have received higher legal training, were, in addition to exercising appellate jurisdiction, to exercise

original jurisdiction. This would be of great benefit to litigants. Any reform that would bring this about would go along way towards enhancing the role of customary law in our legal system.

It has also been noted that a spouse may file a divorce petition relying on any one of the grounds discussed in chapter six. To avoid frivolous litigation it is considered necessary to reduce these grounds to one namely, the irretrievable breakdown of marriage as a result of which spouses can no longer continue to live together. I hasten to advocate that customary law of divorce be amended so as to bring it in line with cap. 211 of the Laws of Zambia. It militates against true justice to apply and administer two different divorce laws in a homogeneous community.

The question of bride price, lowola, also calls for review. The present position is that a bride's parents decide how many head of cattle or how much money they must be paid as lowola - bride price. As a result of this practice, bride price varies from family to family in the same patrilineal group. Girls who have had some education as well as daughters of wealthy parents or chiefs attract a higher bride price.

A young man whose parents are poor finds it difficult to marry a woman he loves because of lowola constraints.

The need to fix the amount of money to be paid or the number of cattle to be transferred to the bride's family as lowola was emphasized at a meeting - chidumbilano - called by Senior Chief Magodi on 10th November, 1978 at the then Tumbuka Native Authority Headquarters - Egicikeni. Participants who were drawn from the three chiefs' areas namely, Magodi, Phikamalaza and Mphamba were unanimous in their recommendation to the central Government that bride price be fixed so as to deter some unscrupulous girls' parents from demanding exorbitant sums of money or many heads of cattle as bride price. As long as the girl and boy love each other they should not be deterred from contracting a valid marriage just because the bridegroom cannot afford the bride price.

There is certainly a need to review customary law. After all, customary law has a capacity to change and adapt rapidly. In this connection I wish to submit that any reforms effected to customary law relating to marriage must reflect change. Reforms that do not reflect social and economic changes must inevitably fail in achieving the desired goal.

APPENDICES

APPENDIX I

THE MARRIAGE ACT OF ZAMBIA

CAP. 211

REPUBLIC OF ZAMBIA

MARRIAGE

CHAPTER 211 OF THE LAWS OF ZAMBIA

CHAPTER 211

THE MARRIAGE ACT

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8. Forms of notice to be supplied

9. [illegible]

10. [illegible]

11. Marriage to be solemnized within three months of date of notice

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MARRIAGE

10 of 1918
27 of 1930
11 of 1937
31 of 1941
35 of 1947
12 of 1949
36 of 1950
48 of 1953
6 of 1955
48 of 1963
57 of 1964
20 of 1966
21 of 1969
Government Notices
316 of 1964
493 of 1964
497 of 1964
Statutory Instrument
72 of 1964

An Act to provide for the solemnisation of marriages; to provide for the validation of marriages already solemnised; and to provide for matters incidental to or connected with the foregoing.

(1st October, 1918)

PART I

GENERAL

Short Title

1. This Act may be cited as the Marriage Act.

Interpretation

2. In this Act, unless the context otherwise requires -

"district" means a marriage district constituted under section three;

"licensed minister" means any minister appointed under subsection (2) of section five to solemnise marriages in Zambia;

"Registrar" means a Registrar of marriages appointed under section four and any person lawfully acting as such;

"Registrar-General" includes the Registrar-General of Marriages, the Deputy Registrar-General of Marriages and any person lawfully acting as the Registrar-General of Marriages or the Deputy Registrar-General of Marriages;

"special licence" means a special licence granted under section twelve.

(As amended by No. 11 of 1937, No. 48 of 1953 and G.N. No. 36 of 1964)

Marriage districts

3. The Minister may, by statutory notice, divide Zambia into districts for the purposes of this Act and may, by like notice, from time to time alter such districts, either by change of boundaries or by union or sub-division of districts or by the formation of new districts.

(As amended by G.N. No. 316 of 1964)

Appointment of Registrar-General and Registrars

4. The Minister may from time to time appoint a Registrar-General of Marriages for Zambia and Registrars of Marriages for any marriage district; and may also from time to time appoint a Deputy Registrar-General of Marriages, an Assistant Registrar-General of Marriages and Deputy Registrar of Marriages for any marriage district.

The Assistant Registrar-General of Marriages and the Deputy Registrar of Marriages for any marriage district shall, in the absence or during the illness or incapacity of the Registrar-General or of the Registrar or Registrars of any marriage district respectively, have and exercise all the powers conferred by this Act upon the Registrar-General and the Registrars respectively.

(No. 27 of 1930 as amended by No. 31 of 1941, No. 48 of 1953, G.N. NO. 316 of 1964 and S.I. No. 72 of 1964)

Licensing of places of public worship

5. (1) The Minister may, by Gazette notice, license any place of public worship to be a place for the solemnisation of marriages and may at any time, by like notice, cancel such licence.

(2) The Minister may, by Gazette notice, appoint any minister of any church or religious body to solemnise marriages in Zambia and may at any time, by like notice, cancel such appointment.

(As amended by G.N. No. 316 of 1964)

PART II

PRELIMINARIES TO MARRIAGE

Notice of intended marriage

6. No marriage shall be solemnised unless notice of the intended marriage shall have been given in the prescribed form by one of the parties thereto to the Registrar of the

district in which the marriage is intended to take place not less than twenty-one days before the date of solemnisation.

Signature of notice

7. If the person giving such notice is unable to write, it shall be sufficient if he place his mark or cross thereto in the presence of some literate person who shall attest the same, which attestation shall be in the prescribed form.

Forms of notice to be supplied

8. Every Registrar shall supply forms of notice gratuitously to any persons applying for the same.

Entry in Notice Book and publication of notice

9. Upon receipt of such notice the Registrar shall cause the same to be entered in a book to be called the "Marriage Notice Book" which may be inspected during office hours without fee. He shall also publish such notice by causing a copy of the same to be affixed on the outer door of the office and to be kept exposed there until he grant his certificate as hereinafter mentioned or until three months shall have elapsed.

Issue of certificate

10. (1) The Registrar, at any time after the expiration of twenty-one days and before the expiration of three months from the date of the notice, upon payment of the prescribed fee, shall issue his certificate in the prescribed form:

Provided always that he shall not issue such certificate until he has been satisfied by affidavit -

(i) that one of the parties has been resident within the district in which the marriage is intended to be solemnised for at least fifteen days immediately preceding the granting of the certificate;

(ii) that each of the parties to the intended marriage (not being a widower or widow) is not less than twenty-one years old or that if he or she is under that age the consent hereinafter made requisite has been obtained (which consent must be in writing and annexed to such affidavit);

(iii) that there is not any impediment of kindred or affinity or any other lawful hindrance to the marriage;

(iv) that neither of the partners to the intended marriage is married by African customary law to any person other than the person with whom such marriage is proposed to be contracted.

(2) Such affidavit may be sworn before the Registrar.

(3) The Registrar taking such affidavit shall explain to the person making the same what are prohibited degrees of kindred and affinity and the penalties which may be incurred under the provisions of this Act.

(As amended by No. 48 of 1963)

Marriage to take place within three months of date of notice

11. If the marriage shall not take place within three months after the date of the notice, the notice and all proceedings consequent thereupon shall be void: and further notice must be given in accordance with section six before the parties can lawfully marry.

Issue of special licence

12. (1) The Minister or an authorised officer, upon proof being made to him by

affidavit that there is no lawful impediment to a proposed marriage and that any necessary consent to such marriage has been obtained, may, if he shall think fit, dispense with the giving of notice and with the issue of the certificate of the Registrar and may, upon payment of the prescribed fee, grant a special licence in the prescribed form authorising the solemnisation of a marriage between the parties named in the special licence by a Registrar or by a licenced minister of some religious denomination or body and may further, if he shall think fit, authorise the solemnisation of a marriage at a place named in the special licence, not being a licensed place of worship or Registrar's office.

(2) In this section-

"authorised officer" means a public officer designated by the Minister as an authorised officer.

(As amended by No. 11 of 1937, G.N. No. 316 of 1964 and No. 21 of 1969)

Entry of caveat

13. Any person whose consent to a marriage is hereby required, or who may know of any just cause why the marriage should not take

place, may enter a caveat against the issue of the Registrar's certificate by writing at any time before the issue thereof the word "forbidden" opposite to the entry of the notice of the Marriage Notice Book and appending thereto his name and place of abode and the grounds upon or by reason of which he claims to forbid the issue of the certificate, and the Registrar shall not issue his certificate until such caveat shall be removed as hereinafter is provided.

Procedure on entry of caveat

14. Whenever a caveat is entered against the issue of a certificate, the Registrar shall refer the matter to the High Court, and that Court shall thereupon summon the parties to the intended marriage and the person by whom the caveat is entered and shall require the person by whom the caveat is entered to show cause why the Registrar should not issue his certificate and shall hear and determine the case in a summary way, and the decision of the High Court shall be final.

Cancellation (or otherwise) of caveat

15. If the High Court decides that the certificate ought to be issued, the Judge shall remove the caveat by cancelling the word "forbidden" in the Marriage Notice Book in ink and writing in such Marriage Notice Book immediately below such entry and

cancellation the words "cancelled by order of the High Court" and signing his name thereto. The Registrar shall then issue his certificate and the marriage may proceed as if the caveat had not been entered, but the time that has elapsed between the entering and the removal of the caveat shall not be computed in the period of three months specified in section ten.

Costs of proceedings

16. The High Court may, in its discretion if it shall consider that a caveat has been entered in any case without reasonable or probable cause, order the person entering the caveat to pay any reasonable costs incurred by either of the parties to the intended marriage by reason of the proceedings consequent on such caveat being entered.

PART III

CONSENT TO MARRIAGE IN CERTAIN CASES NECESSARY

When consent to marriage is necessary

17. If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Zambia, of the guardian of such party shall be produced and shall be annexed to the

affidavit required under sections ten and twelve and, save as is otherwise provided in section nineteen, no special licence shall be granted or certificate issued without the production of such consent.

(As amended by G.N. No. 316 of 1964)

Signature to consent and attestation

18. (1) If the person required to sign such consent is unable to write, he shall sign such consent by placing his cross or mark thereto in the presence of one of the following persons: any Judge, District Secretary, Registrar of the High Court, Registrar of Deeds, [illegible] Medical Officer or [illegible] of Petitioner.

(2) Such signature shall be attested by such person in the prescribed form.

Cap. 2

(3) The provisions of section two of the Interpretation and General Provisions Act shall not apply to this section.

(As amended by G.N. No. 493 of 1964)

Consent in case of refusal or absence of parent or guardian

19. (1) If any parent or guardian, whose consent to a marriage is required, refuses his consent, a Judge of the High Court may, on application being made, consent to the marriage, and the consent of the Judge so given shall have the same effect as if it had been given by the person whose consent is refused.

(2) If there be no parent or guardian of such party residing in Zambia and capable of consenting to the marriage, then any of the following persons, that is to say, the Minister, a Judge of the High Court, or a district [illegible] may consent to such marriage in writing [illegible] entitled [illegible] but there are no [illegible] to the interest of either party for withholding such consent, and such consent shall be as effectual for the purpose of this Act as if the father or mother had consented.

(As amended by No. 35 of 1947 and G.N. No. 316 of 1964)

PART IV

SOLEMNISATION OF MARRIAGE

Solemnisation of marriage by ministers

20. Marriages may be solemnised in any licensed place of worship by any licensed minister of the church, denomination or body to which such place of worship belongs and according to the rites and usages of marriage observed in such church, denomination or body, or with the consent of a recognised minister of the church, denomination or body to which such place of worship belongs by licensed minister of any other church, denomination or body according to the rites and usages of marriage observed in any church, denomination or body. Every such marriage shall be solemnised with open doors between the hours of nine o'clock in the forenoon and three o'clock in the afternoon, in the presence of at least two credible witnesses besides the officiating minister.

(No. 11 of 1937 as amended by No. 48 of 1953)

Registrar's certificate or special licence to be provided to minister

21. A minister shall not solemnise any marriage if he knows of any just impediment to such marriage nor until the parties deliver to him the Registrar's certificate or the special licence, as the case may be.

(As amended by G.N. No. 316 of 1964)

22. A minister shall not solemnise any marriage except in a building which has been duly licensed by the Minister or in such place as the special licence may direct. Marriage in licensed building

(As amended by G.N. No. 316 of 1964)

23. The Minister shall cause to be printed and delivered to the several Registrars and to the licensed ministers of licensed places of worship books of marriage certificates in duplicate in the prescribed form with counterfoils. Such books shall be kept by the several Registrars and the licensed ministers for the [illegible] Marriage books

(As amended by No. 11 of 1937 and G.N. No. of 1964)

24. Immediately after the solemnisation of any marriage by a minister, the officiating minister shall fill up in duplicate a marriage certificate with the particulars required by the said prescribed form and enter in the counterfoil the prescribed particulars. Completion of marriage certificate

25. The certificate shall then be signed in duplicate by the officiating minister, by the parties and by two or more witnesses to the marriage. The minister having also signed his name to the counterfoil shall sever the duplicate certificate therefrom and shall deliver one certificate to the parties and shall, within seven days thereafter, transmit the other to the Registrar for the district in which the marriage takes place who shall transmit the same to the Registrar-General within seven days of the receipt thereof.

Attestation of marriage certificate

26. After the issue of a certificate under section ten or fifteen, or of a special licence, the parties may if they

in the presence of two witnesses, in his office with open doors, between the hours of eight o'clock in the forenoon, in accordance with the prescribed procedure.

Marriage before Registrar

(No. 36 of 1950 as amended by
G.N. No. 316 of 1964)

27. The Registrar shall then fill up and he and the parties and witnesses shall sign the certificate of the marriage in duplicate and the Registrar shall then fill up and sign the counterfoil as hereinbefore provided in the case of a marriage by a minister and shall deliver one certificate to the parties and shall, within seven days, transmit the other to the Registrar-General.

Issue of Marriage Certificate by Registrar

28. Wherever a special licence authorises the solemnisation of a marriage at a place other than a licensed place of worship or the office of a Registrar, the minister or [illegible] solemnising such marriage shall [illegible] a licensed place of worship or Registrar's office, as the case may be. The minister who has solemnised any such marriage shall deliver one certificate to the parties as in section twenty-five provided and shall, within seven days thereafter, forward to the Registrar for the district in which such marriage has been solemnised the other certificate of marriage

Marriage in building other than licensed building or Registrar's office

and also a copy of the special licence pursuant to which the marriage has been solemnised. Within seven days of the receipt of such certificate and such copy, the Registrar shall forward them to the Registrar-General.

(As amended by G.N. No. 316 of 1964)

PART V

REGISTRY AND EVIDENCE OF MARRIAGES

Registration of marriages by Registrar-General

29. (1) The Registrar-General shall file in his office all certificates of marriage which shall be transmitted to him, and shall forthwith register in a book to be kept in his office for such purpose and to be called the "Marriage Register Book" in the prescribed form particulars of every certificate of marriage which shall be filled in his office, and every entry so made shall be dated on the day of which it is so entered and shall be signed by the Registrar-General, and such book shall be kept in such manner as is best suited for easy reference thereto.

(2) Upon payment of the prescribed fees, the Registrar-General shall at all reasonable times allow searches to be

made in the Marriage Register Book and shall give certified copies therefrom.

(3) Every Registrar and the licensed minister for the time being of every licensed place of worship shall, at all reasonable times upon payment of the prescribed fee, allow searches to be made in the counterfoils of his marriage certificate books.

(As amended by No. 11 of 1937)

Correction in Register of clerical errors

30. The Registrar-General may correct any clerical error in any certificate of marriage filed in his office and in the Marriage Register Book upon production to him of the certificate delivered to the parties, or of all counterfoils and counterparts [illegible]

Certificate of marriage to be evidence

31. Every certificate of marriage which shall have been filed in the office of the Registrar-General, or a copy thereof purporting to be signed and certified as a true copy by the Registrar-General for the time being, and every entry in a Marriage Register Book or copy thereof

certified as aforesaid, shall be admissible as evidence of the marriage to which it relates in any court of justice or before any person now or hereafter having by law or consent of parties authority to hear, receive and examine evidence.

Invalid marriages

32. (1) No marriage in Zambia shall be valid-

(a) which if solemnised 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;

(b) where either of the parties thereto at the time of the celebration for such marriage is married by African customary law to any person other than the person with whom such marriage is had.

(2) A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its solemnisation-

(a) in any place other than the office of a Registrar or a licensed place of worship or a place authorised by the special licence; or

(b) under a false name or names; or

(c) without the Registrar's certificate of notice or special licence having been duly issued; or

(d) by a person not being a licensed minister of some religious denomination or body or a Registrar.

(As amended by No. 11 of 1937
No. 48 of 1963 and G.N. No.
316 of 1964)

33. (1) A marriage between persons either of whom is under the age of sixteen years shall be void: Void marriag

Provided that this section shall not apply when a Judge of the High Court has, on application being made, and on being satisfied that in the particular circumstances of the case it is not contrary to the public interest, given his consent to the marriage.

(2) Nothing in this section shall affect any marriage already solemnised or contracted before the 20th May, 1949. Exemption of existi marriages

(No. 12 of 1949 as amended by
No. 6 of 1955)

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

African customary law, or in any manner apply to marriages so contracted.

(No. 48 of 1963)

PART VI

VALIDATION OF MARRIAGES ALREADY SOLEMNISED

Marriages already solemnised in Zambia

35. Every marriage solemnised in the portion of Zambia formerly known as North-Eastern Rhodesia before the 1st February, 1903, and every marriage solemnised in the portion of Zambia formerly known as Barotse-land - North-Western Rhodesia before the 16th July, 1906, by any minister of any religious denomination or body, according to the rites in use by such religious denomination or body, shall be deemed to have been from the time of the solemnisation thereof, a legal and valid marriage:

Provided that nothing herein contained shall legalise any marriage which has, before the commencement of this Act, been declared invalid by any competent court, nor any marriage, either party to which had at the time of its solemnisation a lawful wife or husband living, nor any marriage which was void by reason of kindred or affinity or fraud or

incapacity to contract marriage, nor any marriage otherwise invalid, either party to which shall, before the commencement of this Act and in the lifetime of the other party thereto, have intermarried with any other person.

Records of evidence of such marriages

36. Every minister of religion or other person in Zambia who has in his custody or control any register, record paper purporting to be such a marriage solemnised before the 1st February, 1903 in the portion of Zambia formerly known as North-Eastern Rhodesia, and before the 16th July, 1906, in the portion of Zambia formerly known as Barotseland-North-Western Rhodesia, shall forthwith deliver or transmit to the Registrar-General the said register or official record or a copy thereof, unless a copy has already been transmitted pursuant to the provisions of the North-Eastern Rhodesia Marriage Regulations, 1903, or Proclamation No. 15 of 1906 omitting if desired any matter of a private nature with a certificate appended thereto in the following form:

I.A.B., (here describe place of above and position) do certify that the annexed written pages contain the true record (excepting matters of a confidential nature) of the marriages heretofore solemnised in (here name church).

Dated the day of 19

(Signed A.B.)

Costs of transmission of records etc.

37. The Minister may defray out of the general revenues of the Republic all proper expenses connected with the transmission or delivery of the said registers or which may otherwise become necessary to be incurred in carrying out the provisions of this Act.

(As amended by G.N. No. 316 of 1964 and S.I. No. 72 of 1964)

PART VII
OFFENCES AND PENALTIES

Contracting marriage under this Act when married in African customary law or contracting marriage in African customary law when married under this Act.

38. 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:

Provided that this section shall not extend to any person who contracts a marriage during the life of a former husband or wife, if such 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.

(No. 48 of 1963)

39. Whoever being unmarried goes through the ceremony of marriage with a person whom he or she knows to be married to another person shall be liable on conviction to imprisonment with or without hard labour for a period not exceeding five years. Accomplices

False declarations, etc.

40. Whoever in any affidavit, declaration, licence, document or statement by law, to be made or issued for the purposes of a marriage, swears, declares, enters, certifies or states any material matter which is false shall, if he does so without having taken reasonable means to ascertain the truth or falsity of such matter, be liable on conviction to imprisonment with or without hard labour for one year or shall, if he does so knowing that such matter is false, be liable on conviction to imprisonment with or without hard labour for a period not exceeding five years.

False pretences in connection with consent to marriage

41. Whoever endeavours to prevent a marriage by falsely pretending that his consent thereto is required by law, or that any person whose consent is so required does not consent, or that there is any legal impediment to the performing of such marriage, shall, if he does so knowing that such pretence is false or without having reason to believe that it is true, be liable on conviction to imprisonment with or without hard labour for a period not exceeding two years.

42. Whoever performs the ceremony of marriage knowing that he is not duly qualified so to do, or that any of the matters required by law for the validity of such marriage has not happened or been performed, so that the marriage is void or unlawful on any ground, shall be liable on conviction to imprisonment with or without hard labour for a period not exceeding five years.

Illegal performance of ceremony

43. Whoever, being under a duty to fill up the certificate of a marriage celebrated by him or the counterfoil thereof or to transmit the same to the Registrar, wilfully fails to perform such duty shall be liable on conviction to a fine not exceeding one hundred Kwacha, or, alternatively or in default of payment of such fine or in addition thereto, to imprisonment with or without hard labour for a period not exceeding two years.

Failure to fill up and transmit certificates

44. Whoever personates any other person in marriage, or marries under a false name or description with intent to deceive the other party to the marriage,

Personation

shall be liable on conviction to imprisonment with or without hard labour for a period not exceeding five years.

False representation

45. Whoever goes through the ceremony of marriage, or any ceremony which he or she represents to be a ceremony of marriage, knowing that the marriage is void on any ground and that the other person believes it to be valid, shall be liable on conviction to imprisonment with or without hard labour for a period not exceeding five years.

PART VIII

MISCELLANEOUS

Rules

46. The Minister may, from time to time by statutory instrument, make, alter, amend or repeal such rules as may be necessary for the proper carrying out of the provisions of this Act and more especially may prescribe-

(a) the place or places at which shall be situate the offices of the Registrar-General and of the several Registrars;

(b) the form and manner of giving any notice required by this Act and the particulars to be furnished;

(c) the form of any attestation required by this Act;

(d) the form of any certificate, licence, register or other document required for the purpose of this Act;

(e) the conditions under which registers or other documents may be inspected;

(f) the fees to be paid under the provisions of this Act in respect of anything required or permitted to be done or any document required to be executed and provision for their remission or reduction on account of the poverty of the parties or for other good reason;

(g) the procedure to be followed when a marriage is contracted before a Registrar.

(As amended by No. 36 of 1950
and G.N. No. 316 of 1964)

Ministers may receive fees

47. Nothing herein contained shall preclude a minister from receiving the fees ordinarily paid to a minister of his denomination for the solemnisation of marriage.

Notice when solemnisation intended in United Kingdom

48. Where a marriage is intended to be solemnised or contracted in the United Kingdom between a British subject resident in England, Scotland or Ireland and a British subject resident in Zambia, the latter may give notice of the intended marriage to the Registrar of the marriage district in which he resides and a certificate for marriage may be issued by any [illegible] by him.

Validation of certain marriages

49. Any marriage solemnised before the 23rd July, 1937, by a recognised minister, according to the rites and usages of marriage observed in the church, denomination or body to which he belongs, in any licensed place of worship not of the same church, denomination or body as that to which the minister belongs, shall be, and shall be deemed always to have been, as valid as if the minister belonged to the church, denomination or body of such place of worship, and had solemnised the marriage according to the rites or usages of marriage observed in such last mentioned church, denomination or body.

(No. [illegible] of 1937)

APPENDIX II

LIST OF PERSONS INTERVIEWED

SENIOR CHIEF MAGODI

NAME	SEX	AGE	VILLAGE
Headman Dodamutima	Male	72	Emusa
Gibson Mtonga	Male	72	Emusa
Lakelo Nyandhlovu	Female	76	Emusa
Enala NyaBanda	Female	60	Emusa
Esinati NyaKumwenda	Female	55	Emusa
Ackim Mbale	Male	45	Emusa
Abiyudi Banda	Male	50	Emusa
Elias Banda	Male	61	Ehluzeni
Amos Nyirenda	Male	58	Ehluzeni
Enala NyaNdhlovu	Female	65	Ehluzeni
Fumba Mkandawire	Male	68	Ehluzeni
Senior Chief Magodi	Male	56	Egicikeni
Thomson Mbeba	Male	64	Egicikeni
Chilipanambo Mtonga	Male	63	Egicikeni
Misheki Shonga	Male	50	Egicikeni
Neb Theu	Male	50	Kamuzowole
Grace NyaMNyirenda	Female	75	Kamuzowole
Gabriel Theu	Male	70	Kamuzowole
Dalson Nyirenda	Male	46	Chimutembo
Tamalanji Nyakumwenda	Female	45	Chimutembo
Langford Ngoma	Male	69	Chimutembo

AVERAGE AGE: 60

SENIOR CHIEF MAGODI contd.

NAME	SEX	AGE	VILLAGE
Eliam Mapara	Male	70	Ephiweni
Wiseman Mapara	Male	60	Ephiweni
Elidayi NyaJere	Female	63	Ephiweni
Zisa NyaKaunda Widow	Female	80	Ephiweni
Biyudi Banda	Male	65	Mukoko
Nezara Banda	Male	55	Mukoko
Headman Mwata	Male	50	Mwata
Gadi Mwantumwe	Male	70	Mwata
Tamala NyaMusimuko	Female	47	Mwata
Danwell Musimuko	Male	61	Mwata
Milika NyaMukandawire	Female	70	Mwata
Johnson Kasaro	Male	52	Kaimbonye
Headman Kaimbonye Kasaro	Male	75	Kaimbonye
Lanjezi Kasaro	Male	60	Kaimbonye
Headman Harry Nyirenda	Male	80	Malandula
Zifa Nyirenda	Male	50	Malandula
Laison Kajepu Nyirenda	Male	61	Kajepu
Fage NyaKasaro	Female	77	Kajepu
Mulawona NyaZimba	Female	49	Musindama
Keti NyaNdhlovu	Female	76	Musindama
Headman Musindama Nyirenda	Male	50	Musindama
Ackim Mukandawire	Male	69	Enyanjiweni
Tiwoneni NyaBanda	Female	55	Enyanyiweni

SENIOR CHIEF MAGODI contd.

NAME	SEX	AGE	VILLAGE
Headman Guza Ndhlovu	Male	80	Longa
Enesi Nyamvula	Female	55	Longa
Cephas Banda	Male	60	Longa
Headman Wilikani Mtonga	Male	77	Wilikani
Maliya Nya Terbo	Female	48	Wilikani
Vuso Mkhalipi	Male	42	Wilikani

AVERAGE AGE: 62

CHIEF PHIKAMALAZA

NAME	SEX	AGE	VILLAGE
Chief Phikamalaza Ziba	Male	55	Chiginya
Meya NyaJere	Female	50	Chiginya
Gomezya Zimba	Male	70	Maluwa
Kalikeka Mvula	Male	60	Maluwa
Chikwanda Zimba	Male	65	Maluwa
Rabson Ziba	Male	60	Edingeni
Edina NyaMhoni	Female widow	70	Edingeni
Fidesi NyaBanda	Female	45	Edingeni
Eliam Chikoya	Male	52	Manyi
Ackson Mapara	Male	54	Manyi
Chidumayo Ngumayo	Male	38	Chidumayo
Tafwauli Nyambale	Female	59	Chidumayo
Mugwanta Phiri	Male	76	Mugwanta
Malita NyaGausi	Female	52	Mugwanta
Headman Chijemu Banda	Male	65	Chijemu
Kamumbondoma Mvula	Male	82	Chijemu
George Lungu	Male	65	Mvakule
Gideon Luhana Mvula	Male	66	Mvakule

AVERAGE AGE: 60

CHIEF MPHAMBA

NAME	SEX	AGE	VILLAGE
Chief Mphamba Nyasulu	Male	64	Mphamba
Elina NyaUswesi	Female	55	Mphamba
Kamubwanyanga Chirwa Musuzi	Male	62	Musuzi
Amoni Chirwa	Male	48	Musuzi
Chipyola Nyirenda	Male	70	Tigone
Neliya NyaMsimuko	Female	63	Tigone
Edesi NyaZyambo	Female	50	Tigone
Ngwata Phiri	Male	45	Ngwata
Japhet Zimba	Male	40	Ngwata
Etase NyaLungu	Female	56	Ngwata
Kalukomo Phiri	Male	70	Kalukomo
Gilbert Ndhlovu	Male	56	Kamupala
Kamupala Ndhlovu	Male	60	Kamupala
Elinala NyaMnyirenda	Female	56	Kaweche
Binet Nyirenda	Male	65	Chilipadambo
Nezara Mtonga	Male	63	Chilipadambo
Chilambula Frackson Nyirenda	Male	40	Chilambula
Pheku Nyirongo	Male	60	Kachilindo
Vaines NyaNkoma	Female	55	Kachilindo
Jonas Luhana	Male	38	Thumbalanyi-fula
Maliya NyaZyambo	Female	70	Makule

AVERAGE AGE: 56

REFERENCES

Allot A.N. — Essays in African Law, London, 1960

Barnes J.A. — Marriage in a changing society, a study in structural change among the Fort Jameson Ngoni, published for the Rhodes - Livingstone Institute by Oxford University Press, 1951.

Bromley P.M. — Family Law, Fifth Edition, London, Butterworths, 1976.

Colson E. — Marriage and the family among the plateau Tonga of Northern Rhodesia, Manchester University Press, 1958.

Church William L. — An introduction to the law of Zambia, 1974 (unpublished).

Elias T.O. — The Nature of African Customary Law, Manchester University Press, 1962.

Gluckman Max — Politics, law and ritual in tribal society, Basil Blackwell, Oxford, 1967.

The ideas in Barotse Jurisprudence, Manchester University Press, 1965.

The Judicial process among the Barotse of Northern Rhodesia, Manchester University Press, 1955.

Hindu Marriage Act. — India, 1955.

Holleman J.F. — Shona customary law, Oxford University Press, 1952.

Holy Quran — Evergreen Press, Lahore, 1972.

Local Courts Act. — Cap. 54, Revised Laws of Zambia.

L.C.A. — No. 29,1977 (unreported)

Lundazi Native Court	Case No.	188 of 1908	(unreported)
	" "	201 of 1908	(unreported)
	" "	48 10 1938	(unreported)
	" "	145 of 1939	(unreported)
	" "	289 of 1941	(unreported)
	" "	272 of 1950	(unreported)
	" "	172 of 1958	(unreported)
	" "	15 of 1960	(unreported)

L.R. I Pand D, 1866

Magodi Local Court	Case No.	15 of 1933	(unreported)
	" "	17 of 1940	(unreported)
	" "	45 of 1946	(unreported)
	" "	13 of 1956	(unreported)
	" "	70 of 1958	(unreported)
	" "	18 of 1961	(unreported)
	" "	11 of 1963	(unreported)

Marriage Act — Cap. 211, Revised Laws of Zambia.

Mbelwa Native Court — Case No. 324 of 1960.

Moffat J. — Justice and the Law, Oxford/Capetown University Press, 1956.

Monthly digest — of Statistics Vol XV No. 54 — 6, Government Printer, April/June 1979.

Mvunga M.P. — Application and administration of customary law, University of Zambia, 1980, (unpublished)

Nawalia Native Court — Case No. 16 of 1912.

Case No. 33 of 1912.

Northern Rhodesia — Order in Council of 1912

Nwogugu E.I. — Family law in Nigeria, Heinemann, Ibadan, 1974.

Obi Chinwuba S.N. — Modern Family Law in Southern Nigeria, Sweet and Maxwell, 1966.

Ordinance — No. 18 of 1933.

Penal Code, — Cap. 146, Revised Laws of Zambia

Phikamalaza Local Court. — Case No. 18 of 1942.
Case No. 3 of 1958.
Case No. 9 of 1967.

Radcliffe - Brown — The African systems of kinship and marriage, Oxford University Press, 1950.

Rhodesia and Nyasaland Law Reports Vol. 1, High Court of Northern Rhodesia, 1959.

Schapera I., — A Handbook of Tswana Law and Custom, Oxford University Press, 1937.

Selected Judgements of Zambia — No. 12 of 1967.

Stein Jess, — The Random House Dictionary of the English Language,

The unbridged edition, New York.

Subordinate Courts Act, Cap. 45, Revised Laws of Zambia.

Tumbuka Customary marriages, University of London, School of African and Oriental Studies, author unknown (unpublished).

White C.M.N. — circular No. 2 issued by the Native Courts Adviser, Native Courts Department, Ministry of Justice, Lusaka, 20th August, 1964 (unpublished).

Matrimonial cases in Local courts in Zambia, J.A.L. Vol. 15 No. 3 of 1971.

Principles of customary civil law (unpublished).

Witchcraft Act. — Cap. 145, Revised Laws of Zambia.