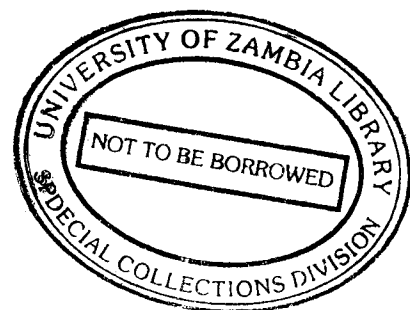


**THE DUAL LEGAL SYSTEM AND ITS EFFECTS ON
THE ADMINISTRATION OF JUSTICE IN ZAMBIA**



BY

MUZAMBALIKA SIMWATACHELA

UNZA

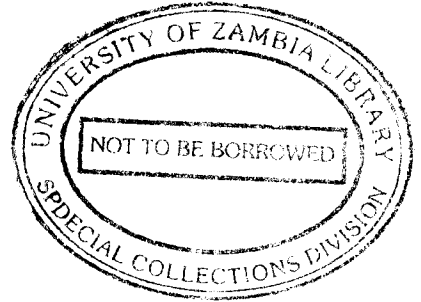
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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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**THE DUAL LEGAL SYSTEM AND ITS EFFECTS ON THE
ADMINISTRATION OF JUSTICE IN ZAMBIA**

BY

MUZAMBALIKA SIMWATACHELA

**A DIRECTED RESEARCH ESSAY SUBMITTED TO THE SCHOOL OF LAW OF
THE UNIVERSITY OF ZAMBIA IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF A DEGREE OF BACHELOR OF
LAWS (LL.B)**

**SCHOOL OF LAW
UNIVERSITY OF ZAMBIA**

DECEMBER, 2005

DEDICATION

To the loving memory of Dad, Muvwimi Simwatachela and Mum, Regina Moyo Simwatachela who answered the Lord's call on the 21st May, 2003 and 2nd September, 2005 respectively. It is hurtful that their demise happened towards my successful completion of the Bachelor of Laws Degree (LL.B), this would have made them proud for they were the architects of this achievement. You deserve a special place here, I thank you for the material and moral support, encouragement, wisdom and understanding. May your dear departed souls rest in eternal peace and may the good Lord be with you till we meet again.

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CHAPTER ONE

1. INTRODUCTION

The dual legal system and its effects on the administration of justice in Zambia is a research whose intention is to highlight the lack of uniformity in the administration of justice particularly where African customary law is to be administered by higher courts on appeal from the local courts. This problem is as a result of conflict between the imported English law and the indigenous African customary law. These conflicts are particularly prevalent in areas of family law. For instance, there are numerous pieces of legislation from the British parliament which have a direct application to Zambia and these are frequently changing, thereby creating difficulties in keeping pace¹.

It is hoped that this research will try and solve this problem of conflict of laws which has its ultimate effect on the administration of justice in Zambia by adding new information in already existing information to the academia. The fact that customary law is unwritten, it raises problems of ascertaining it. Therefore, in order to take care of this, the research will contribute to the academia by strongly recommending that customary law be codified and efforts must be made in that area. It is also important to note that customary law has no uniform application in Zambia and varies from one locality to the other.

¹ Prohibited Degrees of Consanguinity.

Having into contemplation the problems that have been envisaged, this will be the general outlook of the research. This chapter will basically concentrate on the historical aspect of the problem and cover topics like law in Africa before the year 1889 when Zambia became a British territory under the British South African company. This chapter will also primarily look at the period of introduction of the English Common law to this indigenous African territory.

Chapter two will concern itself with the issues of conflict between the African customary law and the English common law, that is the problem of internal conflicts. Some conflicts will be highlighted in the area of family law. At this stage, problems or shortcomings of African customary law will be highlighted and under this chapter the repugnance clause will also be analysed.

Chapter three of the research will actually set out the analysis of the dual legal system and its impact on the administration of justice by the courts of law in Zambia. Chapter four will basically concentrate on the possible solutions to the shortcomings of justice as administered by the Zambian courts with respect to the conflicts between the African customary law and the English law. Finally, under this very chapter, a general overview will be given. Chapter one is subdivided into four categories and these are law in Africa before the year 1889. Secondly, the introduction of English law after 1889, thirdly, the recognition of African customary law, fourthly the administration of justice and law

during the British colonial period between 1924 and 1964 and finally the administration of justice after Zambia became independent.

2. LAW IN AFRICA BEFORE THE YEAR 1889

Before the time of colonisation, the indigenous people of Zambia practiced traditions and rules of customary law which they enforced through their traditional elders, leaders and chiefs.

These rules of customary law varied from one tribe to the other. At this juncture, it would even be important to state that there are many customary laws as the number of tribes present at this time. This African customary law was specifically tailored to the needs of the people it served and was informal in nature. It flowed mainly from the chiefs and leaders as their adjunct to their personal stature and political power. African customary law was not written down. This law did not require references to formerly constructed analogues from the past or other societies. This made African customary law more flexible. It differed radically from place to place and from tribe to tribe.

Sometimes, it even differed from time to time within a single area as leaders changed. African customary law passed from one generation to the next and most people respected it. Where there was ambiguity and doubt with respect to its application of a particular aspect, the leaders in the society resolved this simply by their prestige and power arbitrary or sometimes by consensual means. African customary law

has endured or has stood the test of time in spite of its inconsistency due to the fact that it was effectively administered within the African Societies.

3. THE INTRODUCTION OF ENGLISH LAW AFTER THE YEAR 1889

After the year 1889, came the introduction of English law into a territory called Zambia now. The indigenous Africans had a new experience for the first time in their lives. The coming of the British South African Company (BSACo) brought with it the introduction of English law into a territory now called Zambia.

In the year 1884, on the 15th of November, there was a conference famously known as the Berlin Conference or the "Scramble for Africa". This conference was attended by countries like Austria, Belgium, Denmark, Germany, Great Britain, Hungary, Italy, Netherlands, Norway, Portugal, Russia, Spain, Sweden, Turkey and the United States of America.

This conference resulted into an Act known as the Berlin Act.² Most of the provisions of the British South African Company Charter were a transplant of the Berlin Act due to the fact that this Act influenced the British legal draftsmanship, particularly to statutes that applied to

² This was an Act which was signed on the 26th February 1885, it largely concerned with itself with trade issues in the Congo Basin, including slavery

colonized and acquired territories. Therefore, the introduction of English law into Zambia took place during the era of the British South African Company. This explains how Zambia and other protectorates and colonies ended up with a dual (or multiple) legal system where African law existed side by side with the English imported law.

4. THE RECOGNITION OF AFRICAN CUSTOMARY LAW AND THE ADMINISTRATION OF JUSTICE DURING THE COLONIAL PERIOD, 1924 – 1964

The British South African Company which has full power over the territory had to apply British law due to the fact that the status of the company had to be and remain British in character and domicile, with its principle office in Great Britain and its directors had to be born British persons or subjects as per an Act of Parliament of the United Kingdom.

The charter provided that an administration of justice by courts set up under it, regard had to be given to the African local custom and customary law, especially in circumstances where the application of English law was likely to cause injustices to a native litigant. Article 14 of the charter read as follows:-

In the administration of justice to the said people (tribes) or inhabitants, careful regard shall always be placed to the customs and laws of the class or tribe or nation to which the parties respectively belong...., but subject to British laws which may be in force in any of the

territories aforesaid and applicable to the people's or inhabitants thereof.

It is also important to note that other provisions of the charter empowered the British South African Company to set up courts of law to be administered by persons trained in the British legal system. The Orders-in-Council of the Barotseland – North Western Rhodesia 1889 and North Eastern Rhodesia 1900, which also provided for the manner of appointment of judges, the reception and firmly established. Clause 21 of the 1900 Order-In-Council read:

- (i) There shall be a court of record styled the High Court of North-Eastern Rhodesia with full jurisdiction on civil and criminal, over all persons and over all matters within North-Eastern Rhodesia, subject to the provisions contained hereinafter contained with regard to native law and custom.
- (ii) Such civil and criminal jurisdiction shall, so far as the circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for time being in force in and for England, and the powers vested in and according to the course of procedure and practice observed by and before the courts of justice and justices of the peace in England according to their respective jurisdictions and authorities, except so far as such law may be modified by any Order-in-Council Regulation or Queen's regulation.

Section 5 of the 1904 High Court Procedures Regulations also provided that if no rules of procedure were formulated in North Eastern Rhodesia, then English law would apply.

Section 8 provided that :

Nothing in these regulations shall deprive the High Court of the Right to observe and enforce or shall deprive any person of any law or customary not being repugnant to natural justice, equity and good governance.

From the above, it is certain that the recognition of customary law in Zambia was given by the Orders-in-Council and customary law applied as the law in all native courts while a separate court system applied statutory law and English common law to the settlers. Thus from the beginning of colonialism, customary law existed side by side with introduced English Law.

Customary law still applies in Zambia today. However, such customary law should not be repugnant to natural justice, equity and good conscience and should not be incompatible, equity in terms or by necessary implication with any written law in force in Zambia.³

³ Section 15 of the Subordinate Courts Act, Cap 45 of the Laws of Zambia

This scenario where African customary law should not conflict with the statutory law or the imported English law, still exhibited itself even during the periods the British South African Company took charge of governance issues and during the colonial period, 1924 – 1964. As early as 1915, the company had become anxious to reduce its administrative expenses in Northern Rhodesia especially that it had also to take care of the cost defending the country against German troops from East Africa. So in 1924, the company agreed to divest itself of the powers of government over Northern Rhodesia. As was expected a new machinery had to be set up for the government of Northern Rhodesia. This was provided for by Northern Rhodesia Order-in-Council, 1924. Accordingly, by this Order-in-Council, the High Court, Magistrate Court and Native Commissioner's Court were established.

These courts were expected to administer English and statutory law along side African customary law, where such customary law is not repugnant to natural justice equity and good conscience. During the colonial period, the High court and Magistrate Courts could apply customary law on appeal from the native courts, however, it is interesting to note that the native courts could not apply certain provisions of the law like the penal code. In the case of **Mukume v R**,⁴ the appellant who was convicted by the Lubemba Native court on the charge of theft contrary to Section 243 of the penal code of Northern Rhodesia, appealed and contended that the Lubemba Native Court had no jurisdiction to administer the provisions of the penal code. The High Court upheld this contention. Per Somerhough, J.

⁴ (1959) II Rhodesia and Nyasaland 248

Now it may well be accepted and has been accepted for many years that the crime of theft is a crime which is contrary to native law and custom and consequently if the offence is tried as being a breach of native law and custom, a native court has jurisdiction... The District Commissioner has stated in his judgement that conviction was held, not in respect of a breach of Section 243 of the Penal Code...

Finally, the Native court would have jurisdiction to administer the provisions of the penal code if the:

The governor had authorized it so to do by Order under Section 13 of the Ordinance... In the circumstances, therefore it would appear that the trial of or purported trial of this appellant by the Lubemba Native Court... on a charge of theft contrary to Section 243 of the Penal Code was without jurisdiction being ultra-vires the powers conferred by the Native Courts Ordinance.⁵

⁵ Section 12 of the Native Court Ordinance, 1936

5. THE ADMINISTRATION OF JUSTICE IN ZAMBIA AFTER THE YEAR 1964

The year 1964, October 24 marked the end of the colonial rule period. This brought a lot of changes to the administration of justice system, for instance, the 1964 annual report of the judiciary and magistracy, revealed these changes and future plans. Some of the changes are that the Native Courts were integrated into the judicial system or the formal judicature. Other changes that were seen after or immediately after independence were the abolition of the Ministry of Native Affairs, which led to the New Ministry of Justice. The supervision of the Native Courts was transferred from the provincial administration to " a new care of Local Courts Officers and Magistrates of the judiciary."⁶ However, not everything changed after independence with respect to the law that was to be administered, it still remained the same.

In the present day Zambia, that is still the scenario where local courts are charged with the responsibility to hear matters based on customary law and such law being heard by higher courts on appeal.

From this chapter, it is evident that African customary law prevailed among the Africans in order to maintain peace, love, order and harmony among the people. This African customary law varied from place to place, it was not uniform and it was enforced through the

⁶ Annual Report of the Judiciary and Magistracy for 1964, p.1

chiefs and elders of the village. An inference can also be drawn in that after the year, 1889, the British South African Company introduced English law into the territory and this was administered side by side with the African customary law and this scenario still exhibits itself up to this era and age provided that this African customary law is not repugnant to natural justice and good conscience. During the various periods of Administration or governance certain mechanisms were set up in order to ensure that the administration of the dual legal system operated effectively, for instance the colonial government had set up Native court system for the administration of customary law. This co-existence of African Customary law and the English common law brought about a lot of challenges and shortcomings to the Administration of justice in Zambia. The successive chapters highlight these issues in context.

CHAPTER TWO

1. CONFLICT BETWEEN AFRICAN CUSTOMARY LAW AND THE IMPORTED ENGLISH COMMON LAW AND THE REPUGNANCE CLAUSE.

The co-existence of African Customary law and the imposed English law is never short of conflicts particularly where an African and a European were to be involved in the same law suit. These conflicts are quite prevalent in areas of the law dealing with marriages, property and inheritance and other civil cases. It is the endeavour of this chapter to highlight some of these conflicts between the indigenous African customary law and the imposed English law. Going by the provisions of Section 12 of the Local Court Act, Chapter 29 of the Laws of Zambia, African Customary Law may not be applied, if it is repugnant to natural justice and or morality or incompatible with written law, However, there is a challenge that needs to be resolved and this is the question of how this repugnance to natural justice or morality is to be determined. Some interesting guidelines have been provided on how the repugnance clause may be interpreted. Paragraph 16 of the Local court Handbook⁷ states that:

“...for example, the customary methods of discovering guilt

⁷ Local Court Handbook, 1967, 3rd Edition Lusaka, Government Printers (Published For the Guidance of Local Court staff).

by means of an 'ordeal' (such as taking a stone from a pot of boiling water) are clearly contrary to natural justice, for guilt must be proved by real or verbal evidence and not by supernatural methods. Repugnancy to morality means anything which offends the sense of rightness or decency or is contrary to fundamental human rights. For example a customary law forcing someone to marry against his or her wish, to do so would be repugnant to morality."

It appears that since the decisions of the local courts are not reported, and appeals involving questions of customary law rarely reach the High court, it is not possible to state what customary practices have been held by the local courts to be repugnant to natural justice or morality.

The case of **Kaniki V Jairus**⁸ may be an example of a matter involving the Lala customary law practice of 'Akamutwe' which was held to be repugnant to natural justice by the high court. It is doubtful whether the local court on its own would hold customs as such. This case seems to suggest that a local court's sense of values may be different from those of a court presided over by a trained lawyer. A local court is thus unlikely to refuse to enforce the observance of customs which have the general support of the community.

Therefore, African customary law may be enforced by local courts only if it is not inconsistent with any written law which is in force in the courts' area of

⁸ (1967) SCJ P 91

jurisdiction. Where there is inconsistency between customary and written law, written law shall prevail. Some local courts have in the past allowed litigants to claim compensation because of an alleged bewitching by the defendant.⁹ Such claims would be inconsistent with the Witchcraft Act¹⁰ which makes it an offence to accuse anyone of being a witch. Customary law allow such a claim but Section 12 (1) (a)¹¹ prevents this law from being enforced.

2. CONFLICT OF LAWS IN THE FAMILY LEGAL SYSTEM (MARRIAGE)

In Zambia, marriage is governed by the applicable Zambian customary law and the Marriage Act Cap 211 of the Laws of Zambia which essentially reproduces the basic elements of the English Law. One would for instance, encounter a conflict of laws if one of the parties at the time of contracting a customary marriage was below the age of sixteen years and then at a later stage decides to convert their marriage into a statutory one. The issue will be whether such marriage will be regarded as a valid one for its was done under customary law at the time when one of the parties had no capacity to marry under the statute.

Furthermore, the principles applied by the customary and statutory legal systems of jurisprudence to divorce jurisdiction may conflict that the same two persons are deemed married in one legal system but unmarried in another.

⁹ Local Courts Handbook Op Cit , p. 5

¹⁰ Witchcraft Act Chapter 90, 1995, Edition

This does not exhaust all possible conflict situations: the colonial boundaries that were delimited by the colonisers, contain within them several different tribal groupings. Not surprisingly, problems arise regarding the solution of conflicts between the different systems of tribal law.

In solving a conflict problem in marriage, certain choice of law rules should be sought which will provide constant criteria for selecting the system of law considered appropriate for the solution of the case. The conflict of law rules do not purport to solve the case itself, they do no more than indicate the legal system to be used. For more is involved in a system of choice of rules, than an academic mind teaser or analysis. The conflict between customary and statutory marriage is a formal reflection of a cultural dichotomy, the separate existence of the traditional Zambian culture and the European culture, each espousing its own legal system. Although in Zambia, customary law is generally applicable in respect of marriages contracted between native Zambians and as such, is implicit recognition that the dispute remaining embedded in its traditional Zambian social setting.¹² One may well ask whether this policy successfully accommodates these Zambians who have become westernised in their social attitudes. Should customary law be changed and developed to cater for situations unknown to the traditional Zambian society or should be excluded in favour of more developed system of statutory law? These are vital questions pertinent to the sociologist, politician and lawyer. The conflict of laws reflects a far more profound social conflict.¹³

¹¹ Chapter 29

¹² Bennet W. T . Conflict of Laws, the Application of Customary Law and the Common Law, P 67

¹³ Ibid, P 162

In view of this, it is not surprising that no little attention has been paid to conflict of laws in Zambian marriages.

Despite Zambia's long history of legal dualism, the problem of conflict between statutory and customary law marriages has seldom appeared in case reports. The provision of a dual court system frequently forestalls any conflict problem. If the litigant wishes to seek remedy under customary law he litigates in a court applying that system: Conversely if he wants his remedy under customary law, he litigates in the local courts. Jurisdiction, in effect, usually operates to avoid conflict problems, although this system has clearly depreciated.

The court In **Re Robert**¹⁴ said that,

it would be a novel and an intolerable situation in which the substantive law governing the relationships between the same parties varied in accordance with the court in which it fell to be decided.

The plaintiff by his choice of forum is usually the person to select the legal system which will ultimately govern the case. Although the plaintiff has a choice of forum for litigation, potential conflict problems are likely to arise in the local courts. The type of conflict envisaged in this category may concern a marriage dispute between a Bemba and a Lozi, for example, or between a

¹⁴ 1953, S. R. 47 and 48: But See the speech of the Minister of Internal Affairs, Hansard January 28, 1969 Cols 626 et seq, for the contrary view.

Tumbuka and a Kaonde: the question arises as which system of tribal law is to be chosen to govern the case?

In such circumstances of course, where there is a mixture of the various tribal laws, it cannot safely be said that any one law prevails. The difficulties of attempting to discover whether, in fact, any particular system prevails would be circumvented by the provision that basic principles of right and wrong should be applied to the solution of the case.

Problems of conflict of laws between the African customary law and the English law also exhibit themselves in the offence of bigamy. Bigamy is expressly made illegal under the Marriage Act, which provides for civil law marriages. However, it is clearly lawful and widely practiced under customary law marriages.

This short and somewhat pessimistic comment attempts to show that conflict of law problems in this area are still very much with us, despite some judicial efforts to face this issue. The relevant section of the Marriage Act providing for the offence of bigamy is section 38 and its reads as follows:

- (a) Any person who 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.

The offence of Bigamy can also be charged under Section 166 of the Penal code, the offence of Bigamy is committed under Section 166 if a person whose spouse is still living goes through a ceremony of marriage with another which but for this earlier subsisting marriage would have resulted in a valid marriage.

The first case which reached the High Court on this issue was the **People V katongo**¹⁵ decided in 1974. The facts of the cases were that **Alfred Chibesa** and the accused, **Florence Katongo** entered into a customary union in 1969 and thereafter lived together until they were married under the Act, Cap 211. While her first marriage was still subsisting, she went through a ceremony of marriage under customary law with **Dennis Siwale**. Justice Care having stated the facts continued: As to the first marriage, he noted that, it was not necessary for him to state the effect which a marriage under the Act has upon a customary union which takes place before it and which point had many times been raised, for example, in **Cheni V Cheni**¹⁶ and **Ali V Ali**,¹⁷ and he was content with himself with holding that the first marriage was properly proved to have been a valid marriage under Cap 211. As to the second marriage he was satisfied that some time in November, 1973 the accused Mr Siwale went through some sort of customary union. Hence the question before him which he was to decide was whether that union was void by

¹⁵ (1974) ZR P 280

¹⁶ (1962) 3 ALL ER 873

reason of its having taken place during the life of the husband, but was it (a) a ceremony of marriage and was it (b) void because Mr Chibesa was still alive? He noted that Cap 211 contains two sections which bear on this question namely : Section 38.

Section 34 reads:

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

Section 38 has already been stated above and justice Care further contended that Bigamy (more correctly and originally called polygamy) was made a civil offence in England in 1963. For the offence of Bigamy to be committed the second marriage must be one capable of producing a valid marriage known and recognised under the law but for the subsisting first marriage. Justice Care agreed with **Sinclair, P. in Abdul Raliman v R**¹⁸ when he stated that:

A customary union is not capable of being a valid marriage

¹⁷ (1966) 1 ALL ER 664

¹⁸ (1963) EA 664

in the sense of a monogamous marriage under the Act.

Whether the husband is still alive or not; the fact that is known or recognised by the law is not to my mind sufficient , for this section.

In 1978, a similar case of **Nkhoma v The People**¹⁹ which came before Commissioner Ngulube as he then was. This case presented views differently and in conflict with those propounded by the court in the Katongo case. The facts in the Nkhoma case were slightly different but substantially similar to those of Katongo. In **Nkhoma v The People**, the accused married under the Act when his first wife married under customary law was still alive. In this case, Justice Ngulube was quoted to have said that, "It is interesting to note that Section 38 of the Marriage Act is similar to Section 166 of the penal code".

The court held that customary marriages are valid by virtue of Section 38 of the Marriage Act and therefore any person who commits an offence under Section 38 of the Marriage Act shall be guilty of bigamy, much as the judge accepted that customary marriages are polygamous, he warned that alongside polygamy we have bigamy which may be committed.²⁰ He further went on to state that in terms of Section 166 of the Penal Code, bigamy is committed whenever the second marriage is void by reason of a subsisting first marriage. In the premises, bigamy can be committed where a marriage under the Act takes place when another marriage under this Act is subsisting,

¹⁹ (1978) ZR p 310

²⁰ Ibid, p 313

he cited the **Chitambala case** or where a marriage under the Act takes place where a customary first marriage is still subsisting. The latter position is so because the marriage under the Act will be void since there would result two wives, which that law does not accept. Therefore, the accused was found guilty.

It is important to mention here that both cases were decided by the High Court and there was no appeal to the Supreme court. The position of the law (regarding the offence of bigamy) is not clear until the supreme court resolves the conflict. From the two conflicting cases, Justice Care's decision in **The People v Katongo**, is more technically correct. The two justices seem to have focused on different aspects of the problem. Commissioner Ngulube was concerned to preserve the monogamous nature of the civil marriage and once convinced that customary marriage was recognised as valid in Zambia, concluded that the latter could co-exist with the former. Mr Justice Care, on the other hand, appears to have been motivated in the Katongo Case by a general philosophy that there was merit in accommodating African nations with regard to polygamy even within the terms of a 'western' enactment. In other words, a statute appearing to force Africans into monogamy must be interpreted narrowly so as to restrict its ambit. Furthermore, to support the decision in the Katongo Case, it is worth quoting the expression of **Mr Justice Nathan in the Ex. Parte Cinidza and Another**,²¹ where he said that:

It is not clear to me why the legislature should have decided,

²¹ (1979) SLR 361 at 362 E -H

for the purpose of the law of bigamy to elevate Swazi law and customary marriage to the same status as a civil rites marriage under the Act where the latter marriage is the second marriage. Especially, is this difficult to appreciate in a country like Swazi and (which is also the case in Zambia) where polygamy is permitted and there are no legal impediments to more than one marriage by Swazi law and custom.

In the African society customary law marriages are highly polygamous. Section 166 of the Penal Code deals with monogamous marriages. It is therefore not in order to squeeze customary marriages under this section. A hypothetical situation may advance this argument better. Suppose a man marries a fifteen year old girl in accordance with customary law and there after, the same man while the first marriage is still subsisting enters into another contract of marriage with a twenty three year old woman, in accordance with civil rites: (can this man be charged with the offence of bigamy? Firstly, it is evident that the customary marriage is invalid under statutory law because the girl is below sixteen years of age. But according to the decision in **Nkoma**, the customary law marriage will be treated as valid as a marriage under the Act and the man will be convicted of bigamy. This will contradict Section 33(1) of the Marriage Act which declares that any marriage between persons either of them being under sixteen years of age shall be void.

It is unjust and absurd to apply the statutory principles of monogamy to the customary polygamous unions which most Zambians enter into. Thus to divorce a man married under customary law from one of his wives on the ground that he has committed adultery with bigamy would be to furnish a remedy where there is no offence. The need for urgent legislative reform in this area cannot be over emphasised.²²

These conflicts in the area of family law are by no means exhaustive but merely illustrative of the many conflicts that exhibit themselves in the areas of criminal law, land law and property relations, inheritance and other civil cases just to mention but a few.

3. PROBLEMS OR SHORTCOMINGS OF AFRICAN CUSTOMARY LAW

Apart from conflicts of the African customary law and the English law, there are other factors that affect Zambian adjudicators in the decision making process, for instance, African customary law is not uniform and this can be attributed to the fact that in Zambia there are seventy-two tribes which have different customs and practices traditionally. This lack of uniformity in customary practices impacts negatively on the administration of justice particularly where parties to the same law suit come from different tribes, for example between a Kaonde and a Tumbuka. In such a scenario the court will be faced by a dilemma as to which customary law should be applied, is it the

²² Some detailed reform possibilities are to be found in Nhlapo, R. J. *Family Law in Swaziland*, 1983, p 64.

Kaonde or the Tumbuka custom? As a matter of fact there is no law that directs which customary law should be applied when there is such a conflict of one customary law against another.

Therefore, customary law varies from place to place and it may be correct to state that there are as many customary laws as there are tribes in Zambia.

The other problem of customary law is the fact that customary law is unwritten and this raises problems of ascertaining it. In the local courts, it is assumed to be in the breasts of the local court justices. This however cannot remain true for the future. An increasing number of young people are now running the Local courts directly or indirectly.

The issue of how long a custom can stand the test of time is yet another problem that is faced by the courts. With respect to durability customary law cannot withstand the test of time, that is it changes from time to time and its efficacy will not be released due to the so much erosion of customs and traditions particularly in this fast changing global society.

The ascertainment of customary law through the advisors raises yet another problem. The fact that the courts, other than Local courts are not generally expected to be conversant with the rules of customary law as was the position outlined by **Chief Justice Blagden** in the case of **Kaniki V Jairus**²³ where he stated that:

²³ (1967) ZR 71

A native court may be presumed to know the native law and custom prevailing in the area of jurisdiction. In the same manner that Judges of this court are presumed to know the common law, but cannot regard this presumption as extending to non native courts.

With this scenario the ascertainment of customary law on appeal to higher courts will be done through the advisors and this kind of ascertainment has its own demerits . The special knowledge of the advisors might have been acquired sufficiently, long ago and as such, it could be outdated and may not reflect the current needs of a modern society.

Another problem of ascertaining of customary law through Advisors exhibits itself in a scenario where two advisors to the court perceive the same custom differently. Two people may have different approaches to the same custom especially if they are from different generation and backgrounds despite belonging to the same ethnic group or tribe. This situation puts the court faced with such a scenario into a dilemma as to which advice the court should take.

The use of advisors in courts tends to bring the problem of colouring the testimony. Where an advisor has been summoned by one of the parties to the case, there is a desire to support the party calling the witness and this may lead to false contradictory testimony because the witness may either gain

or lose due to the outcome of the case. In the case of **Inyang v Ita**,²⁴ Justice Berkeley stated that:

A good deal of evidence was given by both side on this question of native law and custom. This kind of expert evidence must always be treated with very great caution. The evidence of these experts is invariably coloured, each by his own personal interest. The only way in which such testimony can be safely treated is to refrain from attempting to estimate individual credibility and to concentrate on drawing conclusions from the general trend of the evidence.

Despite the many demerits of customary law in the administration of justice such as conflict of one customary law to another, lack of uniformity and ascertainment through advisors, African customary law still plays a vital role in the regulation of our day to day lives and activities like family matters, land and property relations and inheritance. With respect to the conflict of one customary law to another, there is a lacuna in the law as there is still no law or statute giving guidance as to what must prevail when such a situation arises and perhaps this poses a challenge for the legislature to consider the enacting of specific laws to take care of this.

²⁴ (1929) p NLR 84

CHAPTER THREE

CONFLICT BETWEEN AFRICAN CUSTOMARY LAW AND THE ENGLISH LAW: REACTION AND IMPACT ON THE JUDICIARY

1. REACTION ON THE JUDICIARY IN FAMILY MATTERS

Whenever there is a conflict between the African customary law and the English Law, the most common and usual reaction of the court is to look down upon the indigenous African customary law . In the following three cases, African customary law was looked down upon the Magistrate courts on appeal from local courts in Lusaka, in **Zenah Phiri v Kaliza Banda**²⁵, **Margaret Daka v Mercy Lwanda**²⁶ and **Rosariya Phiri v John Phiri**, the issue of widows not having children was used by relatives of their deceased husbands to justify the position that widows should give up the houses. For instance, in the case of **Zeneth Phiri v Kaliza Banda** the court had this to say:

The house was in the name of E. Banda. The deceased's family appointed the defendant to administer the home. When the plaintiff went home for purification she was shared a cow, therefore, if the plaintiff wants and she has no where to stay, she should go home and settle . The Chairman (of the ward) has no power over different people's estates unless he is a relative. Building a house together with a wife does not warrant the woman to take ownership of the house.

²⁵ Case Number 17 of 1989

²⁶ Case Number 1381 of 1992

The above example might have been a good judgement in the eyes of customary law. But are they not repugnant to equity? However, the subordinate court in **Rozariya Phiri v. John Phiri** took into consideration the duration of the marriage (17 years) and the contribution of the widow towards the house. With these considerations, the house was given back to the widow. So also in **Zenah Phiri v Kaliza Banda**, the court made the following observation inter alia:

I am concerned further that the matrimonial home in issue was built not only by the appellant but together with her late husband. I am mindful that at this time in our country, when the plight of widows is being seriously considered, society would expect courts to interpret parliaments efforts seriously.

From the above excerpt, it seems that the magistrate in reviewing the lower court's position of the case above, made the intestate succession Act provisions override customary law. I am afraid that this is a very strong indication that customary law, much of which is about matrimonial causes and property will always be struck down by supervising officers, thereby uprooting the African indigenous customary law. At this juncture, it is also important to note that not only courts look down or uproot African customary rules and practices but the community, too particularly with the christian community or society. For instance, in the case of **R v Mubanga and Sakeni**²⁷, the subordinate court found that the Bemba customary practice of contributing

²⁷ (1952) 2 R and N, 52

grain after a successful harvest to be used in the thanks giving festivals had largely fallen into disuse because of missionary influence. Missionaries regarded such practices as being pagan.

Another case that highlights the disregarding of the indigenous African customary law is highlighted in the family law case of **Muyamwa v Muyamwa**²⁸ where the issues about the resolution of the dual marriage where spouses married firstly under one system being African customary law and then secondly, went through a formal ceremony of marriage under the Act. The petitioner who was a party to the dual marriage insisted that, "as far as he was concerned they had been married under customary law before hand, lobola having been paid. He was not interested in the procedure that took place at the Boma," the High Court still went ahead to prove the validity of the case under the Marriage Act, disregarding Africa customary law. From the case of *Muyamwa*, it is quite evident that where there will be a clash between African customary and the English law or an express statute provision which in most cases will be a derivative of English law, the courts reaction will be to disregard the African customary law. Furthermore, there is even an express statutory provision which stipulates that in an event of a conflict between African customary law and an express statutory provision (which in most cases is derivative of English Law) the statutory provision will prevail over African customary law.

²⁸ (1974) ZR p, 280

For instance, Section 12 of the Local Court Act Chapter 29 provides that African customary law will not be applied, if it is incompatible with written law.

2. REACTION OF THE JUDICIARY IN CRIMINAL MATTERS.

With respect to African customary matters that have a bearing on the criminal law jurisdiction, the courts usual reaction with such matters is to treat such matters as being repugnant to natural justice, equity and good conscience. Most African customary rules and practices that will be repugnant to natural justice, equity and good conscience will in most cases be criminal in nature as well. This is illustrated in the case of **R v Luka Matengula and Others**²⁹ where Luka Matengula and three others were pall bearers for the coffin of Chichibanda. There is a Lamba custom whereby the dead can 'point out one responsible for their death. In this case, an old woman, Mayamba Lusika, was 'pointed out' by the coffin ramming on her chest three or more times. The blows were hard and she sustained some injuries which later caused her death. They were all charged with murder. The pall bearers said they felt as if they were under a supernatural force and could not control their actions. The court held that there was no doubt that the Lamba custom was repugnant to natural justice. Further, the court went on to say that if any manifestation to take the life of the woman had been disclosed by the crown, the court would not have hesitated to find malice aforethought. The court further said that it did not think that these four stupid men had any knowledge that the bumps of the coffin, severe as they were would probably have caused the death of Mayamba.

²⁹ (1951) LRNR 148

The court convicted the four men for manslaughter on the evidence. This case clearly illustrates how African customary rules and practices such as where the dead 'point out' the one responsible for their death, being repugnant to natural justice can turn out to be criminal in nature as was the case here. The act of the four men turned out to be manslaughter.

Kaniki v Jairus³⁰ was yet another case in which the repugnance of the Lala customary law practice of 'Akamutwe' as also viewed being criminal by the High court.

3. THE IMPACT AND REACTION OF THE JUDICIARY WHEN THERE IS A CONFLICT BETWEEN ONE AFRICAN CUSTOMARY LAW AGAINST ANOTHER

One of the most important factors that usually puts the courts in a dilemma is when there is a conflict between one customary rule or practice against another customary rule or practice. This dilemma as to which customary rule should be followed, when there is a conflict can be attributed to the fact that there is no statute or any authority which lays down any guidelines to be followed in times of such a scenario coming up in the courts of law particularly where advisors are used in order to ascertain a particular customary law or practice. Presently, in Zambia, there is no statute giving guidance as to what should happen when there is a conflict between two or more customary laws.

³⁰ (1967) ZR 71

The foregoing problems stems from the fact that 'African Customary Law' is not defined. However, it is submitted that, as used in the Local Court Act and the Subordinate Court Act³¹ African customary law refers to more than one system of customary law and this is so because there are seventy two (72) tribal groupings in Zambia and generally each tribal group has its customs and practices. As a general rule, local courts apply 'the customary law prevailing in the area'³² over which they have jurisdiction. It is once more important to note that although people in Zambia are entitled to move freely and reside in any part of the country³³ and the urban areas are populated by people from various tribes from outside Zambia. No law has so far been entered to deal with obvious potential conflicts between one customary law and another.

In a situation where the court is in a dilemma as to which customary law should be applied when there is a conflict between one customary law and another, one option that the court faced with such a situation can do is to consider what the parties to the suit wish, as to which law should be applied. If the parties to the suit decide that no customary law should be applied to the case, then the court will go by that and the court will not apply any customary law to the suit.

This scenario where the parties to the suit decide by mutual consent that no customary law should be applied to the suit is known as Ouster of Customary

³¹ Section 16 and 49 respectively

³² Section 12 (a) Native Courts Ordinance No 19 of 1936

law by consent. The parties to the suit will enter into an agreement that will expressly state that African customary law will not apply to a particular transaction.

The court may not only dislodge African customary law in the consent of the parties to the suit to ouster such African customary law but the facts of the case and nature of the case may just demand that no African customary law should be applied. For instance, in the case of **Sithole v Sithole**³⁴ where the parties were initially married under African customary law and later converted their marriage to a statutory one through registration. There was an action for divorce under the African customary law. However, the High court's reaction was that, 'upon registration of the marriage', its status changed from customary to a statutory one and as such it could only be dissolved by a court order issued by the high court.

The scenario was also very true for the case of **The People v Chitambala**³⁵ where a man was married under the Act but sought to dissolve the marriage under African customary law. The High Court's reaction to this petition was that the action of entering a marriage under statutory law entering a marriage under statutory law excluded the application of African customary law and for this reason, the man could not rely on it.

Another case where the situation by itself just demanded that African customary law should not be applied in spite of the non-ouster of African

³³ Part III of the Republican Constitution

³⁴ (1987) ZR 13

customary law by consent of the parties is the case of **Banda v Banda and another**³⁶ where the parties were married under South African law. When in Zambia, the wife was accused of adultery and the local court ordered compensation to be paid to the husband. However, on appeal, the High Court held that the local court had no jurisdiction to hear the matter because the parties conduct at the celebration of marriage excluded the application of customary law.

On other important issue worthy noting is that an adult has capacity to contract out of African Customary law, this position of law was also affirmed in **Hwalima v Hwalima**³⁷ where Justice Whelan quite clearly stated that:

As to question 1 and 2 regarding an African's capacity to make a will, I do not see why an African of full age cannot dispose of his property by means of a will. There is no written law and as far as can be ascertained no customary law to the contrary either, I consider that an African may accept the jurisdiction of an authority, just as at common law a person is entitled to subject himself to any jurisdiction and law of his choice. Subject to certain conditions as to the disposition of land, I take the view that in this case the testator has contracted out of African customary law applicable to him whatever that may be.

³⁵ (1969) ZR 75

³⁶ (1974) ZR 10

³⁷ (1968) ZR 38

Furthermore, it is very vital to note that African customary law can be ousted by written law when it is expressly stated by statute. With such a scenario there is no room for any doubt.

Finally, having analysed the reaction of the judiciary in its course of administration of justice, particularly when there is a conflict between African customary law and English law, an inference can safely be said that the courts will normally tend to look down upon or disregard African customary law particularly where such African customary law is repugnant to natural justice, equity and good conscience. Not only will the courts or judiciary look down upon African customary practices and rules that are repugnant to natural justice but it will also treat such rules and practices as being criminal as was the case in **R v Matengula and Others** where it was believed that the dead could 'point out' someone responsible for their death. This customary practice was viewed as being repugnant to natural justice and at the same time criminal in nature. Where there is a conflict between one African customary law and another, the courts are usually in a dilemma as to which one of customary rules should prevail, however, where the parties to the suit ouster the application of the customary law by consent, the court will not apply it. Where a statute expressly provides that there will be no customary law to be applied, the court has no option but to oblige.

CHAPTER FOUR

GENERAL DISCUSSION, CONCLUSION AND RECOMMENDATIONS

1. INTRODUCTION

In all these examples that have been cited in the proceeding chapters as indications of waning customary law, the root cause of the problems could safely be said to be the impact of the dualism of the laws and their ultimate effect on the administration of justice by the courts.

The Zambian judicature administers both English law and African customary law on appeal from the local courts. The administration of African customary law in the subordinate and superior courts is done with the help of advisors for the reason that these courts are not very conversant with every aspect of African customary law practice and rules.

At this juncture, it can safely be submitted that much as we would have loved our treasured customary law to exist perhaps side by side with written law, the latter has taken an overshadowing image over customary law by either labelling it repugnant to natural justice, equity and good conscience or stating its incompatibility with written law, or by simply by stating that where there is a conflict between written law and customary law, the former will prevail. For instance observations of the local court system leads to the conclusion that the vast underlying dissatisfactions are quite evident. We acknowledge that it

is relatively simple to see the difficulties in the judicial system, it is less simple to propose solutions. There are however, several improving changes which could be made in the system with or without substantial expenses.

2. CODIFICATION AND INTEGRATION OF LAWS

It is strongly submitted that regional variations in customary law are a very good recipe for division rather than uniformity which encourages nationalism. Following this therefore, it is felt that as long as there is no definite plan for the proper direction of customary law which is not likely presently, it will be much better if it were incorporated into statute.

Presently a great number of English statutes are found on the Zambian law books. This scenario does not in any way reflect Zambia's proper aspirations. However, Zambia has the power to remove legislation that is objectionable and retain what is useful but this process is slowly happening. This is particularly true to case law where Zambian authorities are replacing English authorities, this however, is happening under the received communal system. It seems we cannot do away with the received law which has in fact formed the base of our present legal system. The easier and better way would be to codify customary law. It has been done in Botswana and Ghana reportedly successful³⁸.

In case of Zambia, there are indications that there was such a policy in place. At the start of 1964, the government decided to appoint a commission to

³⁸ See generally A. N Allot 'New Essays in African Law, Butterworths. London 1970.

record and consider as far as possible the unification of customary in the country. A research officer was appointed and was responsible for the major part of work of recording customary law and he did embark on the task.³⁹

The 1964 report shows that at least some policy was in place to codify customary law. However in the year 1975 the report stated that this was not necessary⁴⁰ and there was no indication as to whether it was desired or impossible to do so. Perhaps today is the time, and may be there is sufficient reason to do so. However, the committee acknowledged that there were areas of customary law which required urgent and immediate attention because certain customary traditions, such as deprivation of property and beating of widows and widowers still caused grave hardship.

In this respect, the committee recommended that legislation be enacted which takes into consideration and reconciles merits in various customary laws pertaining to marriage, divorce, guardianship and succession.⁴¹ In 1951, Epstein, a lawyer who made an intensive study of urban Native Courts in Northern Rhodesia wrote:

In the urban areas, circumstances are gradually making for the codification of the African conception. In matrimonial suits and urban court will often strive to arrive at a decision satisfactory to all parties.

³⁹ Annual Report of the Judiciary and Magistracy for the Year 1964. Government Printer, Lusaka, 1965.

⁴⁰ Annual Report of the Judiciary and Magistracy for the Year 1964: Government Printer, Lusaka, 1965

⁴¹ 1975 Report of the Adhoc Committee on Legal Reforms, Appointed 1st June, 1973, Government Printer, Lusaka.

Moreover, it has to become possible in many cases to conduct a hearing without any reference to tribal affiliations , what is happening therefore, is that in many cases where there would appear to have been the possibilities of conflict, this is being inverted by the modification of customary ideas....⁴²

As regards the future, Epstein stated that:

Three possibilities may be mentioned. In the first place, it may become possible in the future to speak of an urban Native common law, that is one common to all Africans living in the town and one to which irrespective of tribe they would be expected to conform. Or again it may be possible to make a deliberate choice of one law as against the other, to work on the principle for instance that where a man marries a woman of a matrimonial tribe he must be assured to accept all the customs of that tribe. Thirdly, a special set of principles may be invoked to govern such cases in much the same way as English courts have evolved and evolving the principles of 'conflicts of laws.'⁴³

Epstein was writing this in 1951. It is thus very possible that by now, 54 years later, what he called an 'Urban African Law' has been evolved by the urban local courts. It is respectfully suggested that Zambia could emulate the

⁴² 1975 Report of the Adhoc Committee of Legal Reforms Appointed 1st June, 1973. Government Printer, Lusaka.

⁴³ Ibid, p 4

example of other countries, such as Botswana and Ghana, which have enacted law to deal specifically with the subject of conflict of laws.⁴⁴

The enactment of such legislation would clarify the position and introduce greater predictability in the choice of the laws to be applied.

3. THE PROCESS OF UNIFICATION AND INTEGRATION OF LAW

First and foremostly, there must be ascertainment and recording of customary law which should be prepared in consultation with the elders of each community, so as to ensure that it reflects their common authority. After ascertainment of the law, it should then be unified. This would definitely reduce the effect of conflict between one African customary against another. Most customary laws display great similarity. This makes it possible to unify the law. In the unified system procedure in courts, it should reflect some of the virtues of customary law procedures. For instance in divorce proceedings, a court tries reconciliation before considering. The divorce proceedings must be simple and informal.

⁴⁴ See generally A. N Allot, *New Essays in African Law*, Butterworths, London, 197, pages 133 - 144

4. RECOMMENDATIONS ON THE CONFLICTS FACED BY THE JUDICIARY ON FAMILY MATTERS: CONFLICT OF LAWS BETWEEN STATUTORY AND CUSTOMARY LAW MARRIAGES IN ZAMBIA

Marriage is generally regarded as a union bringing two families rather than two people. Thus a marriage which has no approval of the wider family on both sides is not recognised by the families. Equally important is the fulfilling of all customary requirements relating to marriage, including the payment of lobola. Due to the significance attached to both procedures and the payment of lobola, we found that even people married under the Marriage Act still fulfilled the customary requirements, even though they did not have to. Furthermore, marriage is also considered a crucial determinant of whether one could be called a widow or widower.

Thus where the necessary customary law requirements are not met or where lobola is not paid, no marriage is considered to have taken place and therefore, in the event of the death of the husband, a wife is not considered to be a widow.

Although there are two prominent marriage regimes in Zambia, that is, customary law marriage and marriage under the Act, most of the interviewees were married under the customary law and even the few that married under the Act, also went through customary law marriage requirements and in practice however, research has established that women whether married

under statutory law or customary law, share the same difficulties as it is clear that many men married under statutory law have contracted second marriages without their spouses suing for bigamy. Although provisions exist in the law, women do not utilise the law due , for example, to cultural expectation which do not expect a woman to challenge her husband, hence she cannot take him to court.

The Marriage Act as mentioned above is based on the basic elements of English marriage law. It goes without saying that the cultures of the two countries are very different and what works in England will not necessarily work in Zambia, as is evidenced by the discussion above.

In view of the above observations, the following recommendations are made:

- (i) Marriage law should be rationalised, unified and indigenised to include customary law so that there is one law application to all Zambians; or
- (ii) In the face of such diversity of marriage systems, the only feasible solution would be to give equal legal recognition to each system, either through recognising a personal law in an integrated state court system (as in Tanzania) or through having traditional courts for family matters operating side by side with state courts (as in Malawi).

Customary law as a whole, as well as from other sources, must be measured by present day needs and future social and economic development. It would do to borrow the words of Dr W. C. Ekow Daniels as he expressed views on

the nature of this development which would probably be fully accepted elsewhere when he said:

“The interaction of English law with customary law must not be taken to mean that in all cases, it is the English law which should be applied to modify customary law. It is a two way process. If English law is to thrive then its application must be modified sometimes by indigenous law to make its acceptable. It is only when it has thus been adapted that we can call it our own law.”

Thus, is our recommendation that “repugnancy clause” be discarded. Undesirable aspects of the customary law of marriages and divorce, whatever their character, should be corrected in the future by legislative rather than judicial decisions. Some African states have already eliminated this clause. Tanganyika’ Magistrate Courts Act , 1963, has repealed the pre-independence order in council provisions that were adopted after independence including “not repugnant to justice and morality” and substituted a new section , omitting any such qualification on the application of customary law. Ghana’s Courts Act 1960 contains no repugnancy clause.

Lastly, we recommend that provisions should be included in the appropriate Acts that the determination of customary law should be a question of law for the court and not a question of fact.

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