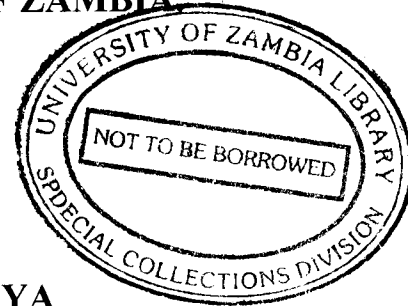


**CONSENT AND BRIDE PRICE AS TWO ELEMENTS THAT HELP
IN DETERMINING THE VALIDITY OF A CUSTOMARY
MARRIAGE AND CUSTODY OF CHILDREN AMONG THE
BEMBA PEOPLE OF NORTHERN PROVINCE OF ZAMBIA**



BY

**CHANDA MAXMILLIAN CHILUFYA
(25053400)**

**Being a paper in partial fulfilment of the examination requirements for
the degree of Bachelor of Laws of the University of Zambia.**

2008.

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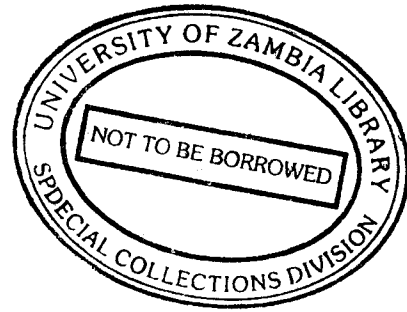
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2008

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UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



I recommend that the Obligatory Essay under my supervision by

**CHANDA MAXMILLIAN CHILUFYA
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Entitled

CONSENT AND BRIDE PRICE AS TWO ELEMENTS THAT HELP IN DETERMINING THE VALIDITY OF A CUSTOMARY MARRIAGE AND CUSTODY OF CHILDREN AMONG THE BEMBA PEOPLE OF NORTHERN PROVINCE OF ZAMBIA.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulation governing Directed Researches.

Supervisor..... *ANNE CHEWE* Date... *07-02-08*

Annie Chewe Chanda (Mrs)

DECLARATION

I, Chanda Maxmillian Chilufya, computer number 25053400, do hereby declare that I am the author of this Directed Research Essay entitled;

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And that it is the creation of my own research and that due acknowledgement has been given where other scholars' works have been used or cited. I further declare that to the best of my knowledge, this work has not previously been presented in any university for academic purposes. I therefore remain accountable for the contents, errors and omissions.

Signature.....

Date.....7th Feb 2008

DEDICATION

To Mum and Dad, you started it all and for all your patience and endurance. Thanks for all the support you have offered me. Be assured that one day it will pay.

ACKNOWLEDGEMENT

I would like to communicate my innermost and heartfelt appreciation to the following people who assisted in making the preparation of this study a reality;

Mrs Anne Chewe Chanda, my supervisor who offered me useful advice and academic guidance from the inception of this Research as a blurred idea to a more definite project proposal and finally in its completion.

I also want to thank to Dr Margaret Munalula for her personal interest, encouragement and support during the Research.

My special thanks go to all Academicians from whose works I drew inspiration. Their various contributions to this work are so invaluable. I also want to thank the following people; Local Court Justice's Singogo, Chengo, Nguni of Lusaka Provincial Local Court, Mr. Mc Cloud Bwino of Legal Resource Foundation, Mrs. Malama of Kabwe, Father Joe. Keanne of St Ignatius Parish in Lusaka, Irene Nkhunda and Esther Mvula of Young Women Christian Association for all the valuable information and from whom I learnt a lot on Bemba customary law as well as the support rendered during the preparation of this essay. I am greatly indebted.

Am also grateful to all my classmates, my family and close friends (Young Samalengi, Kazimbe Chenda, and Kenneth Tembo) and all those not mentioned for all the moral support and encouragement during the preparation of this paper. Without you guys this would have been an impossible task to achieve.

Finally, and mostly importantly, the almighty God for affording me the opportunity to pursue my dream and for seeing me through all the difficult times.

PREFACE

Customary law marriages are and have been a form of marriage recognized in Zambia side by side with the statutory marriage.¹ Though both are acknowledged by the law one can either marry under the statute or under a particular custom. Where one opts to marry under customary law there are certain formalities which have to be done for this marriage to be valid. These include the obtaining of the consent of the parents of the girl, marriage payments and the giving away ceremony as well as consummation. Also important is the marital status of the parties especially that of the girl and prohibited degrees of marriage which entails a restriction of marriage between blood relatives or people of the same clan.

It is therefore the purpose of this research to establish whether or not a marriage entered into under customary law without the consent of parents is valid and further whether custody of the children of the marriage depends on the consent of the parents and marriage payments (Bride price). Whether there is need to restate the law as regards what determines the validity of customary marriage and custody of children vis-a-vis the customary lineage system.

The Research was in addition intended for policy makers, Lawyers, Administrators of Law, Student Academics, Local Court Justices and their personnel.

¹ Sections 34 and 38 of the Marriage Act, Chapter 50 of the Laws of Zambia.

LIST OF STATUTES

Constitution, Chapter 1 of the Laws of Zambia.

The Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia.

The High Court Act, Chapter 27 of the Laws of Zambia.

The Local Courts Act, Chapter 29 of the Laws of Zambia.

The Marriage Act, Chapter 50 of the Laws of Zambia.

The Matrimonial Causes Act No. 20 of 2007.

LIST OF CASES

Hafiz Ayub Durg V. Najmunnissa Ismail (1992) SJ (HC) 1992/HP/D/28.

Hyde V. Hyde Woodmansee (1866) L RI P & D I30.

J v C (1970) A.C 668,710.

J. Montimbi Siwo V. P. Amesi Siwo (1970) Z.R 79.

Janet Mpofo Mwiba V. Dickson Mwiba (1980) Z.R 175.

Re O (1962) 2 ALL E.R 10, C.A

Siamuchunga V. Musukwa High Court files series U2/3/1.

Sibande V. The People (1975) Z.R 101(SC).

The People V. Chitambala (1969) Z.R 142.

The People V. Katomgo (1974) Z.R 290(HC).

The People V. Paul Nkhoma (1978) Z.R 4 (HC).

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CHAPTER 1

1.0 INTRODUCTION

This chapter provides the background to the whole research by firstly identifying the problem, then giving the purpose of the research and the reasons it has been carried out. The manner in which the research has being carried out is discussed next, followed by a comparison of the two types of marriage recognized in Zambia, that is civil marriage and customary law marriage as generally practiced throughout Zambia. It also gives a definition of marriage while the main body under different subheadings brings out the main differences between these two types of marriages. This will give a broad understanding of what marriage is and the formalities for creating a valid marriage. The last thing to be discussed under this chapter is the content of the remaining chapters.

1.1 BACKGROUND TO THE STUDY

Customary marriages are governed by a set of rules and values which prescribe how different ethnic groups of Zambia found a family and regulate marriage, divorce, and Custody of children. It recognises marriage as creating a social relationship between man and a woman and locates their children in the kingship system.¹ The various customary laws in their patterns, principles and concepts exhibit broad similarities and characteristics in the sense that it is not only a union of the two parties but a union of the two families. It is an arrangement between the man's family and the woman's family who agree to the marriage upon specific terms. These terms often relate to marriage payments which begin the whole process to contracting a valid marriage. Generally the terms stipulate when the marriage payments have to be made, and for the Bemba these consist of three types namely *insalamo*, *mpango* and *cisungu*. These payments are important and have to be paid before a marriage ceremony can be held and before a marriage can be said to subsist. Thus without the making of these payments every other subsequent event such as '*ukulanga umulilo*', and 'the entering-in of the son-in-law ceremony' are not performed. These terms are negotiated and agreed upon between the man's family

¹ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; Page 35.

representative, known as a *shibukombe* (go-between) and the woman's family. The *shibukombe* is appointed by the man's family and normally has to be an elderly person preferably one in a position to provide counsel in the event of marital problems. To initiate negotiations the *shibukombe* takes a present, usually a small amount of money to indicate the man's family's intention to court or engage from that woman's family. Their acceptance of the present signifies that they agree to his proposal.²

1. I.0 STATEMENT OF THE PROBLEM

An examination of most of the cases on matrimonial matters handled at the Legal Resources Foundation, a non-governmental organisation providing free legal advice, reveals that most people in peri-urban areas do not usually follow the formalities to contracting a customary marriage. Two of the formalities normally not complied with are consent of the girls' parents and marriage payments which validate the marriage and give the right to children of the marriage. Marriage payments are either not paid or are partially paid. However, failure to comply with procedure has an effect on the status of the marriage and children of such a marriage. The significance of marriage has to be acknowledged because marriage by establishing a family locates the children in the kinship system and gives them a special status. The particular kinship system being followed resolves the issue of custody by electing who is to have custody of the children as the child's membership is fixed at birth and does not change. In the light of the present economic situation, advancement in technology and social interaction, it is questionable if the lineage system is the basis upon which custody should be granted. Furthermore, the validity of the marriage comes into question as the way the parents to the girl react to such a union is critical to legitimising it.

It is against this background that the study will establish why the customary law relating to marriage is not being followed to the latter in spite of it being recognised as law. This in itself has led to an increase in the number of people that are cohabiting and by law such a union is not recognised as a marriage. Complicating matters further, the status of

² Muna Ndulo, Law in Zambia; First Edition; East African Publishing House Limited; Lusaka; 1984; Page 150.

children born from such a union comes into question in the event of separation or divorce. Arising from this is the issue of custody of children as the kinship system which they belong to is not clearly defined. That is who is to be responsible for the day-to-day needs for the child's upbringing until they are of majority age. This also leads to several other problems such as abandoning and deserting of children as well as an increase in the number of street kids.

1.1.1 SPECIFIC RESEARCH QUESTION

Does the validity of customary marriage and custody of children of the marriage depend upon the consent of the parents to the union and marriage payments (Bride Price)?

1.1.2 RESEARCH OBJECTIVE/PURPOSE OF THE STUDY.

The objective of this research has been to determine whether the woman's family should regard and accept a marriage entered into without paying of Bride price or where it is partially paid, as a valid subsisting marriage. To ascertain in a situation where the man and woman have not gotten parental consent and the couple have lived together for a period of time, should this also be recognised as a marriage? To find out the role of the court in determining the worth of consent and bride price in a customary marriage.

Furthermore, the study has critically analysed two of the general formalities (consent and bride price), their application, and assessed their importance in determining the validity and custody of children of a customary law marriage. It has also criticised the basis of granting custody of children on the basis of the lineage system, in that way advancing the rights of the child. The research paper has also outlined the customary marriage formalities peculiar to the Bemba people of Northern Province. Finally, the study has highlighted the need to strengthen as well as to restate the customary laws relating to matrimonial laws and custody of children in the light of changed circumstances and the reality.

1.1.3 JUSTIFICATION/RATIONALE

The rationale for this study has been to establish why this branch of customary law is not being obeyed despite it being recognised as law. The question has been; should it be done away with and if not, what are the legal implications of not complying with this law. It has also endeavoured to identify the weaknesses in the law that have perpetuated the problem of cohabitation. The need to conduct this research has also been influenced by the change in the circumstances such as the economic situation, advancement in technology and social interaction. These measures have helped ascertain whether the lineage system is the best and sole consideration for granting of custody of children under customary law.

1.1.4 METHODOLOGY

The researcher in gathering information has undertake used two methods namely; desk research and field research. The desk research has been conducted at the University of Zambia, Great East Road main campus main Library while the field research has been conducted at the Local Courts, through interviewing of people married under Bemba customary law and those knowledgeable of Bemba customary law, and Church leaders. Non-governmental organisations such as Women and Law in Southern Africa Trust and Women in Law and Development in Africa specialising in women's rights were also visited but due to the nature of research they were conducting at the particular time they were unable to provide any information related to the Researchers topic.

1.2 DEFINITION

Traditionally, marriage is a ceremony by which a man and woman become husband and wife, that is, the act of marrying. It has also meant the relationship existing between a husband and his wife of opposite sexes or the state of being married. It establishes a status, that is, the state of belonging to a particular group of persons-married persons, to whom the law assigns definite peculiar legal capacities or incapacities.³ There is no generally accepted definition of marriage as it varies from place to place. The confusion

³ P. M Bromley, 'Bromley's Family Law'; Sixth Edition; Butterworths; London; 1981; P 16 -17.

surrounding the definition of marriage has been compounded by the recognition of certain relationships as marriage or affording them of equal legal status as marriage.

Same-sex marriages or gay marriages a term for a governmentally, socially or religiously recognised marriage in which two people of the same sex live together as a family is now given legal recognition in a few countries such as the Netherlands, Belgium, Canada, South Africa, Spain, and certain States in the United States for instance Massachusetts. A Registered Partnership is another of such unions which is also nearly equal to marriage acknowledged in Scandinavia and Iceland. These partnership laws state that wherever the word "marriage" appears in the country's law will now also be accepted to mean "registered partnership" and wherever the word "spouse" appears will now also be construed to mean "registered partner". In the United Kingdom, civil partnerships have been introduced giving partners an identical legal status to a marriage, with such benefits as shared parenting tasks. Partnership ceremonies are performed by a marriage registrar in exactly the same manner as a civil marriage.⁴

The Zambian courts when faced with the question of defining a marriage have relied on the conventional English definition given by Lord Penzance in Hyde V. Hyde Woodmansee⁵ when he defined marriage as the;

“.....voluntary union for life of one man and one woman, to the exclusion of all others...”

The above position of the law is well illustrated in Janet Mpofo Mwiba V. Dickson Mwiba,⁶ where Chirwa, J., held that the basis of marriage in English law is the Christian marriage, the voluntary union for life of one man and one woman to the exclusion of all others and the Christian concept is not a religious one but a monogamous concept of marriage and that courts of matrimonial jurisdiction would therefore not dissolve or annul marriages unless they are monogamous unions within the meaning of English marriage.

⁴ http://en.wikipedia.org/wiki/Same-sex_marriage

⁵ (1866) L R I P & D I30.

⁶ (1980) Z.R 175.

The court held that although the marriage was monogamous, the man was free to take another wife under the law governing their marriage.

Clearly the legal recognition of these other forms of marriage has changed the meaning of marriage and its traditions. In the past the meaning of marriage was restricted only to the Christian concept of a voluntary union for life of one man and one woman, in which procreation of children is one of the principle ends of marriage. Same-sex couples are incapable of having children of their own through ordinary biological means. Additionally traditional family values and the presupposition of perpetuity of marriage have been damaged. This all goes to show that the definition of marriage has changed fundamentally over time.

1.3 LEGAL FRAMEWORK

Zambia has a dual legal system consisting of customary law and statutory law. This is as a result of the introduction of English law into Northern Rhodesia (now Zambia) dating back to the time of the British South Africa Company.⁷ The Constitution of the Republic of Zambia and the Marriage Act provide the principal legal systems of the laws of marriage by acknowledging civil law marriages and customary law marriages,⁸ though each has a distinct legal framework regulating it. The English law of marriage applies to Zambia by virtue of the High Court Act.⁹ Customary law consists of local custom and traditions of indigenous peoples which is largely unwritten and is orally passed on from one generation to the next.¹⁰ It is these same set of rules and values which stipulate how various ethnic groups found a family and regulate marriage, divorce and custody of children during and after marriage.

⁷ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 1.

⁸ Article 23 (4) (c) Chapter 1 of the Laws of Zambia, and Sections 34 and 38 of Chapter 50 of the Laws of Zambia.

⁹ Section 11 of the High Court Act, Chapter 27 of the Laws of Zambia.

¹⁰ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 10 and 11.

In a civil marriage, the Marriage Act¹¹ is the most eminent source of the law of marriage. The Act was enacted to cater for the solemnisation of marriages, to look into the validation of marriages already solemnised, and to provide for matters incidental to or connected with such issues.

1.4 UNION AND DURATION

Going by the definition of a civil marriage given by Lord Penzance in the Hyde case, it is a union of the two parties to the marriage and must be voluntary. Accordingly, it can be invalidated if there was no genuine consent on the part of one of the parties. The marriage presupposes endurance for life. Neither spouse may get into another marriage so long as the initial union subsists.¹² If any of them does, he/she commits the offence of bigamy punishable by up to five years imprisonment and also the subsequent marriage is void *ab initio*, that is, it is of no legal effect from the beginning.¹³

In **THE PEOPLE V. KATONGO**,¹⁴ the high court held that, to constitute the offence of bigamy under Section 166 of the penal code the second marriage must be one capable of producing a valid marriage known and recognised by the law but for the subsisting first marriage. Section 166B of the Penal code contemplates that both the first and second ceremonies of marriage should be Christian or western type marriages.

The above decision was firmly endorsed in the case of **THE PEOPLE V. PAUL NKHOMA**,¹⁵ Commissioner Ngulube held, "I am satisfied that on 22nd March, 1976, when the accused gave notice of marriage to Juliet right upon until 13th April, 1976, when he purported to marry her, and indeed thereafter and at all times, the accused knew that he was still married to Dorothy. PW3, the marriage officer, gave the accused all the necessary warnings and obtained an affidavit from the accused and yet the accused still

¹¹ Chapter 50 of the laws of Zambia.

¹² P. M Bromley, 'Bromley's Family Law'; Sixth Edition; Butterworths; London; 1981; P 17 and 18.

¹³ Sections 38, 40, 44 & 45 of the Marriage Act, Chapter 50 of the Laws of Zambia.

¹⁴ (1974) Z.R 290(HC). An earlier decision on the offence is that of *The People V.*

Chitambala (1969) Z.R 142.

¹⁵ (1978) Z.R 4 (HC)

held himself out to be an unmarried man. I do not accept that the accused held any reasonable belief that he had divorced Dorothy.” Accused was convicted accordingly.

Exempted by section 38 is a spouse who marries another person under a presumption of death. If the spouse is living but has not been- heard of or seen for seven years by people who ought to see or hear of him, there is a presumption of death and consequently such person (who agrees to another marriage) may not be penalised.¹⁶

Unlike a civil marriage, a customary marriage can be a union of more than two people as the marriage is potentially polygamous. This is also the reason why the offence of bigamy does not apply to customary unions. It is not a voluntary union because the marriage can be arranged by parents and is not deemed to be for life as the marriage can be dissolved on flimsy grounds such as laziness or allegations of ill-treating of relatives of either spouse.¹⁷

1.5 CONSENT

There is no requirement for marriage payments in civil law marriage although parties in Zambia pay it anyway as custom values it. Consent of parents under civil law is equally is not a necessary requirement for parties who are of marital age, though again parties to a marriage in Zambia obtain it as a sign of respect and because of cultural values. Under the Act it is only mandatory if either party to an intended marriage, not being a widower or widow, is under twenty-one years of age. Such permission should be attached to the affidavit or else no special licence or certificate shall be given out. As a result no marriage will be celebrated.¹⁸

Where this sanction to a marriage is denied, a Judge of the High Court may upon application being made, consent to the marriage. It shall be deemed to have the same result as if it had been obtained from the person whose consent was refused. Similarly if there be no parent or guardian of such party residing in Zambia, the Minister or a District

¹⁶ Section 38 of the Marriage Act, Chapter 50 of the Laws of Zambia.

¹⁷ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts.

¹⁸ Sections 17 & 38 of the Marriage Act, Chapter 50 of the Laws of Zambia.

Secretary will be competent to grant such consent. However, they have to be satisfied after investigation that there is no reasonable justification in the interest of either party to withhold such consent, and it shall be authoritative for the objectives of this Act as if the father or mother had assented.¹⁹

As already alluded to consent in a civil marriage is obtained as an indication of respect for ones prospective in-laws and for blessings for the marriage to be a success, which is a cultural value. This is also one of the reasons it is sought under customary law marriage. It is also gotten so as to allow for the helping of resolving of marital problems and for the parents of the girl to know of the man their daughter is living with. Parental consent is considered vital mainly because a girl is of tender age and with no experience that would make it possible for her to appreciate the nature of marriage.²⁰

The significance of the consent of parents was comprehensively discussed in the case of **SIBANDE V. THE PEOPLE**,²¹ in which the appellant was charged with defilement of a girl of twelve and one of the issues was whether the parents had given their permission or at least had been asked for it. **BARON, ACJ**, in delivering judgment of the court stated; “In Zambia it is not unlawful for a man to have carnal knowledge of a girl under the prescribed age if he is lawfully married to her. Lawful here means that both the parents and the girl have consented to the marriage. Unfortunately, unlike rape, the consent of the girl alone cannot be raised as a defence to a charge of defilement...It is relevant to observe also that there is no evidence that according to customary law a man and woman, and in particular a man and a fifteen year-old girl (which is the age the appellant said he believed the girl to be) can contract a valid marriage with no formality and with nothing more than their own agreement. It is not enough for an accused simply to say ‘we are married’ or even ‘we are married according to customary law’; he must at least say ‘we are married according to customary law because we did this and this and this.’ We are

¹⁹ Ibid,Section 19.

²⁰ Lillian Mushota, ‘Family Law in Zambia: Cases and Materials’; First Edition; UNZA Press; Lusaka; 2005; P 77.

²¹ (1975) Z.R 101(SC).

satisfied that no credible evidence was adduced of a lawful marriage. The appeal must be dismissed. Appeal dismissed.”

1.6 FORMALITIES

In a customary marriage, the families of both parties to the marriage are very much part of the alliance. A long time ago it was not acceptable for a man or a woman to tell his parents directly without the use of an intermediary that he or she wanted to marry. Parents often also arranged marriages with families they regarded as of good character and morals; a family with adequate resources to provide for their daughter and that the man could be a good husband. This made certain that marriage did not take place within the prohibited degrees of marriage, or if allowed, essential payments were made to make it probable for near relatives, mostly cousins, to marry. Today among most tribes, a young man after he has made his choice refers the idea to his go-between to converse the issue with his parents or he tells them himself.²²

Betrothal is held as a first step of a series of acts which would inescapably end in a marriage and therefore is much more than a measly open declaration of the couple's objective to marry. This idea is demonstrated in formal behaviour, in the use of relationship terms and sometimes in reciprocal economic assistance and mutual visits and in the exchange of gifts. The man and woman when courting would exchange gifts to express their love for each other and acceptance of the man's proposal for marriage. The girl was expected to declare the gift(s) received to the grandmother or aunt who would tell the girl's parents that their daughter had been proposed to.²³

The man's parents after being told of the man's intention to marry would then assign a go-between to go and discuss the matter with the girl's parents taking a present, usually a small amount of money. In the olden days a hoe or silver could do. This was meant to notify the girl's parents that the man wanted to marry from their family. On the first visit the go-between is expected to make an initial payment usually called the mouth-opener to

²² Interview with Local Court Justice J. M Singogo, Provincial Local Courts.

²³ Ibid.

facilitate for discussions between the two families. Further discussions are held on the subject and the girl is called to identify her suitor and whether she is agreeable.²⁴

Customary marriages incorporate such fundamental elements as consent of the parents, which counts more than that of the parties to the marriage and marriage payments. The parents who include; aunties, uncles and grandparents play an indispensable role in the marriage process, including approving the parties' marriage, devoid of which no marriage may take place.²⁵ Thus the parents to the girl make a decision and the man is asked to make marriage payments. Traditionally should a girl's father refuse to give his consent to her marriage, however irrationally, there is no means of compelling him to give it. Similarly should the bridegroom's father's object to the marriage, the brides family will decline to endorse the match until the father to the groom has been reconciled with it.²⁶

A case in point is that of SIAMUCHUNGA V. MUSUKWA,²⁷ in which a guardian recovered damages against a relative who gave consent to the marriage of his daughter without his authority.

Consent is indicated by accepting the marriage payment made by the potential groom's family. These payments are necessary aspects of a legitimate marriage and vary from one ethnic group to another though standardised within an ethnic group. The payments are also important because they signify a marriage relationship between the bride and the groom's families and equal respect for each other. Marriage payments are presumed to assure good behaviour of the woman and as compensation to the bride's father for the loss of a daughter. From the instance of consent and the payments (or part thereof) a relationship is formed between the two families of the bride and the groom.²⁸

²⁴ Ibid.

²⁵ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 77.

²⁶ Muna Ndulo, 'Law in Zambia'; First Edition; East African Publishing House Limited; Lusaka; 1984; P 149.

²⁷ High Court files series U2/3/1, as read in Muna Ndulo, 'Law in Zambia'; First Edition; East African Publishing House Limited; Lusaka; 1984; P 160.

²⁸ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 77; Muna Ndulo, 'Law in Zambia'; First Edition; East African Publishing House Limited; Lusaka; 1984; P 150.

A customary marriage is not considered legitimate if marriage payments have not been made at different stages in the marriage process. However, marriage payments can be waived by the father of the girl and occasion of payment can be bargained. In most situations some of it is paid over before the bride is handed over to the husband's family. Its computation seems to be based on considerations such as the status of the bride's family and the capacity of the young man to meet the amount demanded. The bride wealth is paid back in case of a failed marriage and depends on the status of the girl. If she was educated, or a virgin, she was more valued than one who was not. When a girl was raped, the rapist paid damages to the parents of the girl but that lowered the wealth (money, cattle) which her family could ask for her marriage.²⁹

At the fulfilment of all requirements, a wedding is held or the girl is handed over to the man in some rite. Each tribal group has its own method of doing it, with or without spectacle, publicity or limited to close relatives of both bride and groom. Marriage is often considered principally as an establishment of reproduction.³⁰

In a bid that a man and woman may become husband and wife under statute, two requirements must be fulfilled: they must both have the ability to contract a marriage, and secondly, they should abide by the obligatory formalities. Statutory marriages must be performed by an authorised Church Minister (for instance a priest or pastor) or Registrar in a designated or licensed place or building between the hours of six o'clock in the forenoon and eighteen o'clock in the afternoon with open doors in the presence of two or more witnesses. The licences are usually gazetted and the church itself or some other place of devotion must be licensed and gazetted to solemnise marriages. Parties wishing to marry from a place other than those designated must apply for a special license although they must be married by a licensed Minister of religion or Registrar of

²⁹ Ibid, P 84 and 150.

³⁰ Interview with Local Court Justice J. M Singogo, Provincial Local Courts.

marriages or as provided by their laws. Marriages in unlicensed buildings or churches by illegal persons fail as civil marriages.³¹

The parties must initially file a notice of intention to marry which is made on the prescribed form to the Registrar who is found in each and every district. The notice must be of not less than twenty-one days and must be given by one of the parties to the marriage.³² Furthermore, that person must sign it. If the person cannot write, his or her mark, e.g., a cross or thumbprint shall suffice and be placed on the prescribed form. It shall be evidenced by a person who is literate (can read and write).³³ The Registrar upon payment of the approved fee shall issue a certificate in the prescribed form at any time after the end of twenty-one days. Though this must be before the expiration of three months from the date of the notice and subject to these further conditions;

- (i) that one of the parties has been resident within the district in which the marriage is anticipated to be solemnised for at least fifteen days immediately prior to the granting of the certificate;
- (ii) that each of the parties to the planned marriage (not being a widower or widow) is not below twenty-one years old or that if he or she is under that age the consent hereinafter(i.e. in the Act) required has been gotten. The consent should be in writing and annexed to an affidavit;
- (iii) that there is not any obstacle of kindred or affinity or any other lawful encumbrance to the marriage;
- (iv) that neither of the parties to the anticipated marriage is married by African customary law to any individual other than the person with whom such marriage is proposed to be contracted.³⁴

³¹ Sections 20; 21; 22; 25; 26; 28 & 32 (2) (a) & (d) of the Marriage Act, Chapter 50 of the Laws of Zambia.

³² Ibid, Section 6.

³³ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 58.

³⁴ Section 10 (1) of the Marriage Act, Chapter 50 of the Laws of Zambia.

If the marriage is not performed within three months of the notice, the notice and all events consequent thereupon shall be considered void. A new notice must be given in accordance with section six before the parties can lawfully marry.³⁵ The Minister or an authorised officer may waive the above conditions upon being satisfied that there is no lawful impediment to a proposed marriage.³⁶

1.7 CONVERSION

A customary marriage may be transformed into a statutory marriage by registering it at the Marriage Registry. However, as the statutory marriage is monogamous, only a customary marriage where there is only one wife is translatable. A polygamous man who desires to marry under the Act has to divorce the other wives. Statutory marriages are not convertible into polygamous marriages. If married under statute and wish to marry an additional wife the law requires that the monogamous marriage is dissolved by the High Court, upon satisfying the ground that the marriage has irretrievably broken down on proof of the five factors stipulated in the Matrimonial Causes Act, 2007.³⁷

1.8 REGISTRATION AND DISSOLUTION

Customary marriages may also be registered by a local court or council in an urban or rural area. The parties appear before the marriage official with the wife's parents or guardians who are obligated to confirm the legality of the marriage under the customary law that applies to the couple. Such a marriage can either be dissolved by the local court, or by the families of the parties according to their tradition.³⁸ A statutory marriage is registered at the Marriage Registry situated at the Civic Centre before two or more witnesses and the marriage can only be dissolved by the High Court, upon establishing the ground that the marriage has irretrievably broken down on proof of one or more of the five factors stipulated in the Matrimonial Causes Act, 2007.

³⁵ Ibid, Section 10 (2) & (3).

³⁶ Ibid, Section 12 (1).

³⁷ Section 9 of the Matrimonial Causes Act, 2007.

³⁸ Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 90.

1.9 AGE

There is no precise age for marriage in a customary marriage. A girl is ready for marriage at puberty, though some ethnic groups allow a longer period for a girl to be more mature. As for the boy, he is usually thought ready for marriage once he grows a beard and demonstrates ability to carry out work that can sustain a wife, children and other kin. In the established customary setting a family includes brothers, sisters, cousins, parents, uncles and all near relations of the parties to the marriage.³⁹ For a civil marriage, the statute prescribes the age of twenty-one or above when two parties can marry with a proviso that if below twenty-one consent ought to have been obtained.⁴⁰

1.10 CAPACITY TO MARRY

The marital status of the parties in a customary marriage, is such that the girl must be single, widowed or divorced, while that of the man is of no relevance as the marriage is potentially polygamous.⁴¹ In a civil marriage both parties must be single, widowed or divorced.

1.11 PROHIBITED DEGREES OF RELATIONSHIP

A number of ethnic groups forbid marriage amid blood relatives or people of the same family. The explanation for dispiriting marriages within the family is that it presents difficulties when it comes to paying the bride wealth, an act which those who allow it believe is a virtue. Conversely many others do not have such limitations, and cousins do marry. Whilst those who permit marriages within the family believe that it is easier to advise and bring the parties together for the reason that both sides are family.⁴² A statutory marriage does not at all consider and allow for blood relatives or those related by marriage to marry as this is considered incestuous and repulsive. The prohibition is also based on social and moral grounds such as unendurable tensions in the family and so as to eliminate the risk of their children inheriting undesirable genetic characteristics.⁴³

³⁹ Ibid P 76-77.

⁴⁰ Section 17 of the Marriage Act, Chapter 50 of the Laws of Zambia.

⁴¹ Interview with Local Court Justice J. M Singogo, Provincial Local Courts.

⁴² Lillian Mushota, 'Family Law in Zambia: Cases and Materials'; First Edition; UNZA Press; Lusaka; 2005; P 88.

⁴³ P. M Bromley, 'Bromley's Family Law'; Sixth Edition; Butterworths; London;

1.12 INCLINATION

Though parties to a marriage are at liberty to either contract a civil or customary marriage, it is mostly the urban community that marry under statute. This can largely be attributed to the educational status of people living in urban areas, alimony after divorce and the want for security on the part of women. Security of marriage is guaranteed in that it is a monogamous union.⁴⁴

1.13 NULLITY OF MARRIAGE

Both marriages may be rendered null and void *ab initio* or voidable, though under different reasons owing to extensive and deep-rooted shortcomings that go to the manner in which the marriage was contracted. The Matrimonial Causes Act, 2007⁴⁵ and the Marriage Act of Zambia⁴⁶ stipulate what grounds will lead to a civil marriage being declared void or voidable. A civil marriage is null and void if solemnised within the prohibited degrees of marriage on the ground of kindred or affinity. In addition it will also be void where both parties consciously and rebelliously go along with solemnisation in a place other than the office of a Registrar or a licensed place of worship or a place authorised by special licence; or under a false name or names; or without the Registrar's certificate of notice or special licence having been duly issued; or by a person not being a licensed minister of some religious denomination or body or a Registrar.

The Court in their holding in **J. MONTIMBI SIWO V. P. AMESI SIWO**,⁴⁷ sanctioned the principle of law that if parties to a marriage knowingly and willingly go into a marriage with no registrars' certificate or licence, that marriage is void. **Doyle, C.J** also held that if one of the parties is unaware, or both parties are ignorant of this omission, then the marriage is valid and thus the Marriage was declared valid.

1981; P 33.

⁴⁴ Interview with Mr. Mc Cloud Bwino, Chawama Legal Advice Centre, Legal Resource Foundation.

⁴⁵ Section 27 & 29.

⁴⁶ Sections 32 & 33, Chapter 50 of the Laws of Zambia.

⁴⁷ (1970) Z.R 79.

The brief facts of the case are that the petitioner and respondent agreed to marry and lobola of K120 was paid to the girl's parents. No mention was made of a customary marriage and no such ceremony did take place though the marriage was blessed in church according to church rites. There was no certificate or licence issued and the petitioner did not know it was necessary. The issue was whether this marriage was null and void since it was entered into in contravention of the Marriage Ordinance particularly Section 32(2). Section 32 (2) required the registrar's certificate of notice or special licence to be duly issued.

Similarly the case of HAFIZ AYUB DURG V. NAJMUNNISSA ISMAIL⁴⁸ demonstrates the ground of prohibited degrees. In this case the court held that where marriage takes place within the prohibited degrees of relationship, it is of no consequence whether or not the marriage was consummated. It is all the same void ab initio and there is no need therefore, as in the instant case, to plead non-consummation as well. Turning to evidence, the court is content that the parties are blood cousins and therefore fall within the prohibited degrees of relationship and should not have contracted the marriage. In that event the marriage is declared null and void ab initio.

Furthermore, a marriage between persons either of whom was at the time of the marriage already lawfully married will equally be void. As to voidable marriages, the following reason will suffice, that is to say, any party to the marriage did not validly consent to it whether as a result of duress, mistake, unsoundness of mind or otherwise.

From the above discussion, a prohibited degree of relationship under customary law is not strictly applied as a factor in causing such a marriage to be invalid. In addition there are no legal requirements as to where a marriage should be celebrated or special licenses. Consent of the girl is irrelevant as that of parent's counts more than that of the girl proving the fact that customary marriages are normally arranged. A lawfully married couple under customary law will not cause a marriage to be invalid where a man contracts another marriage as polygamy is acceptable.

⁴⁸ (1992) SJ (HC) 1992/HP/D/28.

1.14 CONCLUSION

The chapter has been a general introduction of the study and the rationale for studying it. It has also illustrated the major differences between a statutory marriage and a customary marriage.

1.15 CHAPTER ARRANGEMENT

Chapter two is looking at the legal position of Bemba customary law on marriage and divorce. It is also discussing custody of children. This chapter is the basis upon which most of the material is analysed.

Chapter three is an analysis of themes that are emerging from the research. The law on Bemba custom is being discussed together with specific field case studies and in consequence the legal implications of parental consent and marriage payments are being determined. A critique of the lineage system as the sole basis for granting custody of children is also given here.

Chapter four, which is the last chapter, has concluding remarks and recommendations of the essay on the subject.

CHAPTER 2

LEGAL POSITION OF BEMBA CUSTOMARY LAW AND CUSTODY OF CHILDREN

Many people living in Zambia are very much traditional. Consequently, they continue to practice their various customs in every aspect of their lives. This chapter discusses Bemba customary law in the context of marriage and divorce. Custody of children is discussed from both perspectives of customary law and statutory law as the subject has been better covered under English law. The chapter will provide a basis upon which to evaluate the various cases to be presented in the next chapter, hence determine the research objective or purpose of this study.

2.1 CONTRACTING A BEMBA CUSTOMARY MARRIAGE

In the past when one decided to marry he was advised to marry in a family that was deemed respectable and of good behaviour or the marriage could be arranged for him or her. Today the man can approach the lady of his choice and propose marriage to her. He then refers the matter to his parents, grandparents, maternal uncle and aunties. A go-between known as a '*Shibukombe*' is then appointed by the man's family and charged with the responsibility of negotiating the marriage between the two families. The *shibukombe* does not belong to either the man's family or the girl's family and he is appointed because of his knowledge of the custom of marriage.⁴⁹ He is older than the groom and he is the principle witness of the marriage up to the time it is concluded.⁵⁰

The *shibukombe* goes to seek the consent of the girl's parents on behalf of the man and his family. He takes an initial payment known as '*insalamo*' (formerly a copper wire bracelet), meant to ask them if they could consider the match and to allow the young man to court their daughter.⁵¹ It is also for the purpose of introducing the man to the girl's

⁴⁹ Chondoka A. Yizenge, Traditional Marriages in Zambia: A Study in Cultural History; First Edition; Mission Press; Ndola; 1988; p. 87.

⁵⁰ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁵¹ Audrey I. Richards, Bemba Marriage and Present Economic Conditions (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; P52.

family and hence give him the legal right to speak or chat with the girl either at the grandmother's, sister's or brother's place. This sum of money is carried in a basket made from reeds called "*icipe*"⁵² or is placed and covered in two small white plates. The reason for the colour of the plates for such an occasion is that marriage is regarded as sacred and the purity is reflected in the colour of the plates used to bring such a payment to the girl's kin. It is returned if the parents refuse outright, but even if it is kept, it does not bind either party very seriously as it does not constitute any legal obligations. Further no parents would take such an important message as a marriage proposal seriously if it were made merely by word of mouth, thus, the need to pay *insalamo*.⁵³ *Insalamo* is an assurance that the man is serious and committed to marrying the girl. It is an official claim over the girl and it avoids other men from proposing marriage to her.⁵⁴

The man's family also carries the favour of the girl's mother (a most fearful and respected person in this new relationship) by giving her a length of cloth or some other gift or giving her a reasonable sum of money,⁵⁵ and it is not returnable when the engagement is called off.⁵⁶ When Bemba women pass the child-bearing phase, they have equal standing as a man and can drink with men. They can speak their minds freely before the men folk. Therefore, Bemba women often carry out important negotiations on behalf of their sons or other male relatives.⁵⁷

When the *shibukombe* got to the girl's parent's house he used acceptable language when explaining the purpose of his visit. He spoke as if he was the one intending to marry the daughter of the host family saying, "*ndefwaya kukakila*" meaning, "I have come to engage your daughter". He then handed the *insalamo* present to the father of the girl. The go-between was told to come for the answer on a later date as the girl's family had to meet and decide on the answer.⁵⁸

⁵² Chondoka, Op.cit, p. 88.

⁵³ Interview, Op.cit.

⁵⁴ Chondoka, op.cit.

⁵⁵ For instance K200,000.

⁵⁶ Interview, Op.cit.

⁵⁷ Audrey, Op.cit p.22-23.

⁵⁸ Chondoka A. Yizenge, Traditional Marriages in Zambia: A Study in Cultural History; First Edition; Mission Press; Ndola; 1988; p. 88-89.

The girl's family calls its' relatives and they discuss the proposition. The paternal aunt (Nyina Senge) played an important part in the marriage ceremony of the girl and could bless or curse the fertility of the union.⁵⁹ At the next family meeting the groom's family is invited and they are warmly received by the parents of the girl. Humour and many jokes are shared as the talk to each other. At a suitable time the girl is called to identify the man and she is questioned, 'this man has approached us with a marriage proposal. Are you agreeable and do you know this man?' If she is agreeable the parents to the girl do '*Cisumina Ubusonge*', that is accepting of *insalamo*.⁶⁰

From this moment the parties are betrothed and the man started behaving like a son-in-law to the parents of the girl. The same was also true for the girl in her relations with the man's parents.⁶¹ It is the initial step to contracting a valid marriage and may take place during the childhood of both parties and this is termed child betrothal. Girls are usually bespoken at the age of 10 or 11, while boys are affianced rather later.⁶²

Apparently the Bemba speaking people allow for cross-cousins (*mufyala wandi*) on both the father's and the mothers side of the family to engage and marry. A similar position has been adopted with regard to classificatory granddaughters (*mweshikulu wandi*). In the case of a chief, a man may marry the daughter of his own son, but in the case of a commoner this is regarded as bad, and he may only marry the daughter of his brother's son. The daughter of a daughter is prohibited in both cases because 'the daughter of a daughter is a sister.' So also a woman may marry her grandson although this is not common.⁶³

⁵⁹ Elizabeth Colson and Max Gluckman, Seven Tribes of British Central Africa; University Press; Manchester; 1961; P 175.

⁶⁰ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁶¹ Chondoka, Op.cit p. 89.

⁶² Elizabeth and Max, Op.cit p.181.

⁶³ Elizabeth Colson and Max Gluckman, Seven Tribes of British Central Africa; University Press; Manchester; 1961; p.181.

In Bemba society, a woman has definite rights over her brother's daughter, and may demand this girl as an additional wife for her husband or a substitute wife if she herself is tired of married life. This marriage known as the *mpokeleshi* is characteristic of the Bemba. This is not to say that Bemba women have accepted the institution of polygamy like the Southern Bantu. They in actual fact ignore the existence of the second wife and refuse to co-operate with her in any way.⁶⁴

After betrothal there are a series of courtship visits known as *ukulwisya*. The bridegroom sends word to his bride's village to ask her to come visit him. The girl can only visit when her parents consent to the man's request and after she has been reproached about her behaviour. She is advised to observe a downcast demeanour and not to speak at all during the evening but merely sit behind the friends who escort her. When they reach the boy's village, the betrothed refuses to enter the house until she has been given some small token and may not speak until her husband has put an end to the taboo by giving her another present, which he may do during one of the visits, or later if she is too shy. The bride's party on their return is questioned anxiously as to the behaviour of the bride.⁶⁵

In the village the girl's family becomes responsible for the man's daily food requirements from the time of accepting *insalamo* or engagement whereas in the urban area different foods are passed on as gifts on an occasional basis. The first *nshima* (*ubwali*) with chicken, a traditional dignified relish, from the mother-in-law is not eaten by the son-in-law. Instead, he calls his elderly female relatives to come and collect the food so that it may be given to another family to eat. The very family that eats the food prepares some food for the groom. Thereafter, the food from the girl's family should be prepared by the girl's grandmother or elder sister. It is part of tradition for the groom to ask the source of the food that is brought to him and this he must do for every *nshima* brought to him.⁶⁶

⁶⁴ Ibid.

⁶⁵ Audrey I. Richards, *Bemba Marriage and Present Economic Conditions* (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; P62.

⁶⁶ Chondoka A. Yizenge, *Traditional Marriages in Zambia: A Study in Cultural History*; First Edition; Mission Press; Ndola; 1988; p. 90.

However, after the initiation of the girl or *cisungu* ceremony the man could eat food prepared by the bride's mother. A food offering rite called *ukutebeta* was organised for the groom. Before this ceremony could take place, the *shibukombe* went to the bride's parents and announced that, "*umwana wa bene aleonda ku nsala*" which means "the stranger's child is wasting with hunger." This ceremony was delayed to ensure that the man had proved himself suitable to be their son-in-law. Each chicken that was prepared as a relish had to be saved with a gizzard (*nondo*) failure to which it was not offered. Other foods prepared included fish, beans, *pupwe chulu*, *katapa* and traditional beer (*katubi* or *kattata*). The *shibukombe* was charged with the responsibility of receiving these gifts.⁶⁷ After the food has been consumed the man's relatives return the containers after they have been cleaned to the owners, and in each container they put a small amount of money to show their appreciation for the food prepared. From this day the groom did not need to question the source of his food.⁶⁸

A short period of time elapses and depending on resources and preparations, another ceremony of '*Chilanga mulilo*' is conducted. Foods prepared include *nshima*, chicken, beans, fish, *icikonko* (pounded groundnuts), *pupwe chulu*, *kacheshya*, *katapa*, *tute*, *ifumbu* (sweet potatoes), *icipush i*(pumpkin) and traditional beer.⁶⁹ These foods are taken ceremoniously, with each food covered carefully with a basket and a small gift such as a bangle, to the groom's parent's house and is performed for the sole purpose of showing the man what he should expect to eat when he marries and visits his in-laws to be. When presenting the foods to the man's family the girl's family say to the bridegroom's mother; "We have shown the son-in-law the fire, now he will eat food with us"⁷⁰

Both families to the marriage agreement watch eagerly to see if the presents have been made with due respect. The significance of each food is explained and if there is any food that the man does not eat, he can point at it. This way the girl's family gets to know the

⁶⁷ Ibid p. 91.

⁶⁸ Ibid.

⁶⁹ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁷⁰ Audrey I. Richards, Bemba Marriage and Present Economic Conditions (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; p.63.

foods that their son-in-law does not eat. There is plenty of ululation, humour and jokes are shared during the presentation of the foods. After the explanations the girl's relatives leave and the food is shared amongst the groom's family. When the man and his kin have eaten all the food, the man's people return the containers after they have been cleaned to the owners, and in each container they put a small amount of money or string of beads or some other token to show their appreciation for the food prepared for them.⁷¹

Again a period of time elapses and when the man is prepared, the man's family sends the *shibukombe* to go and consult about the payment of the bride price known as 'mpango' and 'cisungu'. Though this payment is made as a lump sum, *cisungu* is the most valued payment of all the payments that are made.⁷² It is a payment made by the bridegroom to the mother or father of the bride and also to the mistress (*nacimbusa*) of the initiation ceremony to facilitate for the initiation ceremony for the girl as well as to show that she has grown and matured into a woman.⁷³

During the *cisungu* ceremony the girl is secluded, remaining out of sight all day. The girl is taught the future work of a wife through songs and dances. She becomes known as *nacisungu* (the nubile bride) and is shown how to perform domestic works, agricultural works and how to conduct herself before her relatives-in-law. Secrets are revealed to her by showing her various objects, known as *imbusa* (i.e. 'things handed down'), consisting of pottery images, made specially for her, representing tribal legends and domestic objects. All these have archaic names which are now revealed to the girl.⁷⁴

The rite is performed to purify the girl from the stain of her first menstrual blood by bathing her and covering her with white clay. It also involves the exchange of food and beer between the families of the bridegroom and the bride. At the close of the ceremony the bridegroom is shown the *imbusa* which he has to shoot at with a bow and arrow at a

⁷¹ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁷² Ibid.

⁷³ Audrey I. Richards, *Bemba Marriage and Present Economic Conditions* (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; p.53.

⁷⁴ Elizabeth Colson and Max Gluckman, *Seven Tribes of British Central Africa*; University Press; Manchester; 1961; p.182-183.

mark on the wall of the house below which the bride sits. Then afterwards there is singing which goes on through the night till the first cock crows. A chicken is ritually killed and eaten by all the women present to mark the end of the ceremony. A girl who doesn't undergo such a ceremony is formerly despised.⁷⁵

Mpango which is also described as "*ukwimana*" is divided by the father of the girl amongst the girls' family, the maternal uncle and paternal aunt being most important, and is paid for the sole purpose of allowing the woman to marry the man.⁷⁶ If the maternal uncle is the one who has brought up the girl, he has rights to the whole *mpango*.⁷⁷ It is also meant for the parents benefit for giving birth to their daughter and for raising her up as well as recognition of a wife's value both to her own husband to-be and to her own relatives.⁷⁸

During the process of negotiations, the man's family has to behave humbly and respectfully while the woman's family assumes an attitude of superiority which they express in certain aloofness, as if they were reluctant and unwilling to co-operate in the matter. Upon being told the bride price to be paid, the *shibukombe* reports back to the man's family. If the grooms' family is agreeable they pay. This bride price has to be paid before the consummation of the marriage. *Mpango* is higher if the girl is educated and is paid back if the couple divorces but *cisungu* is never returned. All marriage payments must be paid to the uncles or other elderly family members on the mother's side before the woman can be handed over to the man.⁷⁹

When all the payments have been made, the two families plan the wedding ceremony popularly known as '*ubwinga*.' If the families cannot afford to host a big wedding they just conduct a simple function known as "*cibombela ng'anda*", a small family gathering to let members of the community know that the couple is now married. Secondly once all

⁷⁵ Supra, note 26.

⁷⁶ Ibid, p.181.

⁷⁷ Audrey I. Richards, *Bemba Marriage and Present Economic Conditions* (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; p.55.

⁷⁸ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁷⁹ Ibid.

the payments are made, it means that no other man should approach her with a marriage proposal i.e. it legalises the marriage union. The girl is handed over to her husband. If anyone should kill or injure her, or commits adultery with her, who may claim compensation for the injury to his rights. She can sweep his house and prepare his bath water.⁸⁰

The giving of the bride to her husband also takes place in a number of stages after the payment of all marriage payments. The groom sends to ask for someone to sweep his house, wash his clothes and to fetch him water. If permission is granted the girl goes over to do these chores. She executes her duties so as to show him that she will be a good wife once the marriage procedures were finalised.⁸¹ He makes another payment so as to give him the privilege of taking his young bride to sleep with him before the wedding ceremony. However, when puberty seems to be approaching, the girl is returned to her parents to wait for the performance of her initiation ceremony, as it is considered exceedingly dangerous for the whole community if a girl should become pregnant before the carrying out of this rite. The Bemba allow this because they believe that the bride must be made used to the marriage bed very gradually. They firmly believe that such unions are most lasting and that the girl will not like any other man but her husband.⁸²

On the wedding day, this is some days after the *cisungu* ceremony; the following foods are prepared chicken, beef, beans and beer. Before the actual celebrations the girl is taught for the last time by her paternal aunt (*Nasenge*) and *nacimbusa*. Similarly the man is also taught by elderly male relatives. There is singing and dancing and both man and wife are advised on how to look after themselves.⁸³ Thereafter she is carried on the back of her paternal aunt who is accompanied by some elderly ladies and taken to the man's house to consummate the union. The groom gave a gift to his bride and her paternal aunt

⁸⁰ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁸¹ Chondoka A. Yizenge, Traditional Marriages in Zambia: A Study in Cultural History; First Edition; Mission Press; Ndola; 1988; P 89.

⁸² Audrey I. Richards, Bemba Marriage and Present Economic Conditions (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; P63-64.

⁸³ Chondoka A. Yizenge, Traditional Marriages in Zambia: A Study in Cultural History; First Edition; Mission Press; Ndola; 1988; p. 95-96.

for her to leave. After the consummation of the marriage the bridegroom should throw out a smouldering brand to the waiting relatives.⁸⁴ The following day the elderly women ask the bride questions to find out if the marriage has been properly consummated.⁸⁵

If the marriage has been properly consummated the paternal aunt goes to the marriage house with a new pot for the bride and a gourd of oil. The paternal aunt puts the small pot on a fire with the husband and the wife both touching the rim of the pot, to make the contract complete. The water from the pot is then spilt over the wife's hands and she in turn washes the husband's hands. After this they are oiled. The couple stay in the marriage house for two or three days during which they should not talk to outsiders. They are also not allowed to eat hot foods or drink beer.⁸⁶

When the young couple is released and made free to eat ordinary foods as well as join ordinary life, the two families prepare identical meals, with the mans family providing a cock and the wife's family providing a hen. There is an exchange of foods between the two families. Pots of beer are prepared, one especially provided for the bridegroom and two or more for the elders. The young couple are then further advised about their married life, the girl is told to be obedient to her husband, and the man to look after his wife and to protect her from all sorts of danger.⁸⁷

Then the two are bathed, oiled and dressed in their best clothes and brought outside the house where they sit on a mat and receive presents and admonishments from onlookers and relatives a rite known as *ukushikula*. The girl's father formally presents the bridegroom with a bow and arrow, or a spear, with which to protect his wife and children. The marriage ceremony is then completed, but the husband has still not been completely

⁸⁴ Elizabeth Colson and Max Gluckman, Seven Tribes of British Central Africa; University Press; Manchester; 1961; p.183.

⁸⁵ Ibid.

⁸⁶ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁸⁷ Ibid.

incorporated into the wife's family, although the parties acquire the status of husband and wife after the consummation of the marriage.⁸⁸

2.1.1 SETTING-UP THE FIRE PLACE (*UKULANGA UMULILO*)

This rite is mostly practiced in the village and it is a period of probation for the son-in-law. After the marriage ceremony the man and his wife move to the girl's village to set up their house. During his stay there, should he prove to be lazy or quarrelsome, he will not be allowed to remove his wife to his own village should he desire to do so in future.⁸⁹ The newly weds are also not allowed to prepare their own food until after the performing of the *ukulanga umulilo* ceremony. *Ukulanga umulilo* is a ceremony by which the girl's mother allows her a fire-place of her own on which to cook. She does this by lighting the fire for her and giving her one of the new pots known as the marriage pot specially kept to honour the house. Then the marriage pot is filled with water and placed on the fire, with the husband and wife both touching the rim. Water from the pot is spilt over the wife's hand.⁹⁰

From then onwards, the wife is allowed to cook her own food and to brew her own beer. After a year or two, the son-in-law is allowed to have his own garden and to build his own Granary, although he may continue to help his father-in-law. This means that the young couple have established their distinct household, with fields under the control of the husband and the kitchen and store-room under that of his wife. It is then the husbands' duty to clear the ground for cultivation and to build the house and storehouse, make mats, baskets and to provide salt, meat, fish and other foods; and the wife's duty to help in the cultivation of the land.⁹¹

⁸⁸ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁸⁹ Elizabeth Colson and Max Gluckman, *Seven Tribes of British Central Africa*; University Press; Manchester; 1961; p.182

⁹⁰ Interview, Op.cit.

⁹¹ Ibid.

2.1.2 THE ENTERING-IN OF THE SON-IN-LAW

The final marriage ceremony which is incorporation of the son-in-law into the family takes place anytime from five to ten or more years after the consummation of the marriage. At the birth of their first child the man's in-laws perform a ceremony called '*matebeto*' as an indication of respect for increasing the family members. Then follows another rite known as *ukwingishya shifyala*, symbolising that the young man is definitely accepted as a member of his wife's family or in the group of closely related kinsmen. It may therefore take place at anytime during the couples married life, though not before they have had one or two children, but at any time whenever the union seems to be stable, and the parents-in-law are satisfied that their daughter will be well looked after. On such an occasion, the son-in-law may be addressed thus; "*waingisha mukolo wesu pantu wafyala bana. Wakula ing'anda yobe,*" meaning "you have entered our family because you have begotten us children. You have built yourself a house." The joyous occasion consists in joint beer-drinking by both sides of the family with dancing of a formal kind, the son-in-law and the mother-in-law and vice versa.⁹²

2.2 CONSENT AND MARRIAGE PAYMENTS

Without any or if part of the marriage payments is made, there is no wedding ceremony and marriage. All payments must be paid for there to be a marriage. A marriage can only take place where parents have refused their consent at the girls' persistence and will only be a valid marriage if parents finally give in to her request but before she moves into the man's house.⁹³ The parents consent to their son's marriage is a proper thing to seek, and they should conduct the negotiations for it but should he marry without their approval, the union is apparently valid. In terms of marriage payments, parents just contribute to his wedding feast but he does not depend on his kin for his marriage payments.⁹⁴ The local courts have found a man who has not obtained parental consent or made marriage payments to the girl's parents with a case to answer and have deemed such a union as illegal. Thus no marriage subsists and the man can be charged with a case known as

⁹² Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

⁹³ Ibid.

⁹⁴ Audrey I. Richards, Bemba Marriage and Present Economic Conditions (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; P14 & 47.

“*cisungu*”.⁹⁵ The Roman Catholic Church has equally refused to bless a traditional marriage where these two important formalities have not been complied with.⁹⁶

In concluding the discussion on the marriage process, it must be stated that initially the essential element in the contract of marriage consisted formally in service which involved the making and fencing of gardens principally performed by the son-in-law. Through the *shibukombe* the man asked his parents-in-law where their field was. On the first day, the man could invite two or three relatives, and together with the intermediary, they worked the fields. They only knocked off upon being given gifts by the girl’s parents. On subsequent days, the groom went alone and knocked off alone without being given gifts.⁹⁷ This he started soon after betrothal and continued for four or more years, and indeed for the whole of his life. Nowadays the whole nature of the contract has being altered by the making of money payments.⁹⁸ Money that is paid in the alternative to providing labour is separate from the marriage payment of *mpango* and is not claimed back in an instance of divorce.⁹⁹ The paper now turns to discuss divorce under Bemba custom.

2.3 DIVORCE

There is very little difference in divorce procedures or the basis upon which a divorce is approved under the various customary laws. It is though, more complicated owing to the claims made for the return of the bride-price and for high damages in the case of adultery on the part of the woman. Dissolution of a marriage may be either by arrangement between the parties to the marriage and their relatives outside of court, or through proceedings in a local court with an order of divorce. When the parties have major disagreements or one of them is guilty of misconduct, he or she is summoned either

⁹⁵ Interview with Local Court Justice Chengo and Justice Nguni, Lusaka Provincial Local Courts.

⁹⁶ Interview with Father Joe Keanne, Saint Ignatius Parish Priest, Lusaka. See Question 4 under ‘Freedom to marry’ of attached Premarital Inquiry Form at end of Chapter.

⁹⁷ Chondoka A. Yizenge, Traditional Marriages in Zambia: A Study in Cultural History; First Edition; Mission Press; Ndola; 1988; P 90.

⁹⁸ Elizabeth Colson and Max Gluckman, Seven Tribes of British Central Africa; University Press; Manchester; 1961; P 180.

⁹⁹ Audrey I. Richards, Bemba Marriage and Present Economic Conditions (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; P52.

before representatives of their family or before some elders of the community, to have the matter settled peacefully.¹⁰⁰

In a local court either the husband or the wife may bring a divorce action. The wife does not require the consent of any other person to bring such action, though in some areas when the case is heard, the local court will insist that the wife have some close relative present, e.g. father, brother, maternal uncle. In some courts relatives of the husband are permitted to bring divorce action against the wife on the absent husband's directives. A local court, like the two respective families, usually makes an effort to reconcile the parties and avoid a divorce, but once it is clear that the marriage cannot be saved divorce is granted.¹⁰¹

The local courts consider reasons why a divorce is sought, not as grounds in them, but as evidence of the collapse of the marriage. When the man's or wife's relative are a party to a divorce petition their opinions are considered by the court, i.e. whether or not they support or oppose the divorce, though this will not necessarily decide the matter. A local court in some cases may refuse to dissolve a marriage even though both the wife and her relatives or vice versa want the divorce or may grant a divorce to a wife or husband whose relatives do not agree that the marriage should end.¹⁰²

2.3.1 GROUNDS OF DIVORCE

The underlying basis of divorce in all Zambian customary laws is the same, the breakdown of the marriage. Again the reasons for divorce in the local courts are similar throughout the country. They include impotency or bareness, adultery, desertion, wife's laziness, husbands neglect, failure to cohabit, husbands cruelty, frequent periods of imprisonment or witchcraft, and incompatibility.¹⁰³

¹⁰⁰ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

¹⁰¹ Interview with Local Court Justice Chengo and Justice Nguni, Lusaka Provincial Local Courts.

¹⁰² Ibid.

¹⁰³ Ibid

2.3.1.1 BARRENNES OR IMPOTENCE

This ground though tenable to both parties highly disfavours the woman. Procreation is an essential element of a marriage under African Customary law and the most important part of the 'value' of a woman is her child-bearing capacity, thus failure to conceive may be a ground for divorce. This is regardless of her serving him well in other respects. A man's social status is enhanced if he is a father. It's construed as a failure of the wife to fulfil her most important obligation under the marriage contract.¹⁰⁴

2.3.1.2 ADULTERY

Adultery by the wife is regarded as an automatic ground for divorce as it is an injury to the man's integrity. The ground extends to other acts of misconduct short of adultery such as mere touching of the wife's waist or mere association. A husband may be divorced by the wife for successive or persistent adultery, since a man is allowed greater freedom of action.¹⁰⁵

2.3.1.3 DESERTION

Desertion is where a wife deserts her husband in favour of another man or decides to return to her family. There is no prescribed period and the offence is committed when the wife refuses to return to her husband after she has been asked to do so. Desertion by husband does not entitle him to bride price as he is the cause for the dissolution. In many areas, local courts permit a woman to bring a divorce action during her husband's absence after attempts to summon him before the local court have failed, e.g. wife does not know where husband has gone.¹⁰⁶

2.3.1.4 LAZINESS

A lazy, disobedient or quarrelsome wife may sometimes be returned to her parents for a period of correction and sent back again when she is supposed to have learnt to behave

¹⁰⁴ Interview with Local Court Justice Chengo, Justice Nguni, Lusaka Provincial Local Courts, Father Joe Keanne, Saint Ignatius Parish Priest, Lusaka and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

¹⁰⁵ Interview with Local Court Justice Chengo, Justice Nguni, Lusaka Provincial Local Courts, and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

¹⁰⁶ Supra, note 52.

better. If there is no sign of improvement, the husband may seek a divorce. Failure to maintain a house in good order and to cook properly or failure by the wife to follow the rules laid down by the husband and disrespect towards the husbands' relative will constitute laziness and disobedience.¹⁰⁷

2.3.1.5 NEGLIGENCE

Neglect or wilful refusal by the husband to maintain his wife and the children is a ground for dissolution of a marriage.¹⁰⁸

2.3.1.6 COHABITING

Failure to cohabit with the wife by a husband for a reasonably long period of time is another good ground for the dissolution of a customary marriage.¹⁰⁹

2.3.1.7 CRUELTY

Frequent beating of wife without proper reason or cause will amount to cruelty and on this basis the wife may file for divorce.¹¹⁰

2.3.1.8 THEFT

Either party becomes an incorrigible thief, for this reason the other party is not ready to continue living with him/her.¹¹¹

2.3.1.9 INCOMPATIBILITY

Parties cannot compromise on most matters and find it difficult to continue living with each other.¹¹²

The list is not complete nor can it be complete, because any situation that causes a breakdown of the marriage may be included. The courts also accept the fairly common reason

¹⁰⁷ Ibid

¹⁰⁸ Interview with Local Court Justice Chengo, Justice Nguni, Lusaka Provincial Local Courts.

¹⁰⁹ Interview with Local Court Justice Chengo, Justice Nguni, Lusaka Provincial Local Courts, and Mrs Malama of 35 Jameson Avenue, Kabwe, Central Province.

¹¹⁰ Interview, Op.cit.

¹¹¹ Ibid

¹¹² Ibid.

from a wife seeking a divorce that I do not love my husband.¹¹³ A discussion on divorce would be incomplete without discussing custody of children as it is one of the issues raised where a divorce is granted and so in summarising this chapter, the essay will now look at the law on custody of children from both approaches of statutory and customary law.

2.4 CUSTODY OF CHILDREN AND THE LINEAGE SYSTEM

When a marriage has broken down it is generally the children who are likely to suffer most, both from the disharmony in the family prior to the final break down and the psychological effect of the disturbance in their lives. **Lord Denning, M.R** defined custody to mean “a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.” It can also be defined in terms of Actual Custody which means actual possession of the child’s person, whether or not that possession is shared with anyone else. This narrow sense of the word is sometimes denoted by the words ‘care and control’ or ‘possession’.¹¹⁴

Divorce does not alter a child’s membership in the particular kinship group since this status is fixed at birth and does not change. Thus a child born to parents in a matrilineal society is a member of his mother’s matrilineal group and a child born in a patrilineal society will be a member of his father’s patrilineal group after divorce. The Bemba people who inhabit large areas of Zambia particularly Kasama and Mporokoso are a matrilineal group. Membership to a matrilineal group further entails that there is no paying of *lobola* and the man has no say in the upbringing of his own children though they live with him.¹¹⁵

This responsibility is placed on the children’s uncles on the mothers’ side. These uncles have a greater say when it comes to marriage negotiations, disciplining them and to

¹¹³ Ibid.

¹¹⁴ P. M Bromley, ‘*Bromley’s Family Law*’; Sixth Edition; Butterworths; London; 1981; P 283.

¹¹⁵ Interview with Local Court Justice Chengo, Lusaka Provincial Local Courts.

providing such basics as education, food and shelter. It also entails that children can only inherit property or wealth from their uncles and would not be entitled to whatever their father has amassed over the years through his hard work. Usually the woman will have custody of the children, because under customary law it is generally recognised that it is a woman's duty to look after the children.¹¹⁶

In deciding the question of custody, there are basically two questions that arise. That is, who is to have legal custody and who is to have actual custody? However in answering these two questions, the paramount concern should be the child's welfare or the best interests of the child.¹¹⁷ This assertion is well supported by the law governing custody of children; which states in section 15(2);

"15 (2) In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa."¹¹⁸

Lord Macdermott in construing the meaning of "child's welfare in J v C¹¹⁹ had this to say;

"[These words] must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed"

¹¹⁶ Ibid.

¹¹⁷ *Supra*, note 65, p. 293 and 294.

¹¹⁸ *Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia*

¹¹⁹ (1970) A.C 668, 710.

Therefore, consideration should be given to the following factors;

2.4.1. PERSONALITY AND CHARACTER OF THE CLAIMANTS

It should be ensured that the child is not exposed to the danger of moral corruption or encouragement. Additionally, if the parents are divorced and propose to re-marry, which of their partners will most likely make the better parent substitute? Thus, both parents should be appraised to see what effect each is likely to have on the child if granted custody of it.¹²⁰

2.4.2 SEX AND AGE OF CHILDREN

Common sense dictates that the mother should have the care and control of young or sickly children (particularly little girls) or those who for some other reason specially need a mother's care. Other things being equal, it may be better for an older boy to have the influence of his father. It is generally desirable to keep brothers and sisters together and not to split the family up more than is necessary.¹²¹ This position of the law was well illustrated in the case of Re O¹²², in which an English woman who was married to a Sudanese brought the son and daughter of the marriage back to England. It was held that the boy, who was aged six or seven, should go back to the Sudan with his father where he would eventually succeed to his business, whilst the girl, who was a year or so younger, should stay with her mother apparently on the ground that the future prospects of a girl of mixed parentage was better in England.

2.4.3 ACCOMMODATION AND MATERIAL ADVANTAGES

The fact that one parent is more wealthy than the other does not give a prior or superior claim to who is to have custody of the children. It is the happiness of the child, and not its material prospects, which should be the concern. However, this is not to say that a party's financial position should be ignored totally. If he or she is so poor that he or she cannot even provide a home for the children, this in itself might be

¹²⁰ Supra, note 68, p.295.

¹²¹ Ibid, p.295-296.

¹²² (1962) 2 ALL E.R 10, C.A.

enough to refuse him or her actual custody. This is linked to the amount of time and energy a parent can devote to the care and upbringing of the child. It is a factor worth considering because children need to feel a parental love and care. This may mean that a mother who can spend the whole of her time with her children will necessarily have an advantage over a father who will be out at work all day, despite whatever alternative arrangements that can be made to have them looked after.¹²³

2.4.4 STABILITY OF HOME LIFE

The fact that the child has lived for some time with one parent may in itself be a good reason for not moving him/her for it is imperative that he/she should have as stable a home life as possible. Consequently, if say, a child is in the mother's care and the father takes it away against her will, the proper course will usually be to reinstate it to her immediately in the absence of any evidence that this is likely to harm the child.¹²⁴

2.4.5 THE CHILD'S WISHES

If the child is old enough to express its own wishes, it is worth taking them into account before the granting of custody. Though, the danger that the child may have been coached by one parent must always be had in mind. Sometimes the child's own wishes are so contrary to its long-term interests that it may be justified to disregard them.¹²⁵

2.5 CONCLUSION

Basically the chapter has given an exposition of Bemba Customary Law in relation to marriage and divorce whereas custody of children was looked at from a customary and statutory point of view. It has also brought out, though not exhaustive, factors that ought to be considered when granting custody. The subsequent chapter will be a synthesis of the law discussed under this chapter and specific cases, and thereby determining the legal implications of not obtaining parental consent or not making of marriage payments.

¹²³ Supra, note 71 p. 297.

¹²⁴ Ibid

¹²⁵ Ibid.

CHAPTER 3

ANALYSIS OF EMERGING THEMES

This chapter is an analysis of themes emerging from the research that has just been conducted. It is a synthesis of the law discussed under the preceding chapter and specific cases, and thereby determining the legal implications of not obtaining parental consent or not making of marriage payments. It will also criticise the basis of granting custody of children by virtue of the customary lineage system.

3.1 LEGAL IMPLICATIONS OF FORMALITIES

3.1.1 GENERAL

Although the law on the manner of contracting a valid Bemba customary marriage is certain, couples married under such law have not adhered to or fully complied with the formalities. The research findings during the study show that, particularly parental consent and marriage payments were not viewed or considered by respondents as strict requirements to be complied with when contracting a valid marriage. It was apparent that some respondents had little knowledge about Bemba customary law with regard to marriage.

Mwango Lupanga, of Chawama Compound, and unemployed at the moment lodged a complaint with the Young Women Christian Association (YWCA) seeking reconciliation with her parents who had refused to acknowledge her union with a Mr. Zulu. The two have been living together for the past one year and six months and during this time her parents have made several attempts to withdraw her from this illegal union. At the counselling session the parents still insisted that she return to her parents house. She adamantly refused telling her parents that she was not for sale, that she loved her husband and that he would pay when he had money. At another such meeting Chishimba Mwansa,

also of Chawama, offered to pay her Father her own bride price.¹²⁶ Both parents vowed never to talk to their respective daughters.

It is clear from the behaviour exhibited by the two women that they did not understand and respect their cultural values. They also did not understand that these cultural values have crystallised into Bemba Customary law due to recurrent and repeated use from time immemorial and that these rules are supposed to regulate their relations for people to live in harmony. They are thus applicable as law in Zambia.

However, it was found during one in-depth interview with a couple that they were aware that they were illegally staying together. James Banda and Chanda Mutale, of Mtendere Compound, have lived together for the past three years, but Mutale has continued to use her maiden name though every now and then, refer to each other as husband and wife. Further information to suggest that they are aware that it is an illegal marriage is the lack of confidence when explaining what steps they took in contracting their marriage. At the time of the interview Mr. Banda seemed to suggest that he was in the process of sending a go-between (*shibukombe*) to Miss Mutale's parents house so as to kick start the process for contracting a valid marriage.

3.1.2 EXCEPTIONS

However, the next two rare cases seem to be contrary to earlier research findings. Mr. Peter Mwambazi of Kawambwa impregnated Bwalya Chisha and was charged with an offence of *cisungu*. He has lived with his wife for 15 years and they have four children. He has only made a payment of *insalamo* and part of the Bride price and also continues to provide service to his in-laws. During the interview he told the researcher that he is free to sit, chat and share a meal with them. He is also welcomed with the necessary respect due to a son-in-law every time he visits his in-laws and they in turn visit them. He attributes his accepted marriage to the number of children he has with his wife as they have increased the family value. Ordinarily such a marriage would be null and void for

¹²⁶ Interview with Mrs. Irene Nkhunda; Trainer, Volunteer and Senior Counselor and Mrs. Esther Mvula; Volunteer Counselor; YWCA, Lusaka.

want of all marriage payments but the payments have been substituted by service (working of gardens etc) an old custom. Thus, it is reasonable to conclude that a valid marriage subsists. Furthermore, procreation and possession of children is one of the strongest ambitions of Bemba life, that is, the basis on which ones success (*umukankala*) can be judged.¹²⁷ The Researcher could not agree more with this observation.

Mr. Chiboko Mwansa, of Kamwala, told the interviewer that when contracting his marriage he followed through the initial stages to contracting a valid marriage. He has only made a part payment towards his marriage, these payments being *insalamo* and *cisungu*. He also says that he is accorded the proper respect that is befitting of a son-in-law. His opinion is sought when there is a family meeting to discuss a problem within the family and at times his solutions are accepted and implemented. His late father-in-law appointed him administrator of his estate which includes a house, shopping complex despite him having and leaving behind two sons. On numerous occasions the late father-in-law called on him to do a few errands. He has been married for the past five years and has one child who is three years old. Similarly here this can be said to be a recognised marriage regardless of all the marriage payments not being paid. The girl's parents before recognising this union seem to value the payment of *cisungu* as the most important payment which can give legal recognition to a marriage. This particular case points at recognition and acceptance of the marriage by the woman's family as key to determining the validity of a marriage. Ordinarily, this should not have been accepted as a marriage because marriage payments were not made in full.

3.2 JUDICIAL FRAMEWORK

3.2.1 LOCAL COURTS

The Local Courts have original jurisdiction in all matters pertaining to Customary Law. Local courts are established under a warrant signed by the Minister of Legal Affairs and consist of a Presiding Local Court Justice either sitting alone or with such members of

¹²⁷ Audrey I. Richards, Bemba Marriage and Present Economic Conditions (Rhodes-Livingstone papers no. 4); Livingstone; Rhodes-Livingstone Institute; 1940; P 17.

Local Court Justices as may be prescribed by the Minister in the Court warrant. Local Courts have and may exercise within the territorial limits set out in its Court warrant, such jurisdiction as may be prescribed for the grade of such court to which it belongs, over the hearing, trial and determination of any civil cause or matter in which the defendant is ordinarily resident within the area of jurisdiction of such court or in which the cause of action has arisen within such area.¹²⁸

The other theme which emerged during the field research was that Local Courts had misinterpreted the law creating inconsistencies and making it difficult to decide whether a valid marriage subsist under different circumstances. This unfortunate situation was observed during the field research when the Lusaka Provincial Local Court was considering an application for appointment of administrator by one Stellah Mubanga on the 28th September, 2007 (Case No. 5/91/2007). Chiluba Mubanga Tembo, a School Teacher, had died intestate on the 6th August, 2007 and had been buried on the 8th August, 2007. Though the case before the court was an intestate matter, the question as to whether there was a marriage or not arose during the sharing of property as the woman's family did not want to acknowledge the man's marriage with their daughter.

On 5th October, 2007 the parents of Chiluba, namely Mwiche Mubanga and Beatrice Mubanga, his daughters Patricia, Mambwe and Stellah Mubanga came to Lusaka Provincial Local Court to submit the name of the deceased's sister for appointment as administrator. The deceased's husband Simon Tembo had been invited to attend court and he was present in court. After the formal bows the presiding Local Court Justice called on the parents of the deceased if all interested parties were present in court and the father, Mwiche Mubanga agreed that they were present. Thereafter the father of the deceased said he and his family had chosen the sister of the deceased to be formally appointed administrator; whereupon the court asked the deceased's husband Simon Tembo if he had any objections to Stellah Mubanga, sister of the deceased to be appointed administrator and he replied that he did. He stated that he objected to her appointment because he was the husband to the deceased and that he and his three

¹²⁸ Sections 4; 5; 6; 8 & 12 of the Local Courts Act, Chapter 29 of the Laws of Zambia.

children were entitled to the estate. The parents to the woman objected saying there was no marriage as no marriage payments were made.

The husband to the deceased admitted to not paying the bride price and *insalamo* but argued further saying that during the subsistence of this marriage the couple was regularly visited by both the parents to his late wife, her sisters and other relatives. Besides after the death of his wife a cleansing ceremony was performed and the woman's family didn't demand for marriage payments before conducting this ceremony. This he said signified their consent. The couple had lived together for a period of 7 years and had 3 children.

The local court agreed with the woman's family holding that the couple were not married. It went on to say that the fact that the couple was regularly visited and the man was cleansed did not still make it a marriage because no marriage payments were made. The presiding justice then added, saying that had marriage payments been made to the woman's family and accepted this would have signified their consent and every other formality leading to a valid marriage would have fallen in place. Thereafter, all the family members of the deceased who had come to court each and everyone said they approved of Stallah Mubanga to be appointed as administrator. From there the court ordered that the family of the deceased person to pay court fees for the proceedings which money was paid in court there and then. The Court then made an order of appointment that Stallah Mubanga had been appointed administrator of the estate of Chiluba Mubanga Tembo. In its final remarks the Court stated that it was not competent to probe into issues of maintenance, referring to custody, for the reason that it would exceed its jurisdiction, which jurisdiction belonged to the Subordinate Court.

On the contrary the researcher is of the view that the parents to the girl can be said to have waived their right to marriage payments and to have consented because of the cleansing ceremony and the visiting. The court did not bother to question the parents to the girl why they went ahead with the cleansing ceremony or why they used to visit the

couple if they did not recognise the union as a marriage. The court did not address its mind to the duration of the union too vis-à-vis the visiting.

In another case before the local courts, the applicant sued James Banda, a bus driver, residing in Kabanana for the bride price and *cisungu* (Case No. 5/80/2007). Facts are that he had rightly approached the girl's family with *insalamo* and before he could pay the bride price the girl moved in with him and the couple at the time of the case had been cohabiting together for eight (8) months. The court held it to be a marriage because of the initial payment of *insalamo* and because the two families had accepted the couple's cohabiting. This miscarriage of justice can be attributed to the fact that the Local Court Justice sitting in this particular case though not Bemba had some knowledge of Bemba custom.

The researcher during the period of research discovered that cases were not being assigned to Local Court Justices based on their full understanding of customary law but that every Local Court Justice was deemed to know something about every custom. So a Local Court Justice well knowledgeable with Tonga custom could be assigned a case to do with Bemba custom by mere fact that both tribes are matrilineal. However, Bemba custom dictates that a marriage will only subsist where all the marriage payments have been made, that is both *insalamo* and the bride price.

Generally from all the above cases it can be concluded that marriage payments (*insalamo* and bride price) are key to determining the validity of the marriage as they give it the recognisable status. Without making marriage payments you cannot claim to have gotten the girl's parental consent as consent is granted upon acceptance of *insalamo* as earlier shown in the previous chapter. Thus no marriage is recognized and such a union is illegal if the bride price and *insalamo* are not paid and this is reflected in a parent's refusal to recognize or acknowledge such a marriage or the charging of with an offence of *cisungu* or elopement. These are actionable offences. Secondly, without marriage payments and consent no marriage ceremony is performed to indicate that a marriage has been accepted as such.

Furthermore non-recognition of marriage is demonstrated by the unwillingness of parents from both sides and other elderly family relatives to help in resolving of matrimonial disputes either by giving advice or adjudicating upon it as exemplified in one case below. In other instances there is a break in relationship between the girl's parents and the girl just to compel them (that is the girl and her partner) to follow custom. Today despite the dilution of custom by coming into contact with other tribes or inter-marriages the Bemba still regard the payment of bride price and *insalamo* to signify validity of marriage.

Cohabitation despite length of time does not validate a marriage and consent may be rendered void *ab initio* where they start by cohabiting. On the other hand payment is cardinal and can validate a marriage where there was no initial consent. Knowledge of a couple staying together is immaterial and will not validate such a union. However, it is the researchers' view that knowledge of the couple's staying together coupled with regular visits by the girl's parents or performing of traditional rites such as cleansing should be considered a recognised marriage as parents would have foregone their entitlement to marriage payments and to have given their consent. Evidently the validity of a Bemba customary marriage is sanctioned by recognition of the union by parents.

3.3 CUSTODY OF CHILDREN AND CUSTOMARY LINEAGE SYSTEM

Before concluding this chapter the Research will now address the issue of custody of children in relation to the Bemba lineage system. Two particular cases here proved worth studying. Miss Chipasha, of Chipata compound, went on separation with the man she used to live with three years ago. The two lived together for five years before going on separation and have two children. The woman blames the failed marriage on the pressure that was exerted on the man to comply with the official procedure for contracting a valid marriage i.e. the payment of bride price and *insalamo*. Though when the man was leaving he accused her of being disrespectful and that her family loved money. He could not manage providing for them all the time as he was just a bus conductor and that her family should not think of him as being rich.

When this pair was cohabiting and having other problems prior to the separation, the woman's family did not at any time offer to help and resolve whatever problems they were having despite having knowledge of them. The woman's family refused to sit and resolve the problems for the reason that the man had not paid *insalamo* and bride price and thus they withheld their recognition of this union. She describes their stay as an unhappy one because of the man's continuous unfaithfulness. He generally never provided any food at home or paid house rentals.

It has been three years since their separation and currently she is facing difficulties such as inability to pay school fees, providing of adequate food, clothing, and health care for herself and the children. She is not in any gainful employment and makes a living through selling of vegetables and other foodstuffs at the market. This has had an adverse effect on the children both emotionally and psychologically as the father to the children does not even bother to visit his kids. The children feel guilty and responsible for the separation. They blame themselves and feel that there are things they should have done and had they done them, their parents would still be together.

Miss Joyce Chibuye, of John Howard compound, has been deserted by the man with whom she has one child and lived with for the past two years. He has since moved in with another woman of the same compound and Miss Chibuye has since located the place where his staying. The man is reportedly not providing her and the child with any basic necessities for one's sustenance. They started living together when she first fell pregnant and there is nothing he ever did to make their relationship official.

Both Miss Chipasha and Miss Chibuye apparently do not get much financial, moral and any other support from their respective extended families. An uncle to Miss Chipasha, Mr. Joseph Mulenga, of Kabwata, however, was quick to point out that this is not to say that they do not accept the child as belonging to their kin but it's due to the lack of economic means. He further stated that today's children have been exposed, both at home and school, to various cultures and that disciplining them has become very difficult. Children of today have the audacity to tell you off 'that you are not their father and,

therefore, there is nothing you can tell them.' They understand the responsibility placed upon them by Bemba customary law and the moral obligation towards their nephews, and that this obligation is not conditional on the man's paying of marriage payments or obtaining of parental consent.

Traditionally and usually where a couple divorces or separates the woman will have custody of the children, because under customary law it is generally recognised that it is a woman's duty to look after the children. This is made even worse by the lineage system a particular tribe follows. Though, today's economic situation makes the taking and caring of children by the woman alone difficult and so increasingly women have begun suing for child maintenance contrary to customary law and such actions are entertained by the courts because of Zambia's dual legal system especially where the customary law is repugnant to natural justice or morality or incompatible with the provisions of any written law.¹²⁹

From the immediate preceding two cases it can be deduced that the granting of custody based on the lineage system is not ideal in the light of the changed economic situation and modern world. It is not ideal as it fails to take into account the best interests of the child. The placing of children under the custody of the maternal uncle and the father to the children having no say in their upbringing is contrary to the best interests of the child as the maternal uncles may fail to provide such basics as education, food, health care and shelter as in the two instant cases. The father to the child should have a say in the raising of his children as he will always want what is best for his child. He should be responsible for his own children especially where the other party is not in any gainful employment as is the case with Miss Chipasha.

The lineage system can also be criticized as it perpetuates the man's irresponsible behaviour as he cannot be held accountable for neglecting and deserting his children since this is the responsibility of the maternal uncles. Perhaps this explains the behaviour

¹²⁹ Section 12 (1) (a) of the Local Courts Act, Chapter 29 of the Laws of Zambia; Interview with Local Court Justice Chengo and Justice Nguni, Lusaka Provincial Local Courts.

of the two men in both cases where it is apparent that both men are comfortable with deserting and neglecting their respective families without realizing their legal obligation towards their children. Clearly from the foregoing the lineage system is contrary to the Convention on the Rights of the Child (CRC) a treaty and law to which Zambia is a party. This is the convention which recognises that a child has a right to survive, to develop and to be protected. The next and last chapter will by way of conclusion and recommendations answer the research question and objectives or rationale for the study.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 CONCLUSION

As expressed in the preceding chapters, customary law and statutory law marriages are both recognized as types of marriages in Zambia. In fact they exist alongside each other in the sense that a couple is at liberty to contract either of the two marriages. Many Zambian legal scholars have explained this state by attributing it to the introduction of English law into Northern Rhodesia (now Zambia) during colonial rule. However, it must also be stated that there are several differences between the two forms of marriage. One may cite as an example the different procedures to be followed in order for one to contract a valid marriage and the separate laws applying to each marriage.

The concept of marriage has been defined differently in different jurisdictions or places. Most recent definitions have regarded same-sex marriages, registered partnerships and civil partnerships as marriages or have given them an equal status of marriage. This is a major departure from the conventional understanding of what marriage is. Zambia as a country has retained the old meaning of marriage that of a '*...voluntary union for life of one man and one woman, to the exclusion of all others....*' and both kinds of marriage are frequently believed to be establishments of reproduction although in a civil marriage this is not a ground for granting a divorce.

The process for contracting a valid Bemba marriage is a very lengthy one. It begins with the appointment of a go-between, whose services cannot be done away with, to negotiate the marriage between the respective families. He is the one who goes to seek the consent of the girl's parent's on behalf of the man and is also the chief witness of the marriage. The girl's mother and paternal aunt play an important role in marriage negotiations and the ceremony itself as they have definite rights over their own daughters and their brothers' daughters. For this reason they have to be courted with favour by giving them gifts during negotiations of a marriage.

A Bemba customary marriage is not a legal marriage if marriage payments have not been made by the groom at different stages in the marriage process and cohabitation for a long time will not result in legalisation of marriage. *Insalamo* though does not create legal relations is the first payment that is made to indicate that the man is serious and committed to marrying the girl. It is an official claim over the girl. All marriage payments, however, have to be made to the girl's family before the girl can be handed over to her husband or before the wedding (*ubwinga*) ceremony is held. Where payments have not been observed the girl's family has withheld its recognition of such a union and has considered it illegal. This is demonstrated in a number of ways such as in a parent's or other elderly relative's refusal to help in resolving of marital differences or the charging with an offence of *cisungu* or elopement by the Local Courts. The church has also refused to bless such a union. Other than payments the legitimacy of a marriage can be deduced from the recognition given to an illegal union.

The Bemba marriage process is characterized by a number of ceremonies and exchange of foods performed at different stages of the ceremony. Furthermore, once a man is permitted to engage their daughter the girl's family becomes responsible for preparing his food though less so in urban areas. It is during the period of courtship that the man gets to know more about the bride. Whilst a number of ethnic groups forbid marriage amid blood relatives or people of the same family, the Bemba seem to allow it in certain instances. Another peculiar trait of Bemba customary law governing marriage is the allowing of pre-marital sex before the girl attains puberty and before she is formally handed over to her husband. This is only allowed after the man has paid all marriage payments and consummation of a marriage is not constituted by these acts. Consummation of the marriage is on the actual wedding day.

Like most other tribes in Zambia dissolution of a Bemba marriage may either be done by the two families to the union outside Court or through judicial proceedings in the Local Court. The grounds upon which a marriage can be dissolved have not changed and include the same old reasons such as impotency or bareness, adultery, desertion, wife's

laziness, husbands neglect, failure to cohabit, husbands cruelty, frequent periods of imprisonment or witchcraft, and incompatibility. These reasons are normally considered by the Court as evidence of the break down of a marriage. The above given examples are not exhaustive as any other reason that leads to a break down in marriage may be added.

Custody of Children under customary law is dependent on the kinship system being practiced by a particular tribe and the Bemba being a matrikin group follow the matrilineal system. Divorce does not alter a child's membership in the particular kinship group since this status is fixed at birth and does not change. Therefore it follows that custody of children under customary law is not in anyway linked to divorce as the kinship system determines who has greater say, control and care of children. Even if this may be so it is imperative that the best interests of the child are given paramount consideration and the kinship system has failed because of changes in economic conditions and modernisation. Questions as to who is to have legal or actual custody are answered by the kinship system since this status is fixed at birth and thus has imposed a superiority claim regardless of whether either parent is suitable to have custody of the children. Bemba customary law does not condition custody of children on the man's paying of marriage payments or obtaining of parental consent.

4.2 RECOMMENDATIONS-WAY FORWARD

From all that has been discussed in this essay, certainly there are aspects of customary law that need law reform. Consequently, by way of summarising this paper the most important recommendations to be made are as follows;

- Consequences of not complying with formalities when contracting a marriage should be made known to the couple cohabiting, such as in an event of death, illness.
- The significance of certain cultural practices not repugnant to good conscience or morals or contrary to any written law should be explained and imparted in children as they grow up as this is our identity and binds or brings us together.

- Enforcement mechanism of customary law which is based on moral consciousness should be supplemented by prosecution and punishment for defilement where girl is of young age as it is an offence to have carnal knowledge of a girl you are not married to.
- Punishment for offences such as *cisungu* and elopement should not only be restricted to monetary compensation in form of damages but should be coupled with other punitive measures such as jail sentence.
- There is need for a statutory instrument to confine Local Court Justices to cases that relate to customs to which they belong and are very conversant with.
- The lineage system fails to consider the best interests of the child and so should be done away with as Zambia will be in violation of a number of international instruments to which it is a party.

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APPENDICES

APPENDIX1

Check list for Respondents:

Research Site: Lusaka

Time the interview

1. Personal data:
 - a) Names
 - b) Age
 - c) Sex
 - d) Date of birth
 - e) Ethnic Group
 - f) Position/Occupation.
 - g) Educational and professional qualifications
 - h) Religion
2. Marriage-background to how they met and process leading to marriage:
 - a) Type of Marriage.
 - b) Marriage payments made (Bride price & insalamo).
 - c) Any children – how many and what they are doing – their ages, sex and occupation.
 - d) Any dependent kept.
3. Knowledge of the Bemba Customary Law (content)
 - a) Ideal Customary Law
 - b) Living Customary Law
 - c) Description of Procedures followed in contracting marriage
 - d) Inter-marriages
4. Opinion and attitude of the Respondents towards:
 - a) Ideal Customary Law
 - b) Living Customary Law
5. Practical and psychological effects on couples and children
6. Request for names of people to talk to on either side
7. Thank Respondents

APPENDIX II

Check list for Court Record:

Research Site: Lusaka

1. Which Court decided the case?
2. What is the case number and year of hearing?
3. Who are the parties to the dispute? What is their background (address, educational background, their income generating activities and any other relevant information?)
4. Who are the other interested parties to the dispute and what are their interests?
5. What type(s) of Customary Law(s) was/were applied in the case at hand?
6. How did the Court interpret and apply the Customary Law to the case?
7. What factors did the Court take into account when resolving the dispute?
8. What type of marriage was entered into? Was any performed? If so what did it entail?
9. How did the Court resolve the dispute?

APPENDIX III

Check list for Court observation:

Research Site: Lusaka

1. Court setting:
 - i) Were the doors open, yes/no?
 - ii) Were the doors guarded or unguarded, yes/no?
 - iii) How close was the litigant to the bench, near/far?
 - iv) How close was the litigant to the audience, near/far?
2. Is the litigant accompanied, yes/no?
 - i) If yes, by who?
 - ii) Are those accompanying the litigant allowed to say anything, yes/no?
3. Tone/Language
 - i) Is there an interpreter being used, yes/no?
 - ii) Is the litigant familiar with the language which is being used, yes/no?
 - iii) Is the Court interpreter repeating the statements of the court officials? verbatim, yes/no
 - iv) Is the court interpreter repeating the statements of the Litigant verbatim, yes/no?
 - v) Is the interpreter adding his/her own words
 - vi) Are court officials harsh
Own statements yes/no

(Examples of distortion should be given)

4. Demeanor of the witnesses/litigant
 - i) Is the litigant/witness telling the truth, yes/no

5. Is the litigant/defendant being given a chance to freely assert herself without interruption either Silent or verbal:
 - i.) From Court official
 - ii) From her/his family members
 - iii) People from the other side
 - iv.) From the general public (gallery) yes/no

6. Relationship at face value between the litigant and (defendant, relatives, e.t.c.)
 - i) Who looks more confident?

7. Measure of Knowledge/application and content of Customary Law:
 - i) Do the officials know, apply the law? Yes/no
 - ii) Does the litigant know, apply the law? Yes/no
 - iii) Does the defendant know, apply the law? Yes/no

8. Expected Behaviour:
 - i) Does the litigant know where to go?
 - ii) Did she/he check the cause list?

APPENDIX V

Check List For Key Informants:

Research Site: Lusaka

Time the interview

1. Personal data:
 - a) Names
 - b) Age
 - c) Sex
 - d) Date of birth
 - e) Ethnic Group
 - f) Position/Occupation.
 - g) Educational and professional qualifications
 - h) Religion

2. Relationship to Respondent, if any at all

3. Knowledge of Bemba Customary Law (content)
 - a) Ideal Customary Law
 - b) Living Customary Law
 - c) Description of Procedures followed in contracting marriage
 - d) Inter-marriages

4. Opinion and attitude of the key informants towards:
 - a) Ideal Customary Law
 - b) Living Customary Law
 - c) Any noted gap between ideal customary law and living customary law-contributing factors
 - i) Economic factors
 - ii) Inter-marriages
 - iii) Other

5. Practical and psychological effects on couple and children

6. Role of the key informant in handling matrimonial matters or issues
 - a) advisor/counselor/adjudicator
 - b) Any other

7. Request for names of people to talk to

8. Thank key informants