

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

**TITLE : AN EVALUATION OF THE SANCTITY OF MARRIAGE BETWEEN
CUSTOMARY AND STATUTORY MARRIAGES VIS-À-VIS DIVORCE**

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**BEING A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA, SCHOOL
OF LAW IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF
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I, NCHIMUNYA KATOWA, COMUTER NUMBER: 27050661 DO HEREBY DECLARE THAT I AM THE AUTHOR OF THIS DESSERTATION ENTITLED; AN EVALUATION OF THE SANCTITY OF MARRIAGE BETWEEN CUSTOMARY AND STATUTORY MARRIAGES VIS-À-VIS DIVORCE. I FURTHER SOLEMNLY DECLARE THAT THIS WORK REPRESENTS MY OWN IDEAS AND IS NOT A REPRODUCTION OF ANY OTHER WORK PRODUCED OR SUBMITTED BY ANY OTHER PERSON TO THE UNIVERSITY OF ZAMBIA OR TO ANY OTHER INSTITUTION. DUE ACKNOWLEDGEMENT HAS BEEN GIVEN WHERE OTHER SCHOLARLY WORK HAS BEEN CITED.

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ABSTRACT

The purpose of this paper is to evaluate the sanctity of marriage among the two forms of marriages in Zambia that being Customary marriage and statutory marriages. The paper is largely based on books and articles written by scholars in the field of marriage and divorce and flavored by the author's personal knowledge and experience.

Throughout the paper an attempt has been made to compare the customary Law marriages with statutory marriages however the author has not attempted to pass any value judgments or record personal biases but the author has been able to come up with a concrete evaluation of the two forms of marriages thereby coming up with the conclusion that they should be place on the same footing after taking into consideration the given recommendations. It is therefore up to the reader to come up with his/her own judgments on the basis of the information presented.

At the time of independence in 1964, Zambia inherited a dual legal system guided by statutory law and customary law. The exclusion of Africans from any part of the formal system was abolished in principle while the separation between English and customary Law systems was retained for administrative expediency and the need to preserve customary Law system. As such English Law is not just part of the legal system in Zambia but ironically a superior part of it.

One of the important findings of this study is that despite customary Law facing a comparatively lower status relative of English Law, it enjoys a significant amount of influence over many Zambians in practice of paramount importance in this study is that most people contract customary law marriages and even those who prefer to marry under the Marriage Act almost always comply with customary requirements and practices.

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DEDICATION

I dedicate this work to my late brother Himuunza Chain Katowa. I miss u so greatly may your soul rest in peace.

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CHAPTER ONE

1.1 INTRODUCTION.

Quite apart from its abstract meaning as the social institution of marriage, “marriage” has two distinct meanings: the ceremony by which a man and a woman become husband and wife or the act of marrying, and the relationship existing between a husband and his wife or a state of being married.¹

When two people exchange lifelong vows and promise to be there for one another providing support in times of bliss and troubles, they promise each other total commitment regardless of the situations that may unfold in the future.

But how ready are they to uphold these vows and just how far can they go to walk the life road with its ups and downs?

For even God in the Bible has clearly said that “What God has put together let no man put asunder” hence by so doing, the two are bound and no one but God himself can separate the two.²

To this effect most Church priests and pastors ask over and over again if the two people standing before the altar are ready for the consequences of their actions bearing in mind that once the vows have been exchanged they cannot be broken, no matter what the circumstances.

The African society especially here in Zambia there is this belief that a man’s sexual masquerades can never lead to divorce but an adulterous woman cannot go unpunished.

To this effect there is a saying “*Ubuchende bwamwaume tabutoba Ng’anda*” literally translated “A man’s sexual escapades never break a home,” this is evidenced by the number of extra marital affairs that married men engage in and how much they try to justify them though most of them still lead to divorce.³

¹ P M Bomeley. Family Law 4TH ed. butterworths. London,1971. P 11

²Muna Ndulo. Law in Zambia. East African publishing house, Lusaka, 1984. P 142

³Eden Colson. Marriage and the family among the Plateau Tonga of Northern Rhodesia. Manchester publishing house,Manchester, 2002. P 55

In the case of **Muwale v. Muwale**⁴ the petitioner was married to the respondent who was four years younger than him and envisaged a marriage of unending bliss, without knowing that his wife was a drunkard. The wife due to her excessive drinking started spending nights away from home and the second time she got pregnant decided to hide the pregnancy from the husband as she was not sure if it was his. The court granted him the divorce and granted him custody of the child also won the custody of the children.

1.2 HISTORY OF MARRIAGE LAWS IN ZAMBIA

Prior to the arrival of the colonialists in Zambia the laws that were applicable to the territory were indigenous customary laws. Colonialism was merely a superimposition of imposed laws, legal systems as well as concepts of justice on an already existing and firmly established legal structure.⁵

Like most other countries formerly tied to England, Zambia is recognized as a common law jurisdiction. The description is supported by the history of the country as well as by current statutory guidelines and judicial declarations. While there is a consensus that Zambia falls within the common law camp, however, there is little agreement as to what this actually means either in theory or in practice, and still less as to what it should portend for the future. As used in different contexts or by different people, the term, “common law” is remarkably flexible-and correspondingly ambiguous.

Zambia has a dual legal system of laws-customary law and common law, leading to two types of marriages-customary marriage and statutory marriage. Most of the statutory law of marriage is composed by “received” law, which is in view of the colonial history, is in effect English law. The English law of marriage applies to Zambia by virtue of section 11 of the High court act.⁶

Customary law is recognized as applicable to the country by virtue of section 16 of the Subordinate courts Act⁷ provided such customary law is not repugnant to natural justice, equity or good conscience and is not incompatible, either in terms or by necessary implication, with any written law in force in Zambia.

⁴ (1990) 5 NLRL 298

⁵ Muna Ndulo. Law in Zambia. East African publishing house, Lusaka, 1984. P 143

⁶ High Court Act, Cap 27 of the Laws of Zambia

⁷ Subordinate Courts Act, Cap 28 of the Laws of Zambia

From its very inception the system of judicial administration introduced by the British of Northern Rhodesia differentiated between Europeans and Native Africans due to the belief of white superiority over the Natives. Section 14 of the Royal Charter of October 29, 1989 entrusting the administration of Rhodesia to the British South African Company hereinafter referred simply as B.S.A authorized this differentiation but did not suggest it's true dimensions.

During the colonial period even though customary marriage was expressly recognized, the colonial legislature tended to emphasize the superiority of a statutory marriage over a customary marriage. For instance, in criminal law, a customary spouse was not regarded as a wife for purposes of evidence rules.⁸ This meant that a customary marriage spouse could be compelled to give evidence against his or her spouse whereas a statutory law counter-part could not be so compelled.⁹

African marriages were not regarded as true marriages and the relationship of husband and wife which in European society constituted a marriage was not to exist in the indigenous African society. It was because of this irrational belief that the colonial Government created two distinct legal systems fundamentally different in nature and the Law governing them.

After independence the local courts were empowered to hear and determine matrimonial causes arising out of customary marriages. Africans were free to marry under the English Marriage Act.

In so far as the history of marriage Laws applicable to Zambia are concerned, the dual system of Laws carried over after independence with Local courts dealing with customary marriages and the Subordinate courts, the High court and Supreme court dealing with statutory marriages. As a result of this system, two types of marriages apply to Zambia.¹⁰

From the above, it is clear that the inequalities existing between statutory marriages and customary marriages today in Zambia can be traced from way back even before Zambia got her independence.

This research is intended therefore to give an evaluation of the sanctity of marriage under a customary law marriage and a statutory marriage leading to divorces in Zambia with due regard

⁸Muna Ndulo. Law in Zambia. East African publishing house, Lusaka, 1984. P 143

⁹ Muna Ndulo. Law in Zambia. P 143

¹⁰ Muna Ndulo. Law in Zambia. P 145

to the major causes of such divorces. And thereafter come up with a conclusion as to whether marriage under Customary Law should be placed at an equal footing with marriages under the marriage Act.

1.3 GENERAL BACKGROUND AGAINST WHICH MATRIMONIAL LAWS CAN BE SEEN IN ZAMBIA

As has been mentioned above, the introduction of a dual legal system in Zambia has brought about two different standards of marriages in Zambia, one being much lower than the other when in actual fact native customary law is supposed to co-exist with statutory law. The arrival of European colonial power in Zambia brought a fundamental revolution in African legal arrangement, the results of which are still felt even today.¹¹

Family law in Zambia as elsewhere is undergoing changes as a result of social, economic and other development changes. A major contributing factor is intermarriages. Not only amongst the indigenous ethnic groups of Zambia, but also between them and others from other countries.

The other factor is the influence of the received law whereby people tend to blend customary law practices and civil law requirements into one form of marriage. This has often resulted in conflict of laws which Local court justices resolve according to their own interpretation without applying the real customary law rule. There is a modern trend to assume “living” customary law to suit modern life, and this has resulted in uncertainty or confusion about the state of customary laws. Thus customary law applied by local courts is at variance with that applied by traditional courts of chiefs and headmen. The latter apply actual customary law as it existed from time immemorial mainly because in villages there is little interaction with other cultures and there are fewer intermarriages, whereas in urban and peri-urban, there is socio economic and inter-cultural dynamics have distorted the authenticity of customary laws and practices.¹²

The fact of having a dual legal system has posed problems of the choice of personal laws to apply to people’s lives. Another problem is the heavy reliance on received law especially those

¹¹ Ashby Allot. The future of African Law. butterworths, London, 1960. P 15

¹² Lillian Mushota. Family law in Zambia: cases and materials UNZA Press, Lusaka, 2005. P 45

contained in the English statutes. Zambia has a Marriage Act, but does not have a divorce statute of her own, and looks to England for the laws. The Marriage Act, is confined to regulations and formalities for contracting a valid civil marriage. It does not deal with divorce and other domestic related matters such as custody and maintenance or other financial provisions for the spouse or child of the family or with settlement of property after divorce. For these matters Zambia applies the Matrimonial Causes Act of England, the current Act being in force in Zambia being the 1973 Act although in the U.K the Act has been revised, some provisions replaced and repealed and also consolidated with other divorce laws such as the divorce reform Act.

Customary law is unwritten this fact brings problems in ascertaining it. Customary law has no uniform application in Zambia, but varies from locality to locality. There is nothing like customary law being prescribed for the whole Zambia. Customary law remains to be an important part of the Zambian legal system as it dominates family and personal relations. Some countries like Kenya and Uganda have gone as far as codifying it in an attempt to make it more fully Law¹³

Zambia statutory marriages are primarily governed by the marriage Act which provide for solemnization, validation and requirements of a valid statutory marriage. Marriage under statutory Law may be terminated only by the death of one spouse or by decree of dissolution pronounced by a court of competent jurisdiction.

1.4 PURPOSE OF THE STUDY

Discussing the inequalities existing among the two forms of marriages is of great importance in the sense that both branches of marriages are accorded varying treatment not only by society but by the courts of law in Zambia when it comes to issues pertaining to divorce. This branch of law has a major impact on the physical, emotional and general well being of humans more especially children and also goes to the root of Zambia's reproductive and family life.

Under both customary and statutory law, the enormous social changes following the high levels of poverty and moral decay in Zambia produced a vast increase in the number of divorces. The

¹³ Margaret Munalula. Legal process. UNZA Press, Lusaka, 2003. P 45

idea that the purpose of divorce was to provide a remedy available only to the “innocent” spouse for a matrimonial wrong committed by the other seems to many to be an outdated concept.¹⁴

Anybody is free to contract a statutory marriage, in practice, it is mostly the educated community that makes the most use of statutory law. The reason for this would seem to be that they are for the most part the knowledgeable section of the community about the existence and implications of a statutory marriage.¹⁵

A sizeable number of people after independence contracting civil marriages greatly increased this is because statutory marriage is regarded superior in status to customary marriages. There is also the desire for security in the part of the women in the sense that a statutory marriage ensures a monogamous marriage, and also ensures benefits as alimony after divorce.¹⁶

1.5 SIGNIFICANCE OF STUDY

Theoretical importance of this study

The importance of looking into the two forms of marriages and the inequalities existing there from is that customary law is controversial in the sense that it is not always accepted as law by jurists. Some of the reasons for this claim are the fact that its application may be limited to a particular group of people. Often it is subjugated to national law.¹⁷

According the same treatment to both marriages has limitless benefits on the society of Zambia as this protects women married under a customary marriage from being at the mercy of men who would be in a position to manipulate and abuse them both physically and emotionally.

The popular idea that only church marriages are legal is false. The true position is that both marriages under customary law and statutory law are recognized under our law and the one is not inferior to the other in regard to legal status as the same protection will be given to those married under customary law when it comes to divorce.¹⁸

¹⁴ Eden Colson. Marriage and the family among the Plateau Tonga of Northern Rhodesia. Manchester, Manchester publishing house, 2002. P 67

¹⁵ Muna Ndulo. Law in Zambia. east African publishing house, Lusaka, 1984. P 144

¹⁶ Muna Ndulo. Law in Zambia. P 145

¹⁷ Margaret Munalula. Legal process. UNZA Press. Lusaka, 2003. P 45

¹⁸ Ashby Allot. The future of African Law. Butterworths, London, 1960. P 16

Practical importance of study

The practical importance of this study lies in the identification of the inequalities existing among the two forms of marriages and proposing changes to the current status of customary law that would make it more efficient as would be in a liberalised economy like that of Zambia. It is important that customary law is of immense efficacy as anything short of that would be greatly prejudicial to its objectives and therefore greatly undermine the relevance of such a law.

The British Extent of application ordinance 1963 stipulated that the common law, the doctrines of equity and all statutes which were in force in England on the 17th August 1911 and any other statutes which were in force in England were made applicable to Zambia. In **Frank Chitambala**¹⁹ it was held that native Law and custom must be a matter of proof in all cases in which it is claimed Somerhough J stated: “native customary law is in my view more or less in the same position as foreign law and it must be established by an expert before courts other than the native courts.

This line of thinking was affirmatively adopted in **Kaniki v Jairus**.²⁰

It is therefore against this legal background that legal background that customary marriages should be perceived.

My task is to analyse and evaluate the two forms of marriage systems in Zambia and come up with recommendations on how the marriage laws can be improved in Zambia especially customary law order to maintain the sanctity of marriages conducted under customary law.

¹⁹ IV NRLR. 28

²⁰ (1967) ZR. 81

CHAPTER TWO

Marriage under customary law is defined as a union between one man and one woman or more women and between the woman's or man's families with the consent of the woman's parents.²¹

2.1 CONTRACTING A CUSTOMARY MARRIAGE

The definition of a customary marriage brings out some four important characteristics of customary marriage. These characteristics are that the marriage is firstly heterosexual. This means that for there to be a valid marriage, the parties to the marriage must be of different sexes. In other words Zambian customary law does not recognize marriages within the prohibited degrees of affinity and consanguinity.²²

Secondly, Zambian customary law does not recognize polyandrous marriages this is a situation where a woman marries more than one man²³

Thirdly customary marriages are potentially polygamous. This means that a man may if he so wishes can marry one or more wives besides the first wife either immediately or at a later date. The polygamous nature of a customary marriage was confirmed in the case of **Velenica Zulu v Nelson Zulu**²⁴ The facts of the case were that the petitioner, three months after the local court had earlier reconciled them, went to rejoin the respondent who was her lawful husband. The respondent only stayed for four days with the wife after she had come back to the matrimonial home. The respondent left to see his other wife at the village some distance away from the matrimonial home. The respondent had stayed away from home for two weeks. After his return to the village he found that his wife had left, when the matter came before the local court in a lawsuit initiated by his first wife, the local court reminded the petitioner that the respondent was

²¹ Muna Ndulo. Law in Zambia. East African publishing house, Lusaka, 1984. P 138

²² Cox Mumba. Customary law of marriage and divorce among the Lenje of central Province ,East African Publishing house, Lusaka,1990. P 67

²³ Muna Ndulo. Law in Zambia. P 140

²⁴ (case 098\1980)held at Mumbai local court, grade 'B' Petauke

a polygamous man and as such she was supposed to have wanted for the respondents return from the other village where he had gone to see the other wife instead of asking for a divorce.²⁵

Fourthly there is the aspect of plurality of marriage bonds. A marriage under customary law does not only imply the union between the man and the wife but also denotes a union between the man's family and that of a woman thus both the couple and their families are part of the union. This relationship plays a significant role in the divorce process.²⁶

Marriage under customary law is pretty much the same everywhere else in Zambia it establishes a relationship between a man and a woman, regulates their sexual activities, locates their children in the kinship system and influences the inheritance of property. These general features, however do more than define and identify marriage and distinguishes marriage from concubinage.²⁷

The marriage is only valid when there is consent of the woman's parents. Consent of the woman's parents is more important than that of the woman herself. It is possible under customary law to have a valid marriage without the consent of the woman because the customary practice is for the woman's parents to give consent on her behalf. Consent of the woman's parents is vital as they are the only people who can accept the bride price for the marriage. Bride price is a valid and essential element of a valid customary marriage.²⁸

The accepted procedure today is for the young couple to decide that they wish to marry. The young man approaches the girl's guardian. If the latter has no preliminary objection, he announces that they cannot discuss the matter together and if the man is serious about them marriage proposal, he must send a representative to negotiate. The young man then consults with his relatives, if they are agreeable, they send negotiators to discuss the matter with the girl's guardians.²⁹

The negotiating team usually includes at least the representative from the father's family and mother's family of the man proposing the marriage and the *Shibukombe* of the man. This

²⁵ Muna Ndulo. Law in Zambia. East African publishing house, Lusaka, 1984. P 144

²⁶ Muna Ndulo. Law in Zambia. P 50

²⁷ Phiri Jack: Maintenance and divorced women at customary law: a critical analysis (1991 obligatory essay)

²⁸ Kabesha Mulilo Customary marriage and divorce among the Saala of central province. (1984 obligatory essay)

²⁹ Desk interview :Mr kaheb Muyaba. Interviewed on the 7th of August 2010.

Shibukombe is the person who is given the responsibility of teaching the man good manners of husband's and their duties in the home. He is also the one who provides herbs to the young man for his manhood if necessary. The guardian will be the man in whose household the girl is living, but he must summon the representatives for both families for a meeting. The girl's relatives may refuse the suitor without consulting the girl if they dislike the match. If they are favorable and are willing to meet the negotiators this is an indication that they have no real objection to the match. They then send someone usually the girl's grandmother to interview her and assure themselves that she consents.³⁰

They will then notify the man and ask him to pay *Lobola* (Bride price). A man may also approach the girl's guardians without having previously reached an agreement with her. The procedure that follows is pretty much the same notwithstanding. Guardians thus maintain their right to veto the choice made by the girl, and the girl may be urged and badgered by her guardians to accept a man who she does not like until she finally gives away under the pressure.³¹

2.2 BETROTHAL

Customary marriage is frequently, although by no means, invariably, preceded by an engagement. Betrothal is regarded as a first step of a series of acts which would inevitably culminate in marriage and therefore, is much more than a mere public announcement of the couple's intention to marry. Traditionally betrothal created a relationship between the two families to which the parties belonged. This idea is expressed in formal behavior, in the use of the relationship terms and sometimes in mutual economic assistance and mutual visits and in exchange of gifts³²

Formally betrothal was established by engagement between the parents of the young man and the parents of the young woman without regard necessarily to the consent of the betrothed. This was

³⁰ Desk interview :MR Isaac Munyanga. Headman , Shababwa village. Interviewed on the 11th of August 2010

³¹ Personal interview Miss Yvonne Machilenga ,Mwembezi Local court. Interviewed on the 17th of September 2010

³² Eden Colson. Marriage and the family among the Plateau Tonga of northern Rhodesia.,Manchester University Press, Lusaka,1958. P 44

done years before the parties were mature enough to marry and the marriage did not take place until some years afterwards.

This practice is no longer in existence. Betrothal now takes the form of agreement of between the man and the woman and it may take place at any time before the marriage. The parties are generally not supposed to have sexual relations if they do and pregnancy results, the man is liable to pay damages to the parents of the girl.³³

This is because under customary law, it is an actionable wrong to impregnate an un married woman.

In an action against the man, the case may either be settled between the parties with the help of elders or a go-between or formally be brought before a court. However, most parties try to persuade a marriage and include the damages in their marriage payment. It is often thought that the most honorable and desirable solution to a case of premarital pregnancy is a marriage between the man and the woman. Betrothal does not create uxorial rights to enable the future husband to sue and obtain compensation from another man who has sexual intercourse with the prospective bride.³⁴

Betrothal may be terminated by mutual agreement or repudiation by either party with or without good cause. It appears the parents of the betrothed girl may bring it to an end by withdrawing their consent at any time prior to the marriage, gifts are returned in all cases, except in the event of death of either of the parties.³⁵

2.3 LEGAL SIGNIFICANCE OF MARRIAGE PAYMENT

At the time that a marriage is negotiated, one of the elements that must be settled is the payment of the bride wealth. The common form of payment is paid in cattle for, although occasionally money is substituted.³⁶ A period of two to four years is not regarded as successive delay. Some men have waited for ten years or more without any results. However, if such a man has troubles

³³ Jeff Barnes. Marriage in changing society. Ben's papers no.33. March 12 1997. P 12

³⁴ Jeff Barnes Marriage in a changing society – INTRODUCTION. Oxford university press,oxford, 1984. P 7

³⁵ Atkin Philips. Survey of African Marriage and family life, Oxford University press,oxford, 1990. P 347

³⁶ Robb Brown and Dodson Foed. African systems of kinship and Marriage.(unpublished), 1987. P 56

with his wife, he can expect assistance from his affines, who have no interest in seeing that his marriage continues.³⁷ The case of **Dorika Kapwaya v Andrew Shimuyandi**³⁸ is illustrative of this point. The defendant did not pay bride price the plaintiff deserted him and when the defendant insisted that she should join him, the plaintiff sued for divorce. The court held that the defendant did not marry the plaintiff, they were just friends, and that she could not be forced to join him.

Some parents indeed take more punitive action by claiming back their daughter until bride price is paid. This payment is also important for a man who has lost his wife, for he has to be purified for without purification he can neither re-marry nor have sexual intercourse with another woman.³⁹ He is taken to have what is known as *Cibinde* among the Tonga of southern province. A woman who causes herself to have sexual intercourse with such a man can either die or go insane. All his children will be regarded as illegitimate and where his daughter born from such a marriage gets married he is not entitled to take part in the sharing of the bride price.⁴⁰

Among the *chewa* of *katete*, Eastern province *Nsambo* is the bride wealth, *Kacheke* is the money paid as appreciation to the bride's mother for bearing and rearing the girl.

For the Bemba's of *Kasama*, Northern Province *Nkobekela* is the bride price paid either in money or in kind e.g. bracelet. This goes to the intended bride, *Nsalamu* is paid to the girl's parents but it is not determined by them this is received by the go-between for the maternal uncle who decides how it is to be shared. The trend now is that the bride's parents decide how to share it. The legal significance of this is that once the parents accept this bride price, there is created a marriage contact between the young man and woman.⁴¹

Bride price is returnable should the marriage break down. The responsibility for its refund in case of a divorce attaches to the person who originally received it and is not altered by its

³⁷ Brown and Foede. African systems of kinship and Marriage. Unpublished. 1987. P 57

³⁸ Mwembezi Local court case no. 387 of 1999

³⁹ Lillian Mushota. Family Law in Zambia. UNZA press., Lusaka, 2006. P 55

⁴⁰ Lillian Mushota. Family Law in Zambia. P 55

⁴¹ Desk interview: Chali Mwanachilenga Shakumbila Mwembezhi Local court. A division. Interviewed on the 22nd of January 2011

subsequent distribution. The father of the bride receives it and later shares it with his relatives, he remains liable for its return.⁴²

2.4 CAPACITY TO CONTACT A CUSTOMARY MARRIAGE

Under a customary marriage there is no fixed age at which a person becomes legally capable of contracting a valid marriage. However, both parties must have reached the age of puberty, and a boy must in addition, be physically mature. The puberty ceremony serves as a means of letting the people know that a girl has undergone her first menstruation. A girl who has not had her first menstrual cycle cannot marry neither can a boy who cannot produce semen, but can only get betrothed.⁴³

Insanity is a legal bar to marriage, as in this state the insane person is unable to give the required consent to marry, which is legally necessary for the creation of a valid marriage. A married woman, during the continuance of her marriage, cannot enter into a valid subsequent marriage with another man. A man may contract any number of marriages under customary law during the continuance of the prior marriage or marriages contracted under customary law.⁴⁴

Prohibited degrees: Customary law recognizes a system of prohibited degrees far more extensive in its range than the corresponding system in a statutory marriage. This is because African societies are more closely knit than their European counterparts and their rules of exogamy have therefore a wider and stricter application, operating sometimes to bar the marriage of persons belonging to the same patrilineal or matrilineal clan, which may in terms of practice embrace a whole village or kindred group. The general rule as regards degrees of consanguinity within the marriage is prohibited as members of the same clan are prohibited because it is considered incestuous for such people to indulge in any kind of sexual relations.⁴⁵

Marriage between such parties within certain degrees of affinity is discouraged. The word discouraged is used rather than prohibited because prohibited degrees of relationships range from

⁴² Jeff Barnes. Marriage in a changing society – INTRODUCTION Oxford university press, oxford, 1984. P 8

⁴³ Desk Interview: Mrs Brona Mwamba. Interviewed on the 15th of January 2011

⁴⁴ Jeff Barnes Marriage in a changing society – INTRODUCTION. P 8

⁴⁵ Atkin Philips. Survey of African Marriage and family life, Oxford University press, 1990. Page 40

those in which marriage would never be contemplated through gradations, where consent may be increasingly possible even if the marriage is disliked to cases where no obstacles exist. Tribal membership does not affect a person's capacity to marry. Though there is statistically marked preferential selection of spouses of the same tribe.⁴⁶

2.5 MARITAL STATUS

Matrimonial rights, obligations and duties of the spouses that flow from the marriage relationship include among other things the Name: Before marriage the bride is often called by her first name. Under statutory marriages the wife loses her identity once the marriage contract comes into existence and hence forth she is identified by her husband's name with "Mrs" before her name thereby signifying that she is married. Incidentally same is true for a marriage contracted under customary law where the words "*Bana*" so and so is equivalent to "Mrs" for the Bemba of Northern province of Zambia and pretty much the same in most parts of Zambia.⁴⁷

The only difference is that under statutory marriages the wife is identified only as "Mrs" under customary marriages apart from "*Bana*" among the Bemba, "*Bamuka*" among the Tonga, "*Bamake*" and "*Boma*" among the Lozi, she is also identified by reference to her children if she has any.

A girl must be single, widowed or divorced, while the marital status of the man does not matter since the marriage is potentially polygamous.⁴⁸

2.6 MARRIAGE CEREMONY

Formalities of marriage under customary law may vary from community to community and sometimes from locality to locality. It would appear that there are no essential legal formalities for a marriage ceremony. No law regulates the formation of marriage. It is an arrangement between a man and the parents of the woman who agree to the marriage upon specific terms. In a statutory marriage the situation is different. The marriage Act makes specific provisions for the celebration of statutory marriages. Unlike a customary marriage, a statutory marriage is a public

⁴⁶ Atkin Philips. Survey of the African marriage and family life. P 41

⁴⁷ Lillian Mushota . Family Law in Zambia. UNZA press, Lusaka,2006. P 66

⁴⁸ Lillian Mushota. Family Law in Zambia. P 66

act, in the sense that the state, through its appropriate official, the Registrar, takes an active interest and part in it.⁴⁹

There must be a marriage ceremony before a woman can be regarded as having been validly married under customary law. The marriage ceremony is important socially in that it is a form of advertisement which takes the message to the rest of the community in which it is performed that the parties to the marriage are now husband and wife. The initial marriage ceremony varies today according to the desires of those who enter into the marriage. Some follow the traditional rites more or less closely, others have abandoned most of the rituals but instituted no new ceremonies, others have adopted the Christian marriage ceremony.⁵⁰

Among those who follow traditional rites, the marriage transaction is normally long drawn out process, and there is often some doubt, both as to the exact point in that process at which the parties become husband and wife. Usually the woman is not informed that she is to be sent to her husband on a given day but in theory, the woman is aware but pretends she does not know as it is considered to be good manners. A cow is slaughtered for well to do families and drums are beat and a feast is held with few family members and friends to celebrate the union. With the bride being removed by elderly women from a room to go meet up her groom in a ceremonious manner, with or without pomp that is after she has been taught all she needs to know on how to look after the family and the home.⁵¹

2.7 CONSUMMATION

Consummation is the act of having complete sexual intercourse with a spouse on the first opportunity after the marriage ceremony. It usually takes place on the first night. In spite of fulfilling all the marriage requirements, a marriage is not valid unless it has been consummated. Failure to consummate nullifies it. The rationale is to ensure that procreation will take place. Practices of the Lozi of Western Province, Bemba of Northern Province and the Tonga of Southern Province are shown hereunder.⁵²

⁴⁹ Muna Ndulo. Law in Zambia. East African publishing house, Lusaka, 1984. P150

⁵⁰ Muna Ndulo. Law in Zambia. P 152

⁵¹ Lillian Mushota. Family Law in Zambia. UNZA press, Lusaka, 1996. P 67

⁵² Lillian Mushota. Family Law in Zambia. P 67-68

The *Luyana* of Mongu- At the groom's village is put in a house to sleep. Very early in the morning, *Bahale*, a tutor visits the couple to see if they performed full sexual intercourse. The man puts money on the pillow and leg outside the bed if the girl has "performed" i.e. if she is not rigid or not impossible to penetrate for some physical defect or mental reason. The woman will pound a mortar of the *Lukumba* tree to indicate the number of times of the sexual act. If the woman fails to perform she is taken back to her village and the bride wealth is returned but if the man fails to perform, he is given another chance.⁵³

The Tonga of Gweembe- A woman called *Nchembele* instructs the woman on what to do on her first night, and remains in a hut with her until the man pays to get her out. She goes out and the couple have sex. In the morning the *Nchembele* comes back to find out whether the sexual act was successful she will stand by the door and say *Zwa munganda yangu* (meaning come out of my house) and she will answer back saying it is his house.⁵⁴

The Bemba use the *Banachimbusa* to inspect the newly married and if the marriage was consummated, a special hoe is used called the *Ikundi Yapaa Chitanda* which is put under the bed in a special basket. The significance of this is to show how reserved and chaste the girl was before the marriage if she is not a virgin the man will throw away the hoe just after consummation. If the man fails to perform, he is given herbs and three more chances to try and consummate the marriage if he fails, the marriage is nullified.⁵⁵

The case of **Margaret Mumbi v Soka**⁵⁶ is good example in showing the importance of consummation under a customary marriage in that case, the couple got married and for a period of one year the defendant refused to have sexual intercourse with the plaintiff and the couple slept in different beds. The plaintiff sued for divorce. It was held that the marriage was voidable because it was not consummated by sexual intercourse. The marriage was ended.

⁵³ Lillian Mushota. Family Law in Zambia.UNZA press ,Lusaka,2006.P 77

⁵⁴ Lillian Mushota. Family Law in Zambia. P 80

⁵⁵ Lillian Mushota. Family Law in Zambia. P 81

⁵⁶ Livingston urban local court, case no.0376 of 1980

2.8 OTHER WAYS OF CONTRACTING A CUSTOMARY MARRIAGE (ABDUCTION)

The formal marriage proposal and negotiations may be ignored if the man wants to abduct the female spouse into marriage this is called “Ku uzwa Musali” among the Lozi people of western province.⁵⁷

Among Tonga of southern province the man proposes to the woman, and they exchange gifts this is called **Cizuminano** but before the woman’s parents are traditionally informed about the marriage proposal, the woman runs away with the man to his house. In theory the woman’s parents are supposed to be kept in ignorance about the abduction. It is considered as bad manners to be abducted as a respectable daughter is suppose to be married through the formal marriage proposal. However, the woman informs her grandmother or any elderly woman in the village about her departure from her parent’s house. The elderly woman does not inform the parent’s until after the couple has left the village. The following day, the father of the man will go to the woman’s parent’s house and inform them that “We have stolen your calf” meaning they have abducted the woman. There is no way the parent’s of the woman can disprove of the marriage whether they like the man or not, they cannot demand for the return of their daughter as it is considered a taboo to do so.⁵⁸

This form of marriage contraction is still regarded as a valid way of marrying under customary law and the children born from such a marriage are never regarded as illegitimate they are as legitimate as those born in a well arranged marriage.

⁵⁷ Desk Interview ; Mr Michael Mthetwa of woodlands extension Lusaka. Interviewed on the 16th of December 2010

⁵⁸ Phiri Jack : Maintenance of divorced women at customary law: a critical analysis. (1982 Obligatory essay)

CHAPTER THREE

Most statutory law of marriage is composed of received law, which in view of the colonial history, is in effect the English law. The English law of marriage applies to Zambia by virtue of section 11 of the High court Act⁵⁹ This Act declares that the law of probate and divorce in Zambia is the law in force in England. This means that most of the statutory law of marriage in Zambia is based on the 1969 Divorce Reform Bill of England, in addition to the received law, there is a marriage Act⁶⁰ the purpose of this Act is to modify English law made applicable to the country to suit local conditions and also to set up the administrative machinery necessary to administer marriage laws, such as delimitation of districts, the appointment of registrars of marriage and the detailing of marriage ceremony procedures.⁶¹

3.1 THE LAW GOVERNING STATUTORY MARRIAGES IN ZAMBIA (MARRIAGE ACT)

The Marriage Act does not define the term marriage. The English definition of marriage applied by Zambian courts was given by Lord Penzance in **Hyde v Hyde**⁶² “Marriage has been well said to be something more than a contract, either religious or civil to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. Marriage as conceived in all Christendom, may for this purpose be defined as a union for life of one man and one woman, to the exclusion of all others

This definition means literally that once married always married until death parts the parties. It does not contemplate divorce, nor same sex marriages.⁶³

3.2 SOLEMNISATION OF THE MARRIAGE

Section (6) of the Marriage Act provides that: No marriage shall be solemnised unless notice of the intended marriage shall have been given in the prescribed form by one of the parties thereto

⁵⁹ High court Act, cap 27 of the Laws of Zambia.

⁶⁰ Marriage Act, cap 50 of the laws of Zambia.

⁶¹ Lillian Mushota. Family Law in Zambia. UNZA press, Lusaka, 2006. P 100

⁶² (1866) LRI P & D 130

⁶³ P M Bromeley. Family Law 4th ed Butterworths, London, 1971. P 12

to the Registrar of the district in which the marriage is intended to take place not less than twenty-one days before the date of solemnisation.⁶⁴

3.3 NOTICE

Section 7 of the Marriage Act cap 50 of the Laws of Zambia provides that: If the person giving such notice is unable to write, it shall be sufficient if he place his mark or cross thereto in the presence of some literate person who shall attest the same, which attestation shall be in the prescribed form.

Section 8 provides that the Registrar shall supply forms of notice gratuitously to any persons applying for the same. Forms of notice to be supplied

Section 9 further provides that upon receipt of such notice the Registrar shall cause the same to be entered in a book to be called the "Marriage Notice Book" which may be inspected during office hours without fee. He shall also publish such notice by causing a copy of the same to be affixed on the outer door of the office and to be kept exposed there until he grant his certificate as hereinafter mentioned or until three months shall have elapsed.⁶⁵

Furthermore, section 8 of the Marriage Act cap 50 of the Laws of Zambia⁶⁶ provides that the Registrar, at any time after the expiration of twenty-one days and before the expiration of three months from the date of the notice, upon payment of the prescribed fee, shall issue his certificate in the prescribed form.

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

- (i) That one of the parties has been resident within the district in which the marriage is intended to be solemnised for at least fifteen days immediately preceding the granting of the certificate;
- (ii) That each of the parties to the intended marriage (not being a widower or widow) is not less than twenty-one years old or that if he or she is under that age the consent hereinafter made requisite has been obtained (which consent must be in writing and annexed to such affidavit);
- (iii) That there is not any impediment of kindred or affinity or any other lawful hindrance to the marriage;

⁶⁴ Marriage Act, Cap 50 of the laws of Zambia

⁶⁵ Marriage Act, Cap 50 of the laws of Zambia

⁶⁶ Marriage Act, Cap 50 of the laws of Zambia

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

Such affidavit may be sworn before the Registrar.

The Registrar taking such affidavit shall explain to the person making the same what are the prohibited degrees of kindred and affinity and the penalties which may be incurred under the provisions of this Act.⁶⁷

Section 11 of the Marriage Act cap 50 of the laws of Zambia provides that: If the marriage shall not take place within three months after the date of the notice, the notice and all proceedings consequent thereupon shall be void: and further notice must be given in accordance with section six before the parties can lawfully marry. Marriage is to take place within three months of date of notice.⁶⁸

The Minister or an authorised officer, upon proof being made to him by affidavit that there is no lawful impediment to a proposed marriage and that any necessary consent to such marriage has been obtained, may, if he shall think fit, dispense with the giving of notice and with the issue of the certificate of the Registrar and may, upon payment of the prescribed fee, grant a special licence in the prescribed form authorising the solemnisation of a marriage between the parties named in the special license by a Registrar or by a licensed minister of some religious denomination or body and may further, if he shall think fit, authorise the solemnisation of a marriage at a place named in the special licence, not being a licensed place of worship or Registrar's office.⁶⁹

3.4 NATURE OF STATUTORY MARRIAGES

In English law marriage is an agreement by which a man and a woman enter into a certain legal relationship with each other and which creates and imposes mutual rights and duties. Looked at from this point of view, marriage is a contract which also presents similar problems just like other contracts for example, A contract of marriage can never be discharged by agreement,

⁶⁷ Marriage Act cap 50 of the laws of Zambia

⁶⁸ Marriage Act cap 50 of the laws of Zambia

⁶⁹ Marriage Act cap 50 of the laws of Zambia

frustration or breach. Apart from death can only be terminated only by a decree of dissolution or divorce pronounced by a competent court of jurisdiction.⁷⁰

The second aspect of marriage is much more important than its first. It creates a status, that is, “the condition of belonging to a particular class of persons i.e., married persons, to whom the law assigns certain peculiar legal capacities or incapacities. In the first place, the spouses’ mutual rights and duties are largely fixed by law and not by agreement. Secondly, marriage may also affect the rights and duties of third persons. Thus, a husband has an action against anyone who by committing a tort against the wife thereby deprives him of her consortium, and it is not open to the torfeasor to argue that the marriage is *res inter alois acta*.⁷¹

These illustrations are not intended by any means to be exhaustive there are many more examples of aspects of a statutory marriage.⁷²

3.5 CAPACITY TO MARRY

In order that a man and a woman may become husband and wife, two conditions must be satisfied: They must both possess the capacity to contract a marriage, and secondly, they must observe the necessary formalities. **Sottomayor v. De Barros.**⁷³ In the words of Cotton, L.J..

“The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted. But...personal capacity must depend on the law of the domicile”

The following conditions must be made in order to contract a valid statutory marriage;

1. One party must be male and the other must be female.
2. Neither party must be already married.
3. Both parties must be over the age of sixteen and
4. The parties must not be related within the prohibited degrees of consanguinity and affinity.⁷⁴

⁷⁰ P M Bromeley. Family Law 4th ed . Butterworths, London,1971. P 11

⁷¹ P M Bromeley. Family Law. P 11

⁷² P M Bromeley. Family Law. P 12

⁷³ 3 P.D.1, C.A.

⁷⁴ P M Bromeley. Family Law. P 24

SEX- A new problem arising out of operations to effect a so called change of sex, had to be considered by Ormrod, J., in **Corbett v. Corbett**⁷⁵ The petitioner in this case was a man, Before the marriage the respondent had undergone a surgical operation for the removal of “her” male genital organs and the provision of artificial female organs. After dealing at length with the medical evidence the learned judge (who is also a qualified medical practitioner) came to the conclusion that a person’s biological sex is fixed at birth (at the latest) and cannot subsequently be changed by artificial means. That being so, the Court found that the respondent who was male at birth, would never become a woman and the marriage was therefore declared void.

MONOGAMY-As a result of the English view of marriage as a monogamous union, neither party may contract a valid marriage whilst he or she is already married to someone else. If a person has already contracted one marriage, he cannot contract another until the first spouse dies or the first marriage is annulled or dissolved. It follows that a mistaken belief that the first marriage has been terminated, for example, by the death of a spouse, is immaterial: What is relevant is whether it has in fact been terminated. Consequently the second marriage may be void even though no prosecution for bigamy will lie in respect of it.⁷⁶

AGE- Both by cannon law and at common law, a valid marriage could be contracted only if both parties had reached the age of sixteen. If either party is below this age when the marriage was contracted it could be avoided by either party when that party reached the age of sixteen.⁷⁷ If either party to the marriage is over the age of 16 but is below the age of 18, certain persons are normally required to give their express consent to the marriage or are given a power to dissent from it. These persons are the parents or the guardians of the minor or the person to whose custody the minor has been committed by a court order.⁷⁸

The provision that both parties must be over the age of sixteen is important when the party under that age is not domiciled in Zambia and has capacity under his or her own *lex domicilli*. This is

⁷⁵ [1970] 2 ALL E.R 33.

⁷⁶ P M Bromeley. Family Law 4th ed. Butterworths, London, 1971. P 30

⁷⁷ Marriage Act, cap 50 of the laws of Zambia

⁷⁸ P M Bromeley. Family Law. P 31

illustrated in the case of **Pugh v. Pugh**⁷⁹ A man over the age of 16 and domiciled in England went through a form of marriage in Austria with a girl aged 15. She was domiciled in Hungary, by the law of which country the marriage was valid. It was nevertheless held that it was void since the man had no capacity by English law to marry her.

PROHIBITED DEGREES-Most civilised states prohibit certain marriages as incestuous. The prohibited relationships may arise from consanguinity (i.e., from blood relationships) or from affinity (i.e., relationship by marriage) marriage within these degrees is prohibited at all times and in all circumstances, thus a man may not marry his step mother even after his father's death. A marriage will be prohibited whether the relationship is traced through the whole blood or the half blood, and despite the common law rule that a bastard is *filius nullius* the eugenic basis of the prohibition also brings illegitimate relationships within it. Consequently, a man may marry for example, neither his half brothers daughter nor his illegitimate son's widow. On the other hand a degree of affinity can only be created by marriage thus whilst a man may not marry his step daughter, there is nothing to stop him from marrying his mistress's daughter.⁸⁰ This point was affirmed in the case of **Wing v. Taylor**⁸¹

⁷⁹ [1951] 2 ALL E.R 680;[1951] p. 482

⁸⁰ Lillian Mushota. Family Law in Zambia. UNZA press, Lusaka,2006. Page 105

⁸¹ (1861),2 SW& TR. 278

CHAPTER FOUR

This chapter will discuss the grounds for divorce under both customary and statutory marriages; it will then evaluate how far the two forms of marriages have maintained the sacredness of marriage in light of the various aspects taken into account during the contraction, subsistence and at divorce stage. After all this has been highlighted, a conclusion will be reached which will determine whether the two forms of marriages should be placed on the same footing highlighting the similarities among the two.

Just as it is important to know when a legal relationship like marriage is established, it is equally important to know when it comes to an end. To begin with both man and woman have the capacity to divorce.⁸² However, after looking through the case records at most of the local and subordinate courts in Lusaka, it was discovered that a high percentage of the divorce cases are brought by women. The writer was at pains trying to find out why this was so perhaps it could be true to assert that since most of the divorce cases brought by many women usually hinge on gross cruelty or neglect on the part of the husbands towards their wives . This is the major reason for this state of affairs.

4.1 DIVORCE UNDER STATUTORY LAW

In English law a marriage may be terminated only by the death of one of the spouses or by a decree of dissolution or divorce pronounced by a court of competent jurisdiction. In the case of decree of nullity terminates voidable marriage, but death and divorce differs from nullity in that they have no retrospective effect and that afterwards the parties are still regarded as having being husband and wife up to the moment of the termination of the marriage. The Matrimonial causes Act was designed to help the possibility of reconciliation without slamming the door to divorce if the attempt failed. If the husband, say, commits adultery or deserts his wife, she may wish for some form of matrimonial relief less than divorce in the hope of reconciliation.⁸³

⁸² P M Bromeley. Family Law 4th ed. Butterworths, London, 1971. P 40

⁸³ P M Bromely. Family Law. P 40

The decree of divorce is made in two stages, the decree *nisi* and the decree absolute. Subject to the provisions of section 17 of the Matrimonial Proceedings and Property Act 1970⁸⁴, when the welfare of children is involved, the petitioner may apply for the decree to be made absolute at any time after the expiration of three months from the granting of the decree *nisi*.⁸⁵

4.2 GROUNDS FOR DIVORCE UNDER A STATUTORY MARRIAGE

ADULTERY-The first fact on which the petitioner may rely is that the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent. Whether or not the petitioner finds life with the respondent intolerable is clearly a question of fact and the test appears to be subjective: did this petitioner find it intolerable to live with this respondent? If the court is satisfied with this fact, it seems quite irrelevant that the petitioner's attitude is wholly unreasonable.⁸⁶

UNREASONABLE BEHAVIOUR

The petitioner may establish that the marriage has broken down irretrievably by showing that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him.⁸⁷ It will be seen that this fact is different from the last in that the court must be satisfied that the petitioner cannot reasonably be expected to live with the respondent: The test is therefore objective.⁸⁸

The petitioner may not complain of the respondent's behavior before marriage, even though he does not discover it until after the marriage. This would mean, for example, that a husband could not get a divorce on discovering that his wife was pregnant *per alium* at the time of marriage. It is less clear whether it will be sufficient for the petitioner to establish conduct that would give rise to constructive desertion but could not amount to cruelty. Suppose, For example, that a husband expels his wife from the matrimonial home or leads her to conclude, mistakenly but reasonably, that he has been guilty of adultery. It is arguable that neither case would it be

⁸⁴ Matrimonial Proceedings and Property Act Of 1970

⁸⁵ P M Bromeley. Family Law . 4th ed. Butterworths, London,1971. P 203

⁸⁶ P M Bromeley. Family Law. P 211

⁸⁷ Lillian Mushota. Family Law in Zambia. UNZA press. Lusaka,2006. P 265

⁸⁸ P M Bromeley. Family Law. P 210

reasonably for the wife to continue to cohabit with him in such circumstance. On the other hand it would be highly anomalous if suspicion of adultery were sufficient of give the court jurisdiction to grant a divorce whilst proof of its commission by itself is not.⁸⁹

DESERTION

The petitioner may show that the marriage has irretrievably broken down by proving that the respondent has deserted the petitioner for a continuous period of two years immediately preceding the presentation of the petition. If say, the husband deserts his wife for a year, resumes cohabitation for a period of eight months and then deserts her again, the two year period must be calculated from the date on which he left her for the second time. The period must immediately preceding the presentation of the petition: in other words, it must be running when the proceedings are commenced.⁹⁰

TWO YEARS' SEPERATION

The petitioner may establish that the marriage has broken down by showing that the spouses have lived apart for a continuous period of two years immediately preceding the presentation of the petition and that the respondent consents to the decree being granted. “ Living apart” in this context means living in two separate households and is therefore identical with a concept of separation necessary to constitute desertion.⁹¹

The respondent has to consent to the decree being granted under section 1 (2)(d) of the Matrimonial Causes Act⁹² and has the right to withdraw the consent at any time before the pronouncement of the decree. Consent must continue up to the end of the pronouncement of the decree. The consent has to be freely given, and the giver must have the same mental capacity as at the time of the formation of marriage.⁹³

This provision is a functional recognition that marriage is a contract from which the parties should be freed if the substratum of the relationship, that is mutual love and understanding

⁸⁹ P M Bromeley. Family Law. 4th ed. Butterworths, London,1971. P 211

⁹⁰ Lillian Mushota. Family Law in Zambia.UNZA Pess. Lusaka,2006. P 240

⁹¹P M Bromeley. Family Law. P12

⁹² Matrimonial Causes Act

⁹³ Lillian Mushota. Family Law in Zambia. P 245

disappear. On the other hand this section also provides for a form of divorce by consent by the parties.

FIVE YEARS' SEPERATION

The last fact on which a petitioner may rely is that the spouses have lived apart for a continuous period of five years immediately preceding the presentation of the petition. This provision is more controversial than the last because it enables the marriage to be dissolved against the will of the spouse who has committed no matrimonial offense and who has been responsible for the breakdown of the marriage. On the one hand it has been hailed as a measure that will bring relief to hundreds of couples who are now living in stable elicit unions but are unable to marry because one or both of them cannot secure release from another union; on the other hand it has been castigated as a "Casanova's charter"⁹⁴

4.3 DIVORCE UNDER CUSTOMARY LAW

Like statutory marriages, customary marriages can be dissolved in court. But usually customary marriages are dissolved by one spouse who wants to divorce telling the other party about it whereupon the latter informs his or her parents. The elders of both parties will then sit together with the spouses and hear why one party wishes to divorce the other. Upon hearing from both parties will try to reconcile them more so, if it is their first conflict.⁹⁵

As regards court procedure for divorce, the petitioner pays a fee after which summons for divorce issued at a local court is obtained. The summons inter *allia* will show why the petitioner wishes to divorce the other as well as the date of hearing. Both parties are required to appear in person and in case of a woman, it is a policy of the local court to insist that she comes with her close relative.⁹⁶ The reason for this is that the opinion of the relatives is always considered, albeit, the court is not bound by such opinion when granting the divorce. Like the former procedure, the courts are always reluctant to dissolve each marriage which comes before them but tries to

⁹⁴ P M Bromeley. Family Law. 4th ed. Butterworths, London,1971. P 212

⁹⁵ Muna Ndulo. Law in Zambia. East African publishing house. Lusaka, 1984. P 160

⁹⁶ Muna Ndulo. Law in Zambia. P 170

reconcile the parties. There are many instances where the local courts instead of granting divorce have only encouraged the parties to reconcile.⁹⁷

In the case of **Suzana Kafwale v Dandi Kafwale**⁹⁸ the court encouraged the parties to reconcile and held that since the parties had agreed to remain as husband and wife, the court could not force them to divorce.

Similarly, in **Ehinda Mutobela v Paul Mwamba**⁹⁹ the court encouraged the parties to reconcile however, if there is no improvement after reconciliation the petitioning spouse can go to court again and this time the court will grant them a divorce without hesitation.

It must be pointed out therefore, that is only in the rarest of cases the local court can grant divorce when it is sought for the first time. And from the cases studied by the writer during this research it would appear that divorce is readily granted when there was evidence adduced to the effect that for many times before, the parties had failed to reconcile.

4.4 GROUNDS FOR DIVORCE UNDER A CUSTOMARY MARRIAGE

It is not easy to come up with an exhaustive list of the grounds for divorce let alone any African customary marriage. With that caution in mind the writer has endeavored to discuss only the salient ones which include adultery, bareness, impotence, refusal to render conjugal rights, willful desertion, gross cruelty and neglect.¹⁰⁰

ADULTERY

Adultery is regarded as the most serious of all grounds for divorce. This is because it goes to temper with the foundation of society- and family life. For example if a woman commits adultery with another man, her husband can kill her lover in order to maintain the stability of his marriage.¹⁰¹

⁹⁷ Muna Ndulo. Law in Zambia. P 151

⁹⁸ Solwezi local court case no. 328 of 1994

⁹⁹ Solwezi Local case no. 325 of 1982

¹⁰⁰ Lillian Mushota. Family Law in Zambia. UNZA press. Lusaka,2006. P 273

¹⁰¹ Matthew Gluckman. Ideas and Procedures in African Customary Law. Oxford University press, London, 1969. P61

It is only to a limited extent that under customary marriage adultery on the part of either spouse especially on the man's part is considered as a ground for divorce. But if a spouse chooses to take proceedings the local court is less likely to refuse to grant a divorce on the ground that the adultery in question was not of a sufficiently serious nature. But more often than not, cases in which adultery is alleged are not based on divorce but as a basis for proceedings against a wife's paramour and such proceedings are usually for a claim for damages.

In the case of **Valenesi Lungu v Basikolo Phiri** ¹⁰² The local court justices declined to continue with the hearing regardless of the fact that the woman was caught in adultery but who later appeared before the elders with her lover who was ordered to pay damages to her husband despite the fact that the case had already been before the local court.

The previous case demonstrates the fact that the local court recognizes the vital role played by village elders in resolving marital problems under customary law

Similarly, in the case of **Lukasu Phiri v Nilo Mulema** ¹⁰³ The plaintiff alleged that the defendant committed adultery with his wife, the co-defendant to which the defendant admitted. The court ordered the defendant to pay compensation to the plaintiff.

IMPOTENCE/ BARRENNESS

This must be of a permanent nature in order to effect a divorce-but usually an attempt to cure the condition is always allowed. Sometimes, parties elect to keep on together despite not having children. Usually, a wife may petition for divorce if her husband is impotent. Whether or not divorce would be granted immediately would depend on how long the marriage has lasted. If the husband becomes impotent shortly after the wedding, his marriage payment is returned and the marriage is dissolved. However, if the impotence occurred later in the marriage, the court will be tolerant and will request the wife to give her husband sufficient time to get the impotence treated.

¹⁰² Case no. 0283/1984

¹⁰³ Solwezi Local court case No. 27 of 1997

This can be tolerated if there are children in the marriage.¹⁰⁴ Under customary law, barrenness is not a ground for divorce ipso facto. The rejection of this ground is based upon acceptance of polygamous marriages. If the woman is barren, the husband will be advised privately to marry another fertile wife in the hope that he can father a child.¹⁰⁵

DISSERTION

Most if not all cases of this nature are by women. An intention that the woman is going for good must be shown. The woman usually leaves her husband for her parent's home and it may be for any reason. The husband then finds out about her whereabouts then tries to persuade her to join him. If she refuses, it means she has breached her duty to cohabit and the husband may divorce her. It is rare that the men desert their wives but where the man does not provide her with necessities for life, does not live at home nor care for the children. The woman may go to her parents. The husband is expected to follow her or at least make inquiries about her whereabouts. If he doesn't, it may be presumed that he does not love her anymore and she can remarry. Thus in **Nand Halumbe v. Alfred Mazuba**¹⁰⁶ The spouse had been married for some time and had two children. But for two years, the wife was living at her parents' house due to some problems. The husband did not follow her and she petitioned for divorce. The court granted her the divorce after failing to reconcile them and the fact that they had been on separation for too long.

DENIAL OF CONJUGAL RIGHTS

Except in cases where a woman refuses to sleep with her husband because she is about to give birth or has just given birth or her husband has a venereal disease and has not been cured a husband is entitled to divorce his wife who refuses to have sexual intercourse with him without a justifiable reason. This in **Chilanjira Mwanamungule v. Manchisi Mwanampatisha**¹⁰⁷ The petitioner sought divorce on the ground that the respondent refused to have sexual intercourse with her due to the fact that she had a bad smell. The court granted a divorce for willful refusal to

¹⁰⁴ Maintenance in Zambia. Women and Law in Southern Africa Research Project. March 14 2010. P 33 (unpublished).

¹⁰⁵ Aspects of the Law of maintenance of children: The case of women in Zambia 'working paper in women Law number 25 OSLO. P 33

¹⁰⁶ Lusaka local court (B), case No. 323 of 1978.

¹⁰⁷ Shakumbila Mwembezi Local court, case No. 350 of 1994

have sex. Conjugal rights are mutual rights flowing from the marriage and each party is entitled to demand sexual intercourse.

4.5 AN EVALUATION OF THE SANCTITY OF MARRIAGE UNDER CUSTOMARY MARRIAGES

Customary marriages in Zambia are undergoing change as a result of social, economic and other development changes. A major contributing fact is intermarriages, not only amongst the indigenous ethnic groups of Zambia, but also but also between them and others from other countries. The other factor is the influence of the received law whereby people tend to blend customary law practices and civil law requirements into one form of marriage. This has often resulted into conflict of laws which local court justices resolve according to their own interpretation without applying any real customary law rule.¹⁰⁸

Application of the Law-Customary law as applied by local courts is at variance with that applied by traditional courts of chiefs and headmen. The latter applies actual customary law as it has existed from time immemorial mainly because there is little interaction with other cultures and less intermarriage, whereas in urban and peri-urban areas, the social economic and inter-cultural dynamics have distorted the authenticity of customary laws and practices.

Whereas, the fact of the dual legal system has posed problems of the choice of personal laws to apply to people's lives, another problem is the reliance on received laws especially those obtained in the English statutes. Zambia has a marriage Act, but does not have a divorce statute of her own and looks to England for divorce laws.¹⁰⁹

Family ties-Modern couples in most cases see the alliance between a woman's and a man's family as subordinating the individual to the wider families and their interests. This leads to a shift of emphasis to the individual aspect of marriage as an exclusive relationship between two persons. Modern conditions in the cities also make it very difficult to bind two families. In the past, it was easy to bind the families because people married mostly in their own villages or from

¹⁰⁸ Lillian Mushota. Family Law in Zambia. UNZA press. Lusaka, 2006. P 12

¹⁰⁹ Lillian Mushota. Family Law in Zambia. P13

a village nearby. Today people marry not only from different, far away villages and towns, but from ethnic groups different from their own.¹¹⁰

Breakdown of moral values- increased immorality and pregnancies before marriage is plainly due to the breakdown of traditional custom and sanctions. Damages for pregnancy can only be claimed under customary law, by the father of the girl, she cannot sue in her own name. Hence, in effect, the legal right to claim damages is of no use to girls who leave their parents to live alone or who travel for work purposes and those who live with other relatives.¹¹¹

Polygamy-The practice of polygamy is probably the most criticized aspect of customary law. Polygamy was the basis of the common law refusal to acknowledge that African customary is a legally binding relationship. It has been attacked as reflecting and at the same time, intensifying the fundamental inequalities between the two sexes in Zambia and Africa at large. The other major flaw on this aspect is that with the increase in the rate of HIV/AIDS cases in Zambia, polygamy should be discouraged at all costs and instead one man one woman marriages should be encouraged. As the trend today is that many men are marrying under customary law as a passport to having many sexual partners and its mostly the women who suffer as the men die earlier due to re-infection leaving the women to take care of the children. With the little remaining property and money if any, which is usually not enough to take care of all the children, the women have to fend for them. Looking at the employment rate in Zambia, more men are employed compared to the women as a result most of the Zambian women are house wives.¹¹²

Lobola/bride price-The attitude of most Europeans to *lobola* was and still is wife purchase. The tendency is to discourage it. This is a misconception which is as a result of a mistake of trying to capture the meaning of the institution by use of concepts from the western cultural setting. The short answer is that *lobola* is no more the price of a wife than is dowry the price of a husband, but that either cannot acquire some of the qualities of a sale in a commercial minded society

¹¹⁰ Muna Ndulo. Law in Zambia. East African publishing house. Lusaka.1984. P 155

¹¹¹ Maintenance in Zambia. Women and Law in Southern Africa Research Project. March 14, 2010. (unpublished)P55

¹¹² Muna Ndulo. Law in Zambia. P 156

where property is valued for its own sake. The husband's rights and powers in relation to his wife are nowhere near those which buyers acquire over things they buy. He does not own his wife in any sense. He cannot destroy her, sell or lease her to another person. He cannot repudiate the marriage and recover the *lobola* because of her latent defects.¹¹³

It is ironic that *lobola* has tended to become the thing it was originally thought to be by early westerner observers, purchase price. This development unfortunately tends to make *lobola* an instrument whereby profiteering fathers can bleed the impoverished prospective young bridegrooms. The commercializing of bride price has increased not only the disfavor which it is regarded but also calls for its abolition. The desirability of abolishing *lobola* at this time is questionable. The institution is a reflection of the values of our society, and there is no evidence that those values even among the educated have lost their validity and force. What is needed is a vigorous check upon the tendency towards excessive commercialization of the institution.¹¹⁴

Repayment of dowry-The general custom among the Tonga People is that once a marriage is dissolved, dowry must be paid back to the parents and relatives of the man or depending on who helped the man in paying it, to the persons who played a role in the payment of dowry. If however dowry is not returned, marriage is still considered to be still subsisting between the parties in spite of their agreement to divorce. Thus if the wife committed "adultery" after divorce but before the repayment of dowry the "husband" can sue the other man for damages.

In the case of **Jane Fulangi v Dickson Mumbinji**¹¹⁵ where a woman had been divorced and after divorce the woman had gained a reputation of a prostitute and slept with various men with little or no consideration at all. Her former husband heard of it and on one occasion he had found her with a man in a sexual act. In an action for damages by the former husband against the other man, the woman had contended that they had been divorced for two years and that any relationship that existed and the rights incidental thereto had been extinguished by the divorce. The Court agreed with her contention but ruled however that since under Tonga tradition, dowry

¹¹³ Muna Ndulo .Law in Zambia. East African publishing house. Lusaka, 1984. P 157

¹¹⁴ Muna Ndulo. Law in Zambia. P 156

¹¹⁵ Mazabuka Local Court case no. 18 of 2000

is to be paid back and that since this had not yet been done, the former husband succeeded his claim for damages for the adultery.

Similarly in Sesheke, members of the extended family have rights in a marriage. They can intervene and must be informed if the marriage breaks down. They ask the man why he has divorced his wife and he must write an explanatory letter to his parents. However, should the two families reach the conclusion that divorce is inevitable, part of the marriage payments may have to be returned.¹¹⁶

This custom entails that once a pronouncement of divorce has been declared by the Court or elders, it is not valid not until repayment of dowry is made. This further entails that one spouse can deliberately delay in paying back the dowry in order to have the other spouse tied to him/her in perpetuity rendering divorce useless and impossible.

4.6 AN EVALUATION THE SANCTITY OF MARRIAGE UNDER STATUTORY MARRIAGES

Just like customary Law of marriage have its flaws so does statutory marriages. The highlighted points below will bring out the flaws though not exhaustively in order to try and refute the notion that statutory marriages are more sacred than customary ones.

The Marriage Act-The Marriage Act is confined to regulations and formalities for contracting a valid civil marriage. It does not deal with divorce and other domestic relations such a custody and maintenance or financial provision for the spouse or child of the family, or with settlement of property after divorce. For these matters, Zambia applies the Matrimonial Causes Act of England, the current Act in force in Zambia 1973 Act, although in the U.K the Act has been revised, some provisions repealed and replaced.¹¹⁷

¹¹⁶ Maintenance in Zambia: women and the law in southern Africa research project. March 2010. (unpublished) P22

¹¹⁷ Muna Ndulo. Law in Zambia. East African publishing house. Lusaka,1984. P 14

A serious problem is existing in the nation because whereas the Marriage Act regulates marriages, courts look to another country, England, for divorce and other domestic relations. This requires that the laws of the marriage should conform to those in force in that other country, for them to be in harmony with that country's divorce laws. There are vast changes in the laws of marriage in England from whence our marriage law came in 1963, when civil law marriages became available to African; and there are enormous rapid developments in the divorce laws in England no matched at all with the marriage laws which have remained static since 1963. This has created a conflict largely because the Zambian society has values and other conditions which are totally different and rooted in tradition than values and conditions obtained in the U.K. It has also created uncertainty about which British statutes and precedents to follow.¹¹⁸

Section 11 of the High Court Act,¹¹⁹ chapter 27 of the Laws of Zambia provides "that the jurisdiction of the court in divorce and matrimonial cause and matters shall, subject to this Act and any rules of the Court, be exercised in substantial conformity with the law and practice of the time being in force in England."

Professor Himoonga¹²⁰ writes that in practice courts apply whatever English law that is best known to them; for instance some apply the MCA 1958, or divorce reform Act 1969 instead of the Matrimonial Causes Act 1973, leading to not only the application of the wrong law by the courts, but to the application by the vigorous judges of different legal solutions to similar cases.

In my view there appears to be no judicial interpretation of these provisions which imply that Zambian Courts should apply the Law in practice in England regardless of its unsuitability to Zambian values, local circumstances and practices. The most important Law on divorce and other domestic relations in Zambia is the Matrimonial Causes Act, 1973 made applicable to Zambia by the forgoing provisions. A civil marriage is therefore one governed by the Marriage Act, there is also the Married Women's property Act, 1882 which gives a woman married under the Marriage Act the right to seek redress through criminal proceedings for property which she owns separately and solely from her husband. This Act also makes one spouse competent to give

¹¹⁸ Muna Ndulo. Law in Zambia. East African publishing house. Lusaka, 1984. P 13

¹¹⁹ High Court Act, Cap 27 of the Laws of Zambia

¹²⁰ Nombe Hamonga's legal brief on the nature of Customary Law in Zambia. 1999 .(Unpublished). P 11

evidence against the other, regardless of the rule which makes spouses incompetent witnesses against the other. This would lead to a total injustice in that when two people are joined together by marriage, they become one. Therefore, allowing one spouse to give testimony against the other in theory entails giving two different testimonies by one and the same person and also brings in the issue of biasness and revenge for past wrongs committed by the one spouse against the other.

This instance clearly shows a serious overlooking and ignorance of the concept of the fact that marriage is to be kept sacred. Sacredness involves the acceptance by a couple that they now become one and that whatever the couple has belongs to both of them and that goes on in the marriage is a complete preserve of the couple is to the exclusion of all others.

Parental Consent- Under statutory law, a woman over the age of twenty one does not require consent from her parents. It is enough that the boy and the girl agree to marry each other. Parties below twenty one require parental consent to marry or in certain circumstances the permission of the High court judge suffices. Anybody has the right to choose the form of his/ her marriage. That is he/ she may choose to marry under customary law or by statutory law. Thus an African girl who wishes to do away with parental consent to her marriage can circumvent customary law by going to marry under the Act. The parents have no recourse to this kind of situation s their consent is may not be required.¹²¹

Another factor undermining parental consent is that in some instances the older generation is economically dependent on the younger, who alone can take advantage of the employment opportunities offered in modern economy. Young men and women are supporting their parents economically. This has had an effect on their social status. A father who is economically dependent on his daughter for survival is very unlikely to exercise parental control over the marital her wishes.¹²²

¹²¹ Maintenance in Zambia. Women and Law in Southern Africa Research Project. March 14, 2010. (unpublished). P 51

¹²² Muna Ndulo. Law in Zambia. East African publishing house. Lusaka, 1984. P 156

There is also an argument that the ability of Zambians to marry under the marriage Act¹²³ has also contributed in a way to the loss of parental influence. For example, section 19 (1) provides as follows: “ If any parent or guardian, whose consent to a marriage is required, refuses his consent, a Judge of the High Court may, on application being made, consent to the marriage, and the consent of the Judge so given shall have the same effect as if it had been given by the person whose consent is refused.”

From my analysis it can be argued that this provision to some extent can be seen to deprive the parent's of any influence they may have to the marriage of their children. This again goes against the concept of the sanctity of marriage which requires a couple to get parental consent before contracting a marriage in order to receive blessings from them. Almost every society in Zambia and the world over acknowledges the important role played by parents and guardians in bringing up a child/children hence doing away with parental consent before contracting a marriage is a serious undermine of their important role in bringing life to a child and the upbringing of that child.

Modernization-The general impression among people is that with growth of towns, cultural contact and education, divorce is on the increase under statutory marriages. It would appear that the main source of instability of the marriages in urban areas seems to be the weakening of social control on married couples. For example most modern women are slowly doing away with the important traditional teachings on how to maintain the home and on how to behave as research has it that most women want to compete with men by spending most of their time in bars. Whilst most modern men enter marriage with very high expectations from their new brides while doing very little or nothing at all to sustain the marriage.¹²⁴

Assertive Women – Women are more assertive these days. They are no more submissive. They expect a lot from their men, particularly loyalty. Their demands need to be met. A man who cannot satisfy his woman is discarded

¹²³ Marriage Act, cap 50 of the Laws of Zambia

¹²⁴ Muna Ndulo. Law in Zambia. East African publishing house. Lusaka, 1984. P 158

4.7 RIGHTS AND OBLIGATIONS OF SPOUSES UNDER CUSTOMARY MARRIAGE AND STATUTORY MARRIAGES IN ZAMBIA

Amongst most ethnic groups in Zambia property under customary law acquired by the husband is regarded as his sole property. On divorce, the wife can claim nothing but her own property. As regards the disposal of property while the marriage subsists, husband and wife are expected to consult together. The husband has the final say. However, since the woman's property is kept distinct, she has a certain economic independence. Customary rules do not ordinarily entitle a woman to inherit from her husband. In most ethnic groups all property goes to the children of the marriage if any or to the husband's relatives. In others, all property goes to the relatives of the dead husband who in turn are supposed to look after the children of the marriage.

This point is clearly illustrated in the case of **Mwiya v Mwiya**¹²⁵ where the Court held that a divorced woman was not entitled to maintenance by her former husband nor is she entitled to share in his property on the dissolution of the marriage under Lozi customary Law.

However under the intestate Act 1989¹²⁶ and the Act no. 8 which amended the Local Courts Act, cap 29¹²⁷. The position of customary Law has been altered giving the Local Court power to appoint an administrator whose duty is to share the property between surviving spouse, children and the parents of the deceased including a divorced spouse. The Act also makes provision for the payment of a monthly sum for the maintenance of a divorced spouse.

The case of **Chibwe v Chibwe**¹²⁸ is illustrative of this point the parties were married under ushi customary Law. Upon dissolution of the marriage the wife was entitled to a reasonable share of the property acquired during the marriage and also to maintenance

Maintenance-section 26 of The Matrimonial Causes Act¹²⁹ provides that a "court may make orders for payments of a monthly sum for maintenance of a divorced spouse". In other words if

¹²⁵ (1977)ZR 113

¹²⁶ Intestate Act 1989

¹²⁷ Act no. 8 which amended the Local Courts Act, cap 29

¹²⁸ Appeal no. 38 of 2000

the court finds according to the facts of a particular case that the woman is in a stronger position than that of her husband, then the woman is ordered to maintain the divorced man.

However, under customary law the position of maintenance is that it does not operate both ways. Maintenance here is a sole responsibility of a man. Furthermore, in a typical traditional setting it is mostly the man who is in a position to earn money, but in modern society, women are getting high paying professional jobs even non professional jobs like being engaged in a small scale business hence are able to maintain a man after divorce who is not in formal employment.¹³⁰

Customary law did not recognize maintenance of a divorced woman this stems from the view that a man is only under a duty to maintain a woman whose service he enjoys. According to this view, since a divorced woman is not able to provide her husband with such services such as cooking, washing etc, she is not entitled to be maintained. This view did not pose any problem to a divorced woman in say forty years ago. During this time livelihood largely depended on a subsistence economy. This was able to support very big families, in this community; a divorced woman was looked after by her people.¹³¹

However, with the introduction of a money economy, this way of life collapsed. The big families broke up into smaller ones as this economy could not support them. The migration to urban areas also entailed the inevitable breakdown of this system where a divorced man or woman can easily leave his divorced spouse to live elsewhere and begin a new life while managing to fend for herself/himself and the children.¹³²

In the case of **Edna Chanda v. Mwenda**¹³³ father of the plaintiff requested the court to order the defendant to maintain the children of the marriage who were in the plaintiff's custody. The father said that without such an order, the man could not be compelled to do so under customary law. Hence the Court made the order for maintenance of the woman and the children.

¹²⁹ The Matrimonial Causes Act 1970

¹³⁰ Lillian Mushota. Family Law in Zambia. UNZA press. Lusaka, 2006. P 363

¹³¹ Phiri Jack : Maintenance of divorced women at customary law: a critical analysis. 1982 Obligatory essay. P 22

¹³² Maintenance in Zambia: women and the law in southern Africa research project. March 2010. P 5 (unpublished)

¹³³ L.C 22/56 Unreported

This can also be seen from the case of **Edna Chanda v. Mwenda**¹³⁴ In this case the court did make an order maintenance of the woman and the children.

It has been noted that a lot of women do not get help from the courts in divorce cases because their marriages end out of court. However, there are some cases where divorced women whose marriages have ended out of court and have made the effort to bring their cases before the court. This is done in protest against the rigors of customary law which in most cases does not offer them any relief. However, some cases show these women were not awarded maintenance by the courts either.

In the case of **Ireen Kanala v. Newton Pendapa**¹³⁵ The plaintiff had been divorced outside court and could not claim anything from her husband according to Chewa customary law. She took the case before the local court but the court did not order any maintenance.

The court here clearly conspired with the rigors of customary law to defeat justice. similarly in the case of **Walusiku Lisulo v Patricia Anne Lisulo**¹³⁶ the appellant and respondent were married under the Act, the appellant was appealing against the maintenance order of the respondent and their three children as he was not in employment while the wife was in employment. His appeal regardless of this fact was rejected.

Apart from the inconsistencies in the application of the law and in most cases the complete disregard of the Law under both statutory and customary marriages in matters relating to maintenance of a spouse, the courts in relation to issues pertaining to maintenance of children advises the spouse to report to the court in the event the former spouse does not comply with the maintenance order in relation to children.¹³⁷

The problem here is what constitutes maintenance of a child. In the course of this research it was revealed that to most men as long as they buy uniforms for school going children then they have

¹³⁴ L.C.A 32/92 Unreported

¹³⁵ L.C.A 30/93(Unreported)

¹³⁶ SCZ judgement no. 21/1998

¹³⁷ Maintenance in Zambia: women and the law in southern Africa research project. March 2010. (unpublished).

satisfied the order. From this it can be seen that the day to day to day requirements of a child is left in the hands of a divorced woman who is paid very little maintenance or none at all.

Rights of spouses-In the matrimonial home both husband and wife have many rights. Of paramount importance is the right to sexual intercourse with each other. There was an overwhelming consensus from the people interviewed that the spouses must always maintain one and the same bed and that the husband can demand sex at any time regardless as to whether the wife is feeling well or not.¹³⁸

From what has been said so far I can conclude that for a long time the courts have been practicing a conservative approach in so far as maintenance of divorced women under customary law is concerned. The reluctance of applying a new law and in most cases a complete refusal is an illustration of this conservative approach.

It is also important to note that unlike customary law marriage cases which are handled by local courts and subordinate courts, statutory marriages are only administered by the high court, matrimonial causes arising out of the statutory law are an exclusive concern of the High court sitting as a court of first instance.¹³⁹

But this does not in any way take away the fact that there still exist inconsistencies in the Law applicable to both types of marriages.

Property rights-with the Bemba, every object that the husband has bought is regarded as his sole property. If the marriage breaks down, he has claim to everything excluding kitchen utensils and sometimes the clothes bought by the husband for his wife.¹⁴⁰ However, Under statutory marriages the property bought during the existence of the marriage belongs to both the husband

¹³⁸ Maintenance in Zambia: women and the law in southern Africa research project. March 2010. (unpublished)
P 14

¹³⁹ Lillian Mushota. Family Law in Zambia. UNZA press. Lusaka, 2006. P 13

¹³⁹ Lillian Mushota. Family Law in Zambia. P 13

¹⁴⁰ Lillian Mushota. Family Law in Zambia. P 77

and the wife and after divorce the property is supposed to be equally shared between the couple depending on what is available and who is granted custody of the children.¹⁴¹

In reality this is only implemented to a lesser extent as even those married under the Act face similar problems as those married under customary Law as most couples are now aware of the effects of divorce hence they decide to register the property acquired during the existence of the marriage in another person's name say for instance in the name of a close relative or friend such that at after divorce there is little or no property at all to share with the other spouse.

4.8 SIMILARITIES AMONG THE TWO FORMS OF MARRIAGES

To come up with similar particular elements of statutory marriages and customary marriages, I will start with the essentials of a valid contract of marriage. To contract a valid English marriage, the consent of both parties is essential and that if one of the parties to the marriage is below the age of twenty one¹⁴² then the consent of the mother or father or guardian is required. Well customary Law is not entirely without this element, to state a fact it has more of it because not only the consent of the parties is necessary but that of both parents and major relatives is necessary. Consent in both types of marriages is necessary so as to avoid forceful marriages.¹⁴³

As concerns the age of the parties to the marriage which is also essential, sixteen is the critical age under English Law below which a female cannot contract a valid marriage. Under Customary both parties must have reached the age of puberty, and a boy must in addition, be physically mature. The puberty ceremony serves as a means of letting the people know that a girl has undergone her first menstruation. A girl who has not had her first menstrual cycle cannot marry neither can a boy who cannot produce semen but can only get betrothed, usually the age is between 15 – 16 years that a girl or boy reaches puberty.¹⁴⁴

As regards custody of children under customary law, the children are cognate and both parents have access to them inspite of strong matrimonial cleavages, they belong to both parents.

¹⁴¹ Lillian Mushota. Family Law in Zambia. P 77

¹⁴² Atkin Philips, Survey of African Marriage and family life, Oxford University press, Oxford, 1990. P 377

¹⁴³ Atkin Philips. Survey of the African marriage and family life. P 380

¹⁴⁴ Atkin Philips. Survey of the African marriage and family life. P 377

However, children who are below five or school going age are usually granted to the mother, while those going to school usually remain with the father.¹⁴⁵

The case of **Elizabeth Soko v Patricia Mutasa**¹⁴⁶ clearly illustrates the above point in this case the Local Court justice ordered that the daughter, who was six years old, should be in the custody of the mother but the son who was ten years old, should be free to stay with and visit any of the parents as he wished.

Similarly under statutory Law of marriage and divorce, the Court which hears an application for maintenance has jurisdiction also to make orders with respect to the custody of the children of the family. The duty of the Court is to concern itself with the child's welfare. Courts also consider the age of the child or children, their sex and health. Courts do not ignore the fact that where the children are very young, the mother is often better placed to bring them up until they reach an older age for instance seven and above.¹⁴⁷

However in the case of **(Re L infants)**¹⁴⁸ In this case the father was granted custody of the children aged four and six due to the fact that the mother deserted the matrimonial home to live near her lover.

As regards prohibited degrees of consanguinity and affinity, these bars exist both under statutory and customary Law, although they are not entirely the same. Certainly a marriage between a mother and a son will be incestuous by English morality and African standards and the relationship will not be allowed to take place because it is considered taboo. However customary Law does not completely disregard affiliation by marriage, among the Tonga and other related tribes, a man cannot marry two related women.¹⁴⁹

Consequently then it is clearly visible that the essentials to a marriage in both English and customary Law are not substantially different so as to deserve the already noted disparity in status.

¹⁴⁵ Atkin Philips. Survey of the African marriage and family life. Page 380

¹⁴⁶ Unreported 1993

¹⁴⁷ Lillian Mushota. Family Law in Zambia. UNZA press. Lusaka, 2006. Page 377

¹⁴⁸ (1962) 3 ALL ER 1.

¹⁴⁹ Muna Ndulo. Law in Zambia. East African publishing house. Lusaka, 1984. Page 159

The other issue contributing to the high rates of divorce cases in Zambia under both forms of marriages is Alcohol abuse – this is one of the causes of divorce in Zambia under both statutory and customary marriages as a large number of people are in informal employment hence they have enough free time on their hands to indulge in beer drinking regardless of the day and time. The other reason is that the Law in Zambia relating to the times bars are to open is not full operational as bars open at any time and on any day and remain open until the beer runs out. This has led to the increased cases of gender based violence leading to couples having irreconcilable differences.¹⁵⁰

Family Interference – In many countries especially Zambia, often a spouse may not be able to adjust with the members of the other person’s family. The mother-in-law may be too dominating and interfering and this may not be liked by a spouse. Any addiction (drug, exercise, overeating, porn, internet usage, gaming) takes a spouse completely out of the life of his or her family and rips from that person a real sense of accountability, availability and participation in the relationship. The other spouse is left to pick up the slack while trying to support the spouse into recovery and, before you know it, burnout occurs. Any addiction, if gone untreated, will destroy a marriage. This is regardless of what type of marriage contract one is under.

Hence according to the above highlighted points it is only legitimate to conclude ultimately that customary Law of marriage and divorce has been wrongly placed. This is due to the fact that in spite of modern influences on the customary practices of the Zambian society western influence has not overtaken or wiped out the customs of the Zambian people completely nor has it changed the fact that the divorce rates under both forms of marriage is prevalently high, due to the fact that there is increased interaction of people in Zambia from different walks of life.

Many tribes in Zambia still practice their customs with full force. Customary marriages are still very much in practice even with those who chose to marry under the Act there is usually a fusion of customary Law such as the elders coming together to come up with the bride price, holding of kitchen parties before the wedding ceremony and going for counseling to the elderly members of both families before making the decision of breaking up or dissolution of the marriage resulting

¹⁵⁰ Maintenance in Zambia: women and the law in southern Africa research project. March 2010. (unpublished).
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in the combination of the two forms of marriage. Hence to consider customary marriages as inferior to statutory marriages or to hold that statutory marriages are more sacred than customary marriages would seem to be contrary to public policy, since Law is aimed at fulfilling the aspirations and ideals of society. Though it would be correct to state that Customary Law has certain practices that may not be morally acceptable considering the fact we are living in the 20th century, the inspection by elders of both families as to whether the marriage has been consummated the night after the wedding have to be done away with. Polygamy is also another aspect of customary Law which has received a lot of criticism from HIV/AIDS activists and people from the world over especially taking into consideration the high rates of HIV/AIDS in Zambia and the fight for gender equality.

CHAPTER FIVE

This chapter will give an overall view as to whether statutory marriages are more superior to customary marriages and why most scholars and ordinary people in the Zambian society take this view. The chapter will also give recommendations as to what should be done by the Government in order to overcome the wrong perception towards customary marriages including Law reforms to undertake in order to remedy this misconception.

CONCLUSION

In Zambia little attention has been given to the future of customary law by the government hitherto, because it would appear that it was generally recognized that priority should be given to improving of local courts and to the integration of the local court system with the common law system of courts.

The status of Customary Law of marriage and divorce in Zambia is that it is subject to the “repugnancy” and “incompatibility” clauses that are enshrined in a lot of statutory provisions. This entails that it will only be applied if it is not repugnant to natural justice, equity or good conscience or where it is incompatible with written Law. This status was bestowed upon customary Law by the colonial masters but it has continued to reign even after independence. There is a lot of doubt in the fairness of such a status. As already pointed out the Law which affects many Zambians is customary Law so it should be accorded equal and better status like statutory law. The status of customary Law was prompted by lack of understanding of indigenous Law on the part of the colonisers so to filter off the Law they did not understand, they simply advocated that it will not apply if it is incompatible with written Law.

Needless to say, the institution of marriage and divorce under customary marriages has not been static but always dynamic. It has and has continued to undergo drastic changes and the factors responsible for these numerous changes are multifold. The notable ones, however, include western influence, Christianity, education as well as statutory marriages. These factors have caused a tremendous departure from tradition and this has, in the main resulted in the drop of traditional marriage rituals. The traditional aspect of marriage relationship as a continuing bond

between two kinship groups is gradually been lost, the emphasis now tends to be shifting to the individual aspect of marriage as a relationship between two persons. It is thus uncommon these days for parents to choose a marriage partner for their child as parent's authority over marriages of their children is no longer important if not necessary.

One other thing is that of parental consent is becoming more and more unnecessary as compared to how important it was in the past decades as parties can opt to contracting secret marriages popularly known as abduction. This is due to the fact that in the past, parents were responsible for the payment of bride price whether in kind or in cash, but today with the increase in educated men, it is the bride groom himself who shoulders this responsibility.

It is also quite evident that cases of divorce have become a common feature under both customary and statutory marriages. In the past however, it was quite rare to hear of divorces. Marriages were not easily dissolved and the phrase "Marriage is for life" held water. Various reasons explain the alarming increase in divorce cases. Many people contend that there is a breakdown of morals among not only men but women too who feel they can compete with men hence the notion "if he can cheat why can't I?" when it comes to the men, they have a strong feeling that women are desperate for marriage nowadays hence they believe that they can easily replace a divorced wife and also that the women outnumber the men in Zambia.

Another factor responsible for rampant divorce cases is statutory and customary marriages is family interference – In many countries especially Zambia, often a spouse may not be able to adjust with the members of the other person's family. The mother-in-law may be too dominating and interfering and this may not be liked by a spouse. Any addiction (alcohol, drug, exercise, overeating, porn, internet usage, gaming) takes a spouse completely out of the life of his or her family and rips from that person a real sense of accountability, availability and participation in the relationship. The other spouse is left to pick up the slack while trying to support the spouse into recovery and, before you know it, burnout occurs. Any addiction, if gone untreated, will destroy a marriage.

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and customary marriages as a large number of people are in informal employment hence they have enough free time on their hands to indulge in beer drinking regardless of the day and time. The other reason is that the Law in Zambia relating to the times bars are to open is not operational as bars open at any time and on any day and remain open until the beer runs out. This has led to the increased cases of gender based violence leading to couples having irreconcilable differences.

RECOMMENDATIONS

Seeing that customary Law influences the lives of majority Zambians, there is need for change so that its status will reflect this influence. The following are some of the suggestions to bring about this change.

My recommendations are not entirely new. Some of them have already been advanced by other African scholars in Law.

Advocating for treatment of the customary law of marriage and divorce as sacrosanct. It is only an attempt to show and point out an injustice that exists as regards that law. Customary law as a whole should be measured by present day needs and future economic development. The interaction of English Law with customary Law must not be taken to mean that in all cases that it is the English Law that should be applied to modify customary Law. It is a two way process. If English law is to thrive then its application must sometimes be modified by indigenous Law to make it acceptable. It is only when it has thus been adapted that we can call it our own Law Tanganyika's Magistrates' Courts Act of 1963¹⁵¹ has repealed the pre independence order in council provisions that were adopted before and after independence including 'not repugnant to justice and morality', and substituted a new selection, omitting any such qualification on the application of customary law. In Ghana, the Courts Act of 1960¹⁵² contains no repugnancy clause.

¹⁵¹ Tanganyika's Courts Act of 1963

¹⁵² The Courts Act of 1960

Provisions should be included in the appropriate Acts that the determination of customary law should be a question of Law for the Court and not a question of fact. I would also recommend central legislation based on record statements of customary Law or legislation base on fusion of customary Law from other sources. This can be done by conducting research work among the various customary groupings then discern the essential elements of the different customary Laws, thereafter uniting them by legislation. Those aspects of the Law that the legislature would consider undesirable or inapplicable taking into consideration social and economic standards should then be left out.

The other point to note is that under customary law, maintenance of a divorced man does not exist. The maintenance law applying to men under customary marriage will remain a dream as long as it stands unsupported by other progressive legal provisions. For instance, as long as customary marriages can be contracted and dissolved outside a formal system like that of a statutory marriage, the law will have no effect at all. Customary law should also cater for maintenance of a divorced man due to the fact that even women do engage in activities that can sustain their livelihoods such as selling fish or farm products, as doing otherwise would entail that women do not provide any financial contribution under a customary marriage.

For example in Zimbabwe a customary marriage is solemnized in a local court and can only be dissolved in Court.

This system ensures that every couple is informed of their rights and ensure that every divorce case is handled in a court of Law. In this way the operation of Customary Law where maintenance is concerned can be wiped out.

The central Government should set up a commission of inquiry to probe the existing different systems of customary Law of marriage and divorce and come up with a unified customary practice. This recommendation is based on the fact that culture and customs are not static but respond to socio-economic conditions prevailing in a particular society. In short, culture and customary practices are dynamic as they are a function of socio-economic forces. However the socio-economic changes that have taken place on Zambia since independence are so profound

and rapid that the response by the traditional society has not been at the pace of change. It is now imperative for the central Government to induce change.

The existence of the Law Development Commission is also a factor in favor of codifying customary Law, in that the Commission already has experts who can carry out the inquiry or who can form the back bone of the Commission of inquiry. The final draft of the Zambian Customary law of marriage and divorce could be tabled before provincial chiefs, councils and finally tabled before the House of Chiefs for their scrutiny, advice and/approval in their capacity as traditional rulers and custodians of customary Law and practices.

The adoption of a unified code of customary of marriage and divorce should be accompanied by judicial reforms in the area of Court structure. A district Local appeals Court, should be placed at the same level and status with a Subordinate Court. The advantage of such a Court will be that an ordinary and simple villager will be free, should he decide to do so, to appeal against the decision of a Local Court to a higher Court but with facilities and familiar to him. In this context, the district Local Court appeals Court should not permit litigants to be represented by a lawyer and the court deliberations should be in local language. This atmosphere will make it conducive for illiterate litigants in divorce cases to appeal against the decisions of the Local Court without being scared of procedures formalities and legal costs.

Concerning statutory marriages, the marriage Act must be amended to suit the prevailing situations in Zambia as there are vast changes in the laws of marriage in England from whence our marriage law came in 1963, when civil law marriages became available to Zambia, which not matched at all with the marriage laws which have remained static since 1963 in Zambia.

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