

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

**HOW EQUITABLE IS THE APPLICATION OF
CUSTOMARY LAW IN ZAMBIA JUDICIAL SYSTEM –
A LUSAKA CASE STUDY?**

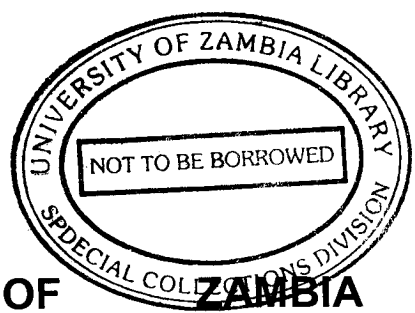
By

ROBERT CHIPETA

**Being a final year dissertation submitted to the University of
Zambia, School of Law, in partial fulfillment to the conditions for
the award of the Degree of Bachelor of Laws (LLB).**

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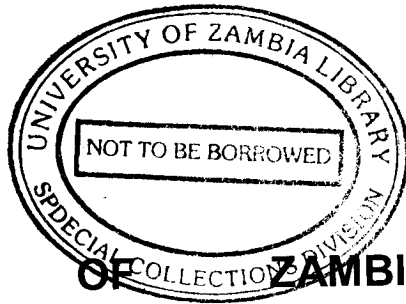
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by

ROBERT CHIPETA

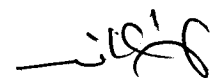
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be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing Directed Research.

Date: 22.12.06

Supervisor: 

MRS LILIAN MUSHOTA

DEDICATIONS

I dedicate this oblique essay to my wife Helen, Children and Parents in law.

To my wife first because of her patience, understanding, support and most of all love that carried me through to the completion of the work.

To my children for bearing with me in that I spent most hours out of home trying to collect data for the purpose of this work – to you all I say love you and may our good Lord continue to bless you.

To my parents in law for their support in ensuring I was on course in the process of my research and their fervent prayers notwithstanding.

To all the above, I say without your encouragement in one-way or another, directly or indirectly, the completion of this work would not have been possible.

"I Can do all things through Christ who gives me strength" Philippians 4:12

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This project would not have been possible without the support of many people.

Many thanks to my beloved wife Helen for her great understanding and support during the whole period of study at UNZA. It was not an easy going, especially that we had to shelve off so many programs and activities so I can concentrate on my studies. You are one in a million sweet heart – stay blessed and never give up on the spirit of care.

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My mother who is a great and always would visit us to see how we were doing at home. She would later, recount, how my late dad would have loved to see me graduate in this noble career.

My father in law, who, I should admit, has been the source of my inspiration to study law at UNZA, at a time when I almost gave up. Each time I visit him, he would inquire of my progress and 'lecture' me on the 'dos' and 'don'ts', of this noble career. Thanks Dad.

I wish to recognize the role my Supervisor, Mrs. L. Mushota played in this research. She sacrificed her time to attend to me whenever I had queries and the manner in which she made the corrections was something emulating. Her criticisms were timely and her advice led me to work from one pace to another until the completion of the research. She read through my numerous revisions and helped make some sense of the confusion. To you mama, I say hats off!

Special mention goes to the Court Clerk staff at Chelstone, Matero and Boma Local Courts, here in Lusaka (who included, Moses Banda, Munene, Glenda, Felix Sisi and Joseph S. Kasonde) who helped me fix appointment with the various Justices so I could interview them. You are wonderful you guys. Thanks a lot.

Finally but not the least to my dependants who felt inconvenienced in the process of my studies and for their patience – please be reminded that the waiting was worthy it, for soon it will pay off.

It would be incomplete if I do not mention my wonderful God for the strength, wisdom He gave me to carry on with this project. I love you Lord and I will ever serve you as long as I live.

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CHAPTER ONE

1.0 EVOLVEMENT OF CUSTOMARY LAW - General Overview and Zambian Experience

Customs in all African societies is complex, sometimes contradictory and almost always in certain instances unwritten. The development of “customary law In Zambia could be attributed to settler societies as far back as the 4th century AD, by the then South ward-migrating Bantu farmers and herders¹. By 1900, the British government had directly assumed jurisdiction over the entire Zambia (then called Northern Rhodesia), with a small central executive authority made up of appointed Europeans headed by a governor and the system of indirect rule allowed great freedom to local rulers. For example, Great chiefs and their administrators were in the fore front settling out disputes, via an ‘indirect rule’ by the British policy on the natives. One thing is true: assimilating all “natives” to colonial civil law would have met resistance from both whites as well as natives, for this would have meant moving indigenous peoples closer to formal legal equality. One response of colonial authorities was to allow those societies to decide daily life within their communities by a version of their traditional rules-contingent, however, on white supervision, revision and veto ².

¹ Encarta.msn.com encyclopedia at page 2

² As observed by J. Scott Long, Human rights Watch on “The Realm of the Customary” at page 24, in 2003

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That disputes would be resolved by a version of natives rules did not mean “natives” themselves would resolve them. The British policy of “indirect rule” had limits to its indirection. In assuming community tasks of conflict resolution, colonial officials often used the very traditional customs that they understood from flexible principles to rigid rules. Because of this, two systems of law thus developed: colonial civil and criminal law on the one hand and customary law on the other hand. The former, as the ruler’s law had primacy while the latter was only a circumscribed jurisdiction. Thus customary law was largely relegated to addressing disputes over the allocation of “native” land—the small percentages of territory left to the indigenous peoples after colonial expropriation ³.

In turn, this meant that marriages would lie at the heart of customary law. “Native” marriage was thus given over to the colonizers to codify. What obtained then was that white settler societies were almost unanimous in their disapproval of two aspects of native marriage: polygamy and the practice of *lobola*, the exchange of bride wealth. Images of the un-Christian polygamous family were used to discredit all “native” marriages not performed before state or religious authorities, and relegate them to inferior legal status ⁴. Communities clung closely to the practice of the groom’s family giving goods in exchange for the bride, as a key way of reallocating wealth. In the end, most a compromise had to be reached: customary law was recognized, but customs were subjected to a moral test.

³ This amounted to 47 percent of the land of Rhodesia, by the land Apportionment Act of 1930

⁴ Mahmood Mandani, *Citizen and Subject: Contemporary Africa and Legacy of Late Colonialism* (Princeton: Princeton University Press, 2000)

The case of Frank Chitambala V The Queen⁵ is there to testify. In that case, Judge **Somerhough** at 39 alluded to the fact that to acquaint himself with the African customary law he would either have to sit with African assessors and seek their advice⁶ or receive the evidence of witness in African customary law⁷ or both. Most importantly, the then Native Courts Ordinance⁸ had a provision of jurisdiction as regards to customary law application but subject to as follows:

“... but only so far as the such law was not repugnant to natural justice or incompatible with the provisions of any written law”.

This could be referred to the general tendency under customary law as observed by one writer, **Scott long**⁹ where he said:

“Lobola almost always passed the test. Polygamy was recognized in other instances and tolerated in others. The morals test allowed the settlers to mould custom in their likeness. Native marriages were so far as possible re-imagined. The moral test implicitly meant the Cristianization of custom. In the process, any residual place for gender or sexual nonconformity which customary practice might once have accorded was inevitably, in the new enactments, expunged. Moreover, the arguably intensified subjection of women made it doubly difficult for them to form effective relationships, or enter into roles in the community, or outside heterosexual marriage”.

⁵ (1957) VI L.R.N.R 29

⁶ Section 60 of the Local Courts Act 1966

⁷ Section 57(1)(b) of the Local Courts Act 1966

⁸ Progressed to Native Courts Ordinance No. 14 of 1961, later Laws of Zambia c.158 (1964) and still later repealed by the Local Courts Act s 71.

⁹ In his publication: *Before the Law: Criminalizing sexual conduct in colonial and post-colonial Southern African Societies* at page 21, 2003.

Suffice to state that the social factors alluded to above were practiced by the indigenous as far back as history is concerned except for the names, which were imported when the whites or colonialist came to Africa¹⁰.

It is such as the above instances that as white rule ended, the upcoming states on the continent faced a quandary. This is so because the distinction between civil and customary law replicated that between settler rulers and subordinate natives. So pressure begun mounting as calls for rescue of the customary law from its inferior juridical position was pronounced and yet another group demanded it be harmonized or joined with civil law, to ensure legal equality across the board ¹¹. Not sliding away from the topic at hand, suffice to mention that Governments have addressed this in varying ways. In Zambia, for instance, customary courts were given little support ¹².

Thus as seen above, from time immemorial, customary law was the principal system of law in African communities. However, this exclusively was broken in the nineteenth century when European colonialists introduced their own metropolitan law and system of courts into their colonies, but retained so much of customary law and the African judicial process that they did not deem contrary to basic justice or morality. These broad features in the development of the dual legal system can be seen with reference to the evolution of the legal system in Zambia where the Native Courts Ordinance of 1939 initially governed its native

¹⁰ Ibid.

¹¹ J. Scott Long, Human rights Watch on "The Realm of the Customary" at page 26, in 2003

¹² AfroNet Report, "The Dilemma of Local Courts in Zambia: A Question of Colonial Legal Continuity or Deliberate Customary Law Marginalisation?" (Afronet: Lusaka, 1998)

court system.¹³ The governor during the colonial period had the exclusive authority to establish native courts upon which were conferred jurisdiction in civil matters involving Africans. The courts also exercised criminal jurisdiction where the accused was an African, except in cases where a non-African could be called as a witness and or where the governor had directed that any party not be subject to the jurisdiction of native courts. Customary law and their records subject to review by the Commissioner of Native Courts determined the practice and procedure of the courts. In 1966, Zambia's native courts were reorganized and renamed 'Local Courts' with limited civil and criminal jurisdiction. The Judicial Service Commission now appoints members of the local courts whose decisions can be appealed to the subordinate courts and then to the High Court and finally to the Supreme Court. Supervision of the work of the court is ensured through advisers and officers appointed for this purpose.¹⁴

I will now turn to the aspect of equity in my quest to establish the application of customary law in the Zambian Judicial system

1.1 EQUITY – Brief overview¹⁵

It is interesting to note that the word "equity" may appear in three types of contexts in African Legal Systems. First, it can mean the body of rules administered in the former Court of Chancery. Secondly, it appears in the phrase "repugnant to natural justice, equity and good conscience", where it provides a

¹³ See generally, Muna Ndulo, "Customary Law and the Zambian Legal System" page 121

¹⁴ Ibid.

¹⁵ Extracted from www.wvlia.org/Equity.htm © 2005

controlling factor in the application of customary law. Thirdly, some ordinances provide that in administering justice in cases where there is a choice of law arising from internal conflict to laws, "justice, equity and good conscience", shall provide the judge with a rule of decision in those cases where no express rule appears to be applicable to the matter in controversy ¹⁶.

It will be observed from the above three categories, that the second definition is of our interest in as far this study is concerned. I allude to it because of the fact that it's meaning in that definition is not the same as that of equity in the first sense of technical equity. In here, equity functions negatively, by disallowing objectionable feature of customary law.

It is the above scenario of fairness, impartial and justness that this paper seeks to inquire as to whether the customary law is duly given the above characteristics when it comes to the application of cases before the judicial system. There are cases where a system of law is rigid and in order to ensure fairness and justice, a body of rules and doctrines are developed to enlarge, supplement or override any narrow or rigid system of law.

Suffice to stress at this point that it is important to appreciate the concept of equity in relation to the legal system. A read up ¹⁷ on the above reviewed that in modern practices; perhaps the most important distinction between law and equity

¹⁶ T.W. Bennet Law In Africa Journal , "The Reform Of Customary Marriage Law in South Africa", 2000 Issue 1, at page 4

¹⁷ www.answers.com/topic/equity

is the remedies each offers. The most common remedy a court of law can award is money (damages). Equity however enters injunctions or decrees directing someone either to act or to forebear from acting.

Another important distinction between law and equity is the source of the rules governing the decisions. In law, decisions are made by reference to legal doctrines or statutes. In contrast, equity, with its emphasis on fairness and flexibility, has only general guides, known as maxims of equity. This is subject to criticism by various observers since it has no fixed rules per se.¹⁸

1.2 Zambian Judicial System – Layout and Legal Provisions.

The Zambian legal system is based primarily on common law traditions. Most laws have been codified over the past decades and are published under the “laws of Zambia”. Where Zambian law is silent, the current law of England and Wales is applicable. Similarly, decisions of common law courts are influential in Zambian courts.

Part VI of the 1996 Constitution organizes the judiciary. The latter consists of the Supreme Court, the High Court, the Industrial Relations Court, Subordinate Courts, Local Courts and any other courts as may be prescribed by an Act of Parliament. In the discharge of their judicial functions, the judges of the courts are independent, impartial and subject only to the Constitution and the law

¹⁸Ibid

Judges conduct themselves in accordance with a code of conduct promulgated by the parliament ¹⁹.

In this study, I will briefly highlight the respective jurisdictional functions of the Supreme Court, High Court, and Subordinate Court and Local courts, in the process of laying a foundation for jurisdiction and application of cases by the respective courts..

The Supreme Court of Zambia is established under Article 92 of the Constitution and by the Supreme Court Act ²⁰. It is the final court of appeal for civil and criminal matters and the superior court of record. The Chief Justice is in charge of drafting the rules with respect to practice, direction and procedure of the Supreme Court.

The High Court is established by Article 94 of the Constitution and by the High Court Act ²¹. The High Court enjoys unlimited and original jurisdiction to hear and determine any civil and criminal proceedings, except for proceedings falling within the jurisdiction of the Industrial Relations Court ²². It also has the power to hear and determine any question concerning the fairness of election and supervisory jurisdiction in any civil or criminal proceedings before any subordinate court or court martial. Also sections 34 of the Act ²³ provides for the

¹⁹ Article 91 of the Constitution of Zambia, CAP 1 of the Laws of Zambia.

²⁰ Chapter 52 of the Laws of Zambia

²¹ Chapter 27 of the Laws of Zambia

²² Article 94 (1)

²³ Chapter 27 of the Laws of Zambia

calling of witness to people who are knowledgeable about African customary law and equally as assessors in the same matter.

The Subordinate Court Act establishes the competence of the Subordinate Courts ²⁴. The jurisdiction of a subordinate court depends on its class rating and the type of magistrate sitting. In every district of the Republic, there is a Magistrate Court, which has original jurisdiction in some criminal and civil cases. Subordinate courts are empowered to adjudicate on appeals from the local courts. An aggrieved party has the right to appeal against the decision of a subordinate court to a superior court. Further, section 49 of the Subordinate Courts Act ²⁵ provides for the court to call a witness to whom it sees fit has knowledge of African customary law.

The Local Court Act ²⁶ governs the operations of the local courts in Zambia. The Act divides these courts into Grade A and B determining the courts' jurisdiction. Their jurisdiction encompasses issue of marriage, divorce, inheritance and other civil matters, together with some minor criminal offences.²⁷ Local Courts employ the principles of customary law, which vary widely through out the country. Suffice to indicate that judgments are not often in accordance with the Penal Code. In addition, according to the local Court Act ²⁸:

²⁴ Chapter 28 of the Laws of Zambia

²⁵ Ibid

²⁶ Chapter 29 of the Laws of Zambia

²⁷ Section 8 and 9 of the Act refers.

²⁸ Section 12(2)

"Any offence under African customary law, where such law is not repugnant to natural justice or morality, may be dealt with by a local court as an offence under such law notwithstanding that a similar offence may be constituted by the Penal Code or by any other written law".

The local courts do not, however, have jurisdiction to try more serious offenses, including murder and rape, which must be heard in the magistrates' court or high court.

Section 61 of the Local Court ²⁹ also permits the assistance of "African assessors ... (and) advisers on matters of African customary law." However, no one may act as an assessor if he is interested in the suit in question or has previously been involved in it as an assessor or judge, and his advice must be given in an open court.

From the above discussion on customary law, equity and courts structures and legal provisions, it is clear that a lot of questions begin to arise in the context of customary law application. Questions that this study will undertake include the following:

- Is fairness and justice applied in the Zambia judicial system, with respect to customary law?
- If it is there, to what extent is the application?

²⁹ Chapter 29 of the Laws of Zambia

- If not, where have we gone wrong as country or a sect of the judicial system?
- Is the bench in the judiciary system aware of its obligation in as far as application of customary law is concerned?
- What of the general population, are we made aware of what it takes when we appear before the courts in line with customary law issue?
- Are there practical steps one can suggest to fill up the lacuna observed above?

These and many other related questions need to be answered in one way or another and the chapters coming forth will seek to attempt to give guide lines and the way forward in certain instances.

CHAPTER TWO

2.0 CUSTOMARY LAW APPLICATION - A Review of Zambia's Experience

Zambia has diverse traditions embedded in the seventy-three ethnic groups. This therefore entails customary law being different from one area of Zambia to another and it is thus difficult to generalize about its application. As earlier pointed out, the dual legal system of customary laws and statutory laws running alongside each other often conflict. Although this state of affairs permeates every aspect of Zambian life, its effect is especially felt in the area of personal law – marriage, devolution of property, inheritance and divorce. This status quo has been maintained by the Bill of Rights in the Republican Constitution.³⁰

It is against the above background that this chapter focuses on the above areas of personal law, with a bias to their effects in the process of their application in the Zambian courts system.

2.1 Inheritance Rights

In Zambia, the law that governs the succession of property is known as Intestate Succession Act 1989³¹. Suffice to state that there are cases still reported as far as property grabbing is concerned. A review of such an incidence is one in

³⁰ Articles 23(4) (c) and (d)

³¹ Chapter 59 of the Laws of Zambia

Livingstone where *Ms Tamara Zulu* had had her property grabbed by her in laws following the death of her husband.³² The tribal tradition practice was that inheritance rights were assigned to relatives of the deceased men. This is where there is a conflict with the law.

What has compounded the situation could be attributed to the following:

- a) Ancient customs often outsmart the modern law.
- b) Enforcement is lacking by the relevant authorities.
- c) There is confusion surrounding the jurisdiction in property grabbing cases.

The Intestate Succession Act and International statutes outlaw the scourge of property grabbing. The practice is totally forbidden and as party to the Convention on Elimination of All Forms of Discrimination against Women- adopted by the UN General Assembly in 1979 and signed by more than 170 countries- the Zambian Government is bound to prevent gender discrimination.

As observed earlier, the Zambian legal system integrates both the African and European legal procedures. While the Zambian Constitution declares gender discrimination illegal, it also holds an exception for matters usually handled by customary law. Here equity becomes questionable. This is so because as most Zambians still marry under customary law, which is generally less favorable to the rights of women and children, it happens that women who seek relief from

³² Extracted from a write up by Geraldine Sealey, Spring 2003 International Reporting Project - Fellow Stories (reprinted with permission of The Christian Science Monitor), May 2003

property grabbing in customary courts usually leave empty handed. One director at the National Legal Aid Clinic for Women ³³ in this regard made an observation:

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“But customary law courts are presided over by men, and their judgments have been unfair for the most parts.”

This is where our courts need to turn the above quote on the positive side and ensure the law is followed to the letter, irrespective of who is on the bench. As observed by Professor Ndulo ³⁵, such beautiful laws need to be enforced, since it appears there is a struggle to make the law work as it not enough jus to have them on paper.

Women and Law In Southern Africa (WLSA) ³⁶ also made the above observations in a publication that analyzed inheritance practices in Zambia as well as the impact of the 1989 law:

“On paper, the new law of inheritance has been a wonderful breakthrough... The law is weakened first and foremost by the lack of conviction among women themselves that they have a legal right to the deceased husbands property and secondly, by their fear of reprisals should they invoke the law. Further more, even the lawyers and the law enforcement agencies such as the police and the Local Courts **may** have failed to give the new law the respect it deserves and encourage its use.” ³⁷

³³ Established in 1990 in recognition of the vulnerability of women and works under the auspices of the Women’s Rights Committee of the Law Association of Zambia (LAZ).

³⁴ Mr. Clement Mudenda, the Director in 2003

³⁵ Cornell Legal Expert and former dean of law at University of Zambia.

³⁶ An Non Government Organization (NGO) with a country project in Zambia.

³⁷ Inheritance in Zambia: Law and Practice, op.cit., p 83

The contention with the above aspect of personal law is the fact that when the local courts are faced with such, an element of unfairness is what seem to be the results. Because of the customary law background, women feel left out in the cold following their pursuance of what seemingly belongs to them, especially after going to courts to seek 'justice'³⁸

2.2 Jurisdiction of the Courts

The local courts in Zambian system are subject to restrictions on their jurisdictions to mete out sentences. However, it has been observed that these local courts outside their jurisdiction have tried some cases such that the sentences meted are frivolous to say the least. For example, if they know that the damages in a customary case goes beyond their jurisdiction, they should send such a case to magistrate with competent jurisdiction for the sake of equity. For a example, the law provides that a local court may not exercise jurisdiction over administration or distribution of an estate deceased's estates and must transfer such a case to the High Court if a party or the administrator general has claimed that customary law should not apply.³⁹

The High Court in a case in which these matters arose, explained that this rule only in effect suspended the power of the local court, precluding it from exercising jurisdiction until the High Court has ruled on the application as was

³⁸ The Courts are there to administer justice This is what the multitude out there seek the court to do, following a dispute. Depending on the outcome of such a dispute however, some have termed those outcomes as 'unfair' while others have termed it 'fair'.

³⁹ Chapter 29 of the Laws of Zambia, section 38 (b)

held in the case of *Munalo V Vengesi*.⁴⁰ Thus this section does not prohibit the High Court from ordering that the estate be handled according to customary law in a local court.⁴¹ To rule otherwise, of course would allow a party to oust jurisdiction from the local court by simply filing an application with the High Court. The High Court or local court, may however transfer such a case on its own initiative to the High Court if it deems it is appropriate.⁴² Local courts are primarily authorized to apply and enforce customary law and by-laws and regulations promulgated under the Local Government Act. In addition, they may apply and enforce such written laws as are specified by relevant statutory instruments.⁴³

As Professor Muna Ndulo observed⁴⁴ under a topical discussion: "The Zambian Judicial System – A review of the Jurisdictional Law", recognition of the extensive problems of scarcity of legal training and experience has shaped certain aspects of the administration of justice in local courts. For example, the Local Courts Act discards strict adherence to separation of powers (i.e. their respective duties) at the local level. A member of the bench in a local court may sit and try an offences arising from a by-law or rule in the making of which he or his colleagues participated.⁴⁵

⁴⁰ (1974) Z.L.R 91

⁴¹ Id. at 95

⁴² Chapter 29 of the Laws of Zambia, section 38 (c)

⁴³ Chapter 29 of the Laws of Zambia, section 12 (b). This does not allow local courts to enforce written laws of foreign countries: *Banda V Banda & Another* (1975) Z.L.R 123

⁴⁴ Law in Zambia, Muna Ndulo, Edition 1984, at page 68

⁴⁵ Chapter 29 of the Laws of Zambia, section 10

In a case of *Fr Telespore Tafuna V Kenneth Sikasote*⁴⁶, which dealt with whether Subordinate Court has jurisdiction on customary law marriage, the subordinate court awarded damages of K3.5M in favor of the respondent as compensation for adultery. The appellant appealed to the High Court on ground, inter alia, that the subordinate court had no jurisdiction on matrimonial customary law matters. The High Court dismissed the appeal. But in the Supreme Court, it was held as follows:

- a) The subordinate court has no original jurisdiction on claims for damages for adultery in matrimonial causes.
- b) Such claims are based on the customary law notion of compensation for adultery. Only the local court has such jurisdiction. The Subordinate Court has appellate jurisdiction if either party is not satisfied with the local court's judgment.

2.3 Land acquiring

This is one area under customary law, which is applied in diverse manner depending on whose chief, and area the land lies. The social and traditional customs have an impact when it comes to land acquisition and distribution.

Under customary land, the customs and traditions govern the land use and ownership. However, these differ from place to place and are usually not

⁴⁶ (2001) SC

documented, but there are common features in the various forms of customary tenure. Acquisition of land in Zambia is through:

a) Statutory Land

a. Application to local authorities ⁴⁷(district councils) that are given land by the state or traditional authorities for allocation to individuals or corporate entities. In this case Title Deeds are given to the individuals for a period not in excess of 99 years. This includes allocation of housing plots in council residential designated areas (including improvement areas)

(ii) Application to the Ministry of Land for state land for lease not in excess of 99 years or for land held under customary tenure. Allocation of land under customary tenure under this category can only be done with consent of traditional authority responsible for that land with proof of no encroachment on existing rights⁴⁸.

b) Application to the traditional authority (Chief or headman) in the area who will allocate for individual use, for a limited period of time or for definite use. Allocation for common use is also made. Title Deeds are not given under this category although the allocating authority may write a letter.

⁴⁷ Town and Country Planning Act Chapter 283

⁴⁸ Lands ACT of 1995

From the development of customs point of view, women were denied to have access on their own other than through a male relative, father, brother or uncle. Also that most ethnics groups in Zambia are matrilineal and patrilocal implying that couples move to the husband's village or home after marriage. The implication of this is that a woman's application to acquire land is not considered unless through the husband when it comes to land acquisition. This kind of arrangement is well known by the justices in the respective courts. The issue arising is whether a male justice will apply the customary law on such a land contrary to the practice at hand or will act for the sake of justice. These are scenarios being confronted by judiciary.

The non-documentation in certain instances in terms of land alienation under customary law poses a challenge to the courts of law when faced with adjudication. In this scenario, alienation is governed by rules known by the community where land is situated. The holder has rights to use and dispose of it. However, since these rights are not normally in writing, the local justices pose a risk of adjudicating based on some misinformation, thereby denying justice to a party to a case. The danger is that local court justices may make a decision based on customary law whether it applies to a particular case or not.

2.4 Marital Claims

In Zambia, there are two types of marriages namely those under customary law and marriages under the Marriage Act. In the famous case **Hyde V Hyde**⁴⁹, Lord Penzance defines marriage as:

' the union of two persons (male and female) to the exclusion of all others.'

However under the traditional way, marriage can be defined as:

' a union between a man and a woman entered into in accordance with the relevant customary law in which the man has a right to take one or more wives during the subsistence of the earlier marriage'.

Thus, the general characteristics of marriages in Zambia under customary law include the following:

- a) Polygamous in nature - Most ethnic groups have accepted this kind of arrangements and women have little or no say when it comes to men wanting an additional wife or wives.
- b) Consent of both parties and parents – Like marriages under statutory arrangements; consent is a vital part of an arrangement even under customary law for both parties to a marriage and their parents.
- c) Consent of both parents – it is vital that parents to the would be husband and wife consent to such a union. However, under Tonga tradition, elopement is one other way of getting a wife for marriage where

⁴⁹ (1866) I P. & D 130

formalities for the marriage ceremony are done later, but this is an irregular way of contracting customary marriage.

- d) Payment of bride price- Paid by a man to the parents of a woman and can be in kind such as cows, hoe etc, or it can be in monetary form.

Customary law marriages are not valid unless a lobola or malobolo payment is made to the wife's side. If the payment of malobolo is not made within a certain time following the marriage, actions for elopement and for the payment of the outstanding malobolo can be begun at the local court.⁵⁰

- e) Bride must attend puberty – i.e. biological maturity. In this case there is no fixed age.

- f) In most cases, grounds for divorce include the following:

- 1) Bareness
- 2) Adultery
- 3) Impotency – a case in point of **Gladys Sakala V Aaron Banda**⁵¹ in which a petition for divorce was commenced on the ground of impotency and yet there were children in that family. The court denied the petition because the sexual impotency was temporal.
- 4) Disrespectful of in-laws and husband
- 5) Pressure from either family side
- 6) Laziness of the wife
- 7) Denial of conjugal rights

⁵⁰ Afronet, 'The dilemma of local courts in Zambia', 1998 page 17

⁵¹ Sunday Mail, "From the Local Courts" October 10,2004

8) Violence and cruelty by either side – the case of **Arthur Yoyo V Mable Mary Bbuku Yoyo**⁵². In that case, the petitioner (husband) petitioned for dissolution of marriage (which was under customary law) and relied on the fact of unreasonable behavior of the wife. The High Court granted the petition citing that the level of cruelty between the two would lead to death of either of them and therefore the marriage had broken down irretrievably.

2.5 Divorce

Among other issues in divorce it has been observed in Zambia that divorce by third party has become prevalent! The local courts have come under head on to head basis with an application such that in some cases divorces have been granted via an application by a third party, there by raising an issue of equity.

A recent example is that of **former President Frederick Chiluba and his former wife Vera**. The then second president's uncle sued for divorce on his behalf and was granted, by Chifubu Local Court, Ndola⁵³. The other case is where a 39-year-old woman had her brother in law sue her for divorce in a Mufulira Local Court and the Court dissolved the marriage.

⁵² (1997) HP / 064

⁵³ As reported in The Post of September 14, 2002

The above rulings in both cases are repugnant to natural justice in the sense that none parties to the suit are the ones who were in the forefront pursuing the matters on behalf of the bonafide parties. Only parties to a case should be allowed to present their cases and not relatives for them to claim certain rights, benefits that are due to them..

My observation to the above examples in as far equity is concerned is that only parties to the marriage can derive certain rights, privileges and benefits which include conjugal rights and also rights to file for divorce, separation, maintenance etc.

In comparison with the Matrimonial Causes Act ⁵⁴, all matrimonial proceedings are commenced in the High Court because the lower courts have no jurisdiction to hear such suits. Parties to the marriage can only bring divorce suits and the court cannot grant divorce unless the petitioner is able to show that the marriage has broken down irretrievably and rely on one or more of the following facts to the satisfaction of the court:

- (i) Adultery;
- (ii) Desertion;
- (iii) Five years separation;
- (iv) Two years separation and that respondent consents to the decree being granted;
- (v) Unreasonable behavior of respondent; and that petitioner cannot be reasonably expected to continue living with the respondent.

Relatives of either party are precluded from instituting divorce proceedings.

However they may be summoned as witnesses to prove unreasonable behavior of the respondent or adultery.

⁵⁴ 1973. See also section 11 (1) of the High Court Act, CAP 27 of the laws of Zambia.

It is true to note that grounds for divorce under customary law marriages are not written down but implied in most cases by virtue of common cases being alike and the local court justices rely largely on customary law and practices when handling such matters, the more reason why they should act cautiously.

With the above observations on personal law, the following chapter analyses the survey questions and answers as captured from the Lusaka Local Courts⁵⁵ which took into account some of the issues raised so as to inquire further whether the justices are applying equity when it comes to the various cases coming up in courts.

⁵⁵ See appendix for a copy of the survey questions capturing areas of interests.

CHAPTER THREE

SURVEY RESULTS AND ANALYSIS

3.1 Introduction

This chapter looks at the findings of the survey conducted in the Local Courts in Lusaka. The main focus is on what the respective personnel in the judicial system perceive as to what customary law is and how it is applied in the courts, notwithstanding the fact that they sit with assessors or consult the books, legal provisions etc. from time to time as a result of diverse customary laws that are applied in their courts. The chapter also presents different case studies from the current year to years back so as to establish the core aim of the study.

3.2 Survey Results ⁵⁶.

Following the survey administered via a questionnaire, it is interesting to note that the term equity is one word the judicial personnel are familiar with and as such, its definition would be summarized as '*same level treatment*'. Similarly, customary law definition would be said to mean '*law which deals with traditional matter*'.

⁵⁶ Sampled analysis from the Local Courts in Lusaka.

The majority of the personnel responded that statute (i.e. CAP 29 of the Laws of Zambia, Local Court Act) governs the application of customary law in Zambia. An example was given to include divorce cases.

It was the view of the majority that 'equity' is one such important term in their day-to-day operations in the courts that without it, effects, such as the vulnerability of women, would be seen in so many cases. Examples were given in this regard:

" Yes, there would be an effect in the application of customary law in the courts if the term 'equity' misses out. I would give an example of the vulnerability of women in so many cases, if there is no same treatment with men." ⁵⁷

" For sure, once equity misses out in the local courts, we are likely to see an imbalance in the traditional laws that Local Court Justices administer. They aim at balancing the traditional laws hence the importance of fair treatment." ⁵⁸

Coming to the question as to whether the current status quo in terms of provisions in the Local Court Act having been enough to cater for customary law matters, it was discovered that all responded in the affirmative. They justified their responses in that there are at least enough provisions pertaining to customary law in the Local Court Act ⁵⁹.

⁵⁷ Senior Local Court Justice at Lusaka Boma Court, November 2005.

⁵⁸ Court of Clerk at Lusaka Boma Court, November 2005

⁵⁹ Suffice to indicate that one of the senior Local Justice observed that there was need to re-look at the intestate Act in as far as the apportionment of percentages are concerned. He was of the view that there was need to increase the portion for the widow and children to say, 25% Widow and 55% Children and equal percentages for the parents and administrator (10% each).

On the question of conflict between received law and customary law, different views were given. Others indicated there is no conflict while others cited some provisions in the Local Court Act, which make them have difficulties to make a ruling. For example in child maintenance cases, Section 35 (e) of CAP 29 provides for 18 years, as maximum number of years for child maintenance.

Some were of the view that we should go beyond this age because at 18 years in Zambia, some children are still been kept, others are school going etc hence the proposal to increase the age up to which maintenance should legally continue.

The issue of attaining a standard of fairness was one question, which had responses from either side, whether it was possible to attain it or not. Some kept mute, others just indicated a flat 'No' without giving reasons. However, from the discussions subsequently, it was noticed that fairness is a debatable issue depending on the aspect one is considering. The truth is that the law aims at striking a balance between parties .An explanation as to the meaning of the law in a particular situation is rendered to both parties and its outcome will therefore be seen to be either unfair or fair depending on which side you are.

It was interesting to note different views on the question of possible codification of the customary law in Zambia. Some stated in the negative citing the vast customs as the main reason but the majority referred to the current CAP 29 which, in their view has attempted to codify the laws. A follow up question as to which laws would be codified, CAP 29 was cited as already attempted to do so while some cited Intestate Act because there is only one 'death'.

There was no doubt in the unanimous answer given that in case of conflict between customary law and English law, customary law should prevail.⁶⁰ This is so because we should maintain our 'own'⁶¹ values from the culture point of view and avoid accepting 'anything' that comes from the west, provided such values are not repugnant to natural justice.

The most affected in customary law conflicts are women and children, it was observed. One common reason came across board:

“After divorce, men tend to relax and let their women and children to fend for themselves. There is no maintenance by them. That is why courts order for maintenance of their spouses and children.”⁶²

As expected, all officers at the judiciary were in agreement that refresher courses ought to be done periodically so as to keep pace with the events of the world. It would be folly for one to be in darkness in events that are globally happening and much more those that touch on the liberty of people. To this end, GTZ⁶³ was commended for their program done so far to organize refresher courses for the members of the judiciary at large, but for the funding which has stalled the progress so far made in this area.

⁶⁰ One Local Court Justice stated that there would be need to adjust in such cases. Otherwise it would unfair to clearly state either English law or customary law should prevail.

⁶¹ Cultural 'ownership' differs across the 73 tribes in Zambia but would be harmonized by application in the courts of law despite their diversity.

⁶² Local Court Justice at Matero Court I

⁶³ A worldwide Germany NGO based in Zambia, supporting various projects, reforms and change process such as economic, political and social development in a globalised world.

The astounding result was that three quarters of the parties, who appears before the Local Court Justices, don't seem to understand customary law matters. One interesting reason given for the above observation was that there are too many intermarriage in this country such that concrete understanding of traditional values and culture eludes most homes. To make matter worse the customary law issues may not be appreciated in full as expected. To mitigate the above problem, traditional leaders should not give up their role to educate their subjects on customary law issues, and also education programs, such as on TVZ⁶⁴ and other local private Television stations, in vernacular languages should be encouraged so many people across the country may see and hear for themselves how some traditions are handled from one culture to another.

On the criteria used to decided cases in the Local Courts, the majority answers were that statutes are used to guide them into decision making except for Child defilement which is not applicable or handled by local courts while land matters are dealt with by Lands Tribunal, Lusaka City Council or Ministry of lands. The following were the answers:

<u>Case</u>	<u>Criteria</u>
a) Divorce Cases	Statutes – CAP 29 of the Laws of Zambia
b) Child Defilement	Not applicable
c) Pregnancy in school going pupils	Statutes – CAP 19 of the Laws of Zambia
d) Property grabbing by either spouse	Statutes – Act No 5 of 1989 (In testate ACT)
e) Misallocation of Traditional land or civics land or state land	Not applicable (Refer to Lands Tribunal, Ministry of Lands or City Councils)

⁶⁴ Zambia's Local Television Network

Marriages under customary law have the aspect of dowry as an important symbol of binding the couple in marriage. Hence, all officers responded that no dowry is to be refunded in cases of divorce. However, they admitted, as will be seen in some cases subsequently, that others return dowry in which as courts they have no choice but to end the marriage because that signifies the end of the contract.

The aspect of Precedents in local courts is one issue that depends on circumstances surrounding the cases. Some cases are decided upon unknowingly that a similar case was dealt with like manner. However, the major guiding principle in cases like child maintenance is the ability to pay, by the other party. This will thus differ from one case to another, as will be demonstrated in some cases below.

Other circumstances, other than precedents that may affect the outcome of their decision will also depend from one case to another. As a Local Court Justice illustrated:

“ if a son insults his father in law, it would be awkward to order that money be paid to the father in law, instead, payment in kind would suffice such as a chicken or may order that elderly people go to the father in law and apologize on behalf of the son in law. Such is our custom.”

Therefore precedents do not play so much a pivotal role in the Local Courts' way of administering their cases. The outcome is situational based.

3.3 CASE STUDY – A SAMPLED ANALYSIS

In the quest to further analyze the aspect of equity in the application of customary law in the local courts, a look at the Local Court cases would help in underscoring the object of this study. The following are some of the cases in the line of divorce and reconciliation with various sub headings such as marriage interference, lack of trust, no affection towards one another, desertion, adultery, the role of dowry in marriage etc.

3.3.1 Divorce Cases

In the case of ***Dennis Mulenga V Paxina Kangwa***⁶⁵ the plaintiff sued the defendant for divorce giving reasons that the wife used charms to enhance her love making to an extent that he developed a persistent backache. In defence, the defendant alluded the backache problem to him reading too much.

The court granted the divorce with an emphasis that charms are not good in a home and ordered the plaintiff to pay K500, 000.00 as maintenance with K100, 000.00 as monthly installment. Also to pay K50, 000.00 each month for the maintenance of their child.

In a related case of ***Daniel Mutale V Bibian Mutale***⁶⁶, the plaintiff sued for divorce citing use of charms and charges for sex by the defendant. In response,

⁶⁵ Lusaka Local Court as extracted from Sunday Mail Edition of 17.04.2005

⁶⁶ Lusaka Local Court as extracted from Sunday Mail Edition of 15.05.2005

the defendant indicated that she loves the plaintiff despite him infecting her with an STI and the several beatings at his hands. She however denied use of charms.

The court granted divorce and held that there was no need for compensation, both Daniel and Bibian to vacate the house and leave it for the six children, share property between them and the plaintiff to maintain two young ones.

It is interesting to note that in both cases, following allegation of the use of charms by the defendant, divorce was granted with a compensation in case one and no compensation in case two. This is where equity is at cross roads.

In another case of **Josiah Banda V Margaret Zulu**⁶⁷, the plaintiff sued for reconciliation despite the defendant being caught in adultery. In her response, the defendant refused to go back to the plaintiff claiming that the plaintiff accuses the defendant of flirting around with men.

The court held that since the defendant refused to go back to the plaintiff, there should be no marriage and ordered no compensation. Further, the plaintiff was to keep the children since the defendant showed no care and that all household property to be for the children and therefore, the plaintiff was to keep.

In another reconciliation bid by the plaintiff in the case of **Charity Chirwa V Gabriel Mponela**⁶⁸ who wanted her marriage to subsist and be restored since

⁶⁷ Sunday Mail Edition of 12.06.2005

⁶⁸ Sunday Mail Edition of 19.06.2004

no man would marry her in the face of not having children due to complication at birth, the defendant was in agreement that the operation was done in good faith due to twin complication but would rather give her money, house and not marriage.

The court dissolved the marriage because the separation (3 years) was too long a period to order reconciliation. Further, the court ordered no compensation since the defendant was already paying K750, 000.00 per month and that the plaintiff was to continue living in the house.

In contrast to the above case (foot note 10), in which the plaintiff, **Sandra Mulenga** sued the defendant **Aaron Mulenga**⁶⁹ for reconciliation following numerous complaints such as no bearing of children to an extent where her in-laws branded her 'prostitute'. She contended that she still loved the defendant. In his response the defendant claims she had a habit of stealing and taking money to her parents.

The court observed that there was room for continuity and so reconciled the couple and advised them to love each other, despite the absence of children in their 4 years of marriage.

The above two immediate cases brings out different results, despite their marriages not bearing 'fruits'. However, the outcome of the two cases was different! It was expected that in the case of **Charity Chirwa V Daniel Mponela**, reconciliation was going to do the couple good (in my view) in that they went

⁶⁹ Sunday Mail Edition of 10.07.2005

through the trauma of operation together as a family despite the separation. This could another area where equity suffers a setback.

In the case of *Maureen Nyambe V Like Liwena*⁷⁰, divorce was granted due to the disrespect exhibited by the defendant, towards his father in law by revealing embarrassing information about his wife. The dissolution came about after the court established that the defendant was fond of insulting his father in law whenever he quarreled with his wife. In passing judgment, Lusaka Boma Senior Local Court Justice Henry Mwananshiku said:

“I’m disappointed with Liwena who had the cheek to embarrass his wife in Public. From the evidence given by Liwena, Nyambe and her father, it was enough to show that the marriage had broken down. I therefore grant divorce and order that the defendant pay the plaintiff K300, 000.00 for maintenance and K40, 000.00 per month for child maintenance.”

3.3.2 Reconciliation Cases

In the case of *Doreen Chiyoya V Nelson Jere*⁷¹, the defendant’s mother in law supported the defendant that the plaintiff was not good enough and that she was disturbing her son such that he had to leave his home to stay with another woman. The defendant argued that the plaintiff had no respect for him and that he did not desert home but that the plaintiff packed her belongings on her own.

⁷⁰ Sunday Mail Edition of 22.08.2004

⁷¹ Sunday Mail Edition of 17.08.2005

The court after serious scrutiny reconciled the couple advising them to love one another and cautioned the in-laws not to interfere in the running of their children's home.

In another case of **Alfred Sakeni V A Mrs. Phiri**⁷², a brawl broke out when the defendant revealed the love affair between the plaintiff and his church mate, to the church elders. This angered him that he sued for divorce citing the defendant's disrespect for the plaintiff and her in laws and also lack of care for the family.

The court reconciled the couple and told them to forget about the past and focus on the future and advised them to live in harmony.

In the case of **Charity Mwandila V Samuel Chirwa**⁷³, the plaintiff sued for reconciliation with the defendant so he can provide food for the family, following his extra marital affair with another woman, whom he admitted later on and that he would manage to keep both women provided the plaintiff stopped keeping herbs in the bedroom on the pretext there were for the baby.

In passing judgment, the court reconciled the couple and ordered the defendant to find another house for the second wife.

In another case of **Chilombo Mukombula V Victor Mulenga**⁷⁴, the plaintiff sued the defendant for reconciliation despite her his infidelity with a student at National

⁷² Sunday Mail Edition of 30.10.2005

⁷³ Sunday Mail Edition of 25.09.2005

⁷⁴ Sunday Mail Edition of 12.06.2005

Institute for Public Administration (NIPA). In his defence, the defendant cited the plaintiff's disobedience which led him to do what he did i.e. the plaintiff was fond of going out on Fridays without his consent, a warning he sounded that he would marry another woman if she persisted. He thus stated he would not want to reconcile with the plaintiff.

The court in passing judgment said the plaintiff's sentiments were compelling enough to justify that the two got back together.

It is interesting to note that one could have expected some of outcome of the above cases to lead to divorce as earlier seen under divorce cases, but as explained by the local court justice, these cases vary from one to another and the outcome depends on the circumstances surrounding them albeit their similarities.

3.3.3 Marriage Interference Cases

In the case of ***Brenda Ngulube V Shully Kabisa***⁷⁵, the plaintiff sued the defendant, a widow, for marriage interference on the pretext that the plaintiff's husband was teaching the defendant how to drive. Later during cross-examination, the defendant admitted going out with the plaintiff's husband and had even talked about marriage with him. The plaintiff's husband also admitted and said that as far as he was concerned, both Ngulube and Kabisa were his wives.

⁷⁵ Sunday Mail Edition of 01.06.2003

Passing Judgment, the court found the defendant guilty of marriage interference and ordered her to compensate the plaintiff K1.2M with initial installment of K100,000.00 followed by K50,000.00 monthly.

In another case of ***Mwaka Mwanza V Rachael Tembo***⁷⁶, the defendant, a divorcee was sued by her friend, the plaintiff for having an illicit affair with the plaintiff's husband. The flirting of the plaintiff's husband with the defendant affected the plaintiff's home in terms of finances. The defendant admitted that the plaintiff's husband approached him for a hand in marriage, which she agreed, despite him telling her that he was a married man. The plaintiff's husband too admitted that both were his wives.

The court found the defendant guilty of marriage interference and ordered that the defendant pays the plaintiff K500,000.00 as compensation and to paid in monthly installments of K50,000.00. The court further indicated that tradition demanded that a man tells his wife first if he wanted to marry another woman.

Another interesting point to note from the above is that the compensation fees that the Local Court Justices come up with vary depending on the capacity to pay by either party to a dispute, following the court's scrutiny.

⁷⁶ Sunday Mail Edition of 21.07.2002

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Another interesting point to note from the above is that the compensation fees that the Local Court Justices come up with vary depending on the capacity to pay by either party to a dispute, following the court's scrutiny.

⁷⁶ Sunday Mail Edition of 21.07.2002

3.3.4 Dowry refund cases

The Lusaka Boma Local Court dismissed a case in which a man demanded for a refund of dowry from his-laws after his wife died. This was in a case of **Wester Namakando V Teddy Kaumba**⁷⁷, in which the plaintiff sued the defendant (his father in law) for a refund of K350, 000.00 dowry saying that they had divorced before his wife died. His contention was that after his wife got sick and recovered, she never went home, but packed her belongings, a symbol that marriage ended, hence the claim that dowry should be refunded. That was three years back. But the defendant in his defence said her daughter and the plaintiff were on separation and not divorced until she died.

Passing judgment, the court held that there was no official document to show that they had divorced and so dismissed the claim.

In another case of **Goodson Mwanza V Annie Kapacha**⁷⁸, the plaintiff sued the defendant for divorce citing intolerable behavior by his wife such as insults towards him and the plaintiff's mother. He contended further that the defendant wrote a letter to him that the marriage had ended and that dowry was given back to him. In response, the defendant did not argue but let everything to be in hands of the courts to decide.

Delivering judgment, the court granted divorce basing on the letter the defendant wrote to the plaintiff, explaining that the marriage between the two ended when

⁷⁷ Sunday Mail Edition of 19.06.2005

⁷⁸ Sunday Mail Edition of 13.11.2005

the defendant wrote the letter and that the returning of dowry signified the end of marriage.

The above two cases illustrate that dowry is an important issue in marriage and that it not returned anyhow, as was observed by the justices in response to the questionnaire.

Further it has been demonstrated from the above cases records from the Local Courts that circumstances will determine the outcome of a case. As indicated in the response by one Justice, the issue of precedent in the application of customary law is not strictly followed owing to the nature of cases and the fact that there are diverse customs across the 73 tribes in Zambia.

The general observation of the cases records from the Local Courts that require fines and compensation would be viewed in the following format:

CASE	COMPENSATION (K)	MAINTENANCE (K)
ADULTERY	600,000 - 2,000,000	NIL
MARRIAGE INTERFERENCE	400, 000 – 2,500,00	NIL
PREGNANCY – SCHOOL GIRLS	800,000 – 3,000,000	NIL
PREGNANCY – IN GENERAL	800,000 – 1, 500,000	NIL
DIVORCE	300,000 – 2,500,000	300,000 – 2,000,000

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PREGNANCY – IN GENERAL	800,000 – 1, 500,000	NIL
DIVORCE	300,000 – 2,500,000	300,000 – 2,000,000

CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATION

4.1 CONCLUSION

Customary law unwritten rules, which have developed from the customs and traditions of communities. Thus for customs and traditions to become law, they must be:

- a) Known to the community,
- b) Followed by the community, and
- c) Enforceable (able to be carried out)

Therefore as seen in the preceding chapters, customary law is often criticized for not being accurate because it:

- a) Confuses the real principles of unwritten customary law.
- b) Leaves out some of the principles and areas of unwritten customary law.
- c) Gives the impression that there is only one system of customary law.

It has been seen and demonstrated that local courts mainly use customary law⁷⁹ but also by the magistrates and judges, who rely on witness or assessors who

⁷⁹ Chapter 29 of the Laws of Zambia, being the main drive ACT

are knowledgeable about customary law⁸⁰. It is worth observing that any written customary law does not always give a complete picture of the rules of customary law. This means that customary law is often not understood or used properly when it is needed in a situation.

Another point worth citing is that customary law in its nature, seeks to regulate inheritance, land rights, family relations marriage, divorce and custody issues, which are all vital in one life. It is this regulation that has posed some form of unfairness when it comes to the respective judicial officers adjudicating the various cases.

The recognition of customary law by the Constitution but in a negative way is yet another threat to this vast but vital aspect of peoples' lives since it prescribes the mode of a particular society's activities. Article 23 (4) (d)⁸¹ brings an unfortunate scenario where the Constitution creates an exception for discrimination based on the application of customary laws, which gives a leeway for various forms of injustices and discriminatory laws. Local justices, magistrates and indeed judges may thus apply this provision but in a negative way there by compromising the quality of equity expected.

⁸⁰ Chapter 28 of the Laws of Zambia, section 49.

⁸¹ Chapter 1 of the Laws of Zambia

Another vital observation made during the study was that Local Justices are lay people. Today, they are mostly retired civil servants who are on three-year contracts with the judiciary. In rural areas, they have to be recommended by their traditional rulers to the judiciary, which seems to cause quite a number of problems. It also dawned generally that there are more male than female. In 2003 for example, there were 888 Local Court Justices in the country of which only 44 of them were female.⁸²

Thus it was observed that the average Local Court Justice in Zambia is male above the average of 45 years, literate, at least understanding English language, conversant in customary law of his area and able to understand the basic statutory provisions he has to apply (in some cases), procedure he is to follow or reference to some international instruments Zambia has signed.

4.2 RECOMMENDATIONS

Going by the survey results carried in this research paper, the considerable amount of work done so far by the Law Development Commission on customary laws in Zambia and several write ups on the subject of customary law, notwithstanding the legal provisions, the following observations are worthy while considering in our quest to achieve equity in the application of customary laws in Zambia's judicial system.

⁸² Afronet, "The dilemma of local courts in Zambia", 1998 page 15

The use of customary law should depend on where the disputes take place.

People are free to choose which law to use if both customary and common law can decide the dispute. If people can agree on which law to use, the courts can choose the law for them. In doing this, the courts should consider the following:

- a) The type of crime or dispute
- b) Where it took place
- c) The law used in that area.

An example would be a customary crime in a chief's area. If the customary crime say of elopement or seduction takes place in the area of a chief, you can use customary law, even if one of the people involved does not usually fall under customary law.

Therefore if we are all to enjoy the rights and freedoms promised by the Constitution, then our courts should try to develop a standard that identifies:

- i) Cultural practices which deserve to be protected because they do not discriminate, and
- ii) Cultural practices, which should be done away with because they discriminate unfairly.

In this way, we protect group interests and at the same time ensure that customary laws are:

- i) Measured against the rights of all people, and
- ii) Adapted to the changing conditions in Zambia.

It is also vital to indicate at this point that in the process of our contact with the judicial officers, especially the Local Justices, one would love to see their influence when it comes to choose when to use customary law and civil law in areas such as :

- a) The law chosen by the people involved in the case.
- b) The kind of dispute or legal action, which takes place.
- c) The place where the dispute or legal action takes place.
- d) The lifestyles of the people involved.
- e) Their understanding of customary and common law.
- f) If land is an issue, the place where the land is situated.

The above matters are vital as they act like stepping-stones to the creation of more certainty about when customary law would be used in a situation. If you do not want customary law, you can make a choice even before there is a dispute. Take for instance; a girl may not get access to her parents' property if customary law governs the parent's property. Thus parents can decide to draw up a will to make sure she inherits under the common law.

Further observations on the way forward for the application of customary law in Zambia, vis-à-vis equity, would be in the following points:

1. General Principles Governing Application of Customary Law.

Application of customary law should remain a matter of judicial discretion, but more exact guides to choice of law are necessary to bring certainty to an issue that is currently vague and confused. These guides should be precise flexible, simple and in keeping with the way in which courts have been used to solving choice of law problems.

The new choice of law rules should indicate that parties are free to agree on the law that best suits their needs. If no express agreement was made, courts should attempt to discern which law the parties would reasonably have expected to apply in the circumstances of the case. In order to assist the courts in this inquiry, a list of factors that typically indicate the parties' expectations should be provided. No one factor on its own should be regarded as decisive in indicating the applicable law; rather all factors should be considered in combination in order to discover the legal system with which the case has its closest connection.

2. Marriage

Wherever marriage law permits of differences between customary and common law, conflict problems will persist. Special statutory choice of law rules to regulate these conflicts would be undesirable, however, since existing case law indicates that the issues are too complex to permit legislative solutions the topic is best left to the courts to deal with. Although the courts' decisions have tended to be unduly influenced by the form of marriage, choice of law should in principle be directed by the general principles governing conflicts between customary and common law.

3. Conflicts between systems of customary law

Admittedly, with vast number of tribes in Zambia, what may be perceived, as good law by one tribe may not be in another tribe but both under customary law arena. As observed by a Senior Justice at Lusaka Boma Court ⁸³ :

“An attempt to codify the customary law prevailing currently in Zambia would be a daunting task in that the conflicts would arise as a result of identifying which area of customary does not infringe the other tribe's belief. That is why we as justices we look at the tribe and their beliefs and then compare with what CAP 29 of the laws of Zambia has to say before we pass Judgment”

⁸³ Interview ~~with~~ on 14.11.2005 at about 12:00hrs

Thus this calls for diligent but careful approach in as far as the codification is concerned. That is why the current Local Court Act is a good attempt to look at Customary Law issue and govern them the way it is.

4. Proof and Ascertainment of customary Law

The present system of ascertain customary law must be retained i.e. use of expert assessors, though care must be taken that assessors are more representative of the composition of their communities.

All in all, the aspect of equity in the application of customary law in Zambian Judicial System is situational based. In certain cases, strides have been made to reach the benchmarks in equity though more needs to be done in other areas. Thus refresher courses are vital in helping out the judicial officers to bear in mind this vital aspect of legal instrument when it comes to the application of various customary laws.

The sampled survey carried out in Lusaka has revealed a great deal of what it would take for the nation at large in the application of the customary law in the Local Courts, in as far as equity is concerned. It is our hope that these recommendations will add to the study of law in this country.

APPENDIX 1

UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

DIRECTED RESEARCH STUDY QUESTIONNAIRE (2005)

**TOPIC: HOW EQUITABLE IS THE APPLICATION OF CUSTOMARY
LAW IN ZAMBIAN JUDICIAL SYSTEM? A LUSAKA CASE
STUDY.**

**Research done by: Robert Chipeta, Final Year Law Student, University of Zambia
(2005)**

Project Supervisor: Mrs. Lillian Mushota, Lecturer in the School of Law

SURVEY INSTRUCTIONS AND INFORMATION

This questionnaire is designed to be answered by Clerk of Court, Director of Local Court and Local Justices. There is no limit as to the rank within the judicial system, but primarily, we are interested in those who can respond to the questions involving the application of customary law in Zambia. Please try to answer all questions to the best of your ability. If a question does not apply to your situation, respond with "N/A". Feel free to add written comments, as you feel appropriate if you believe your responses should be further clarified.

The survey results are purely used for academic purposes, as part of the fulfillment of the law degree program at the University of Zambia, Lusaka Campus. As such the results will be used in the development of a research paper which better clarifies areas within the customary law in Zambia whose application vary from one custom to another and just to appreciate the dynamism of our country in terms of tradition and culture. We believe you will take the time to help out in this noble effort.

**CLEARLY MARK BETWEEN THE BRACKETS TO YOUR LEFT OF THE MOST
APPROPRIATE RESPONSE FOR YOUR SITUATION OR COMPLETE THE BLANK
WITH YOUR INFORMATION.**

PART A PERSONAL INFORMATION

Question 1. Sex:

() Male () Female

Question 2. Age Range:

() Under 20 () 20 – 29
() 30 – 39 () 40 – 49
() 50 – 59 () 60 or older

Question 3. Tribe / ethnic Group:

Question 4. Religious Belief:

() Christian () Islamic
() Jewish () Hindu
() Buddhist () Others _____ (Specify)

Question 5. Highest Education Level Attained:

() Primary School Graduate
() Secondary School Graduate
() College Graduate
() University Graduate
() Master's Degree
() Doctoral
() Others _____ (Specify)

Question 6. Marital Status:

() Married or Long term partnership
() Widower / Widow
() Divorced
() Separated
() Single

Question 7. Do you have any children?

() Yes () No

Question 8. If you have children, enter number of sex.

Male: _____ Female: _____

PART B WORK RELATED INFORMATION

Question 9. What is your position in the judiciary system?

- () Director of Local Court
- () Clerk of Court
- () Local Court Justice

Question 10. What do you understand by the term 'equity', in a legal sense?

Question 11. What do you understand by the term 'Customary Law'?

Question 12. In your years of experience in the judiciary, do you think the term 'equity' can be said to be applicable in the customary law arena?

- () Yes () No

Question 13. On what basis is the customary law applied in the Local Court system in Zambia?

- () Statutes () Case Law
- () Traditional and Culture
- () Others _____

Question 14. Is there any effect for the term 'equity' to miss out or nor applied at all in the Local Court system in Zambia?

- () Yes () No
- () I'm not sure () I don't know

Question 15. Briefly explain your answer in question 14.

Question 16. Does the Local Court Act have enough provisions to cater for customary law matters?

- () Yes () No
- () I'm not sure () I don't know.

Question 17. Justify your answer in question 16, if it 'Yes' or 'No'

Question 18. Do you see any conflict between received law and customary law, going by the day-to-day cases in the local court?

- () Yes () No
- () I'm not sure () I don't know

Question 19. Explain your answer in question 18.

Question 20. Is a standard of fairness attainable when it comes to the application of customary law in the Zambian courts?

- () Yes () No
- () I think so () debatable

Question 21. If you think there is no fairness, how do you think it can be improved?

Question 22. Is the codification of customary law in Zambia possible?

- () Yes, though difficulty task to undertake but attainable
- () No, because of the many customs in Zambia
- () I don't know.

Question 23 Which law(s) do you think can be codified in your view?

Question 24. In case of conflict between Customary law and English law, which, in your own view, should prevail?

- () Customary Law
- () English Law
- () I do not know

Question 25. In your years of experience, who is most affected in customary law conflicts?

- () Men () Women
() Children () It depends
() I don't know

Question 26. Give reasons, if applicable to your answer in question 25. If you are able to provide statistics, kindly do so.

Question 27. Should Local Court / Magistrate Justices under go training or refresher courses in customary law knowledge in general?

- () Yes () No
() It depends

Questions 28. Explain your answer in question 26

Question 29. In your years of experience in court, do you think the majority of the general public understands the customary law matters, even as they appear before you?

- () Yes () No
() It depends from one case to another

Question 30. Are you in a position to rate your observation in question 29, say based in the first half-year of 2005?

- () Yes – $\frac{3}{4}$ (three quarters) of the cases handled
() Yes – $\frac{1}{2}$ (Half) of the cases handled
() Yes - _____
(give your own statistics)
() No. I don't know

Question 31. How in your own perception can problems encountered in questions 29 and 30 be overcome?

- () Let the NGOs educate the masses, through various means such as radio programs

- () Let traditional leaders play their role to educate their subjects
- () Other means
-
-

Question 32. What criteria do you use to decide cases in the Local Courts in the following circumstances?

a) Divorce cases

- () Experience () Statutes (specify)
- () Situational based () Customary Rules
- () Others _____
-

b) Child Defilement

- () Experience () Statutes (specify)
- () Situational based () Customary Rules
- () Others _____
-

c) Pregnancy in school going pupils

- () Experience () Statutes (specify)
- () Situational based () Customary Rules
- () Others _____
-

d) Property Grabbing by either spouse

- () Experience () Statutes (specify)
- () Situational based () Customary Rules
- () Others _____
-

e) Mis - allocation of traditional land or civic land or state land

- () Experience () Statutes (specify)
- () Situational based () Customary Rules
- () Others _____
-

Question 33. In what circumstances can dowry be refunded for marriages under customary law? (please explain if any)

Question 34. Does the issue of precedent influence you, when it comes to judgment?

() Yes () No
() It depends
() Others _____

Question 35. Are there circumstances or situations other than the precedent alluded to in question 34 above that come in your way to an extent that they influence the outcome of the case at hand?

() Yes () No

Question 36. If your answer to question 35 were yes, would you be kind enough to indicate what those circumstances would be, without elaborating?

>>>>> **END OF SURVEY** <<<<<

Thank you for taking the time to respond to this survey. This survey is with the blessings of the School of Law, University of Zambia and as such should you have any questions about this survey, please do not hesitate to contact the School of Law department on telephone no. 290733 for further details. We will keep your individual response in strictest confidence because we know and understand your need for personal security.

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5. Hyde V Hyde (1866) IP & D 130
6. Munalo V Vengesi (1974) ZLR 91

B)

CASES⁸⁴

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2. Brenda Ngulube V Shully Kabisa	01.06.2003
3. Charity Chirwa V Gabriel Mponela	19.06.2004
4. Charity Mwandila V Samuel Chirwa	25.09.2005
5. Chilombo Mukombola V Victor Mulenga	12.06.2005
6. Daniel Mutale V Bibian Mutale	15.05.2005
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⁸⁴ Extracted from Sunday Mail Editions, as reported under the column 'News from the Local Courts', in Lusaka

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