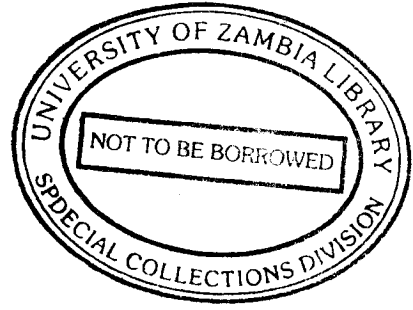


***THE EFFICACY OF THE MARRIAGE ACT AND THE
MATRIMONIAL CAUSES ACT IN ZAMBIA AND THE PLACE
OF THE DUAL LAW SYSTEM.***



BY

JINGALA CHITIYA

UNZA

2006

THE UNIVERSITY OF ZAMBIA

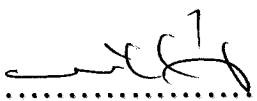
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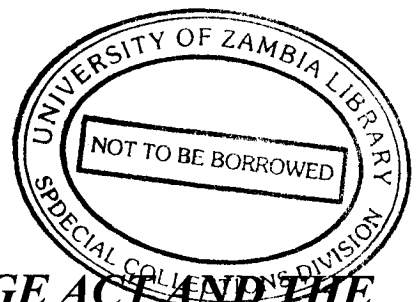
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***THE EFFICACY OF THE MARRIAGE ACT AND THE
MATRIMONIAL CAUSES ACT IN ZAMBIA AND THE
PLACE OF THE DUAL LAW SYSTEM.***

An Obligatory Essay (L410) submitted to the University of
Zambia in partial fulfillment for the award of the Degree of
Laws (LL.B).

BY

***JINGALA CHITIYA
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DECLARATION

I declare that the contents of this dissertation are my conceived ideas, based on my research makings with due acknowledgement given to the various scholars and associates and any person who contributed their ideas to the success of this work.

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DEDICATION

I dedicate this work to the memory of my late mother Miss Sandra Davison whose encouragement to strive to do my best in everything I do will always be with me. You were always a source of inspiration to me. I love you mummy now and forever. May your soul rest in eternal peace.

ACKNOWLEDGEMENTS

Above all I would like to give thanks to the Almighty God for giving me the gift of life and for being with me and guiding me this far.

I give thanks to my supervisor Mrs. L. Mushota for her patience and guidance during the period that I wrote this paper. I am indebted to you for all your knowledgeable insight and time.

I would like to thank my Dad for being there for me through it all. You've been a pillar of strength and encouragement throughout my life. You're the best father anyone could ask for. Words alone cannot express how much you mean to me.

Mum, I want say thanks for all the love and patience you have shown me through the years. I know I wasn't the easiest person to get along with. I love you.

I would like to say a big thank you to my brothers and sisters. I love you guys! Yes, even when we argue and don't see things from the same perspective, I still do. You've helped to mould me into the person that I've become and given me strength of character that even I find surprising.

Etally, let's just say you made walking a very rough road a little easier for me to walk even though it does get a little crazy for us sometimes. You're an even better kid sister than anyone could hope to have. Kama, you're the one! A more fun nephew couldn't be custom made for me. I love you, warts and all.

Rose, Kamona, Patricia, Nkonde, Lynda and Nsamba....the 'Lebanese'.... excuse me is it the 'spice girls', you guys sure have spiced up my life on campus. You rock! Pelani, my dawg, you gave me a lot to smile about. Thank you for taking me home after all those evening lectures.

To my lecturers, I would never have gotten this far without you; I am forever indebted to you. The staff of the law school, Precious, Bester and Mr. Chisuta for the time you gave and all the prints and reprints of not only this paper but my assignments as well. Mrs. Sakala, for the encouragement that

you gave me, I am forever grateful. My load always felt a little lighter for having visited you. You were a mother in a place where I didn't expect to find one.

To you that always encourage me to wish for the impossible and reach for my dreams, hey, I'm still wishing and reaching out and yes I *am* holding my breath.

To all my classmates, keep on keeping on...and the gunners, I guess old habits die-hard.

To all those people whose names I haven't mentioned, you have not been mentioned not because you are any less special but because there are so many of you to mention. Thanks for everything.

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PREFACE

This dissertation analyzes the effect of the Matrimonial Causes Act (1973) and the Marriage Act on marriages and divorces in Zambia, taking into account the aspect of customary marriages and the rights accorded by such marriages and thus the conflicts between such marriages and the Acts. It also seeks to analyze the dual law system in Zambia and the efficacy of the present legislation in this regard. This is in reference to the importation of laws such as the Matrimonial Causes Act 1973 which are obsolete laws in their countries of origin but are still being implemented in Zambia. This gives rise to the question why the Zambian legislators have not created legislation that is better suited to the Zambian situation and put an end to the dual law system and the conflicts it brings about.

In the analysis of these issues, this dissertation will discuss the history of the dual legal system in Zambia as well as the Marriage Act and the Matrimonial Causes Act.

It will also bring out the different ways in which the laws laid down in the Acts are in conflict with the customary laws and how the dual legal system allows for the continued existence of these conflicts. This will be followed by a discussion of the advantages and disadvantages for Zambia of the introduction of a single legal system. An analysis of how this may be done and the problems that may be encountered in the event of the creation of a law that encompasses both customary and civil laws in a bid to come up with an indigenous Zambian piece of legislation governing both marriage and divorce will also be discussed.

This dissertation is divided into four chapters that analyze and discuss the abovementioned issues and finally ends with a summation of the findings and the recommendations by the author as to the way forward.

CHAPTER ONE

THE HISTORY OF THE DUAL LAW SYSTEM IN RELATION TO THE MARRIAGE AND MATRIMONIAL CAUSES ACTS

1.0 Introduction

The introduction of English law into Northern Rhodesia dating to the time of the BSA Company explains how Zambia ended up with a dual legal system by which the African customary law existed concurrently with English law. It was of course inevitable that there would be conflicts between the customary law and the newly imposed laws from Europe as the adjectival law limited the application of customary laws that would be considered repugnant. The constitution of Zambia and the Marriage Act provide the primary legal systems governing marriage and both statutes acknowledge customary law marriages and civil law marriages in accordance with the dual legal system which was inherited at independence. The High Court Act¹ gives the court, in matrimonial causes and matters, jurisdiction in conformity with the law and practice in England.² To date, the Matrimonial Causes Act 1973 of England is referred to in matters of divorce and other related matters. Although legislation has been put in place, it is not easily accessible to the local population as they are not sold by the Government Printers. In addition, there is insufficient knowledge of the Matrimonial Causes Act 1973 which governs divorces and property settlement in Zambia.³ Whereas the fact of a dual legal system in Zambia has posed problems of choice of the personal laws to be applied in people's lives, another problem is reliance on received laws.

¹ Cap 27 of the Laws of Zambia

² Mushota L, Family Law in Zambia: Cases and Materials, Lusaka, Unza Press, 2005, p10

³ Ibid

Marriage was defined in the case of Hyde v Hyde⁴ as the voluntary union for life of one man and one woman to the exclusion of all others. It has been observed that almost every single word of this definition is inapplicable to marriages contracted under the customary law. Underlying concepts of the African customary marriage and the European monogamous marriage differ radically and from this profound difference spring innumerable legal difficulties.⁵ In African custom, the essence of marriage is the creation of a bond between two families and their respective members. There are several distinctive features of customary marriage, the first and most obvious being the potentially polygamous nature of the marriage. There is no limit to the number of wives although the conclusion can be drawn that not all marriages are actually polygamous. The second characteristic is the role played by the spouses' families at almost every stage of the marriage which has been described as the "collective" aspect of the marriage and as such it is seen that the families and not the spouses negotiate and conclude the marriage agreement and the consent of the spouses' families is a precondition to the marriage. Establishment of the marriage relationship gave birth to a network of rights and obligations pertaining not only to the man and woman involved but also to the family of each. Another feature of the customary marriage is the emphasis on the procreation of children as the prime end of marriage failure to which affected the legal rights and obligations of the principal parties to the marriage.⁶

⁴ [1866] L.R 1P & D 130

⁵ Mittlebeeler E, 1976, African Custom and Western Law, London, Africana Publishing Company : 39

⁶ Anderson J, ed, Family Law in Asia and Africa, London, George Allen & Unwin Ltd, 1968, p21

1.1 The History of the Dual Law System

All countries in commonwealth Africa have a dual system of laws – customary law and common law. In the early days of colonization, colonial policy towards indigenous law was not rigidly established. Each colonizing power was then still busy trying to subdue the local people and establish a colonial government. Because each power came along with its own system of law and because each adopted a policy of qualified tolerance of indigenous law, a dual system of law came to exist in each territory.⁷ In the case of Zambia most of the common law is composed of received law applied to Zambia by virtue of the English Law Extent of Application Act.

The introduction of English law into Northern Rhodesia dating back to the time of the British South Africa Company explains how Zambia and other former colonies and protectorates ended up with a dual legal system whereby African law existed side by side with English law.⁸ The BSA Company Charter specifically provided in article 14 that in the administration of justice by the courts set up under it, regard should be paid to African local customs and customary law especially in circumstances where the application of English law was likely to cause injustice to a native litigant. Although colonial authorities both here and elsewhere in Africa were prepared to tolerate customary law, they would not enforce rules that might offend European standards of morality and justice. The British colonial policy in regard to customary marriages was summed up by Professor Phillips, who said,

⁷ Anyangwe C, The Whittling Away of African Indigenous Legal and Judicial System, Zambia Law Journal, Special Edition, Lusaka, Unza Press, 1998, p49

⁸ Mushota L, 2005, Family Law: Cases and Materials, Lusaka, Unza Press :1

*"Hitherto, the predominant tendency of governments has been to avoid, as far as possible, any interferences with the traditional pattern of domestic relations and to limit the intrusion of external authority into this sphere to matters which involve, not merely a conflict with European ideas and codes of behavior, but a violation of the universal precepts of justice and morality."*⁹

The British administration had in effect expressly given recognition to customary marriages subject to the repugnancy principle but in addition made provisions for persons who were previously subject to the customary law to marry under an enactment providing for an English type of marriage in the hope that the existence side by side of the two systems would gradually influence African public opinion and that through education and missionary influence, the monogamous type of marriage would finally prevail.¹⁰ The introduced law at first only applied to Europeans but was later extended to 'Europeanized' Africans as well while the indigenous law was confined to village dwelling Africans and those that had not adopted the European way of life.

This dual law system was inherited by Zambia at independence on 24th October, 1964 which comprises civil law and customary law, which are administered under parallel legal systems. It is in this light that both the constitution of Zambia¹¹ and the Marriage Act¹² which provide the primary legal systems governing the laws of marriage acknowledge both civil law marriages and customary law marriages.

⁹ Anderson J, 1968, Family Law in Asia and Africa, London, George Allen and Unwin Ltd : 23

¹⁰ Ibid

¹¹ Chapter 1 of the Laws of Zambia

¹² Chapter 50 of the Laws of Zambia

1.2 The Marriage Act: Chapter 50 of the Laws of Zambia

Marriage in Zambia and everywhere else in the world forms a very important institution because every family being the smallest unit of society is based on it. Marriage may be conducted under the Marriage Act or may be conducted under customary laws that apply to the parties concerned. In Zambia, Africans were not allowed to marry under the Marriage Act until 1963 and could therefore up to that point only contract customary marriages.¹³

The Marriage Act is confined to regulations and formalities of contracting a civil marriage. It does not deal with divorce and other domestic relations or even with settlement of property after divorce. This in itself proves to be inadequate because being the principle Act dealing with marriage in Zambia, it should have provisions for what should happen in the event of the dissolution of any marriage that is performed in accordance with its provisions. A marriage under this statute must be solemnized by a licensed church minister, priest or pastor in a designated building.¹⁴ The Act does not have a definition for marriage but generally upholds the Christian concept of marriage which is basically a voluntary monogamous union for life as stated by Lord Penzance in **Hyde v Hyde and Woodmansee**.¹⁵ This definition is in conflict with the customary position as customary marriages are potentially polygamous. The Act recognizes as valid marriages contracted under any customary law that is valid between the parties¹⁶ and criminalizes the act of marriage while one of the parties is in a subsisting customary

¹³ Ndulo M, 1981, Ascertainment of Customary Law: Problems and Perspectives with Special Reference to Zambia, African Social Research, Number 31, Lusaka, Mambo Press, p69

¹⁴ Ss21 and 22

¹⁵ (1866) LR1 P & D 130

¹⁶ S34

marriage or if one of the parties has been married under the Act and proceeds to marry again under customary law.¹⁷ This section of the Act effectively criminalizes any act of polygamy that may be purported to be performed under the Act. In Mwiba v Mwiba¹⁸ it was held that the basis for marriage in English law is monogamy and courts of matrimonial jurisdiction would therefore only annul or dissolve marriages that were monogamous within the meaning of English law. In this case, although the marriage was monogamous, it was a customary marriage and was therefore a potentially polygamous marriage which could not be dissolved by the Zambian High Court. This stand shows the forms of discrimination that are brought about by the existence of a dual legal system as persons are not given the right to be heard in the High Court because they married according to custom. This also gives the impression that customary marriages are maligned or seen to be inferior. Although it would be difficult to deal with customary cases on marriage in the High Court given Zambia's diverse cultures which comprise 73 ethnic groups, most of them have common aspects and with the current trend of intermarriages the differences among their practices have since been reduced to a level where it would not be impossible for them to be dealt with in the High Court.

As opposed to the case in a customary marriage, the consent of the parents or guardians of either of the parties is only necessary if one of the parties to be married is under the age of twenty one.¹⁹ Furthermore, a marriage between persons of either of whom one is below the age of sixteen is void.²⁰ This is in contradiction with the customary law under

¹⁷ S38

¹⁸ (1980) ZR 175

¹⁹ S17

²⁰ S33

which any girl reaching puberty is marriageable. This was clear in the case of **R v Chinjamba**²¹ where a villager married a girl under the age of sixteen and lived with her as man and wife. In this case, the villager was charged with unlawful carnal knowledge of a girl under the age of sixteen and he pleaded not guilty. This plea did amount to a genuine plea because at the time of the carnal knowledge there was in fact a valid subsisting marriage between the accused and the girl in question. The repugnancy test was not applied in this case although in the author's opinion it should have because the test specifies that customary law should be applied in so far as it is not repugnant to justice, equity or good conscience and is not incompatible with the written laws in force²². The marriage in fact contracted was in the author's opinion repugnant as it deprived the girl of the chance to develop and mature into an adult and deprived her of the right to an education. In this case, although the girl was below the age of sixteen, the villager was not be prosecuted because a valid marriage had in fact been contracted under customary law.

1.3 The Matrimonial Causes Act (1973)

The law governing divorce in Zambia is the Matrimonial Causes Act 1973 of England as there is in fact no actual Zambian law in place that governs divorce. This arrangement puts a country like Zambia in a very embarrassing situation where it can be said to be legislated to by Britain, its former metropolitan power. However, in so far as this is a conscious choice, it can be said to be an example of the exercise of state sovereignty.²³

²¹ 5 NRLR 384

²² S16 of the Subordinate Courts Act

²³ Ndulo M, 1981, Ascertainment of Customary Law: Problems and Perspectives with Special Reference to Zambia, African Social Research, Number 31, Lusaka, Mambo Press: 67

This law was imported by virtue of S12 of the High Court Act²⁴ which gives the court in divorce and matrimonial causes and matters, jurisdiction in substantial conformity with the law and practice for the time being in force in England.

A marriage can only be terminated when proof is adduced that there was actually a marriage. Under the current law, there is only one ground for divorce, this ground being that there must be irretrievable breakdown of the marriage. This ground is qualified into five factors under section 1 of the Matrimonial Causes Act.

- (2) The court hearing a petition for divorce shall not hold the marriage to have
Broken down irretrievably unless the practitioner satisfies the court of one or
more of the following facts, that is to say-*
- a) that the respondent has committed adultery and the petitioner finds it
intolerable to live with the respondent;*
 - b) that the respondent has behaved in such a way that the petitioner cannot
reasonably be expected to live with the respondent;*

The most common factor for divorce is adultery followed by unreasonable behavior and it shall therefore be discussed in detail how these grounds for divorce conflict with the grounds for termination of a marriage in a customary law marriage. The duty of the court is to enquire into the facts alleged to establish the irretrievable breakdown of marriage.²⁵ The standard of proof of irretrievable breakdown of marriage has been reduced. The test is an objective one and it is now sufficient to show that a marriage has become for all intents and purposes, an empty shell without any future prospects for reconciliation.

²⁴ Chapter 27 of the Laws of Zambia

²⁵ Mushota L, 2005, Family Law: Cases and Materials, Lusaka, Unza Press: 157

In cases of adultery, the petitioner must prove that there was or there must have been sexual intercourse between the respondent and another person who must be cited and the petitioner must show that because of the adultery, he or she finds it intolerable to live with the respondent.²⁶ These requirements must be proved interdependently of each other. In **Wachtel v Wachtel**²⁷ it was stated that it is not essential to persuade the court that an association between a spouse and a member of the opposite sex had resulted in actual sexual intercourse because the association in itself may amount to conduct which led to the court's conclusion that the other spouse could not live with the one who formed the association.

As regards behavior that is such that the petitioner cannot be reasonably expected to live with the respondent, it was stated in **Young v Young**²⁸ that the conduct must amount to such a grave and weighty matter as renders the continuance of marital co-habitation virtually impossible.

In contrast to the above, a customary marriage comes to an end when the families of both parties have made several attempts to counsel and reconcile them. Allegations by a man do not need to be proved and the marriage is usually dissolved as long as the man does not want his wife. This however does not apply to the allegations of a woman as they have to be proved and the marriage is usually not dissolved if the man contests such dissolution. Adultery is not considered a ground for the dissolution of the marriage as a man may have as many wives as he is able to look after.

²⁶ Ibid: 159

²⁷(1973) 1 All ER 829

²⁸(1962) 3 All ER120

The application of the Matrimonial Causes Act in Zambia poses a problem because while there is a local Marriage Act which regulates marriages, divorces are governed by the law in force in a foreign country. This in effect means that even the laws governing marriage should be in substantial conformity with the laws subsisting in that country. There is therefore a conflict between the traditions and culture in Zambia as well as the values and those in England because laws should be legislated in the best interests of the country for which they are being made. It follows that with the growing trend of people getting married under both custom and statute some of the provisions of the Matrimonial Causes Act are in conflict with the customary law provisions as reflected in the differences in the factors considered for divorce. This is also evident in the fact that whereas under statute the marriage is brought to an end by the courts, such matters under customary law are dealt with by the families of the two parties who decide only after discussions and counsel of the parties whether to bring the marriage to an end or not.

1.4 Conclusion

In conclusion, it may be said that the existence of the dual system in Zambia was as a result of its being declared a protectorate and the subsequent colonization by Britain. Up until this colonization the indigenous peoples practiced customary law which was enforced through traditional leaders, elders and chiefs and the rules varied from one group to another.²⁹ The presence of the colonialists necessitated their importation of their system of law but they did recognize customary law from the outset of their arrival³⁰ and

²⁹ Mushota L, 2005, Family Law: Cases and Materials, Lusaka, Unza Press, p1

³⁰ Royal Charter of the Incorporation of the BSA Company, 1889, Article 14

throughout the colonial period through orders in council.³¹ This was the parallel system of dual laws that was inherited at independence and the existence of which has led to many conflicts as to the administration and choice of personal laws.

³¹ Ndulo M, 1981, Ascertainment of Customary Law: Problems and Perspectives with Special Reference to Zambia, African Social Research, Number 31, Lusaka, Mambo Press, p68.

CHAPTER TWO

THE CONFLICT BETWEEN CUSTOMARY LAW AND STATUTORY LAW ON MARRIAGE AND DIVORCE AND HOW THE DUAL LEGAL SYSTEM ALLOWS FOR THESE CONTINUED CONFLICTS

2.0 Introduction

A major characteristic of the law in Zambia and indeed most African countries today is the dualistic system of law in practice. Such legal dualism gives rise to many problems concerning political unity, economic development, and administration of justice as well as internal conflicts of law. This chapter will discuss the different ways in which the laws laid down in the Matrimonial causes Acts are in conflict with the customary laws of divorce and marriage and how the existence of the dual legal system allows for these conflicts to continue in existence. It will also touch briefly upon issues arising upon the death of either spouse.

2.1 Conflicts between the Marriage Act and African Customary Law

It must be noted firstly, that the underlying concepts of the African customary marriage and the marriage as stipulated in the Marriage Act³² differ radically in that in African custom, the essence of marriage is the creation of a bond between two families and their respective members while as mentioned before a statutory marriage is the creation of a bond between two people to the exclusion of all others. Establishment of the African marriage gives rise to rights and obligations not only applicable to the man and woman involved but also to the families of each. Inherent in the marriage is the purpose of

³² Cap 50 of the Laws of Zambia

bearing and rearing children and failure to produce children affects the rights and obligations of the principle parties of the marriage.³³ It may in fact be concluded that marriage is a transfer of the bride to her husband's family. The African marriage is potentially polygamous and there is in theory no limit to the number of wives that a man can have although not every customary marriage is in fact polygamous. In **Janet Mpofu Mwiba v Dickson Mwiba**³⁴ it was held that the basis of a civil law marriage is the Christian marriage, its concept being monogamous and the courts would therefore not dissolve marriages unless they were monogamous within the meaning of the Christian marriage. In this case, although the marriage was monogamous, the man was allowed to take another wife under the law governing their marriage. In addition, the concept of age of the party was irrelevant. A girl or boy was ready for marriage not when he or she knew what they wanted in a mate but when they were able to reproduce and thus carry on the family tradition and estate. If a husband died, all his rights remained with the family and the wife was expected to marry one of her deceased husband's relatives. If the woman, however, died childless, the husband could demand a return of the lobola or another girl of the same family³⁵.

In contrast, in a statutory marriage, the emphasis is on the two individual participants. The marriage is between the two parties however much the families may be interested in the marriage for social, economic or other reasons. The legal and moral background of the marriage is reflected in the words of the New Testament which states, for this reason, a man shall leave his father and mother and shall become joined to his wife and the two

³³ E. Mittlebeeler, African Custom and Western Law, London, Africana Publishing Co, 1976, 40

³⁴ (1980) ZR 175

³⁵ Op cit, p43

shall be of one flesh.³⁶ Under the Marriage Act, bigamy or polygamy is criminalized³⁷ thus the union is purely monogamous. In line with this, it was held in **The People v Chitambala**³⁸ that the accused that had, during the subsistence of a valid marriage to one Anne Mumbi, contracted a marriage to Grace Lombe was guilty of the offence of bigamy.

The Marriage Act also provides for the age at which one can enter into a marriage. By S11 (a) (ii) if either party is under the age of sixteen then the marriage is a nullity. This position is buttressed by S33 which states that a marriage between persons under the age of sixteen is void unless consent was given by a High Court Judge upon being satisfied that such marriage is not contrary to public policy. Parental consent is required if either of the parties to the proposed marriage is a minor. Where it is a prerequisite, it must be in writing but this is not applicable if the minor is a widow or widower. In the absence of consent where such consent is necessary, the contract is void. This was implied in **Muyamwa v Muyamwa**³⁹ where it was held that the presence of a girl's mother at the marriage ceremony was proof enough of parental consent to validate the marriage. The essence of consent is in contrast to that under customary law as the only consent which can affect the validity of the marriage under customary law is that of the girl's parents. Even then, it only affects the validity in the sense that it is required for the setting of the lobola. Parental consent would still be necessary under customary law even where the

³⁶ Ephesians 5:31

³⁷ S38

³⁸ (1969) ZR 142 (HC)

³⁹ (1976) ZR 146

proposed minor was previously married.⁴⁰ This lack of consent on the part of women at the time of marriage denotes a failure on the part of society to accord women full majority status or adulthood while early marriages deny the girl child the right to education thus ensuring their economic dependency and exacerbating the current illiteracy problem in the country.

Whereas for a statutory marriage, much emphasis is placed on the registration and solemnization of the marriage⁴¹ this is not so in customary marriage which instead places great importance on lobola or dowry. This is because lobola is seen as an essential part of the establishment of the validity of the marriage.⁴² It is basically a gift of some form that is given to the family of the bride in cash or in kind. The bride therefore, does not become the property of the husband but the payment creates among others a bond between the man and the parents of his bride and in essence a means of continuing the lineage was received.⁴³ This could be demanded by the family of the man if no children were born of the marriage or as a result of the dissolution of the marriage due to the misbehavior of the woman.⁴⁴ Likewise, if the husband neglected his family and grossly mistreated his wife, she might claim the protection of her father who in extreme cases might return the lobola and dissolve his daughter's marriage. Africans who enter into civil marriages nearly always couple the marriage with bride price agreements. Thus the marriage signifies the union between the bride and groom and the lobola signifies the

⁴⁰ Kakula L., The Law of Marriage and Divorce among the Malozi of Western Zambia, SJD Thesis, Unpublished, 1982

⁴¹ Part IV of the Act

⁴² Anderson J, Ed, Family Law in Asia and Africa, London, George Allen & Unwin Ltd, 1968, 18

⁴³ E. Mittlebeeler, African Custom and Western Law, London, Africana Publishing Co, 1976, 41

⁴⁴ Ibid: 43

joining of their two families. In this way, the African conception of marriage is imported into the civil ceremony giving the union a double validity in the eyes of the persons involved.⁴⁵ It is probably the most enduring institution of customary law and it is this characteristic that ensures its practice in accompaniment of the civil marriage. Its persistence may well be indicative of the parties' entanglement in debts inherited by the previous generation rather than any particular attachment to cultural heritage.⁴⁶ This is particularly so in urban areas where certain customs may be practiced without the basis for the custom being known or understood and thus the custom will be practiced because it has been handed down by the previous generation.

2.2 Conflicts between the Matrimonial Causes Act 1973 and Customary Law

The current civil law is that there is only one ground for divorce, this ground being the irretrievable break down of the marriage which is broken down into five facts. One of these five factors must be proved in order to establish such irretrievable break down⁴⁷ but as mentioned earlier, the most common factors for divorce in Zambia are adultery, followed by unreasonable behavior. The conduct in this instance must be such that cruelty is contemplated. It was stated in Young v Young⁴⁸ that the conduct must amount to such a grave and weighty matter as renders the continuance of marital co-habitation virtually impossible. This view was however changed in the recent Supreme Court case of Malama v Malama⁴⁹ where it was stated that the standard of proof necessary in

⁴⁵ Bennet T.W., The Application of Customary Law in Southern Africa, Cape Town, Juta and Co, 1985, 147

⁴⁶ Ibid

⁴⁷ S1 of the MCA 1973

⁴⁸ (1962) 3 All ER 120

⁴⁹ Appeal No.84 of 2000.

determining the existence of one of the facts in section 1(2) of the Matrimonial Causes Act, 1973 was that for the provisions to be met the conditions need not be as serious as would have amounted to cruelty under the pre-1971 laws.

Under customary law, divorce is a matter to be settled by the two families concerned and dissolution by divorce usually entails the return of part or all of the lobola. There is no need to have recourse to a court unless the parties cannot agree about the settlement of bride wealth. T.W. Bennet in his book on the application of customary law stated that the woman is often powerless to effect her own divorce. This opinion reflects the subordinate position of the woman as she would have no part to play in negotiating the return of the lobola in the event of a divorce or the guardianship of the children because this is her guardian's function as representative of the family.⁵⁰ It is however not uncommon today for a woman married under customary law to provide the money for the lobola to be returned in cases where her family are unable to raise the amount. A customary marriage comes to an end when the families of both parties have made an effort to reconcile and counsel them. The grounds for divorce are many and vary from one ethnic group to another. Among them are adultery, unbecoming behavior, cruelty, childlessness and desertion to mention but a few.

One of the main conflicts existing between the civil and customary laws on divorce is seen in the treatment of adultery as a ground for divorce. Whereas under statute, divorce is granted where adultery has been proven, this is not so under the customary laws. Under the customary laws, a man is allowed to have an extra-marital relationship owing

⁵⁰Bennet T.W., The Application of Customary Law in Southern Africa, Cape Town, Juta and Co, 1985, 160

to the potentially polygamous nature of the relationship.⁵¹ A husband may, however, divorce an adulterous wife. This is contrary to the statutory provision that the marriage is “*for life, to the exclusion of all others*” and therefore allows the interference of third parties in the union between the husband and wife. It is the author’s opinion that the potentially polygamous nature of the customary marriage which is practiced by most Zambian tribes is the reason why the cases of adultery in Zambia are high. This is because of the combination in most cases today of the customary and statutory marriages which causes a resulting conflict as there is a tendency to ignore the provisions of statute regarding the exclusivity of the marriage. In addition, the view of a woman’s right to divorce an adulterous man as a flimsy ground in customary law has somewhat discriminatory undertones in that it favors the man’s wrong actions and places women in a subordinate position. Polygamy reflects and at the same time intensifies the fundamental inequality between the sexes which appears to be typical of African social systems. It can hardly be denied that the institution of polygamy is normally associated with a social system where there is unchallenged male dominance.⁵² In accommodating polygamy under customary law, the law is in fact creating and entertaining a different and lower system of justice for women.

The very fact that the bride price is paid to the parents of the bride means that they must give their consent to the marriage. They will obviously not accept the bride price for a marriage that they do not approve of. In this aspect, customary law discriminates against

⁵¹ Mushota L, Family Law: Cases and Materials, Lusaka, Unza Press, 2005, 274

⁵² Arthur Phillips and Morris H., Marriage Laws in Africa, London, Oxford University Press, 1971, 6

adult women in denying them the right to marry men of their own choice. Bride price also undermines the status of women under customary law in relation to divorce. In most tribes, the bride price must be returned by the women's relatives upon dissolution of the marriage. This therefore means that the woman has to seek her parents' consent to dissolve the marriage. Even where the woman is in a position to pay back the bride price, she must still obtain the consent of her parents or guardians. Customary law therefore discriminates against women in denying them the right to terminate their marriages in their own right.⁵³

Women married under customary law are entitled to maintenance during the marriage but not after the divorce.⁵⁴ Only if the marriage ends as a result of death may the woman be maintained and then, only if she agrees to be inherited⁵⁵. In contrast, women married under the Act are entitled to maintenance after divorce. The High Court is given extensive discretionary powers to order one party to maintain the other after divorce.⁵⁶ The court is also expected to take into account specific principles in making orders for maintenance and to ensure that the spouses are well provided for.⁵⁷ The principles taken into account are the income earning capacity, property and other financial resources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of the parties and the standard of living enjoyed by the family before the dissolution of the marriage so that as far as possible people can enjoy the same

⁵³ Julie Stewart and Armstrong A., The Legal Situation of Women in Africa, Harare, University of Zimbabwe Publications, 1990, 149

⁵⁴ *Mwiya v Mwiya* (1977) ZR 113

⁵⁵ *Op cit*, p151

⁵⁶ Ss 22 and 24 of the Matrimonial Causes Act

⁵⁷ P.M. Bromley, Family Law, London, Butterworths, 5th Edition, 1981, 542

standard of living as they did before the dissolution.⁵⁸ Other factors that are taken into account are the age of the parties to the marriage, the duration of the marriage and the value of any benefit which by reason of the dissolution of the marriage any party will lose the chance of acquiring. The individual contribution of each party to the welfare of the family is taken into account. This particular principle is beneficial to women in particular because it is not restricted to financial contributions but is also extended to include contributions of a domestic nature, thus even housewives are said to have contributed their time and efforts into the marriage.

Because the dissolution of marriage is also governed by the parallel system of law, the system is not only gendered but different women are faced with different standards of justice depending on the type of marriage they contracted.⁵⁹ It is therefore seen from this that the choice that is given to people to marry under statute or customary law has far reaching consequences for the spouses' property and maintenance rights. Amendments to the Local Courts Act⁶⁰ which deals with customary law divorces as well as judgments of the superior courts have somewhat eased the customary law stance on maintenance in the context of changing the perceptions of women's entitlements after divorce as illustrated by **Chibwe v Chibwe**⁶¹ in which the parties were married under Ushi customary law and upon dissolution of the marriage it was held that the woman was entitled to reasonable maintenance and a share of the property acquired during the subsistence of the marriage. The action, which commenced in the Local Court, went all

⁵⁸ Julie Stewart and Armstrong A., The Legal Situation of Women in Africa, Harare, University of Zimbabwe Publications, 1990, p151

⁵⁹ Margaret Munalula, Women, Gender Discrimination and the Law, Lusaka, Unza Press, 2005, p86

⁶⁰ Chapter 29 of the Laws of Zambia

⁶¹ Appeal No. 38 of 2000

the way up to the Supreme Court on appeal. These amendments however do not mean that women will claim or receive maintenance.⁶²

Maintenance of children in both customary depends on the party that has custody. Admittedly, the law does tend to be biased towards women as opposed to men in the awarding the custody of young children. In customary law, this usually depends on whether the tribe follows the matrilineal or patrilineal form of kinship. The matrilineal form of kinship gives the children to the mother upon the death of their father or divorce while the opposite is true of the patrilineal system of kinship. Such decisions are increasingly being taken in the best interests of the child rather than on the basis if who was at fault or has the most financial resources.⁶³ This system is not very different from the statutory provisions governing the maintenance of children upon the divorce of their parents by which the court has the discretion to make an order in any amount it sees fit for the custody, maintenance and education of the children of the divorced couple.⁶⁴ The main statute dealing with the maintenance of children is, however the Affiliation and Maintenance Provisions Act.⁶⁵

2.3 Conclusion

In conclusion, it must be noted that there are four basic features that are characteristic of a customary marriage that are not true of a marriage governed by statute. Firstly, the institution of marriage is a private one in that there need not be any intervention of a state official to give the marriage the stamp of validity nor is a decree of court necessary to

⁶² Op cit, p87

⁶³ Op cit, 109

⁶⁴ S26(1) of the Matrimonial Causes Act 1973

⁶⁵ Chapter 64 of the Laws of Zambia

dissolve it. Its creation and dissolution is therefore dependant on the agreement between two families. Secondly, there is no fixed time for the commencement of a customary marriage as opposed to a civil marriage.⁶⁶ The customary marriage is a gradual process that is achieved by a number of events that begin upon the agreement of the families. Thirdly, all customary marriages are potentially polygamous and finally lobola is vital in securing both family and community acceptance of the validity of the union and in the determination of the legitimacy status of children as they are accepted to be children of their paternal father once the lobola is paid. The clear points of contrast with statutory marriage lie with the monogamous nature of the marriage and the absence of marriage consideration.⁶⁷ The requirements of the customary law such as polygamy are somewhat undermining of the status of a woman and as such seem to encourage inequality and a male dominated society in which the rights of a woman are sidelined. Although there have been changes to the law pertaining to these customs, such as the provision of maintenance for women after divorce, there remains an underlying aspect of discrimination which goes against the provisions of CEDAW⁶⁸ which provides that all state parties should take steps to eliminate discrimination against women in all matters relating to marriage and family relations and ensure the basic equality of men and women.

⁶⁶ SS 6-12 of the Marriage Act

⁶⁷ Bennet T.W., The Application of Customary Law in Southern Africa, Cape Town, Juta and Co, 1985, 137

⁶⁸ Article 16(1)

The continued dual system of law in subsistence in Zambia makes it difficult for these provisions to be ratified and implemented. It follows therefore that a system of law which upholds all these rights be developed.

CHAPTER THREE

PROBLEMS THAT MAY BE ENCOUNTERED IN THE CREATION OF A SINGLE LAW THAT ENCOMPASSES BOTH CUSTOMARY AND CIVIL LAW GOVERNING BOTH MARRIAGE AND DIVORCE AND WHETHER OR NOT THE INTRODUCTION OF A SINGLE LEGAL SYSTEM WILL BE ADVANTAGEOUS FOR ZAMBIA.

3.0 Introduction

It seems to be the general attitude that legal pluralism is an anathema and its eradication is necessary. This attitude stems from several considerations among them being that a single legal and judicial system will do away with the headache of conflict of laws within the same political unit and the belief that 'legal unitarism' will speed up the development of the country. It is also believed that a uniform national legal and judicial system will aid the development of national unity and sentiment.⁶⁹ This chapter will discuss the advantages and disadvantages for Zambia of the introduction of a single legal system. It will also discuss how this may be done and the problems that may be encountered in a bid to come up with an indigenous piece of legislation governing the laws of both marriage and divorce.

⁶⁹ Carlson Anyangwe, *The Whittling Away of the African Indigenous Legal and Judicial System*, THE ZAMBIA LAW JOURNAL, Special Edition, Lusaka, Unza Press, (1998), pp48-49

3.1 The Ideal Situation: The Existence of a Single Legal System Encompassing Both Customary and Civil Law governing the laws of Marriage and Divorce

In analyzing the problems that would be encountered in the introduction of a single legal system, it is imperative that an outline of the ideal situation that would be on the ground be laid out. Such a system would effectively do away with the conflicts outlined in the preceding chapter thus creating a system of law that would be just and take into account the positive aspects of both customary and civil law, leaving out the negative aspects.

To begin with, the discrimination of women under the customary law would be curbed by the domestication and codification of the provisions of the Convention on the Elimination of All forms of Discrimination Against Women 1970 (CEDAW)⁷⁰ which states that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women:

- (a) the same right to enter into marriage:*
- (b) the same right to freely choose a spouse and to enter into marriage only with their free and full consent;*
- (c) the same rights and responsibilities during the marriage and at its dissolution;*
- (d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*

⁷⁰ Article 16(1)

- (e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to information , education and the means to enable them exercise these rights;*
- (f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
- (g) the same personal rights as husband and wife including the right to choose a family name, a profession and an occupation;*
- (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

The abovementioned provisions would therefore be incorporated into statute in Zambia thus domesticating them. In addition, as regards adultery which is included as a reason for the irretrievable breakdown of marriage under statutory law and is only actionable by the man under customary law, the ideal law would provide for it to be actionable or subject to penal action against men as well thus further enhancing the equality between men and women. This was demanded by the women of Ghana in the Women's Manifesto for Ghana of 2004⁷¹ where it was stated that while recognizing the validity of polygamous marriages, the government and law enforcement agencies should ensure that the laws against bigamy are properly enforced, that the government should put in place mechanisms that discourage polygamy and encourage monogamy with a view to

⁷¹ www.abantu.org : The Coalition on the Woman's Manifesto for Ghana, Combent Impressions, Accra, p38

abolishing polygamy in Ghana in the future and that the existing grounds for divorce under customary law be aligned with those in statute to promote uniformity and equity between men and women. The enactment of such provisions in Zambia would do much to align the customary and civil laws and would contribute much to the existence of a single legal system. Such a situation, would, however have to come into existence as a result of a concerted effort of the women as was the case in Ghana or as a result of the efforts of notable members of society. This would result in the law being recognized as being the will of the people and its legitimacy would result in the increased efficacy of the legislation that would exist under a single legal system.

As regards divorce, the need for the couple to be counseled must be emphasized in accordance with the customary law and the need to identify people who would be better placed to deal with this aspect of divorce.⁷² Although such a provision already exists in the Matrimonial Causes Act, there is no mechanism in place to ensure that conciliatory efforts have in fact been made. In customary law, divorce involves a series of meetings, discussions and counseling and in the event that reconciliation is found to be impossible the decision to divorce is made. This aspect of divorce has been taken into account by the Zambia Law Development commission which is currently undertaking to enact the Family Law Act to replace the currently existing law currently dealing with divorce and other matrimonial proceedings. Among the general principles of this Act⁷³ are that the institution of marriage is to be supported, that the parties to a marriage which may have

⁷² See the Law Development Commission Paper prepared as a follow-up to the Submissions Received at the Internal Workshop attended by a Committee of Experts on the Enactment of a Local Matrimonial Causes Act for Zambia, August 2004.

⁷³ As set out in S1

broken down are to be encouraged to take all practicable steps to save the marriage and that a marriage which has irretrievably broken down should be brought to an end with minimum distress to the parties and in a manner designed to promote a good continuing relationship by supporting the institution of marriage and encouraging the parties to a marriage to take practicable steps by marriage counseling or otherwise to save the marriage.⁷⁴ These provisions are in substantial agreement with the values laid down by customary law and would therefore be a welcome inclusion in the ideal law for Zambia.

Another welcome development to the laws of Zambia would be maintenance orders such as periodical payments and lump sum payments even where an order has not been obtained that affects the status of the marriage itself because most women in this country are not financially independent and to try and reduce the consequences of violence against women who usually remain in the matrimonial home due to poverty than for any other reason would help in the emancipation of women in matrimonial causes. This is yet another addition which is being considered by the Law Development Commission to be included in the Family Law Act.

Most Zambian customs expect all men and women to be married and bear children once they have attained puberty. The women feel this burden more heavily as they are expected to marry much earlier than men and are blamed for the breakdown of the marriage and the absence of children in such marriage. It was on this basis that the Women's Manifesto of Ghana demanded that the legislature and executive take steps to

⁷⁴ See the Zambia Law development Commission Report on the Internal Workshop on the Issue Paper presented to the Committee of Experts on the Matrimonial causes Legislation Project, Lusaka, August, 2004.

strengthen or extend existing laws to include the prohibition of forced marriages, child marriages and abductions.⁷⁵ This would do much to include the rights of women to choose their marriage partners and align customary law with statutory law in that the actual parties to the marriage would be able to make their own choice of marriage partners. The Ghanaian women also spoke out against practices which encouraged discrimination against women such as polygamy and the practice of bride price. They therefore demanded that a law be put in place to reform the customary marriage to eliminate substantial payments in money and to ensure that only token payments are made.⁷⁶ This would ensure that the institution of marriage in Zambia would not be commercialized as seems to be the growing trend and that the necessary payments remain a token of appreciation to the family of the bride. It is the author's opinion that culture is a dynamic force that must be able to change and leave behind practices which are no longer appropriate and have a negative impact instead of being a source of positive values and as such cultural values which have discriminatory effects against women and others are examples of practices which must change. The sharp increase in the amounts of money being paid as bride price today may also allow the men who pay these amounts to view the payment as a purchase transaction which gives them ownership of the women thus leading to discrimination of the woman as she is seen not as a human being but as a chattel.

⁷⁵ www.abantu.org : The Coalition on the Woman's Manifesto for Ghana, Combort Impressions, Accra,

p47
⁷⁶ Ibid

3.2 Problems that may be encountered in the Implementation of a Single Indigenous Piece of Legislation

The implementation of a single system of legislation may be faced with many hurdles that may be difficult to surmount. Most prominent among are the problems related to culture and practices that have long been held to be an important aspect of the local customs that doing away with them would be seen to be a taboo.

Some customs have long been seen to be a fundamental part of the local traditions of Africans. This is true of the practice of bride wealth. It follows that to propose to remove such a practice would be seen as a deliberate move to undermine the traditions and values of Africans and the suggestion that it is a discriminatory practice against women may be seen as a direct insult to the traditional authorities. The same is true in the case of consent for the bride as the suggestion for the removal of parental consent in her case may be seen as insubordination on the part of the women as most traditional African cultures view the man as the head of the household who must therefore have authority and the last word over what happens in it. This is in line with the traditional saying that *“a woman should be seen and not heard”*. The woman is therefore not expected to take part in the decision making processes but should be cared for by the man. The loss of identity of the local populace may also be associated with such an action. This is because the culture of the people is so deeply rooted that to ask them to give up certain practices would be similar to the action of uprooting a tree.

Another problem that would be faced in introducing such legislation would be the sensitization and socialization of the local populace to a point at which they would recognize or realize that the traditions they had been practicing for so long were detrimental to the positive growth and development to a modern society. Making people in the rural areas understand that customs such as the marriage of girls because they had attained the age of puberty which have been practiced since time immemorial are against the girl child's right to education and have led to an increase in the poverty rates in Zambia and should no longer be practiced would be a major stumbling block. Although law is an instrument of social change, the resistance of the people to such measures would be a major factor in its implementation. The main difficulty in this instance would therefore be in trying to educate the rural society on the importance of an equitable society that is not entirely male-dominated. This could be overcome by enforcement measures to ensure conformity with the law and thus ensure social change.

As mentioned above, certain changes to the legislation can only be made if the affected parties come together as one voice as was the case in Ghana or notable persons in society such as non-governmental organizations and other members of civil society speak out against the violations of the above mentioned rights and discriminations. Because of certain customary teachings and the fear of being chastised, independent research by Women and Law in Southern Africa has shown that most women would prefer not to speak out against such discriminatory practices.⁷⁷ One such case is the introduction of sanctions for the adultery of men in marriages as most women feel that if sanctions such as arrest are implemented they will be without a breadwinner and so prefer to suffer in

⁷⁷ WLSA, Maintenance in Zambia, (1992)

silence in order to avoid poverty. This therefore in itself shows one of the negative effects of customary law on the women as they cannot provide for themselves mostly due to early marriages which reduce them to a position of poverty in the absence of their husbands. This is therefore another difficulty that would be faced in the implementation of a single piece of legislation as the affected persons are afraid to speak out for themselves for fear of losing the main breadwinners of their families which would lead to a drop in their standards of living. It can therefore be concluded that the fear of a life of poverty and poverty itself is one of the difficulties that would face the implementation of such legislation. Although it is not the norm that married women are better placed than their unmarried counterparts, because of the high levels of illiteracy and poverty in Zambia, most women prefer to get married in order that they do not have to be the sole breadwinners and to share costs with their husbands.

As Zambia is a country with diverse peoples that number seventy-three tribes in total, it follows that there are diverse customs as well therefore some conflict may arise as a result of whose customs to incorporate into statute. Thus it follows that a problem may arise in the selection of what customs to incorporate in a statute that incorporated customary law and therefore a careful selection of the positive customs that are universal may be a somewhat tedious operation.

3.3 The Costs and Benefits to Zambia of the Introduction of a Single Legal System

There is a serious problem in existence in the country because of the reliance on the laws of the UK for divorce and other domestic relations. This is because of the great

disparities in the laws of marriage in Zambia which were adopted in 1963 from the laws of England and the rapid developments in the law of divorce of the UK. Therefore, it would be beneficial for Zambia, in this regard, to introduce a single legal system as there would be certainty in the law and the law would be rooted in Zambian tradition and values.⁷⁸ There would also be no need to rely on the received laws contained in British statutes thereby doing away with the conflict of laws which occurs when people blend the requirements of customary law marriages and civil law marriages which are resolved by local court justices according to their own interpretation. A problem also arises from the fact that the law states that the law should be applied in substantial conformity with the law and practice in England. What amounts to substantial conformity at the end of the day is purely in the determination of the judge hearing the matter. This in effect takes away the essential characteristics of predictability and certainty in the law and the introduction of a single system of law would therefore ensure these qualities in the law.

Although the Zambian High Court Act states that the jurisdiction of the court in matters of divorce and matrimonial causes shall be exercised in substantial conformity with the law and practice in for the time being in force in England, no mechanism has been put in place to ensure that the said law is readily and easily accessible through inexpensive means to the High Court Judges, legal practitioners and the general public. This means that the ability to enforce the law is largely dependant on individual efforts. This trend cannot be continued because of the lack of access to the necessary materials and it will therefore be beneficial to Zambia to have an indigenous single system of law whose wealth of materials will be readily available within the country. This will also reduce the

⁷⁸ See Mushota L, Family Law: Cases and Materials, Lusaka, Unza Press, 2005, p13

cost of materials as opposed to the costs incurred in the procurement of the necessary books and reference materials that reflect the law in force for the time being in England.

The integration of the positive aspects of customary law into statutory law is another benefit that could accrue to Zambia if a single legal system of law was adopted as there would be direct representation of the values of the people through codification in statute. An added advantage is the fact that once these values are codified there is a lesser chance of the culture of the people being lost. There may, however be a disadvantage in that certain customs and practices which have long been fundamental to the African marriage and divorce laws and have since become detrimental to the positive growth of society due to the dynamism of society may have to be removed thus resulting in a culture shock. In the same vein, if such customs are codified, the court system in existence can be done away with by which certain cases are relegated to the local courts and can only be heard by higher courts on appeal. This will therefore allow everyone a right to be heard in the higher courts of law.

This removal of certain practices may, however, be somewhat advantageous to the international status of the country as a whole if it is done in line with international instruments that promote human rights such as CEDAW which advocates for the protection of the rights of the woman and the eradication of their discrimination in order to ensure that they are able to access and enjoy their rights in full. This is because it deals with discrimination that is systemic and is an integral and natural part of most societies.⁷⁹ This would allow the law on the ground to be in conformity with the international

⁷⁹ Margaret Munalula, Women, Gender Discrimination and the Law, Lusaka, Unza Press, 2005, p17

standards of human rights and would raise the minimum standard of human rights for women in the country.

Conclusion

In conclusion, it is submitted that a single indigenous piece of legislation would be beneficial to Zambia. This is in the light of the fact that there are numerous pieces of legislation that are referred to in marriage and divorce proceedings and a single piece of legislation codifying marriage and divorce proceedings and all other matters incidental would be more than convenient. Although there would be problems in the actual formulation of a single piece of legislation, it would be beneficial to the people in that it would be a true reflection of their values and not an imported piece of legislation whose impact they neither understand nor accept as the norm.

CHAPTER FOUR

CONCLUSION

4.0 Introduction

This chapter will discuss the implementation of an indigenous single piece of legislation governing the laws of marriage and divorce in Zambia and whether or not they can in fact be implemented to the advantage of the Zambians. It will in conclusion sum up the efficacy of the Marriage Act and Matrimonial Causes Act and whether or not the dual system of law is beneficial to the Zambian system by also giving recommendations.

4.1 Findings and Conclusions of Research

From the research conducted for this paper there have been several conclusions. Among them, is that the Marriage Act⁸⁰ and Matrimonial causes Act⁸¹ are inadequate and inefficient due to their insufficient inclusion of local Zambian values and beliefs. In addition, they are inefficient in that they do not promote universal human rights in that they are limited in scope since they deal only with civil law and ignore customary law thus promoting discrimination and ignorance of human rights under the customary law. This is an attribute of the dual system of law currently in existence in the country.

It has also been concluded by the author that the inefficacy of the Marriage Act can be seen from practices such as marriage of minors being condoned as was illustrated in the case of **R v Chinjamba**⁸² in which the marriage of a man to a girl below the age of sixteen was found to be valid because it has been entered into under customary law.

⁸⁰ Chapter 50 of the Laws of Zambia

⁸¹ 1973

⁸² 5 NRLR 384

Such ignorance effectively ignored the girl's rights which in fact should be protected. It has further been observed that both the Marriage Act and the Matrimonial Causes act are inefficient and insufficient because they do not include or refer to international instruments on human rights and the rights of women with regard to marriage, divorce and other related matters.

Due to the high rates of poverty in the country, it is becoming a growing trend to exploit certain traditions to the maximum capacity for monetary gain. This is especially so with the issue of bride price which although it is a customary practice with positive undertones is being abused today as a money making venture by some. As there is no legislation in place to govern such practices, it has been noticed that such payments are becoming increasingly exorbitant. Although this may in fact be attributed to the current social and economic conditions prevailing in the country with the current high levels of illiteracy and poverty, it is submitted that the rising trend of the payments is negative and there should be some form of provision regulating it. One such example was where the women of Ghana spoke out against such treatment and demanded for bride price to be regulated.⁸³ It would therefore also be easier in this light to gauge the range of the amount of bride price to be paid in the event of a marriage taking place between persons from two different social spheres such as, for example, a graduate of the University of Zambia and a girl from the rural districts of Zambia.

⁸³ www.abantu.org : The Coalition on the Woman's Manifesto for Ghana, Combust Impressions, Accra, p47

4.2 Recommendations

It is recommended that the law as regards under age marriages is amended to include marriages under custom. This is because in as much as such marriages are valid under customary law they deprive the girl in question of the right to an education and curtail her period of being a child as such girls take on adult responsibilities at a very tender age. These marriages also expose such girls to diseases such as HIV/AIDS due to the polygamous nature of the marriages that they enter into. This is also one of the failings of the dual law system because in allowing two systems of law to co-exist, the human rights of those who are married under such law are ignored. In addition, the issue of consent under customary law should be addressed and aligned with that under statute in order that older women and widows do not need the consent of their parents to enter into a marriage but may inform them as to their choice in spouses. This would therefore limit the role of the parents to one of approval rather than the actual choice of partner for the woman.

The situation that subsists as illustrated in **R v Chinjamba**⁸⁴ should not be allowed to continue. This shows that different standards of justice are existent and that therefore the rights of children can easily be derogated from for customary law. It is submitted by the author that such customs are immoral and should not therefore be upheld by any courts as they reflect a negligent attitude towards the welfare of children on the part of the courts and society as a whole. The existence of such a situation is therefore contrary to the repugnancy clause which provides that so far as the customary law is not repugnant to

⁸⁴ 5 NRLR 384

natural justice and equity it may be applied. There is, however a problem with this provision since the term repugnant has never been defined.⁸⁵

It is also recommended that a law be put in place to regulate the setting of bride price so that it does not lose its value as a token of appreciation and become a commercial aspect of the marriage contract as it will in effect turn the transaction into one somewhat like the sale of a chattel. This is in order to curb the growing trend of setting the exorbitant amounts of money that are being charged as bride price. Such a demand was also made in Ghana as mentioned above.

A further submission is that there should be a sanction put in place for the offence of polygamy and an enforcement mechanism for this sanction should also be put in place because although it is an offence under the Marriage Act⁸⁶ it has for the most part been ignored. This is evidenced by the low number of polygamy and bigamy cases that have been reported. This is partly due to the aggrieved parties not wanting anyone publicize such actions because of the embarrassing nature of the court proceedings. It is also submitted that similar steps to those taken by the women of Ghana should be taken to put an end to polygamy even in the customary setting. It is the author's opinion that if such a provision was added to a statute that governed the laws of marriage and divorce, it would greatly help to curb the mischief that is polygamy. The introduction of a single system of law would also help to enable the execution of such a law.

⁸⁵ Mushota L, Family Law: Cases and Materials, Lusaka, Unza Press, 2005, p3

⁸⁶ S38

It is recommended that a uniform Act to govern the laws of marriage and divorce should be put in place to ensure that the grounds for divorce are the same for everyone thus encouraging equity and equality in the marriage. This is in order to curb the disparities in the grounds for divorce between civil and customary marriages and to ensure that in customary marriages, the grounds for divorce are the same for both men and women. This is in order also, that people do not have expectations of their marriage such as monogamy that do not actually apply to them.⁸⁷ In this regard, it has been concluded that because of the presence of a dual law system, there is some confusion as to what rights and obligations evolve to a person as a result of what form of marriage they undertake. This is because of the unavailability of the current legislation and the ignorance of many as to what laws govern marriage and divorce. In this regard, if the legislation was indigenous, it would be publicized and would also reflect the wishes, values and beliefs of the people and there would as a result be little or no confusion.

The Zambia Law Development Commission is developing a Family Law Act under which the five grounds for divorce as provided in the Matrimonial Causes Act are no longer to be directly relevant. It instead provides that a marriage is to be taken as having broken down irretrievably if

- either party makes a statement in prescribed form that he believes the marriage has broken down
- the period for reflection and consideration has ended, which period has been set as nine months ; and

⁸⁷ See Mwiba v Mwiba (1980) ZR 175

- the application for a divorce order is accompanied by a declaration that after due reflection and consideration, the applicant believes that the marriage cannot be saved.⁸⁸

Although the abovementioned provisions may be said to be indigenous, they seem to have made the process of divorce very easy for the parties to the marriage thus reducing marriage to an institution that may be entered into and left upon the whims of the parties to such marriage. This Act does not also take into account the customary marriage thus continuing with the dual law system as regards marriage which exercises a double standard of justice depending on the form of marriage entered into.

⁸⁸ See the Zambia Law Development Commission Paper prepared as a follow-up to the Submissions Received at the Internal Workshop attended by a Committee of Experts on the Enactment of a Local Matrimonial Causes Act for Zambia, August 2004.

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