UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

A CRITICAL ANALYSIS OF BILATERAL (DUAL) MARRIAGES IN ZAMBIA

RESEARCH SUBMITTED FOR THE REQUIREMENTS OF THE LLM DEGREE

BY

KASHEWE M SIYUBO

STUDENT NUMBER: 4176943

SUPERVISOR:

PROF LEA MWAMBENE

UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/

FACULTY OF LAW

CHECKLIST AND DECLARATION: RESEARCH PAPER

YES √ NO X

I have checked that the research paper topic is reflected in my work	√	
I have done adequate research and have ensured that the most recent court decisions, etc. has been included in my work.	√	
I have acknowledged all quotations and significant contributions from other sources by means of the correct citation and referencing throughout the research paper in accordance with the prescribed Referencing and Style Guide for Graduate Students.	√	
I understand the rules relating to plagiarism, citation and referencing. I have ensured that the use of the ideas of others has been acknowledged.	√	
I have not copied anyone else's work and have ensured that the use of the ideas of others or any other part thereof has been acknowledged	√	
I have not plagiarized	√	
I am familiar with University Rule 3.6 and Rule 3.8, including the penalties for plagiarism	√	
I have written an introduction outlining the scope and approach of the research paper.	√	
I have edited and double-checked the assignment for spelling, grammatical and punctuation errors.	√	
I have written a summary or conclusion at the end of the research paper.	√	
I have submitted the research paper on or before the due date.	√	

.

K.M.Siyubo

Student Initial(s) and Surname

Signature

14th December, 2022

UNIVERSITY of the WESTERN CAPE

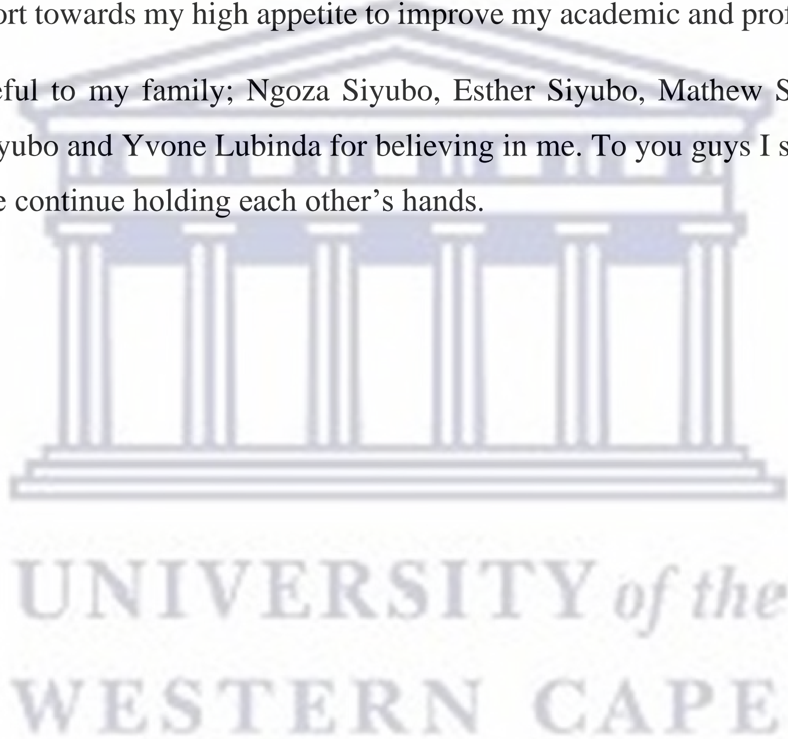
http://etd.uwc.ac.za/

ACKNOWLEDGEMENTS

I wish to acknowledge and thank my research supervisor, Professor Lea Mwambene for her technical guidance, motivation and encouragement throughout the period of this research.

To my greatest cheer leaders, my parents, dad Mr. Muyangwa Siyubo and mum Mrs. Anastasia Zulu Siyubo, I will forever be indebted and grateful to you for your parental guidance and unwavering support towards my high appetite to improve my academic and professional standing.

Lastly I am grateful to my family; Ngoza Siyubo, Esther Siyubo, Mathew Siyubo, Mwangala Siyubo, Faneli Siyubo and Yvone Lubinda for believing in me. To you guys I say thank you very much and may we continue holding each other's hands.



http://etd.uwc.ac.za/

DEDICATION

To Jehovah, thank you for blessing the works of my hands.

http://etd.uwc.ac.za/

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.1 Introduction……………………………………………………………………………1

1.2 Background and problem statement…………………………………………………2

1.3 Research Questions………….…………………………………………………………6

1.4 Significance of the study.………………………………………………………………6

1.5 Literature review…………………………………………………………………………8

1.6 Methodology……………………….……………………………………………………10

1.7 Chapter outline…………………………………………………………………………..11

CHAPTER TWO: MARRIAGE IN ZAMBIA

2.1 Introduction…………………………………………………………………………..12

2.2 Pre colonial era……………………..………………………………………………..……13

2.3 Colonial Era……………………………………………………………………………...15

2.4 Post-Colonial Era……………………………………………………………………...17

2.5 Error! Bookmark not defined.

2.6 Statutory Marriage……………………………………………………………………17

2.6.1 Statutory meaning of marriage……………………………………………………..17

2.6.2 Marriage Under Customary Law……………………………………………………20

2.6.3 Religious Marriage…………………………………………………………………….24

2.7 Bilateral Marriages……………………………………………………………………24

2.7.1 Section 20 Of The Marriage Act……………………………………………………25

2.8 Conclusion……………………………………………………………………………….29

CHAPTER THREE: MARRIAGE LEGISLATION AND THE IMPACT ON SPOUSES'S RIGHTS IN BILATERAL MARRIAGES

3.1 Introduction……………………………………………………………………………30

3.2 Rights of Spouses Under Statutory Law……………………………………………30

3.2.1 Children Welfare……………………………………………………………………..30

3.2.2 Matrimonial Property………………………………………………………………...34

3.2.3 Inheritance…………………………………………………………………..….35

3.3 Rights Of Spouses Under Customary Law………………………………………….....37

3.3.1 Children Welfare……………………………………………………………………..37

http://etd.uwc.ac.za/

3.3.3 Matrimonial Property………………………………………………………………… 40
3.3.4 Religious Marriage………………………………………………………………… 41
3.4 Conclusion…………………………………………………………………………………42

CHAPTER FOUR: RESOLUTION OF CONFLICTS ARISING FROM BILATERAL MARRIAGES IN ZAMBIAN COURTS

4.1 Introduction………………………………………………………………………………. 44
4.2 Jurisdiction of Courts on Bilateral Marriages in Zambia…………………………………44
4.2.1 The High Court……………………………………………………………………. 45
4.2.2 Family Court as a Division of the High Court…………………………………….. 46
4.2.3 The Subordinate Court of Zambia…………………………………………………48
4.2.4 The Local Court of Zambia……………………………………………………….. 49
5.0 Conclusion…………………………………………………………………………………58

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion…………………………………………………………………………………59
5.2 General Conclusion 59
5.3 Recommendations 65
5.3.1 Repeal and Replace the Marriage Act chapter 50 65
5.3.2 Amend the High Court Act 67
5.3.3 Amend Repugnancy Clause 68
5.1.4 Further Research in Introduction to African Customary Law 68
Bibliography 69

UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/

CHAPTER ONE

1.1 BACKGROUND PROBLEM STATEMENT

In the Zambian context, marriage is one concept that has more than one definition[1] This is because marriage can be legally contracted under two laws namely African customary law[2] and statutory law.[3] The former is potentially polygamous[4] while the latter is monogamous.[5] In terms of validity, a marriage that fulfills the dictates of either law becomes a valid marriage.[6] In practice, however, those that contract their marriage under statute also fulfill the dictates of African customary law.[7] The resultant effect is that such marriages are contracted under both laws thereby creating a 'dual-legal' marriage. In this research a dual marriage will conveniently be termed 'bilateral marriage' for ease of reference.

While the birth of bilateral marriage can be said to be an informal attempt by customary law at synergizing it with statutory law, its efficacy embroils the law into the deeper realms of conflict.[8] Until a deliberate attempt is made at confronting the status quo, and finding a well-researched solution, certainty of law in marriage will remain elusive. Imperative to note is that bilateral marriage is traceable to colonialism and the introduction of dualism in Zambia.[9]

UNIVERSITY of the WESTERN CAPE

---

[1] Marriage in Zambia is defined in accordance with the law that provides for the type of marriage that one has contracted. It could be defined in accordance with statute law enshrined in the Marriage Act Cap 50 of the Laws of Zambia or customary law and more often than not Christianity rules.

[2] Comprises local custom and tradition of indigenous peoples and forms the other system in the dual system of Zambia. Customary law is unwritten –Zambia has no legislation with regards to customary marriage laws, therefore reliance is placed on unwritten traditional norms and common practices.

[3] This is the law enshrined in statutes or Acts of Parliament.

[4] A polygamous marriage is one which allows a man to marry more than one wife.

[5] A monogamous marriage is one which allows one man and one woman. If either party marries another while in a monogamous marriage, the subsequent marriage is void abinitio.

[6] *Fenias Mafemba v Ester* Sitali (2007) ZR 215 SC p 265.

[7] Similar practices happen in other parts of Africa as well such as South Africa and Nigeria.

[8] *Janet Mpofu Mwiba v Dickson Mwiba (1980) Z.R. 175 (H.C.)*, p 35.

[9] Prof Chuma Himonga & Dr Fatimata Diallo available at https://www.legitimus.ca/static/uploaded/Files/Documents/Rapports/Rapports2/Formation-and-Patterns-of-Customary-Marriage-in-Zambia---a-Socio-Legal-Study (accessed 20 May, 2022).

http://etd.uwc.ac.za/

The Marriage Act[10] and customary law, however, provides conflicting benefits on the parties which may not be mutually exploited.[11]The fact that the law indirectly permits individuals to contract bilateral marriages therefore make the law uncertain and provide a recipe for confusion and injustice. The first notable confusion of a bilateral marriage is the nature of the marriage that parties enter into. The Marriage Act[12] and Customary Law provides for different marriage procedures as well as different remedies. For example, under Customary Law, a spouse can not apply for maintenance during the subsistence of a marriage, nor can she apply for willful neglect to maintenance when she has been abandoned by a spouse. Such a spouse can only be compensated after divorce and the said compensation is at the discretion of the Court. [13] On the other hand, a spouse in a statutory marriage can sue for maintenance pending suit, willful neglect and judicial separation during the subsistence of a marriage.[14]In addition, a spouse in a statutory marriage can also sue for maintenance after divorce.[15]

Another conflicting position is in the context of court jurisdiction. If a spouse in a bilateral marriage decides to commence legal proceedings, any issue arising from a statutory marriage is heard in the High Court, while those arising from customary marriage are heard in the Local Court.[16] This confusion is compounded with the fact that there is no legislation in Zambia that gives a party to a marriage an option of which court to go to when seeking redress or interpreting their rights in the context of bilateral marriage.[17] The practice has been that, when parties

---

[10] Marriage Act Chapter 50 of the laws of Zambia.

[11] This concern has also been raised by Exnobert Zulu and Lungowe Matakala (2019) Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum, University of Zambia.

[12] Marriage Act Chapter 50 of the Laws of Zambia.

[13] *Janet Mpofu Mwiba v Dickson Mwiba* (1980) Z.R. 175 (H.C.), p35.

[14] Sections 34 and 58 of the Marriage Act Chapter 50 of the Laws of Zambia.

[15] Sections 56 of the Marriage Act Chapter 50 of the laws of Zambia.

[16] It was held in the case of *Janet Mpofu Mwiba v Dickson Mwiba* (1980) Z.R. 175 (H.C.), that the High Court has no jurisdiction over potentially polygamous marriage, it can only dissolve monogamous marriages.

[17] Section 4. (1) of the Matrimonial Causes Act provides that the High Court, hereinafter referred to as " the Court" shall have and exercise, subject to the provisions of this Act, jurisdiction and power in relation to matrimonial causes instituted or continued under this Act. While on the other hand the Local Court Act Chapter 29 of the laws of Zambia provides under section 5; (1) Local courts shall be of such different grades as may be prescribed, and local courts of each grade shall exercise jurisdiction only within the limits prescribed for such grade: Provided that no local court shall be given jurisdiction— (i) to determine civil claims, other than matrimonial or inheritance claims, of a value greater than one hundred and twenty fee units.

http://etd.uwc.ac.za/

contracted a bilateral marriage, court proceedings are commenced in the High Court.[18] This however, creates a problem since it perpetuates the colonial attitude that regarded a customary marriage to be inferior to a statutory marriage.[19]

Furthermore, while a statutory marriage is monogamous, a customary marriage is potentially polygamous. This seem to create two conflicting rights to particularly a husband who may be committing the offence of bigamy under the Marriage Act if he marries another wife.[20] In the case of *The People Vs. Chitambala*[21] for example the accused was convicted of bigamy and sentenced to 12 months imprisonment after he had contracted a second marriage under statutory law, while his customary marriage was still subsisted.

Against this background contracting bilateral marriages, therefore, make the law uncertain and may create confusion. Further, it can cause injustice. Moreover, the permissive nature of section 20 of the Marriage Act[22] fuels the conflict in that it provides a window through which the creation of bilateral marriage is realised. Section 20 of the marriage Act provides as follows:

> "Marriages may be solemnized in any licensed place of worship by any licensed minister of the church, denomination or body to which such place of worship belongs and according to the rites and usages of marriage observed in such church, denomination or body, or with the consent of a recognized minister of the church, denomination or body to which such place of worship belongs by any licensed minister of any other church, denomination or body according to the rites and usages of marriage observed in any church, denomination or body. Every such marriage shall be solemnized with open doors between the hours of six o'clock in the forenoon and six

---

While the Matrimonial Causes Act specifically provides for rights of spouses under a statutory marriage, the Local Court Act also specifically provides for rights of parties married under Customary law, however, the law is silent on the jurisdiction of the courts where parties have a bilateral marriage.

[18] In the case of *Kaniki v Julias* (1967), ZR 71, the court held that "where customary law is in conflict with statutory law, statutory law will apply over customary law".

[19] For example, when a spouse commences proceedings at the Local court, her case is dismissed upon the court discovering that she acquired a statutory marriage certificate and that spouse is referred to the High Court instead.

[20] Section 38 of the Marriage Act Chapter 50 of the Laws of Zambia.

[21] *The People Vs. Chitambala* (1969) ZR 142 (H.C), p 25.

[22] Chapter 50 of the laws of Zambia.

http://etd.uwc.ac.za/

o'clock in the afternoon, and in the presence of two or more witnesses besides the officiating minister."

The above section allows parties to contract marriages at churches by licensed Ministers who later issues marriage certificates to them. When solemnizing marriages, religious ministers are guided by biblical dictates and grounded in bible scripture,[23] thereby infusing a Christian aspect in the marriage. Furthermore church ministers either issues a church Marriage Certificate which is usually a Form prescribed in accordance with a particular church or denomination or a Form 6 as prescribed by the Marriage (Forms and Fees) rules under section 46 of the of the Marriage Act.[24] The issuing of a church marriage certificate fuels the confusion in that the High Courts of Zambia do not recognize any other Marriage Certificate aside from Forms 5 and 6.Consequently while the marriage would be said to be a statutory marriage, it is also said to be a Christian marriage by virtue of the parties obtaining a church Marriage Certificate.[25] Unfortunately, despite the Judiciary being fully aware of the situation, the courts have taken a back seat in entertaining marriages contracted legally at churches by licensed Ministers, but with a church Marriage Certificate.[26] When such parties decide to petition for the dissolution of the marriage or claim for any other reliefs under their marriages, they are turned away from the Court Registries by the court marshals upon having sight of their marriage certificate stating that the Courts have no jurisdiction to hear issues arising from Christian marriages.[27]

The situation is further compounded by the Court's lackadaisical approach when dealing with bilateral marriages, and the State's indifference to the status quo.[28]While customary laws have traditional norms regarding property settlement at the times the parties dissolve their marriage,

[23] Genesis 2:24: Therefore, a man shall leave is mother and his father and hold fast to his wife, and they shall be one flesh.

[24] Every marriage certificate shall be in either Form 5 or 6 in the First Schedule.

[25] Mathew 19: 4, he answered, have you not read that he who created them from the beginning made them male and female, and said "therefore a man shall leave his father and mother and hold fast to his wife and the two shall become one flesh? So they are no longer two but one flesh. What therefore God has joined together, let no man separate.

[26] There is yet to be a decided case in Zambia on this position as it has been an unspoken issue for years and surprisingly no individual has petitioned the courts of law on this issue.

[27] Before court documents are filed registry, clerks have a mandate to ensure that all documents are in order, therefore, when one is petitioning the court for dissolution of marriage, production of a marriage certificate is mandatory. Consequently, when the registry clerks notice the church marriage certificate, they do not accept the petition for filling, instead they advise the parties that the High Court only recognizes Form 6.

[28] Exnobert Zulu & Lungowe Matakala 'Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum' (2019) 3-18.

http://etd.uwc.ac.za/

statutory laws equally guides the parties and the courts on how to deal with property sharing[29]. Evidently the High Court applies a much fairer equitable standard than the Local Courts. Local Courts do what is fair, reasonable and equitable but they cannot achieve this result because they are limited by customary practices in the way they analyze spousal property[30]. For example, in some tribes, such as the Lozi and Tonga tribes, women are not entitled to own matrimonial property after divorce as established in the case of *Mwiya v. Mwiya*[31], Judge Sakala sat with two Lozi assessors who unanimously agreed that there is no Lozi custom which entitles a divorced wife to maintenance or share of property even if she helped to acquire**.**[32]

However, the above position has since changed with the influence of human rights movements and instruments.[33]Currently Local Courts apply the principles of equity and fairness in sharing matrimonial property. irrespective of customary law or common law. For example, in the case of *Rosemary Chibwe v Austin Chibwe*[34], the supreme court held *interalia* that in making property adjustments or awarding maintenance after divorce the court is guided by the need to do justice considering the circumstances of the case and further customary law in Zambia is recognized by the Constitution provided its application is not repugnant to any written law.[35]

The courts seem to take a different approach with regards to property settlement in a bilateral marriage. In the settlement of property, the Court looks at the intention of the parties and their contributions to the acquisition of the matrimonial property. For example, in the case of *Tembo v Tembo*[36] the Supreme Court held that in making the determinations on property, "the Court looks

UNIVERSITY of the WESTERN CAPE

---

[29] Section 55 of the Matrimonial Causes Act No. 20 of 2007.

[30] Munshya, E 'Statutory Recognition of Customary Marriages in Zambia: Reforming colonial marriage laws 'available at http://www.eliasmunshya.org (accessed 17 March 2022).

[31]*Mwiya v. Mwiya* (1977) ZR 113 p. 35.

[32] The facts of the case are that the Respondent (husband) and the Appellant (wife), both Lozi by tribe, were divorced at Mulobezi Local Court. The appellant appealed to the subordinate court on the grounds inter alia, that the property bought during the marriage was not shared between the parties. The senior resident magistrate dismissed the appeal and upheld the decision of the lower court. From the decision of the subordinate court the appellant appealed to the High Court on the grounds that under Lozi custom, property acquired during the marriage should be shared between the parties, a husband should support his divorced wife throughout her life and the husband should be compelled to take back his wife.

[33] Munshya, E 'Statutory Recognition of Customary Marriages in Zambia: Reforming colonial marriage laws 'available at http://www.eliasmunshya.org (accessed 17 March 2022).

[34] *Rosemary Chibwe v Austin Chibwe* (SCZ Judgment No. 38 of 2000) p 46.

[35] Article 7(d) of the Constitution of Zambia, Act No. 2 of 2016.

[36] *Tembo v Tembo* (2004) Z.R. page 79

http://etd.uwc.ac.za/

at the intention of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement, then the Court must make a finding as to what was going on in their mind at the time of acquisition of the property".[37]

Therefore, this research will focus on bilateral marriages, the conflicts arising from it and the impact these marriages have on the rights of the parties contracting them.

1.2 Research Questions

The main objective of this research is to critically analyze bilateral marriages in Zambia and their impact on the rights of spouses in these marriages.

The above objectives will be addressed by looking at the following sub-questions:

1.2.1 What are the different forms of bilateral marriages in Zambia?

1.2.2 What is the legal framework of bilateral marriages in Zambia?

1.2.3 What are the legal consequences of having bilateral marriages?

1.2.4 How do Zambian courts resolve the conflicts that arise in bilateral marriages?

1.2.5 What is the impact of bilateral marriages on the rights of spouses after court decisions?

UNIVERSITY of the
WESTERN CAPE

1.3 Significance of the Study

This study is significant because it sets out to highlight the challenges in the law regulating marriages in Zambia and propose ways of reducing some conflicts associated with bilateral marriages. It is important to note that family is the basic unit of society and that marriage is the commonly used institution in perpetuating family. Marriage is therefore the core fabric of society

[37] See also the case of *Chilima v Chilima* (2000) Z.R. 103, where the following observation was made; "When a woman and a man join in holy matrimony they become one body, one flesh and during the subsistence of their marriage they acquire property jointly and individually and until the marriage is put asunder none of them should be heard to say he owns this or that property."

http://etd.uwc.ac.za/

which has the right of claim to procreation which ultimately gives birth to family. It creates, and often gives birth to new relationships.

Yet the uncertainties of law and the injustice emanating from the conflict of laws on marriage threaten the very existence of society.Through marriage, certain rights, obligations, and privileges are conferred on the couple, and their relatives. These benefits and obligations emanate from the law regulating marriage and its auxiliary relationships. The need for certainty of law regulating this institution is therefore imperative.

Emanating from the background information to this study, it appears that the courts are inclined to take a different approach with regards to property settlements in a bilateral marriages. A bilateral marriage is dissolved only by the High Court, notwithstanding the fact that the parties are married under both customary and statutory law. The Court looks at the intention of the parties and their contributions to the acquisition of the matrimonial property. The foregoing scenario tends to present a serious challenge stemming from the aspect of overlooking the legal limitations associated with customary marriage. This is a recipe for conflict as the legal and administrative gap created therefrom needs analysis in order to bring about equity and fairness in the dispensation of justice.

In the case of *Tembo v Tembo*[38] the Supreme Court held that in making the determinations on property:

> "the Court looks at the intention of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement, then the Court must make a finding as to what was going on in their mind at the time of acquisition of the property".[39]

This study, therefore, is aimed at adding to the body of knowledge on the subject matter as well as at increasing awareness among various Zambian interest groups such as scholars and researchers including the judiciary. Further, the study is meant to motivate, generate interest and conscientize scholars and academia interest groups to appreciate the issues under discussion and assist in

[38] *Tembo v Tembo* (2004) Z.R p 79.

[39] See also the case of *Chilima v Chilima (*2000) Z.R. 103, where the following observation was made;
"When a woman and a man join in holy matrimony they become one body, one flesh and during the subsistence of their marriage they acquire property jointly and individually and until the marriage is put asunder none of them should be heard to say he owns this or that property."

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

making informed discussions in so far as proposing remedial measures to the vexing issues surrounding bilateral marriages in Zambia and the impact on the rights of spouses found in these marriages.

1.4 Literature Review

Numerous research has been conducted on customary and statutory marriages in Zambia. There is enough literature on issues relating to divorces in Zambia. However, not much research is available which analyse bilateral marriages and their impact on the contracting partners. The researcher found this area important as the dual system of marriages in the country contribute to some of the conflicts experienced in marriages.

The literature regarding conflicts arising from bilateral marriages and the impact on the rights of spouses under these marriages is scares. For some old reason, while concerns have been raised about bilateral marriages in Zambia, there has not been much information on their analysis. Most of the written and published works in this field mainly discuss the different types of marriage in Zambia, however, the consequences of contracting the said types of marriages largely remain a discussion in the corridors of the courts and a topic for discussion among academics.

The closest literature relating to this research is by Exnobert Zulu and Lungowe Matakala's 'Conflict of laws in bilateral marriages that fuse statutory law and Ngoni customary law in Zambia: the need to address the conundrum'[40] . This study focuses on the conundrum attendant to the strict application of duality of laws in bilateral marriages. The main outcome of this study analyses the impact of bilateral marriage and its benefits to its contracted parties; appreciate some gaps and make remedial recommendations to appropriate stakeholders and strategic interested parties.

Elias Munshya's 'Statutory Recognition of Customary Marriages in Zambia: Reforming colonial marriage laws'[41] research outlines the usefulness of the distinction between statutory and customary marriage. The author notes that the distinction between these two types of marriages

[40] Exnobert Zulu & Lungowe Matakala 'Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum' (2019) 3-18

[41]Munshya, E 'Statutory Recognition of Customary Marriages in Zambia: Reforming colonial marriage laws 'available at *http://www.eliasmunshya.org* (accessed 17 March 2022).

http://etd.uwc.ac.za/

have outlived its usefulness. In the modern legal regime, it would be a good idea to collapse the distinctions and give statutory recognition to customary marriages.[42]

Nchimunya Katowa's 'Evaluation of the Sanctity of Marriage Between Customary and Statutory Marriages vis-à-vis Divorce',[43] study evaluates the sanctity of marriage between customary and statutory marriages in relation to divorce. The research makes a comparison of the marriages contracted under these laws and notes that statutory marriage tends to enjoy a superior status over customary due to the repugnancy clause. The research recommends that these marriages should be given equal status.

Other related literature which has been reviewed includes: Lungowe Matakala's 'Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws'[44] thesis. The thesis analyses the laws applicable in Zambia, and their attendant hierarchy.[45] The scope of this research is limited to laws relating to succession and inheritance and its application to the widows and orphans in Zambia.

Though this research does not deal with the conflict of laws in marriage, it discusses among others the importance of article 23 (4) of the Constitution on African Customary law vis-à-vis statutory law. This research, however, relies on analysing article 23 (4) of the Constitution in discussing the cause of conflict of laws regulating marriage in Zambia. Lungowe's research also discusses ways of reconciling laws.

Muna Ndulo's 'African Customary law, Customs, and Women's Rights',[46] is a discourse on African customary law customs and women's rights. It examines, among others, the role played by African customary law in the prevailing African legal setting and the resultant conflict of laws.[47]

[42]Munshya, E 'Statutory Recognition of Customary Marriages in Zambia: Reforming colonial marriage laws 'available at http://www.eliasmunshya.org (accessed 17 March 2022).

[43] Nchimunya Katowa *Evaluation of the Sanctity of Marriage Between Customary and Statutory Marriages vis-à-vis Divorce* (unpublished LLB Dissertation, University of Zambia,2011)11-30.

[44]Lungowe Matakala *Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws* (unpublished Ph.D thesis University of Cambridge, 2009) P21-45.

[45] Lungowe Matakala *Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws* (unpublished Ph.D thesis University of Cambridge,2009) p38-45.

[46] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*, (2011) Vol 18. Iss. 1. Article 5 187.

[47]Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*' (2011) Vol 18.Iss.1. Article 5 90.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

Though the article's title appears limited to the issue of women's rights in a homogenous African setting regulated by African customary law, it notes the need to create one legal system which takes into account both received law and customary law.[48] This research, therefore, intends to build on Ndulo's research by identifying the cause of this conflict of laws and proposing solutions.

1.5 Methodology

The research is qualitative in nature. Qualitative research is defined as a means by which one explores and understands the meaning that individuals or groups ascribe to a social or human problem[49].The methodology utilised in this research is the socio-legal approach. The methodology is preferred because it is flexible and not intellectually rigid to understanding law and the operation of the legal system[50]. It represents a new method of studying law in the broader social and political context. It uses a number of methods taken from various disciplines in the social sciences.[51] This methodology incorporates the case study design. It is this design or strategy which this research has used in pursuit of dealing with the identified challenges.

The case study is defined as a strategy of inquiry in which the researcher investigates in depth an event, activity, process or one or more individuals.[52] The case in point is the conflicting benefits conferred on parties to a marriage that emanates from the State's failure to effectively regulate the institution of marriage. This failure invariably leads to uncertainty in law. Although the law provides distinct procedures and rules applicable when contracting marriage under either law, its failure to proscribe the use of both laws when contracting a marriage, leads to a bilateral marriage and the attendant conflicts. The process of contracting a valid marriage in Zambia, the prevailing law, the rights incidental to the parties to a marriage, and the rights of the parties to a marriage at the dissolution of marriages therefore forms the essence or focus of this study.

John Cresswell states that cases are bounded by time and activity, and researchers collect detailed information using various data collection methods over a given period of time[53]. Evidence from

[48]Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*' (2011) Vol 18.Iss. 1. Article 590.
[49] John Cresswell W *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* ed (2009) p 4.
[50] Mike McConville & Wing Hong Chui *Research Methods for Law* (2007) 4-5.
[51] Mike McConville and *Wing Hong Chui, Research Methods for Law* (2007) 4-5.
[52] Robert Yin K Case Study Research: Design and Methods ed. (2009) p 9.
[53]John Cresswell W *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* ed (2009) p13.

http://etd.uwc.ac.za/

case study can come from different sources. These sources include documentation, archival records, interviews, direct observation, and physical artifacts.[54]

The research's analysis therefore heavily relies on secondary data obtained through desk or doctrinal research. To this end the researcher will review decided cases, published books and articles. The data relied on therefore is that obtained from the documents listed above.

1.6 Chapter Outline

The dissertation contains five chapters. The first chapter is the introduction which includes the problem statement, purpose of the research and specific objectives and research questions. The second chapter provides, among others, an introduction which outlines the brief historical development of Zambia's legal system, particularly the law on marriage. It further discusses a party's capacity to marry and the nature and characteristics of these marriages. It highlights the procedural niceties related to contracting either marriage. It also spells out what actually happens in practice – namely, the contracting of bilateral marriages.

The third chapter looks at the regulation of marriages in Zambia and also the enabling legislation that champions the spouse's rights in bilateral marriages. In doing so, the chapter considers the different types of rights conferred on spouses under the different types of marriages. The said legislation will vary from divorce, inheritance, custody etc. Chapter four further discuss the efficacy of these laws. It also identifies the drivers of conflict of laws regulating marriage in Zambia.

Chapter four further focuses on the Courts attitude towards resolving conflicts that arise from bilateral marriages. It also analyses how courts in Zambia use the legal framework in resolving the said conflicts. The chapter also answers the research questions by highlighting the impact of bilateral marriages on the rights of spouses. This in turn exposes the conflicting rights and obligations that these laws confer on the parties. This chapter critically analyses how these spouses are positively or negatively affected by contracting bilateral marriages and what recourse they have if negatively affected.

Chapter five concludes the dissertation and makes recommendations.

---

[54] Robert Yin K *Case Study Research: Design and Method*s ed. (2009) p 99.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

CHAPTER TWO: MARRIAGE IN ZAMBIA

2.1 Introduction

> "A good system has to possess certain attributes. One of the characteristics of a good legal system is that there has to be certainty and predictability. One should be able to ascertain the likely outcome of the case by just looking at the facts. The need for certainty entails the need for several attributes such as: the law should be written down so as to ensure certainty. Additionally, the law should be comprehensive, that is to say it must cover as much as possible all potential disputes."[55]

With regard to marriage laws in Zambia, the above quotation leaves much to be desired. The law on marriages is not just uncertain, but also not comprehensive enough. Why is this the case? Law such as customary law is yet to be written while the statutory laws on marriage, on the other hand, seem to collide with the unwritten customary laws hence causing conflicts in its application.

This chapter, however, discusses the current legal status of marriages in Zambia by highlighting the different types of marriages that are recognised, and how they lead to the creation of bilateral marriages. The aim is to show how the two marriage systems overlap, and create uncertainty in the legal protection of rights and obligations of parties to these marriages. This chapter will demonstrate that most Zambians combine customary marriage practices, such as payment of dowry, with signing a Form 6 which then constitutes a statutory marriage.[56] Furthermore, the chapter will also confirm that other couples incorporate religious practices and statutory requirements invariably creating confusion pertaining to rights and obligations of the parties in a marriage.[57]

To achieve this objective, this chapter sets out to outline the law regulating the validity of statutory, religious, and African customary law marriages in Zambia. The laws regulating the different marriages in Zambia is linked to the political history, predating colonialism. Like many African Countries, Zambia was established as a British territory by the British South African Company

---

[55] Munalula M *Legal Process: Zambian cases, Legislation commentaries Lusaka* (2004) p5 [Be consistent with the use of names or only initials w

[56] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p8

[57] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p8

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

(BSA).[58] Colonisation of Zambia by the British government therefore resulted in a transition of the Zambian Legal System. This is due to the enactment of statutory law after colonialism which has resulted in the pluralistic nature of the Zambia legal system.[59]

Due to colonisation, the Zambian legal system has gone through some changes in three stages: the Pre-colonial era, colonial era, and post-colonial era. This chapter therefore highlights the fact that the creation of bilateral marriages is linked to the history of colonisation in Zambia. Significant effort is devoted to stating in great detail the extents of conflict in the laws regulating marriages.

2.2 Pre-Colonial Era

Zambia has 73 ethnic groups, with all having different customs and traditions. Prior to colonisation, customary laws regulating marriages were rooted deep in tradition, cultural norms and practices that varied from one ethnic group to another.[60] The effect of this was that African customary law was often viewed as a unique possession of a particular ethnic group handed down to them by their ancestors or God.[61] Just like in other jurisdictions[62], customary law in Zambia has no uniform application. It is depended on a particular ethnic group.[63] The distinction was mainly dependent on whether the descent, clan affiliation, and succession to office followed the matrilineal[64], patrilineal[65], or a bilateral lineage[66] system. It is also imperative to state that marriages were mainly contracted within the ethnic groups.[67]

Notwithstanding this fact, bilateral marriages did exist during pre-colonialism save for the fact that less has been recorded in this regard. Bilateral marriages in this era arose through customary marriages between different tribes. For example, a Bemba man could marry a Lozi woman. This, however, did seem to create conflict especially where two parties with different lineage systems got married. Another example, of bilateral marriages would arise when a man from a matrilineal

[58] Mushota R K K *The Control of Mining Companies under Zambian Mining and Company Law* (unpublished Ph.D thesis,University of Birmingham UK ,1980) Chapter 2.
[59]Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies'* (2011) Vol 18.Iss. 1. Article 5 90 p 11.
[60] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p 1.
[61] Anthony Allott N *Essays in African Customary Law* (1960) p 59.
[62] Such as Malawi and Nigeria.
[63] Fredrick Mudenda S *Land Law in Zambia:Cases and Materials* (2006) p 12.
[64] Based on kinship with the mother or female lineage.
[65] Based on kinship with the father or male lineage.
[66] A system of kinship in which grants equal status to male lineage and female lineage.
[67] Anthony Allott N Essays in African Customary Law (1960), p 59.

http://etd.uwc.ac.za/

lineage marries a woman from a patrilineal lineage. The Bemba's kinship is based on descent in the matrilineal line. This again is true among other Zambian tribes like the Bisa, Lamba, Lala, Chewa, Kaonde, Luba, and others. A man's legal entitlements and rights of inheritance are on his mother's side.[68] He has no rights to inheritance from his paternal clan. Therefore, if a Bemba man married a Lozi woman, conflicts would arise with respect to which clan the children would belong to and from which parent they would inherit. Furthermore, there were different marriage rights and procedures followed when contracting a marriage amongst the diverse tribes.

In an event of a collision of customs from different tribes leading to a conflict, which result in the infringement of someone's marital rights, customary law seems not to have a solution. Put differently, there is no properly acceptable practice in resolving the conflicts arising from bilateral marriages. In part, this is largely attributed to the fact that customary law remains unwritten, and deems a man more superior to a woman.[69] Consequently, in most cases, the disadvantaged party is a woman as custom deems a man to be superior over a woman and therefore the man's custom carries the order of the day.[70]

2.3 Colonial Era

During the colonial era, Northern Rhodesia, as Zambia was then called, was governed by the British South African Company (BSA Co., or the Company). The BSA Co.'s administration of the territory lasted about thirty-two years from (1891 to 1923). During this period, the Company made the effort to formalise the Zambian African customary law system. Clear distinctions were legally made between White settlers and Africans. The need to maintain this racial divide led to the establishment of the dual legal system.[71]

The colonisers who migrated with their own legal system adopted, in certain instances, a policy of qualified tolerance of indigenous law.[72] The customary law applied to Africans, while the received

[68] Audrey Richards I *Bemba Marriage and Present Economic Conditions* (1969) p.30.
[69] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies'* (2011) Vol 18.Iss. 1. Article 5 90 p 187.
[70] Lucy Mair P *African Marriage and Social Change in Survey of African Marriage and Family Life* (1953) p.51.
[71] Earl Hover L John Piper C & Francis Spalding O '*One Nation One Judiciary: The Lower Courts of Zambia.*' Zambia Law Journal, (1970) Vol. Nos. 1 and 2 p4.
[72] Carlson Anyangwe 'The Whittling Away of African Indigenous Legal and Judicial Systems' Zambia Law Journal (1998) p.4.

http://etd.uwc.ac.za/

law applied to the White settlers. Laws relating to marriage equally maintained this partition.[73] English common law was applied in areas affected directly by White rule, while African customary law was used in areas under 'indirect' BSA Co. rule. The colonial regime recognized African customary law, especially in the area of personal laws. African customary law was, however, considered subservient to any British Law in force in the territory at the time.[74]

Native courts were established in urban areas to administer African customary law to the majority of Africans who maintained their customary way of life after migrating to urban areas. The setting up of such Native courts was aimed at avoiding the emergence of a 'detribalised' urban population.[75] Members of the bench were recruited from the native authorities on account of their knowledge in customary law and experience in traditional courts.[76] The status *quo* subsisted until independence. Relevant to the focus of this thesis, Africans were never allowed to marry under the Marriage Ordinance or English law until in 1963.[77] Arguably, this means that fewer or no bilateral marriages were concluded.

Thereafter, Africans were allowed to marry under the Marriage Ordinance Act[78]. Spouses marrying under the Act would, however, still observe the traditional marriage practices under customary law as well as the Marriage Ordinance Act requirements. However, once parties decide to divorce, the courts of law would ultimately decide that statutory law was applicable thereby invalidating whatever rights parties may have had under customary law.[79] Furthermore, this caused conflict with regard to jurisdiction of courts due to the distinction of courts that dealt with either customary law marriages or statutory law marriages.[80]

UNIVERSITY of the WESTERN CAPE

2.4 Post-Colonial Era

---

[73]Carlson Anyangwe 'The Whittling Away of African Indigenous Legal and Judicial Systems' Zambia Law Journal (1998) p.4.

[74] Winnie Sithole Mwenda *Paradigms of alternative dispute resolution and justice delivery in Zambia* (2006) p73.

[75]Epstein A.L *Urbanization and Kinship: The Domestic Domain on the Copperbelt of Zambia 1950-1956*(1981) p16.

[76] Epstein A.L Urbanization and Kinship: *The Domestic Domain on the Copperbelt of Zambia* 1950-1956(1981) p16.

[77]*The People v Paul Nkhoma* (1978) Z.R. 4.

[78] The Zambian Marriage Act originated from the Marriage Proclamation issued for Northern Rhodesia in 1918. The changes made to this statutory law of a marriage included Africans being allowed to marry under the new Marriage Ordinance.

[79] *KanikI v Jairus* (1967) Z.R. 71.

[80] *Janet Mpofu Mwiba v Dickson Mwiba* (1980) Z.R. 175.

http://etd.uwc.ac.za/

The independence of Zambia in 1964 brought with it a myriad of social and legal changes. Urbanisation dictated by industrialisation, intensified the rural – urban drift.[81] The resultant effect included increased ethnic social interaction which at times resulted into bilateral marriages. The post-colonial era has also witnessed enactments of different statutes which provides for marriages in Zambia, as well as rights under these types of marriages. In the same vein, customary law marriages have equally continued alongside statutory law marriages. However, the existence of these two separate laws on marriage has allowed parties to continue their old practice of contracting bilateral marriages which has fueled the conflicts already in existence. The said conflicts will be discussed in detail, starting with the requirements of a valid marriage under both statutory and customary law.

2.5 Types of Marriages in Zambia

In Zambia, the term marriage has a number of distinct meanings. The first meaning relates to the state of being married thus the relation between husband and wife; wedlock or matrimony. The second meaning refers to the act of marrying: wedding. The third meaning denotes the rite or form used in marrying.[82] In addition, the definition of "marriage" reflects either statutory or customary law, as laws that regulates marriages in Zambia.[83] Marriage has been generally defined as a union between a man and a woman and recognised by the law, whether customary, religious or statutory law.[84] It should however be pointed out from the outset that the two main types of marriage in Zambia are statutory and customary. There is of course the third silent type of marriage, religious, which has features of a statutory marriage. In the preceding paragraphs the three types of marriages, and their requirements will be discussed in turn.

2.5.1 Statutory Marriage

In Zambia, the statutory meaning of marriage was derived from Lord Penzance's definition in the case of *Hyde v. Hyde and Woodmansee*,[85] where marriage was defined as "a voluntary union for life of one man and one woman to the exclusion of all others." The English definition denotes that

---

[81] Epstein A.L *Urbanization and Kinship: The Domestic Domain on the Copperbelt of Zambia 1950-1956*(1981) p92.

[82] Licien Cornelious B *Marriage; The Golden Key to Unhappiness* (1994) p45.

[83] Lilian Mushota Family *Law in Zambia: Cases and Materials* (2005) p8.

[84] Mandy Manda *Marriage* (2020) p1.

[85] *Hyde v. Hyde and Woodmansee* (1866) LRI P & D130.

http://etd.uwc.ac.za/

marriage is for life.[86]In the case of the *People v Katongo*[87] a statutory marriage was defined as a contract for the voluntary union of one man and one woman to the exclusion of all others, until that union is terminated by death, or is dissolved or annulled by statute or by decree of a competent tribunal.[88]

This definition mirrors the English one in that it brings about the monogamous requirement of marriage, negating all other people. The exclusion of extended family members in a statutory marriage is in direct conflict with a customary marriage which, as it will be shown below, is a union between two families. It further recognises that there is a possibility of the marriage ending either when one party dies or when parties divorce.[89]

The requirements of a statutory marriage are not farfetched, as they are inferred from the definition itself.[90] The statutory definition of marriage both in the case of *Hide v Hide and Woodmansee*[91] and *The People v Katongo*,[92]expressly defines it to be a "voluntary union"[93] which means that the act of marriage should be willfully intended by both the man and the woman.[94] Voluntary has been defined by the Law dictionary[95] to mean the following: unconstrained by interference; uncompelled by another's influence or free and unrestrained will of the person. Consequently, the parties are required to be of proper mental capacity so as to make a proper decision devoid of any external influences.[96]

Furthermore, the adopted definition further defines marriage to be between "one man and one woman",[97] therefore according to the Zambian Law, marriage can only be recognised if it is

UNIVERSITY of the
WESTERN CAPE

---

[86]Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p 56.
[87] *The People v Katongo (1974) Z.R 366* p369
[88] *The People v Katongo* (1974) Z.R 366, at 369 per Care J.
[89] A statutory marriage is a union of two parties in the marriage, but in the Zambian context, their families are very much party of the alliance.
[90] *The People v Katongo* (1974) Z.R 366, at 369
[91]*Hide v. Hide and Woodmansee* (1866) LRI P & D130
[92] *The People v Katongo* (1974) Z.R 366, at 369
[93] Marriage is a voluntary union for life of one man and one woman to the exclusion of all others.
[94] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p56.
[95] Henry Campbell Black M. A *Black's Law Dictionary. Revised Fourth Edition*. (1968) p.1746.
[96] Nchimunya Katowa *Evaluation of the Sanctity of Marriage Between Customary and Statutory Marriages vis-à-vis Divorce* (unpublished LLB dissertation, University of Zambia 2011) p 13.
[97] *The people v. Katongo* (1974) Z.R 366, at 369.

http://etd.uwc.ac.za/

between male and female or a man and a woman.[98] In the case of *Corbett v Corbett (otherwise Ashley)*[99] it was held that whether the parties to a marriage were male or female was to be determined solely by biological criteria, so that, as the respondent at the date of the marriage ceremony was not a woman but a biological male, the marriage was void. It should also be noted that the Matrimonial Causes Act[100] rendered same sex marriage as void marriages.[101]

In addition, in as much as the definition of marriage does not capture prohibited degrees or relations of marriage, it is one of the most essential elements to a valid marriage.[102] Section 27(a)(b)[103] of the Matrimonial Causes Act[104] prohibits relatives to contract a marriage. The Penal Code[105] has expressly outlined these prohibited degrees by proscribing sexual relations between male and female who are either a grandmother, grandfather, father, mother, aunt, uncle, brother, sister, niece, nephew, son, daughter, granddaughter, or grandson. A person who indulges in sexual relations within the above relations is liable to a conviction for incest.[106] In the case of *Hafiz Ayub Durga v Najmunnisa Ismail*[107] it was held *inter alia* that marriage within the prohibited degrees of relationship renders a marriage *void ab initio.*

Furthermore, the definition of marriage states that the marriage should be between one man and one woman, thereby making the marriage a monogamous one.[108] Consequently it is imperative that before parties can solemnise their marriage, none of them should be legally married to another person either under statutory or customary law.[109] Section 27[110] of the Matrimonial Causes Act[111]

---

[98] Section 27 (1) of the Matrimonial Causes Act No. 20 of 2007.

[99] *Corbett v. Corbett (otherwise Ashley)(*1970) 2WLR 1306.

[100] Section 27(1) (C)of the Matrimonial Causes Act No. 20 of 2007.

[101] 27. (1) A marriage celebrated after the commencement of this Act shall be void on the following grounds:
(c) the parties to the marriage are of the same sex.

[102] Section 27(1) (a)(i) of the matrimonial causes Act No. 20 of 2007.

[103] 27. (1) A marriage celebrated after the commencement of this Act shall be void on the following grounds:
(a) that the marriage is not a valid marriage under the provisions of the Marriage Act due to the fact that—
(i) the parties are within the prohibited degrees of consanguinity or affinity;

[104] No. 20 of 2007.

[105] Chapter 87 of the Laws of Zambia.

[106] Section 159 (1) and (2) of The Penal Code Chapter 87 of the laws of Zambia.

[107] *Hafiz Ayub Durga v Najmunnisa Ismail* (1992) SJ (HC) 1992/HP/D/28.

[108] *The People v Katongo* (1974) Z.R 366, at 369.

[109] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p111.

[110] 27(1) A marriage celebrated after the commencement of this Act shall be void on the following grounds:
(b) that either party to the marriage was lawfully married to some other person at the time of the marriage.

[111] No. 20 of 2007.

http://etd.uwc.ac.za/

renders such marriages as being void.[112] In the case of *The People v Chitambala*[113] the accused was convicted for bigamy after discovering that he was lawfully married to his first wife before contracting a statutory marriage with his second wife.

One of the cardinal requirements of a statutory marriage is the age of the parties, as age does not only determine their mental capacity but also their understanding of what they are doing.[114] Section 17 of the marriage Act provides that the person can solemnise a marriage if that person was 21 years and above.[115] The said section provides for the maximum age of which one can solemnise a marriage while section 33[116] of the marriage Act, provides the minimum age. This means that the general rule is that a person is only eligible to contract a marriage at the age of 16,[117] however, this is subject to the proviso of section 33(1) of the Marriage Act.[118] Section 33 (1) provides that "…this section shall not apply when a Judge of the High Court has, on application being made, and on being satisfied that in the particular circumstances of the case, it is not contrary to the public interest, given his consent to the marriage".

Notwithstanding the fact that the minimum age of marriage is 16, persons intending to marry between the age of 16 to 21 years are mandated to obtain consent from their father, mother or guardian.[119] If for any reason, the said parents or guardian withhold the consent, the intended party to a marriage may apply for consent from a judge,[120] and if the parents are not within Zambia,

UNIVERSITY of the
WESTERN CAPE

[112] *The People v Paul Nkoma* (1978) ZR *4*.
[113] *The People v Chitambala* (1969) ZR 143 (HC).
[114] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p61.
[115] If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Zambia, of the mother, or if both be dead or of unsound mind or absent from Zambia, of the guardian of such party shall be produced and shall be annexed to the affidavit required under sections ten and twelve and, save as is otherwise provided in section nineteen, no special license shall be granted or certificate issued without the production of such consent.
[116] (1) A marriage between persons either of whom is under the age of sixteen years shall be void.
[117] Section 33 (1) of the Marriage Act.
[118] Provided that this section shall not apply when a Judge of the High Court has, on application being made, and on being satisfied that in the particular circumstances of the case it is not contrary to the public interest, given his consent to the marriage.
[119] Section 17 of the marriage Act
[120] 19(1) If any parent or guardian, whose consent to a marriage is required, refuses his consent, a Judge of the High Court may, on application being made, consent to the marriage, and the consent of the Judge so given shall have the same effect as if it had been given by the person whose consent is refused.

http://etd.uwc.ac.za/

consent can be obtained from District Secretary, Registrar of the High Court, Registrar of Deeds, Government Medical Officer or Minister of Religion.[121]

2.5.2 Customary Marriage

Customary marriage has been loosely defined as one entered into in accordance with African customary law.[122] However, a more certain definition of customary marriage is a marriage between one man one or more women and between the woman's and man's families.[123] One profound thing from the definition is that customary marriages are potentially polygamous.[124] Polygamy is the practice of having more than one spouse.[125]

In the Zambian sense, only a man is allowed to marry more than one wife and a woman cannot marry more than one man.[126] However, it is imperative that a man seeks consent from his subsisting wife before taking on a second or third wife.[127] Further, just like in statutory marriages, such marriages are heterosexual and not same sex.[128] Expressly stated in the definition is the said marriage is between a woman and man's family, therefore under customary law, the marriage is not only between the parties marrying, but their respective families as well.[129]

Coming to the requirements of a valid customary marriage, unlike in statutory marriages , there is no specific age for marriage under customary marriages.[130] When a girl reaches puberty, she is considered eligible for marriage *albeit* this varies from one ethnic group to another as some ethnic groups allow a girl to be more mature before she is considered eligible or ready for marriage.[131] Men on the other hand are said to be eligible for marriage once they grow a beard and further they

UNIVERSITY of the WESTERN CAPE

[121] Section 19(2) of the Marriage Act Chapter 50 of the Laws of Zambia.
[122] Mandy Manda *Marriage* (2020) p5
[123] Ndulo, M *Law in Zambia* (1984) p. 143
[124] *Janet Mpofu Mwiba v Dickson Mwiba* (1980) Z.R. 175 (H.C.)
[125] Martin E.A & Jonathan Law *A Dictionary of Law* (2006) p399
[126] Muna Ndulo *Law in Zambia* (1984), p 138
[127] *Janet Mpofu Mwiba v Dickson Mwiba* (1980) Z.R. 175 (H.C.)
[128] Cox Mumba *Customary Law of Marriage and Divorce among the Lenje of Central Province* (1990) p 140.
[129] Muna Ndulo's 'African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies' (2011) Vol 18.Iss. 1. Article 5 90 p 187
[130] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p76.
[131] Ibid p76.

http://etd.uwc.ac.za/

need to do some form of work to show that they will be able to support a wife, children and other members of the family.[132]

In addition, under customary law, it is immaterial whether the man is married or not. However, the woman must be single.[133] The woman must be single, divorced or widowed while the man could be in another subsisting marriage under customary law.[134] The fact that customary marriages are potentially polygamous negates the man's marital status.

Another requirement is the involvement of family in the marriage negotiation process. In a typical traditional setting, family includes brothers, sisters, parents' uncles, cousins, aunties and all close relatives.[135] These people play a very important role in raising a child in the society or village. The involvement of the parties' families extends to the giving of the marriage payments and sometimes the paying of the same. Contrary to statutory marriages where parental consent is not a requirement, when parties intend on getting married under customary law, parental consent is cardinal.[136] If the parents refuse to grant consent for the marriage, there is no valid marriage.

Notwithstanding the fact that parents of the intended marriage have consented to it, such marriage will not be valid unless the groom's family makes marriage payments to the bride's family.[137] Marriage payments vary from tribe to tribe and so is the process for marriage. For example, under the Bemba custom of the Northern part of Zambia, the first payments made to the bride's family is known as *Nkobekela*.[138] This can either be in monetary form or in kind, presenting a bracelet to be worn by the bride, which is a symbol of an engagement. The next step is payment of *Nsalamu*.[139] The said payment is requested by the people representing the bride's family and received by a go-between who is usually known as *banachimbusa.*[140] Further, the money is not specific as it varies from bride to bride. In the past, the *Nsalamu* was in the form of a hoe or necklace or beads,

[132] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p77.
[133] Ibid p77.
[134] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p76.
[135] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p76.
[136] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p77.
[137] Muna Ndulo's 'African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies, (2011) Vol 18. Iss. 1. Article 5 187.
[138] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p81.
[139] Yizenge Chondoka *Traditional Marriage in Zambia; A study in cultural history* (1988) p 45.
[140] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p81.

http://etd.uwc.ac.za/

however, the current trend is money.[141] The legal significance of the acceptance of the *Nsalamu (bride price)* by the bride's parents symbolises marriage.[142]

In the same vein, the Tonga speaking people of Gwembe Area, Zambia begin marriage negotiations by appreciating the bride's parents by gifting her mother with two hoes known as *jamba* and her father with a spear known as *isumo*[143].That is then followed by the payment of the bride price known as *luselo* and it is usually in the form of cattle being a cow or a bull. If the cow produces a calf then that calf is returned to the groom's family to solidify the two families and this process is called *chizyole.*[144]Lilian Mushota states as follows;

> "Marriage payments are an essential aspect of a valid marriage. Acceptance of the payments by the girl or woman's parents signifies their consent. The marriage payments are many and vary from one ethnic group to another. The payments are also important because they signify a marriage relationship between the bride and the groom's families and mutual respect for each other". [145]

After a bride price has been paid, the other requirement is that the bride is handed over to the groom in a traditional ceremony.[146] It is, however, not a mandatory requirement, and is in some cases dependent on what the two families agree. In the case of *Beatrice Mulako Mukinga and Kelvin Cliford Fuller and others,*[147] for example it was held by the Supreme Court that according to Lozi custom, once the bride price is paid, it is considered to be a valid marriage. The court found that there was sufficient intention from the parties of living together and marriage was consummated, despite the fact that the handing over of the bride did not take place.

In addition**,** customary law recognizes a system of prohibited degrees far more extensive in its range than the corresponding system in a statutory marriage. This is because African societies are more closely knit.[148] Any sexual relations between relatives is regarded as

---

[141] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies'* (2011) Vol 18.Iss. 1. Article 5 90 p 93.
[142] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p80.
[143] Lilian Mushota Family Law in Zambia: Cases and Materials (2005) p80.
[144] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p 81.
[145] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p77.
[146] Yizenge Chondoka, *Traditional Marriage in Zambia; A study in cultural history* (1988) p87.
[147] *Beatrice Mulako Mukinga & Kelvin Cliford Fuller and others* (2008) SCZ.J.No. 27.
[148] Yizenge Chondoka *Traditional Marriage in Zambia; A study in cultural history* (1988) p98.

http://etd.uwc.ac.za/

incestuous and therefore forbidden by the law.[149] Traditionally, there are no cousins, uncles or aunties the commonly known relations are that of grandfather, grandmother, father, mother, brother and sister. The titles of 'mother' and 'father' extend to one's parents' siblings.[150]

2.5.3 Religious Marriage

A religious marriage is defined as a union of one man and one woman for life to the exclusion of all others.[151] This definition mirrors the statutory definition. However, the main distinction is that a religious marriage is a union for life and provides no room for divorce. The genesis of this type of marriage emanates from section 20 of the marriage Act[152] which provides that:

> "Marriages may be solemnised in any licensed place of worship by any licensed minister of the church, denomination or body to which such place of worship belongs and according to the rites and usages of marriage observed in such church, denomination or body, or with the consent of a recognised minister of the church, denomination or body to which such place of worship belongs by any licensed minister of any other church, denomination or body according to the rites and usages of marriage observed in any church, denomination or body. Every such marriage shall be solemnised with open doors between the hours of six o'clock in the forenoon and six o'clock in the afternoon, and in the presence of two or more witnesses besides the officiating minister."[153]

The above section empowers licenced ministers of churches, who include pastors and priests to solemnise a marriage in accordance with Christian rites or rights observed by that particular church or denomination.[154]

[149] Yizenge Chondoka *Traditional Marriage in Zambia; A study in cultural history* (1988) p98.
[150] Lungowe Matakala, *Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws* (unpublished PHD thesis University of Cambridge, ,2009,) P21-45.
[151] Mandy Manda *Marriage* (2020) p10.
[152] Chapter 50 of the laws of Zambia.
[153] Section 20 of the Marriage Act Chapter 50 of the Laws of Zambia.
[154] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p 58.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

2.6 Bilateral Marriages

Despite the fact that the three discussed marriages have their own procedures regulating validity, it is a common trend for most Zambians to go through either two or three procedures that essentially are applicable to a statutory, customary or religious marriage. Consequently, an overlap of these procedures leads to contracting a bilateral marriage, and thereby creating uncertainty in which law becomes applicable, and a number of conflicts. The following discussion highlights the points of conflict.

2.6.1 Section 20 of the Marriage Act

The aforementioned section [155] 20 of the Marriage Act[156] is problematic as it has created confusion in statutory marriages and is also the bedrock of religious marriages. Ordinarily, the foundation of marriage in the church is grounded in the Bible which frowns upon divorce.[157] For Christians, marriage is intended to be monogamous and for life, only with an exception of a woman's adultery.[158] Due to the authority granted to religious ministers or priests under section 20, churches are not obligated to allow the parties to sign a Form 6, which is a marriage certificate.

This is because the authority under the said section gives the men of God discretion to solemnise a marriage in accordance with the rights of that particular denomination.[159] Consequently there are no strict rules as to whether, the parties can sign a form 6 or any other marriage certificate that the church deems fit.

Further, because such marriages are deeply rooted in scripture and biblical principles, certain characteristics are not tolerated such as divorce. The situation is worsened when the parties intending to divorce had their marriage solemnised in church and have a church marriage

---

[155] Marriages may be solemnized in any licensed place of worship by any licensed minister of the church, denomination or body to which such place of worship belongs and according to the rites and usages of marriage observed in such church, denomination or body, or with the consent of a recognized minister of the church, denomination or body to which such place of worship belongs by any licensed minister of any other church, denomination or body according to the rites and usages of marriage observed in any church, denomination or body. Every such marriage shall be solemnized with open doors between the hours of six o'clock in the forenoon and six o'clock in the afternoon, and in the presence of two or more witnesses besides the officiating minister.

[156] Chapter 50 of the Laws of Zambia.

[157] Mark 10:9, What God has joined together, let no man separate, also see Mathew 19;6.

[158] Mathew 5:31-32.

[159] Section 20 of the Marriage Act.

http://etd.uwc.ac.za/

certificate in accordance with that denomination which is not a Form 6.[160] Section 4[161] of the Matrimonial Causes Act[162] grants jurisdiction to the High Court to hear divorce matters, however, section 46 of the Marriage (Forms and Fees Rules) of the Marriage Act, requires parties to sign a Marriage Certificate known as Form 6.[163] Consequently, the High Court registry does not entertain any other marriage certificate which is not Form 5 or 6. Section 46 of the said Act is couched in a mandatory manner and therefore there is no room for discretion.

Aside from the High Court, the other court with jurisdiction on marriage matters in Zambia is the Local Court.[164] However, the Local Court jurisdiction is restricted to a marriage solemnised under customary law.[165] This therefore disadvantages couples married under strict religious rights as of the two courts that has jurisdiction to hear matrimonial causes do not seem to have the authority to pronounce themselves on religious marriages. Section 4 of the Matrimonial Causes Act[166] does seem to allude to a fact that it may have jurisdiction in that regard, however, the said jurisdiction is tied to section 46 of the Marriage (Forms and Fees) Rules which makes Form 5 and 6 a mandatory requirement as proof of marriage.

Coming to the age of the parties, it has been noted that while statutory marriages have placed the majority age of marriage at 21, and a minimum age at 16, customary marriage places no age limit.[167] Aside from the Marriage Act that regulates the marital age, the Penal Code [168] and the Education Act[169] seem to provide guidance on when a girl can be married. While the Marriage Act provides for consent of the parents, guardians, or judges to be obtained if the child is below 21 and

UNIVERSITY of the
WESTERN CAPE

[160] every marriage certificate shall be in either Form 5 or 6 in the First Schedule.

[161] 4. (1) The High Court, hereinafter referred to as " the Court" shall have and exercise, subject to the provisions of this Act, jurisdiction and power in relation to matrimonial causes instituted or continued under this Act.
(2) Notwithstanding subsection (1) of section eleven of the High Court Act or any other written law, the jurisdiction of the Court in divorce and matrimonial causes and related matters shall, after the commencement of this Act, be exercised only in accordance with the provisions of this Act.

[162] No. 20 of 2007.

[163] Every marriage certificate shall be in either Form 5 or 6 in the First Schedule.

[164] section 5 of the Local Court Act Chapter 29 of the laws of Zambia.

[165] Ibid.

[166] Chapter 50 of the Laws of Zambia.

[167] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p76.

[168] Chapter 87 of the laws of Zambia.

[169] No. 23 of 2011 of the Laws of Zambia.

http://etd.uwc.ac.za/

above 18,[170] a 14 or 12 year-old girl child can be married off as long as she becomes of age.[171] Marriages involving a person below the age of 16 are termed child marriages and they are illegal in Zambia. The illegality of such marriages stems from the definition of a child enshrined in different statutes but for purposes of this research we will look at two definitions.

The Penal Code[172] and the Education Act both define a child as a person who has not yet attained the age of 16 years.[173] Consequently the Penal Code[174] criminalises the act of any adult having carnal knowledge of a child. It must be noted however, that if the said canal knowledge was within marriage wedlock, then such would not be defilement.[175] This was held in the case of *R. v. Chinjamba*[176] where the court held, among others, that having sexual intercourse with a girl below the age of 16 is not defilement if one is lawfully married to her. Lawfully married in that case should be construed to mean a marriage valid under either African customary law or statutory law. Such sexual relation cannot be said to be unlawful as envisaged by section 138 of the Penal Code Chapter 87 of the Laws of Zambia.

The above position seems to be conditional however, as can be seen under the Education Act[177] which provides under section 18 as follows:

A person shall not-

a) marry or marry off a learner who is a child; or
b) prevent or stop a learner who is a child from attending school for the purpose of marrying or marrying off the learner who is a child.

(3) A person who contravenes this section commits an offence and is liable, upon conviction, to imprisonment for a period of not less than fifteen years and may be liable to imprisonment for life.

The above section creates a challenge by proscribing marriage involving a child who is a learner. It further prohibits the removal of a learner who is a child from a learning institution for purposes

---

[170] Sections 17,18 and 19 of the Marriage Act Chapter 50 of the laws of Zambia.
[171] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p76
[172] Chapter 87 of the Laws of Zambia.
[173] Section 3.
[174] Chapter 87 of the Laws of Zambia.
[175] *R v Chapman* (1959) 1 QB 100.
[176] *R v Chinjamba* 5 N.R.L.R. 384.
[177] No. 23 of 2011 of the Laws of Zambia.

http://etd.uwc.ac.za/

of marrying her off. Most importantly, it places criminal liability on any person who aids or abates such act. It prescribes a minimum mandatory sentence of 15years imprisonment and a maximum sentence of life imprisonment.[178]

In as much as the customary practice of marrying girls under the age of 16 seems to have backing as seen from the preceding case of *R v Chinjamba*, the position becomes unclear when one reads Article 7 of the Constitution of Zambia[179]which provides that the Laws of Zambia consist of Zambian customary law which is consistent with the Constitution. Further in the case of *Kaniki v. Jairus*[180] the court held that it was incumbent on the court of first instance to administer the customary law applicable to the matter before it, but only so far as such law was "*not repugnant to natural justice or incompatible with the provisions of any written law*". The Local Court Act under section 12(1)(b)[181] equally gives conditions upon which customary law can be applicable in the courts of Law.

Furthermore, parental consent has been discussed from a statutory and customary perspective. On the one hand, it has been noted above that as a general rule for the minimum age of majority of the parties to a statutory marriage is 16 years old. The exception to the rule applies when a Judge of the High Court gives consent to the marriage of parties below the age of 16 years.[182] It has also been noted that a person between the age of 16 years and 21 years can only contract marriage with the consent of the parents, a guardian, a Judge of the High Court, and a Minister or District Secretary.[183] This implies that two consenting adults aged above 21 years do not require consent from anyone to contract marriage. Apparently, the Marriage Act merely determines the age of majority for purposes of marriage and confers authority on certain individuals to give consent to marriage between parties below the age of 21 years. The Act waives the need for consent to parties above the age of 21 years because they are considered as adults.[184]

---

[178] Section 18 of the Education Act No. 23 of 2011 of the Laws of Zambia.

[179] As Amended by Act No. 2 of 2016.

[180] *KanikI v Jairus* (1967) Z.R. 71.

[181] Section 12 (1) (a) of the Local Court Act Chapter 29 of the Laws of Zambia which provides that:
(1) Subject to the provisions of this Act, a local court shall administer-
(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

[182]Section 33(1) of the Marriage Act Chapter 50 of the Laws of Zambia.

[183] Section 19(2) of the Marriage Act Chapter 50 of the Laws of Zambia.

[184] Section 17 of the Marriage Act, Chapter 50 of the Laws of Zambia.

http://etd.uwc.ac.za/

On the other hand, customary law though not tying the age of majority to a specific age, ties it to puberty. It then confers discretion on the parents or guardians to determine how much time to be allowed between puberty and marriage. Unlike statutory law, customary law maintains the need for parental consent to marriage regardless of the girl's age. This distinction on parental consent often breeds conflict in the case of a bilateral marriage. This is because the consent of the parents is always presumed requisite to the validity of a bilateral marriage, even between two consenting adults. In fact, it is often, if not always, the practice for a bilateral marriage to be solemnised in a church to have the officiating Clergy ask who gives the bride's hand in marriage even when the parties are above the age of 21years.

In some churches if the consent by parents for either party to the marriage was withheld, they would not proceed to solemnise the marriage even if the parties were above the age of 21 years. The justification for this lies in the fact that the need to obtain consent on biblical provisions which are practiced as part of the church marriage rites.[185] This is a clear indication that parental consent is considered cardinal to the validity of marriage therefore, it reinforces the existence of mandatory bilateral marriages.

In addition, it has been discussed that customary marriages are potentially polygamous.[186] A man is said to have discretion to marry another wife(wives) as long as consent is obtained from his first wife.[187]A woman is however, not allowed to marry more than one husband as polyandry is not legal in Zambia. Section 166 of the Penal Code[188] provides that:

> "Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years."

This section does not categorise as to whether it only relates to statutory or customary marriages and therefore, creating conflict as it seems to prohibit the act of polygamy under customary marriages as well. As previously mentioned, this provides uncertainty in the applicable law.[189]

---

[185] Section 20 of the marriage Act, Chapter 50 of the laws of Zambia.

[186] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p89

[187] Ibid p89.

[188] Chapter 87 of the Laws of Zambia.

[189] Munalula M *Legal Process: Zambian cases, Legislation commentaries* (2004) p5.

http://etd.uwc.ac.za/

2.7 Conclusion

This chapter discussed the genesis of bilateral marriages by looking at the history of the Zambian legal system. The chapter further highlighted details of the said history capturing it from the pre-colonialism, colonial era, and finally post colonialism era. The result of which has been reflected under the current types of marriages that are recognised in Zambia. A thorough description has been outlined of the different types of marriages and the essential elements that renders them valid. A cursory glance at these types of marriages reflects an overlap in the application which eventually causes friction either in the application of the law or jurisdiction of the courts in which the marriages can be heard. Finally, the chapter belabored to explain the conflicts that arise from contracting bilateral marriages in Zambia.

UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/

CHAPTER THREE

MARRIAGE LEGISLATION AND THE IMPACT ON SPOUSES'S RIGHTS IN BILATERAL MARRIAGES

3.1 Introduction

The preceding chapter exposed the genesis of bilateral marriages as well as conflicts that stem from these marriages. Among other issues, section 20 of the Marriage Act,[190] which creates religious marriages alongside statutory marriages, was highlighted to fuel the confusion of the jurisdiction of court's in bilateral marriages. Furthermore, the Marriage Act[191] is silent on the same, and there is currently no law to regulate religious marriages, leading to even more uncertainties. At the same time, there are customary marriages which are based on unwritten customary laws which vary from tribe to tribe or from one ethnic group to another.[192] The preceding chapter has also highlighted the fact that statutory and customary marriages have conflicting requirements for the validity of a marriage, and, more importantly, seem to confer conflicting rights on spouses who contract them.

Building on chapter 2, this chapter will look at the different pieces of legislation which regulates these marriages. The objective is to show how legislation creates conflicting rights of spouses in bilateral marriages. Ultimately, the shortcomings of the marriage legislation in its regulation of bilateral marriages will be highlighted. In other words, the chapter will discuss how the said legislation or laws affect the rights of spouses in these marriages.

Within the context of the different legislation that governs rights of spouses/parties in bilateral marriages, this chapter will be approached as follows: the first part will discuss rights of spouses whose marriages are governed by statutory law. The second part will discuss rights of spouses under customary law. The third part will look at the rights of spouses under religious law, and thereafter part 4 will contain the conclusion.

3.2 Rights of Spouses Under Statutory Law

[190] Act No. 50 of the laws of Zambia.

[191] Chapter 50 of the Laws of Zambia.

[192] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies'* (2011) Vol 18.Iss. 1. Article 5 90.

http://etd.uwc.ac.za/

3.2.1 Children welfare

For a statutory marriage, when parties intend to divorce, the Petitioner does file to court a Petition for Dissolution of Marriage which has about 3 accompanying documents.[193] Among the prayers or claims included under the Petition for dissolution of marriage, is custody of the children which the petitioner expressly prays for in an event that the marriage was to be dissolved. The said document that is filed into court is called a "statement as to arrangement of children".[194] This statement states the current welfare of the children of the family. This includes their custody, school and financial arrangement.[195]

Furthermore, the same document proposes arrangements of the children's custody if the divorce is granted. In an event the custody was not granted, during the divorce hearing, either of the parties can make an application for custody of the children post-divorce before the court of law.[196]

In the same vein, section 3(1) of the Children's Code Act [197] provides as follows:

> "A child's best interest is the primary consideration in the matter or action considering the child, whether undertaken by the public or private body."

The aforementioned section is also reflected in Article 3(1) of the UNCRC and Article 4 of the ACRWC which implore courts to consider the best interest of children when dealing with cases that involve them. The best interest of the child was defined in the case of *Van Deijil v Van Deijil*[198] as:

> 'The interest of the minor means the welfare of the minor and the term welfare must be taken in the widest sense to include economic, social, moral and religious considerations. Emotional needs and ties of affection must also be regarded and in the case of older children their wishes in the matter cannot be ignored."[199]

---

[193] Section 9 of the Matrimonial Causes Act No. 20 of 2007.

[194] Rule 8(2) of the Matrimonial Causes Supreme Court of Judicature, England County Rules. (the said rules are still applicable to Zambia through section 10 and 11 of the High Court Act.).

[195] Section 71(1) of the Matrimonial Causes Act.

[196] section 73(1) of the Matrimonial Causes Act No 20 of 2007. The Court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of twenty-five.

[197] No. 12 of 2022.

[198] *Van Deijil v Van Deijil* (1996) 4 S.A 260(R).

[199] *Van Deijil v Van Deijil* (1996) 4 S.A 260(R).

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

In the same vein Lord Macdormott in the case of *J v. J*[200] stated as follows:

> "these words must mean more than that the child's welfare is to be treated as the top item in the list of items relevant to the matter in question. I think they connote a process whereby when all the relevant facts, relationships, claims, and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as the term has now been understood. This is the first consideration because it is of most importance and the paramount consideration because it rules upon or determines the course to be followed."[201]

Further, section 141 of the Children Code Act,[202] allows an interested party to make an application for custody of a child.[203] The said interested parties include the parents and guardian of the child in question.[204]

Basically, under statutory law, the primary guideline before granting custody to a parent is the principle of the "best interest of a child." This will be contrasted with customary law rules which bases rights of custody to a traditional system of the parties which, arguably, is in most cases in the best interest of parents, and not children.

Coming to the issue of care and control of the children, the Matrimonial Causes Act[205] has not expressly provided for which parent has responsibility over the child of the family during the marriage or upon divorce. However, it does allow either party to a marriage to make an application before court for willful neglect to maintain a child of the family.[206] The Children's code Act[207] on the other hand, does define parental responsibility as:

---

[200] *J v. J* (1970) AC, 668,710.
[201] *J v. J* (1970) AC, 668,710.
[202] Act No. 12 of 2022.
[203] 141 (1) A custody order may be made in respect of a— (a) child;
[204] Section 141 (2) of the Children's Code Act No. 12 of 2022.
[205] Marriage Act No. 20 of 2007.
[206] (1) Either party to a marriage may apply to the Court for Neglect by an order under this section on the ground that the respondent—
(a) being the husband, has willfully neglected—
(ii) to provide or to make a proper contribution towards, reasonable maintenance for any child of the family to whom this section applies; or
(b) being the wife, has willfully neglected to provide, or to make a proper contribution towards, reasonable maintenance—
(ii) for any child of the family to whom this section applies.
[207] Act No. 12 of 2022.

http://etd.uwc.ac.za/

> "the duties, rights, powers, responsibilities and authority which, by law or otherwise, a person has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child".[208]

The same Act also provides that a child has a right to live with, and to be protected and cared for by, the child's parents, or to appropriate alternative care if the child is separated from the parents.[209] Finally, section 129 of the Children's Code Act[210] provides that parents of a child whether married or not have joint responsibilities towards the maintenance of the child. Therefore, no parent has greater claim over the other.[211] The Penal Code Act[212] also clothes the responsibility of the child's maintenance on both parents and further makes it a criminal offence for such parents to neglect the children.[213]

It is also important to mention that both, the African Charter on the Rights and Welfare of the Child (ACRWC) and the United Nations Convention on the Rights of the Child (UNCRC), to which Zambia is a party, impliedly enunciate this position.[214] Article10[215] of the ACRWC on the protection of the child's right to privacy, for instance, imposes on the child's parents, among others, a duty to enable the child to realise these rights. It also gives the parents a certain measure of control over the child's enjoyment of these rights. Article 11 (4)[216] of the ACRWC on the right to education enjoins States Parties to respect the right and duty of the parents to choose schools for their children. Article 9[217] of the UNCRC directs States Parties to ensure that the child is not

---

[208] Section 2 of the Children's Code Act No. 12 of 2022.
[209] Section 9(1) of the Children's Code Act No. 12 of 2022.
[210] Act No. 12 of 2012.
[211]129 (a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain the child shall be their joint responsibility;
(b) where the mother and father of a child were not married to each other at the time of the birth of the child and have not subsequently married, it shall be the joint responsibility of the mother and father of the child to maintain that child;
[212] Chapter 87, Volume 7 of the Laws of Zambia.
[213] Section 169 of the Penal Code Chapter 89 of the laws of Zambia.
[214] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p395.
[215] No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.
[216] States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their' children schools, other than those established by public authorities, which conform to such minimum standards may be approved by the state, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.
[217] The child has the right to stay with his or her parents unless this is deemed to be incompatible with the child's best interest. The child also has the right to maintain contacts with her parents if separated from one or both.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

separated from its family save for a justifiable reason.[218]As in the case of custody of the child, the courts are also mandated under section 132(1) of the Children's Code Act[219] to make decisions based on the "best interest of the child".[220]

It should be noted thus far that the wording of the provisions of the Penal Code,[221] the ACRWC, and the UNCRC, vests in the children's parent's equal rights and access to the children of the family. They also impose on the parents an equal obligation to nurture the child or children of the family.[222] Both parents thus have the responsibility to care for, control and maintain the children of the family.[223]

3.2.2 Matrimonial Property

The law that provides for rights of matrimonial property in a statutory marriage is the Matrimonial Causes Act.[224] Unlike Statutory Marriages, where courts face property distribution issues upon annulment of marriage, reference is made to the governing statutes.[225] Within the occasion of a divorce, most tribes do not perceive women's rights to a share of the matrimonial property. When courts are confronted with issues to bargain with property dispersion, they are guided by the conventions and traditions of Zambia's seven primary tribes.[226]

The question of matrimonial property raises various situations on several points. It maybe property acquired by the spouses jointly and for joint use, it may be property owned separately by the spouses.[227] It may also include property acquired by one spouse, and the other has no interest in it. Further, it may include property in which title is vested in one party but the other carried out improvements on that property.[228] These various dimensions have given rise to cases concerning how such property may be shared when the two parties want to live apart. Like any other person, women can freely own property such as land and can own other property in their own right

[218] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p408.
[219] No.12 of 2022.
[220] 132. (1) A court shall, before making a maintenance order, have regard to the best interests of the child and all the circumstances of the child concerned.
[221] Chapter 87, Volume 7 of the Laws of Zambia.
[222] Lilian Mushota, Family Law in Zambia: Cases and Materials; Lusaka: UNZA press (2005) p396.
[223] Section 168 of the Penal Code Chapter 87, Volume 7 of the Laws of Zambia.
[224] Act No 20 of 2007.
[225] Matrimonial Causes Act No. 20 0f 2007 and The Married Women's Property Act of 1887.
[226] *Martha Mwiya v Alex Mwiya* (1977) ZR 113.
[227] *Watchel vs. Watchel* (1973) 1 ALL ER 829.
[228] *Watchel vs. Watchel* (1973) 1 ALL ER 829.

http://etd.uwc.ac.za/

regardless of their marital status.[229] Several issues have arose concerning property vested in one party, but another one carried out some improvements on it either by cash payment or by work done on that property.

It is imperative to note that section 17 of the Married Women Property Act, 1882[230], vests jurisdiction in a Judge to make appropriate discretionary orders as regards the rights to the property in dispute. This jurisdiction is however subject to the legal position that a Judge cannot vary the existing titles. The Judge also has to exercise the same powers as a Judge would in other proceedings when making orders to transfer or create interest in property.[231] To determine the spouses' rights a Judge needs to apply ordinary property principle. A Judge needs to firstly establish the legal ownership of the property. When legal ownership is determined, a judge then needs to determine equitable or beneficial ownership.[232]

It can be inferred from the above legal positions that as a general rule parties have, *prima facie*, equal and indivisible rights in property acquired during marriage.[233] The actual extent of their rights or interests in matrimonial property is determined at the dissolution of marriage. The extent of the parties' rights is dependent on the parties' intent when acquiring the property and amount of each party's contribution.[234] It is therefore safe to conclude that the right to matrimonial property of either spouse at the dissolution of marriage is proportional to the amount of each spouse's contribution to the wellbeing of the family.[235] It must be noted that the contribution may either be in cash or in kind.[236]

3.2.3 Inheritance

The law that governs intestate inheritance of spouses in Zambia is called the Intestate Succession Act.[237] A spouse has a right to inherit her deceased husband's estate upon his death.[238]

---

[229] *Annette Chilima v Peter Chilima* SCZ Judgment No. 22 of 2000.
[230] The Married Women's Property Act 1882 (England).
[231] *Pettitt v Pettitt* (1970) A.C 777.
[232] *Annette Chilima v Peter Chilima* SCZ Judgment No. 22 of 2000.
[233] *Annette Chilima v Peter Chilima* SCZ Judgment No. 22 of 2000.
[234] *Annette Chilima v Peter Chilima* SCZ Judgment No. 22 of 2000.
[235] *Musonda v Musonda SCZ Judgment No. 53 (Unreported).*
[236] *Annette Chilima v Peter Chilima* SCZ Judgment No. 22 of 2000.
[237] Chapter 59 of the Laws of Zambia.
[238] Section 5 of the interstate succession Act, Chapter 59 of the Laws of Zambia.
5(1) Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows: Distribution of estate

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

Notwithstanding the twenty percent that the spouse is entitled to inherit from the spouse's estate, she may also inherit another percentage of the estate under different circumstances, i.e if the other beneficiaries are not alive at the time of the deceased's death.[239] A cardinal observation of the Intestate Succession Act is that it has provided for marriages under customary and statutory law and has provided spouses from these different marriages with the same rights. The Act does not define a spouse however it defines marriage as follows:

> “"marriage" includes a polygamous marriage and "husband", "surviving spouse", "wife" or "widow" shall be construed accordingly”[240]

Despite the fact that the Intestate Succession Act does not expressly define ‘a spouse’ nor categorise a spouse to include one married under statutory, customary or religious marriage, one can conclude who a spouse is from the said Act's definition of marriage.

In Zambia, a polygamous marriage can only be contracted under customary law, consequently one may assume that the Intestate Succession Act[241] does grant equal rights of inheritance to spouses married under statutory, religious and customary law. Section 9[242] of the Intestate Succession Act[243] provides for inheritance of spouses under polygamous marriages.

In the case of *Bonaventure Mutale and Aubie Willy Mubanga (sued as executors of the estate of the late Lagos Nyembele) v. Marjorie Mumbi Nyembele,*[244] the Supreme Court held that the parties were lawfully married under customary law and upheld the decision of the High Court which awarded 70% of the deceased's estate to his wife and children.

UNIVERSITY of the
WESTERN CAPE

(a) twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;

[239] Section 7of the Intestate Succession Act Chapter 59 of the Laws of Zambia.

[240] Section 2 of the Intestate Succession Act Chapter 59 of the Laws of Zambia.

[241] Ibid.

[242] 9 (1) Notwithstanding section five where the estate includes a house the surviving spouse or child or both, shall be entitled to that house: Surviving spouse or child or both to be entitled to house Provided that-

a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and
b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.

[243] Chapter 59 of the laws of Zambia.

[244] *Bonaventure Mutale and Aubie Willy Mubanga (sued as executors of the estate of the late Lagos Nyembele) v. Marjorie Mumbi Nyembele* (Appeal 78 of 2010) [2012] ZMSC 4.

http://etd.uwc.ac.za/

It is very interesting to note that the law under the Intestate Succession Act, has given equal status or rights of inheritance to spouses regardless of which type of marriage. It also begs a question of why the legislature disregarded custom with regards to inheritance[245] and make statutory law applicable to spouses under customary law which has its own dictates on inheritance upon the death of a deceased[246]. Coming to the focus of this discussion on bilateral marriages, this is obviously an example of uncertainty and inconsistent laws.[247] Arguably, statutory laws are treated superior to customary laws on matters of inheritance.

3.3 Rights of Spouses Under Customary Law

3.3.1 Children welfare

Considering the fact that the vast majority of Zambians practice customary law, it has had a great impact in the area of personal law and especially to matters such as marriage, inheritance and custody of children.[248] Ordinarily "customary law comprises local customs and traditions of indigenous people.[249] Custom and practice determine issues such as custody of children, the right of inheritance, as well as property rights in a marriage and upon divorce.[250] In most cases these issues are determined by the kindred where the parties belong. It could either be matrilineal or patrilineal kindred.[251]

As discussed in the previous chapter, a customary marriage is regulated by the customs and practice of a certain ethnic group.[252] The parties intending to marry have to satisfy certain elements for a marriage to be valid and one of the most important requirements that reflects the validity of marriage is the payment of dowry.[253] Customary law focuses on the rights of the family rather than

---

[245] In a traditional society, women were not allowed to inherit from their deceased husband's estate.
[246] Munalula M *Legal Process: Zambian cases, Legislation commentaries Lusaka* (2004) p5.
[247] Munalula M*, Legal Process: Zambian cases, Legislation commentaries Lusaka* (2004) p5.
[248] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*' (2011) Vol 18. Iss. 1. Article 5 187.
[249] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies'* (2011) Vol 18. Iss. 1. Article 5 187.
[250] Eleanor Maccoby E 'Custody of Children following Divorce' available at *www.googlescholar – books.google.com* (accessed on 13 July2022).
[251] Available at https://family.jrank.org/pages/1781/Zambia-Family-Formation.html (accessed on 22 July 2022).
[252] Cox Mumba *Customary Law of Marriage and Divorce among the Lenje of Central Province (1990)* p 140.
[253] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p81.

http://etd.uwc.ac.za/

the rights of the parent or the best interest of the child. It reflects marital arrangements that have economic and tribal roots.[254]

Nevertheless, even where the system is matrilineal, custody of a child is vested in the male family members.[255] In patrilineal systems, paternal preference applies to custody.[256] Children born in wedlock 'belong' to the father's lineage, whereas children born out of wedlock 'belong' to the mother's lineage.[257] In matrilineal systems, children are included in the mother's lineage. Mothers are the primary guardians while the eldest maternal uncle is the primary authority in the child's life and fathers have little authority or decision-making power concerning their children. However, if a bride price has been paid, the husband receives full authority over a child and is entitled to full custody upon dissolution of the marriage.[258] In fact, during the divorce process, it is expected that the custody of children is addressed according to the lineage of the parties, often classified as patrilineal, matrilineal or bilateral in a customary setting. The affiliation of the children is to the father in a patrilineal kinship, or to the mother in a matrilineal kinship.

However, bilateral marriages seem to create uncertainty in this regard. Arguably, statutory law seems to interfere with the customary law on the rights of the child in that the Children's Code Act[259] provides that:

> "A child born from a mother and father, whether married to each other or not, shall have equal rights and privileges as a child born in a marriage."

The above section has a serious bearing on customary law in that a mother or father of a child has a right to make an application under this Act disregarding the custom and practices aforementioned. The judicial practice of the local courts is that, irrespective of the type of kinship,is that custody is often granted to women while men are granted access to children after the divorce.[260]

---

[254] "Gender Equality and Women's Rights in the Context of Child Custody and Maintenance: An International and Comparative Analysis." UN Women Discussion Paper Series No. 30. New York: UN Women.
[255] Ibid.
[256] Available at *https://family.jrank.org/pages/1781/Zambia-Family-Formation.html* (accessed on 22 July 2022)
[257] Eleanor Maccoby E 'Custody of Children following Divorce' available at *www.googlescholar – books.google.com as at 13th July, 2016.*
[258] *https://family.jrank.org/pages/1781/Zambia-Family-Formation.html.*
[259] Act No. 12 of 2022.
[260] Eleanor Maccoby E 'Custody of Children following Divorce', available at *www.googlescholar – books.google.com* (accessed on 13 July 2022)

http://etd.uwc.ac.za/

A dilution of this principle was occasionally found in some cases where the gender and the ages of the children was considered: custody of younger children was allocated to the wife and custody of older children was given to the father, while custody of girls was given to the mother and custody of boys to the father. In very rare cases joint custody was awarded.[261]

A cursory look on how custody is dealt with under customary law and statutory law reflects a serious difference and therefore creats a clash in the dissolution of a bilateral marriage. The said clash, is that in the courts of law, judges are given discretion to determine custody based on the principle of the best interest of the child as provided for by section 75(1)(a) of the Matrimonial Causes Act. When determining such an issue, a judge cannot be persuaded to grant custody to a man simply because he paid dowry or because he hails from a patrilineal system. Kindred and payment of dowry is immaterial in this regard and the court may grant custody to the mother despite the fact that the custom demands that the child belongs to a man as in a patrilineal system.[262] This is also another example where we see that in a bilateral marriage, customary rules regulating the welfare of the children is ignored. Instead, statutory laws takes precedence.

In addition, and as already discussed, the welfare of the children under customary marriage is determined by whether the parents are practicing a matrilineal or patrilineal marriage system.[263] Therefore, if the parents in question are from a matrilineal system, care, control and maintenance of the child lies with the mother. The child can only inherit from the mother's lineage and the mother's sisters and uncles also have a responsibility for the child's welfare.[264] If the system in question is patrilineal, the father is responsible for all the child's needs and the said child can only inherit from the father's lineage. [265] It can therefore, be argued that a serious conflict exists in a bilateral marriage with regards to the welfare of the children.[266] While a customary marriage places the rights, care and control of the children on one parent, depending on the kindred system,

[261] Eleanor Maccoby E 'Custody of Children following Divorce' available at www.googlescholar – books.google.com (accessed on 13 July 2022)

[262] Section 75(1)(a) of the Matrimonial causes Act No. 20 of 2007

[263] Gender Equality and Women's Rights in the Context of Child Custody and Maintenance: An International and Comparative Analysis. UN Women Discussion Paper Series No. 30. New York: UN Women.

[264] Eleanor Maccoby E 'Custody of Children following Divorce 'available at www.googlescholar – books.google.com (accessed on 13 July 2022).

[265] Eleanor Maccoby E 'Custody of Children following Divorce 'available at www.googlescholar – books.google.com (accessed on 13 July 2022).

[266] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p10.

http://etd.uwc.ac.za/

statutory marriage places equal responsibility on both parents. Therefore, when the issue is brought before the court for interpretation, the courts of law seem to be guided by statutory law in making decisions, thereby resulting in total disregard of customary rules.[267]

3.3.2 Matrimonial Property

By contrast to statutory laws, property rights under customary law are usually influenced and determined by the lineage system. Property rights are also influenced by the extended family system recognised under customary law. These rights are mainly centered on marriage and inheritance. [268] Property acquired by a woman prior to her marriage remains her property and is never taken to her matrimonial home. In the same vein, the property acquired by the husband belongs to him. When married, either spouse is entitled to the property they acquire during the marriage. However, men have full access and control over most property. [269]

Whatever is acquired during marriage is presumed to belong to the man. In practice, married women seldom own property. This can be attributed to the male preference of primogeniture which mainly favours the inheritance of family property by the eldest son, or male within the clan. Although primogeniture relates to succession and inheritance which arise out of the death of the head of the family, the rules regulating property rights during the subsistence of the marriage and after its dissolution are somewhat connected. Realty is invariably owned by men, although women are allowed to work the land owned by their husbands to generate an income for themselves and the family.[270]

It is apparent that the two laws confer conflicting rights to matrimonial property on the parties in a bilateral marriage. For instance, the statutory marriage creates joint ownership in the matrimonial property.[271]This however clashes with the male preference primogeniture espoused under customary law. Further, while the statutory aspect of marriage limits the right to the parties to marriage, customary law extends the rights to the clan or members of the extended marriage

[267] Section 3 of the Children's Code Act No 12 of 2022.
[268] Kapihya, L. A *comparative study on women's land rights in Zambia: Access,ownership, control, and decision-Making.* (2017) P1.
[269] *Martha Mwiya v Alex Mwiya* (1977) ZR 113 (HC).
[270] Kapihya, L. A *comparative study on women's land rights in Zambia: Access, ownership, control, and decision-Making* (2017) P2.
[271] *Chilima v Chilima* (2000) Z.R. 103.

http://etd.uwc.ac.za/

system. The nature of property that a woman can own under these laws equally conflict. Customary law limits the woman's ownership to personality. Women are excluded from owning realty.[272]

3.3.4 Religious Marriage

Unlike statutory and customary marriages, a religious marriage has it origin in the Bible. Section 20 of the Marriage Act,[273] which authorises solemnisation of such marriages, states that the solemnisation must be in accordance with the rights and usage of the marriage according to the church.[274] As previously pointed out, divorce is not permitted in a religious marriage unless a woman commits adultery during the subsistence of the marriage.[275] Consequently, spouses under this type of marriage have an interesting and a different approach on their rights i.e. property settlement, custody of children, among others. Due to the fact that they cannot divorce, the issue of custody of children and property settlement is moot.[276]

With regards to the care and control of the children, the Bible provides that "Honor and obey your father and your mother."[277] One can deduct from this verse that both parents have equal rights over the children of the family. The fact that a man is a head[278] of the house, does not give him supreme responsibility over the children of the family. However, parties who contract religious marriages have a serious challenge in determining their rights once they feel that their marriage has broken down irretrievably and they decide to leave their partners. This is because as discussed, in Chapter two, there is no court in Zambia which currently has jurisdiction to dissolve religious marriages.[279]

---

[272] Kapihya, L. A *Comparative study on women's land rights in Zambia: Access, ownership, control, and decision-Making* (2017). p1-3.
[273] Chapter 50 of the laws of Zambia.
[274] minister of the church, denomination or body to which such place of worship belongs and according to the rites and usages of marriage observed in such church, denomination or body, or with the consent of a recognized minister of the church, denomination or body to which such place of worship belongs by any licensed minister of any other church, denomination or body according to the rites and usages of marriage observed in any church, denomination or body.
[275] Mathew 5:31-32.
[276] Genesis 2:24.
[277] (Ex. 20:12; cf. Eph. 6:1-2).
[278] Ephesians 5:23.
[279] Section 4. (1) of the High Court Act. The High Court, hereinafter referred to as " the Court" shall have and exercise, subject to the provisions of this Act, jurisdiction and power in relation to matrimonial causes instituted or continued under this Act. Also see section 5 of the Local Court Act Chapter 29 of the laws of Zambia which provides the following; (1) Local courts shall be of such different grades as may be prescribed, and local courts of each grade shall exercise jurisdiction only within the limits prescribed for such grade: Provided that no local court shall be given jurisdiction— (i) to determine civil claims, other than matrimonial or inheritance claims, of a value greater than one hundred and twenty fee units.

http://etd.uwc.ac.za/

It is, however, interesting to note that if dowry was paid during the process of marriage and parties proceeded to have a religious marriage, if any of the parties seek divorce, the local court will have jurisdiction to dissolve the marriage by virtue of the dowry being paid. [280] In determining the issues of custody and maintenance of children or property settlement, the courts would then use customary law in in this regard. This is a clear case of conflict of spouse rights in a marriage.

3.4 Conclusion

This chapter discussed law that champions spouses' rights in bilateral marriages. Specifically, it discussed custody of children during marriage and after marriage. The salient issues discussed under the right to children in a statutory marriage were the fact that parties to the marriage have an equal right to the children of the family. The law imposes on the parties an obligation to maintain the children of the family. As regards the rights of the parties at the dissolution of marriage, it has been noted that custody of such children, in the event of a dispute, is granted by the Court. The primary consideration in awarding custody is the best interest of the child. The Court is not bound by any primary interest that either spouse may have over the children.

Further, it pointed out that under customary law the right to the children is determined by whether or not dowry was paid. If the man paid dowry, he has the right to the children of the family both during marriage and at the dissolution of marriage. The man is entitled to make decisions pertaining to the welfare of the children. The children are entitled to inherit wealth from their father's clan. If on the other hand dowry is not paid, the woman and her family retain the right to the children both during marriage and at the dissolution of marriage. In that vein, the children's maternal uncles make decisions pertaining to the welfare of the children of the family.

Regarding the right to property, the prominent issues raised were the fact that while parties in statutory marriage have equal rights to the matrimonial property, the same is not the case under customary law. The man has more authority regarding rights to matrimonial property. Further, while no distinction is drawn between ownership of realty and personality in statutory marriage,

[280] Section 4. (1) of the High Court Act. The High Court, hereinafter referred to as " the Court" shall have and exercise, subject to the provisions of this Act, jurisdiction and power in relation to matrimonial causes instituted or continued under this Act. Also see section 5 of the Local Court Act Chapter 29 of the laws of Zambia which provides the following; (1) Local courts shall be of such different grades as may be prescribed, and local courts of each grade shall exercise jurisdiction only within the limits prescribed for such grade: Provided that no local court shall be given jurisdiction— (i) to determine civil claims, other than matrimonial or inheritance claims, of a value greater than one hundred and twenty fee units.

http://etd.uwc.ac.za/

this distinction is emphasised under customary law. The rationale for the emphasis on this divide appears to be the need to protect clan property. Customary law makes a deliberate effort to prevent the loss of clan property from one clan to the other.

Further, the nature of religious marriages seems to trap spouses in unhappy marriages and presents a serious challenge over issues of custody and property settlement if the parties decide to leave the marriage. The Marriage Act has not expressly outlined the rights of the spouses as it ties them to the rights and practices of the religion the parties are exercising. This leaves room for uncertainty and pure confusion in a case where one decides to have her dowry paid and further proceeded to have a religious marriage.

It has thus been established that the combination of the laws governing the rights to the children of the family, and the right to property in bilateral marriage leads to conflict of laws. The conflict is further fueled by the fact that the Constitution does not give a clear guidance on how these conflicts should be resolved. It is therefore imperative that these conflicts are resolved so as to create certainty in the law, and promote justice.

CHAPTER FOUR: RESOLUTION OF CONFLICTS ARISING FROM BILATERAL MARRIAGES IN ZAMBIAN COURTS

4.1 Introduction

UNIVERSITY of the
WESTERN CAPE

Chapter three looked at the legislation that governs the rights of spouses in bilateral marriages. The chapter highlighted the consequences and also the overlap of rights under the different types of marriage laws. The investigation shows that the rights bestowed on parties to a marriage seem to have a bearing on them as there is evidence of some rights being overlooked at the time of enforcement, due to the fact that the law governing the specific marriage is viewed to be repugnant to the rules of natural justice.[281]

One cardinal thing to note from chapter three is that where there is a conflict of rights of spouses under bilateral marriages, the courts opt to rely on statutory interpretation, thereby overriding the rights bestowed by any other law.[282] This chapter will therefore examine and evaluate the court's

[281] *Annette Chilima v Peter Chilima* SCZ Judgment No. 22 of 2000
[282] *Rosemary Chibwe and Austin Chibwe* (2001) ZR 1.

http://etd.uwc.ac.za/

attitude in resolving conflicts arising from bilateral marriages. This evaluation aims to show how conflicting spouses' rights in bilateral marriages are protected or treated by courts in Zambia. The chapter will be approached in the following: the first part will outline the Zambian court system.

The second part discusses the jurisdiction of the courts, and the third part will be a discussion of court cases to show how conflicts arising from bilateral marriages are resolved. The focus will also to highlight the principles used to arrive at the decisions made by judges.

4.2 Jurisdiction of Courts on Bilateral Marriages in Zambia

The three different marriages discussed in chapter two include: customary marriage, statutory marriage and religious marriage. It was also mentioned that the jurisdiction the courts to hear marital matters is tied to the type of marriage that one contracts, i.e customary marriage issues are heard by the Local Court, while statutory marriage issues are heard by the High Court. This is due to the fact that the Constitution of Zambia creates the Judicature[283] and confers jurisdiction to *inter alia* interpret the law. It is thus incumbent on the judges to interpret the law on marriage whenever they are faced with a matrimonial dispute. Whether, the Courts interprets does resolve the conflict without infringing certain rights is a question that will be answered in this chapter.

4.2.1 The High Court

The Jurisdiction of the High Court in matrimonial causes is provided as follows:

"Probate and divorce jurisdiction shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England. (2) The law and practice for the time being in force for the Probate, Divorce and Admiralty Divisions of the High Court of Justice in England with respect to the Queen's Proctor shall, subject to rules of court and to any rules made under the provisions of the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, of the United Kingdom, apply to the Attorney-General."[284]

[283] Article 119 of the Constitution of Zambia provides that;
(1) Judicial authority vests in the courts and shall be exercised in accordance with this Constitution and other laws.

[284] section 11(1)(2) of the High Court Act Chapter 27 of the Laws of Zambia.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

A cursory glance of part IV of the High Court Act[285] does not seem to include the application of African customary law in the High Court.[286] Theoretically as well as in practice, the High Court only has jurisdiction to apply African customary law on appeal.[287] This position has been reiterated and confirmed in a number of decided cases, including, the case of *Rosemary Chibwe v Austin Chibwe.* [288] In this case, the Judge alluded that in cases of property settlement, the High Court has no original jurisdiction to determine such matters as a court of first instance on an application by parties to an African customary law marriage.[289] Consequently, what seems to have been settled by the courts is that in cases of divorce, the High Court and Supreme Court can only apply statutory law.[290] The reasoning behind this decision is grounded in the provisions of section (11) (1) (2) of the High Court Act, and the English Law (Extent of Application) Act which provides the following:

2. "Subject to the provisions of the Constitution and to any other written law –
   a) the common law;
   b) the doctrines of equity;
   c) the statutes which were in force in England on the 17th August, 1911, being the commencement of the Northern Rhodesia Order in Council 1911; and
   d) any statutes of a later date than that mentioned in paragraph © in force in England, now applied to the Republic, or which shall apply to the Republic by an Act of Parliament, or otherwise; shall be in force in the Republic.
   e) the Supreme Court Pracice Rules of England in force until 1999:

Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes, shall be in force in the Republic"[291]

[285] Chapter 27 of the laws of Zambia.
[286] Part iv of the High Court Act Chapter 27 of the laws of Zambia.
[287] *Ann P Nkhoma v Smart Nkhoma* (1978) ZR 4.
[288] *Rosemary Chibwe v Austin Chibwe* (2001) ZR 1.
[289] *Rosemary Chibwe v Austin Chibwe* (2001) ZR 1.
[290] *Rosemary Chibwe v Austin Chibwe* (2001) ZR 1.
[291] Section 2 of Chapter 11 of the Laws of Zambia.

http://etd.uwc.ac.za/

It is therefore noted that the High Court Act,[292] and the attendant decisions tend to stifle and limit the jurisdiction of the High Court in relation to African customary law marriages.[293] This is seen in the decided cases that have been rendered regarding customary law. Despite the fact that the High Court is said to have unlimited jurisdiction over cases, one wonders why the court avoids this authority by departing from it and choosing the easy way out of subjecting any case with customary laws in it to statutory rules and principles. Further, the High Court only deals with customary when the matter is on appeal from the lower courts. This position denies the court the opportunity to first-hand information on customary law as the Judge cannot probe for more information from the record of appeal.[294] On appeal, the court must rely on what is on record or in cases where the record lacks clarity it may send the matter back for a retrial.[295] This position would undoubtedly be different if the Judges were to sit as courts of first instance either with the aid of Assessors, or after receiving adequate training on African customary law. It can thus not be denied that the limitation imposed on the High Court's jurisdiction in African customary law marriages negatively impacts the rights of spouses.[296]

4.2.2 Family Court as a Division of the High Court

In 2016, the Family Court was a creation under the Amended Constitution of Zambia.[297] This court was created to deal with cases falling under the ambit of family law.[298] The Constitution created the Family Court as a division of the High Court under Article 133 (2).[299] The interpretation of the law in this court is guided rules of interpretation which are often expressed in decided cases. In this regard, there is currently no particular model of how this court would run. What has been established so far, is the jurisdiction of the court in all family matters such as divorce petitions; petitions for judicial separation; custody, disputes; applications for maintenance; applications

[292] Chapter 27 of the Laws of Zambia.
[293] Section 11(1) (2) of the high court Act chapter 27 of the laws of Zambia.
[294] *Nkhata and Others v Attorney General* (1966) Z.R. 124.
[295] *Nkhata and Others v Attorney General* (1966) Z.R. 124.
[296] Exnobert Zulu & Lungowe Matakala 'Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum' (2019) 1-27.
[297] Act No. 2 of 2016.
[298] Article 133(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.
133. (2) There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.
[299] 133. (2) There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.

http://etd.uwc.ac.za/

relating to willful neglect to maintain; applications relating to property adjustment; adoptions and intestate succession disputes, among others.[300]

However, it must be noted that the Family Court is a division under the High Court Act[301] and it has been established that the High Court deals with statutory matters, therefore, the said Family Court is not extended to the Local Court. Further, the High Court Rules[302] strictly apply to matters before the High Court. Therefore, Local Courts are not mandated to refer matrimonial matters such as property settlement, child maintenance and custody of the children for mediation. This shows a lack of consistency in the application of the law. When the matter goes for mediation, it becomes immaterial whether the marriage was under customary or statutory law or if it was a bilateral marriage as the parties are allowed to compromise on issues disregarding the law at play.[303]

The existence of two systems means that Zambians can choose to marry under customary law or statutory law. This entails that issues of property settlement, maintenance and custody of children are to be governed by the law under which the marriage was contracted.[304] However, the reality is different. Courts and parties to marriage do not follow this distinct separation and consequently if a matter relating to customary law on property settlement, custody or maintenance proceed on appeal to a higher court, that court decides that matter not on the basis of customary law but statutory law.[305]

UNIVERSITY of the
WESTERN CAPE

4.2.3 The Subordinate Court of Zambia

On the application and interpretation of African customary law, section 16 of the Subordinate Court Act[306] provides that African Customary law is only applicable if it is not repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia.[307] It is noted that in addition to the repugnancy

[300] The Judiciary of Zambia Report on the Family and Children's Division at the 8th Policy Committee Review Meeting of the Judiciary (2018).
[301] Chapter 27 of the laws of Zambia.
[302] High Court (Amendment) Rules, 2018, Statutory Instrument No. 72 of 2018.
[303] High Court (Amendment) Rules 2018 Statutory Instrument No. 72 of 2018.
[304] *Lizzy Musauka v Mpasi S*olomon Dube Supreme Court Judgment No. 64 of 2017.
[305] *Nkhata and Others v Attorney General* (1966) Z.R. 124.
[306] Chapter 28 of the laws of Zambia.
[307] Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law,

http://etd.uwc.ac.za/

to justice, equity and good conscience, this section explicitly makes African Customary law subservient to written law.[308] This poses a significant shift in the relationship between written law and African customary law in that this provision indiscriminately elevates written law over African customary law.[309]

Consequently, one can assume that spouses' rights under customary law are most likely to be infringed or overshadowed by statutory rules if one contracted a bilateral marriage consisting of customary and statutory rules. This to a large extent is what prompts the argument that written law is superior to African customary law and consequently leads to the distortion or generous application of the repugnant clause.[310] It is thus argued that in its present form, the repugnancy clause, as a rule regulating the resolution of conflict of laws in bilateral marriages, works to thwart the progression of African customary law and concomitantly elevates statutory marriages to a superior status.[311]

4.2.4 The Local Court of Zambia

In the same vein, as section 16 of the Subordinate Court Act,[312] section 12 of the Local Court Act,[313] curtails the potency of African customary law by subjecting it to the repugnancy clause and subjects it written law.[314]

---

such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law:

[308] Section 16 of the Subordinate Court Act Chapter 28 of the laws of Zambia.

[309] Exnobert Zulu & Lungowe Matakala 'Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum' (2019) p1-3.

[310] Exnobert Zulu & Lungowe Matakala 'Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum' (2019) 18-25.

[311] Exnobert Zulu & Lungowe Matakala 'Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum' (2019) p18-25.

[312] Chapter 28 of the laws of Zambia.

[313] Chapter 29 of the laws of Zambia.

[314] Section12 (1) provides that 'Subject to the provisions of this Act, a local court shall administer-

(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.'

http://etd.uwc.ac.za/

Therefore, subjecting marriages that are purely customary to the principles of statutory law when adjudicating such cases, may result in an infringement on spouses' rights bestowed on them by customary law. This is because, as seen from the previous chapter, different rights and obligations arise from either statutory or customary marriages and therefore if customary marriages are subjected to statutory principles in determining matters in court, then the rights that arise under customary marriage are deemed immaterial. This consequently may lead to suffocation of the parties who contract such marriages.[315] Having said that, the question to ask is: how do courts resolve conflicts of laws arising from bilateral marriages?

The approach of several courts which impact on the rights of spouses in the bilateral marriages are observed from the cases to be discussed. First, a review of a number of decided cases by the High Court and Supreme Court of Zambia shows a great deal of inconsistency, and scanty assessment of the rationale for particular African customary law provisions especially when it comes to property settlement. For example, in the case of *Mwiya v. Mwiya*,[316] the respondent (husband) and the appellant (wife), both of the Lozi tribe, were divorced in the Mulobezi Local Court. The appellant appealed to the subordinate court on the grounds *inter alia*, that the property bought during the marriage was not shared between the parties. The senior resident magistrate dismissed the appeal and upheld the decision of the lower court. From the decision of the subordinate court the appellant appealed to the High Court on the grounds that under Lozi custom, property acquired during the marriage should be shared between the parties, a husband should support his divorced wife throughout her life. It was held that

i. There is no Lozi custom which upon divorce compels a husband to share property acquired during the existence of the marriage.
ii. Under Lozi custom a husband cannot be compelled to support his divorced wife throughout her life.

In contrast in the case of *Chibwe v Chibwe*[317] the appellant, Rosemary Chibwe was originally in the Local Court the respondent in a divorce petition brought by her former husband Austin Chibwe, the respondent. The respondent sued the appellant for divorce before the local court in Mufulira

[315] Section 12(10 of the Local Court Act, Chapter 28 of the Laws of Zambia.
[316] *Martha Mwiya v Alex Mwiya* (1977) ZR 113.
[317] *Rosemary Chibwe v Austin Chibwe* (2001) ZR 31

http://etd.uwc.ac.za/

under customary law alleging inter alia, unreasonable behavior and adultery. The local court granted the said prayer. The appellant appealed to the Magistrates court on the grounds that the local court justices had misdirected themselves by dissolving the marriage on unestablished grounds and that the local court justices had not addressed their minds to the question of maintenance and property adjustment of the property acquired by the respondent during the subsistence of their marriage. The learned Magistrate heard *de novo* the evidence and sat with assessors in Ushi customary law.

At the end of the trial, he dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant then appealed to the High Court. The learned High Court Commissioner considered Ushi Customary Law, and directed the respondent to pay the appellant the sum of K10,000,000 with simple interest at the rate of ten per cent from the 8th of July, 1991, to the date of Judgment which was 25th of June 1998. The appellant appealed against the decision of the learned trial commissioner which held the following:

i. In Zambia courts must invoke both the principles of equity and law, concurrently;
ii. In making property adjustments or awarding maintenance upon divorce the court is guided by the need to do justice taking into account the circumstances of the case.

Secondly it is important to note that courts recognize in Zambia, a marriage can validly be contracted either under African customary law, or statutory law. The case of *Sithole v Sithole*[318] clearly points out the position on dualism. In the said case the petitioner was lawfully married in accordance with Ngoni tribal custom to the respondent on the 1st of January, 1959. The Petitioner and Respondent later had a second ceremony of marriage which took place under the provisions of the Marriage Ordinance, Cap. 132 of the Laws of Zambia.

This ceremony was held at the office of the Registrar of Marriages in Lusaka on the 10th of July, 1965. The marriage was proved by the evidence of the petitioner and by the production of a certificate issued under the provisions of section 29 of the Marriage Ordinance. It was held that a marriage under the Marriage Ordinance is monogamous. Consequently, a potentially polygamous marriage can be converted into a monogamous marriage, and the parties in the instant case

[318] *Sithole v Sithole* (1969) ZR 92 (H.C).

http://etd.uwc.ac.za/

converted their marriage into a monogamous marriage. In the same vein, the Marriage Act[319] upholds this position by allowing parties married under African customary law to contract a statutory marriage provided that it is to the same.[320]

Thirdly, it is imperative to note that a customary law marriage is as valid as a statutory one and none is more superior than the other.[321] However, the Marriage Act, provides for conversion of a customary law marriage into a statutory marriage.[322] Despite the fact that both marriages have their own legal consequences, it appears that once the conversion from an African customary marriage to statutory marriage is effected, the marriage would then be governed by statutory rules. This is because the conversion implies that the previously potentially polygamous marriage has now become monogamous and therefore, it is the statutory marriage which should be recited in the decree.[323]

Fourthly, despite the acknowledgement of the duality of laws, the view taken by the courts on the application of African customary law has been somewhat inconsistent. On one hand, the courts have held the view that when parties marry under African customary law, the courts are bound to strictly administer customary law at the dissolution of their marriage.[324] For example, in the Munalo[325] case, the deceased had married his wife under Shona customary law. The deceased and his wife were living in Zambia as ordinary Africans but among a large Shona community in the Mumbwa District of the Central province of the Republic of Zambia.

Apart from their marriage, their life had not been affected by Shona law. The widow of the deceased took out a summons to obtain an order that the deceased's estate be administered by the

[319] Marriage Act Chapter 50 of the Laws of Zambia.
[320] 38. Any person who-
(a) contracts a marriage under this Act, being at the time married in accordance with African customary law to any person other than the person with whom such marriage is contracted;
[321] Section 34 of the Marriage Act Chapter 50 of the laws of Zambia.
[322] 34. Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any African customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any African customary law, or in any manner apply to marriages so contracted.
[323] Section 38(a) of the marriage Act Chapter 50 of the laws of Zambia.
[324] See the cases of *Martha Mwiya v Alex Mwiya* (1977) ZR 113 (HC*), Munalo v Vangesai* (1974) ZR 91, and Esther *Ngula Sitali v Fenias Mafemba* (2006) ZR 143.
[325] *Munalo v Vangesai* (1974) ZR 91, which embodies the holdings to the great extent in the Mafemba case

http://etd.uwc.ac.za/

High Court under the English Probate law which applied in Zambia and not under African customary law. The respondent, a cousin of the deceased, claimed that the estate was governed by Shona Customary law. Neither party in the proceeding claimed that the deceased was subject to African customary law other than Shona law.

The court held, *inter alia*, that the parties to the marriage were living in a Shona community and had been married by Shona law. Therefore, it would be catastrophic if it were held that persons living in the manner of the deceased did not retain their customary law, as this would also mean that the customary marriage law would not apply.[326] The court also held that since the deceased had not lived in a manner to divest himself of his customary law, it followed that the law to be applied to the administration or distribution of his estate was Shona customary law.

On the other hand, the Courts tend to suggest that adherence to the dictates of African customary law is abhorrent and a precursor to promoting injustice.[327] In contrast to the above case, the brief facts in *Chibwe v Chibwe*[328] case were that the appellant and the respondent married in 1977 under Ushi customary Law. In 1982 the couple encountered problems. The main ones being, according to the respondent, the appellant's constant late coming to the matrimonial home. He alleged that each time she went to church gatherings and visitations she returned home late. He also alleged that she committed adultery with a man who was not cited in the proceedings.

It was for these reasons that the respondent petitioned the Local Court at Mufulira to dissolve his marriage to the appellant. At the time of the divorce, they had five children, not including nine born by the respondent from his previous marriage. The petition for the dissolution of the marriage was premised on unreasonable behavior and adultery.

The Local Court granted the application. Dissatisfied with the Local Court' decision, the appellant appealed to the Magistrates court. The grounds of appeal alleged that the local court justices had misdirected themselves by dissolving the marriage on unsubstantiated grounds. It was also argued that the Local Court Justices had not addressed their minds to the question of maintenance and

---

[326] *Munalo v Vangesai* (1974) ZR 91.
[327] See the case of *Rosemary Chibwe and Austin Chibwe* (2001) ZR 1.

[328] *Rosemary Chibwe and Austin Chibwe* (2001) ZR 1.

http://etd.uwc.ac.za/

property adjustment of the property acquired by the respondent during the subsistence of their marriage.

The Magistrate heard the matter *de novo*. The court sat with assessors in Ushi customary law. At the end of the trial, the appeal was dismissed. It was the Magistrate's position that the appeal had no merit. The local court decision was therefore confirmed. The appellant then appealed to the High Court. The High Court Commissioner upon considering Ushi customary law directed the respondent to pay the appellant the sum of K10, 000, 000. The appellant appealed against the decision of the learned trial commissioner to the Supreme Court.

The appellant raised five grounds of appeal which included the following;

i. that the learned trial Magistrate was biased in favour of the respondent and that he never considered the appellant's evidence before him;
ii. that the learned trial Magistrate failed to order a lump sum maintenance or monthly maintenance for the appellant;
iii. that the learned trial Magistrate failed to make any property adjustment order;
iv. that the learned trial Magistrate misinterpreted the provisions of section 16 of the subordinate Court's Act; and
v. that he failed to appreciate the principle of equity so as to provide for the appellant upon granting divorce.

After considering these grounds, and the attendant submissions, the Supreme Court held among others that:

i. In Zambia courts must invoke both the principles of equity and law concurrently,
ii. In making property adjustments or awarding maintenance after divorce, the court is guided by the need to do justice, taking into account the circumstances of the case, and
iii. Customary law in Zambia is recognized by the Constitution provided its application is not repugnant to any written law.

The court made the following observation in passing judgment:

"We have observed in this case with interest the dichotomy resulting from the application of an unrecorded customary law, against the background of the changed environment of macro-

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

economic with its ramifications, the growth of the common law of Zambia with the changes in the social values influenced by the international values received by Zambia through its ratification of various international instruments more or less creating two justice paradigms. In fact, this existence of two justice paradigms results in some cases in gross disparities bringing about inequality before the law contrary to our Constitutional provisions. It is incumbent for all the courts to uphold the Constitution. Our Constitution has provided that in Zambia courts must invoke both the principles of equity and law concurrently, a point which some judicial officers at local court and subordinate court levels fail to put into practice."

The 2016 Constitutional[329] amendments have brought new dynamics to the position of African customary law in Zambia which require a bit more attention when interpreting it. Article 1 (1) [330] maintains the supremacy of the Constitution and specifically points out that any written law, any customary law and customary practices that are inconsistent with its provision are void to the extent of its inconsistence. In the same vein, Article 7 provides that the Laws of Zambia Consists of the Constitution, laws enacted by Parliament, Statutory Instruments, Zambian Customary law which is consistent with the Constitution, and the laws and statutes which apply or extend to Zambia as prescribed. [331]

Although the Constitution does not expressly state the hierarchy of our laws, and may still render credence to the arguments, the priority in listing the laws suggests a hierarchy. It can, therefore, be argued that the express provision indicating that the only measure for the validity of customary law, is its consistence with the dictates of the Constitution, somewhat raises the bar for customary law and places it on equal footing with other laws save for the Constitution.

It can further be argued that the repugnance clauses existent in written law can no longer be said to be the ultimate measure of the validity of African customary law. It however, remains to be seen how the court will interpret these provisions and whether they will give true meaning to duality. In light to the express provision under article 7 of the Constitution, which tend to tamper with the test for repugnancy, it would be surprising to see an increase in the generosity previously accorded

[329] Act No. 2 of 2016.
[330] The Constitution of Zambia, Act No. 2 of 2016.
[331] The Constitution of Zambia, Act No. 2 of 2016.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

to the interpretation of the repugnant clause, and the subjugation of African customary to statutory law, Common law, the principles of equity and good conscience.

One cardinal thing, however, is the cautious approach that all the Courts takes when it comes to custody of the children of the family. The courts take the view that custody of children must be determined in the best interest of the child.[332] In the case of *Munalo v Vengasai*[333] the court made the following remarks regarding the custody of children:

> "I am, of course, aware that this application has really little or no relation to the actual estate of nine head of cattle, but is really related to the custody of the children. The Shona law may refer to inheriting children in the sense of inheriting an obligation to look after them, but this could not necessarily determine the custody if that question came before a court by appropriate proceedings. Custody to my mind would be decided in the best interests of the children. The question of custody cannot, however, be determined by the High Court by the appointment of an administrator of his estate. Whether an administrator was appointed by the High Court or by the local court he would have to distribute the estate in accordance with the Shona law applicable."[334]

It is very interestingly to note that there appear to be no evidence suggesting that the courts consider the payments (dowry) made at the time the marriage is contracted, and how the rights conferred on the parties following the said payments ought to be treated. One would present a valid argument to say that the payments are ignored altogether because they are considered repugnant. However, if that were the case, the Supreme Court of Zambia would not have considered the issue of payment of *sionda* to determine the validity of the marriage in the Mafemba case.[335] In the said case the appellant had an affair with the respondent's daughter (the deceased). The appellant did not claim to be married to the deceased either under customary Law nor statutory Law. He paid no dowry, nor followed the laid-down procedure of Lozi customary law. But however, he assumed that he was married on the strength that he had lived with the deceased for fourteen years and had

[332] In the case of *Munalo v Vengesai* (1974) Z.R. 91.
[333] *Munalo v Vengesai* (1974) Z.R. 91.
[334] *Munalo v. Vengasai* (1074) Z.R.91 (H.C).
[335] *Esther Ngula Sitali v Fenias Mafemba* (2006) ZR 143.

http://etd.uwc.ac.za/

two children with her (i.e. common law marriage). After the deceased had passed away, her mother became the administrator of her estate. The appellant took the matter to the Local court claiming that he had a right to her estate because he was a 'widower' and as such was entitled to it vis-à-vis section 9 (1) (b) of the Intestate Succession Act. On appeal, the High Court held that both the Subordinate Court and Local Court were in error and granted the deceased's mother the right to be the administrator holding that there was neither a valid statutory marriage, nor a customary marriage between the deceased and the appellant. The court was of the view that the Marriages Act, Cap. 50 of the Laws of Zambia has only two forms of marriages recognized in Zambia: customary marriages and statutory marriages. Since there is no presumption of marriage under customary law, the court agreed with the lower court when it held that the appellant was not a husband to the late Inonge Sitali, despite the fact the two had stayed together as husband and wife for fourteen years and had two children together. There is thus no presumption of marriage in Zambia.

What makes logical sense is the position that African customary law is a grey area with which most adjudicators are uncomfortable.[336] The repugnance clause therefore presents a perfect opportunity to cover up the ignorance. The Court's attitude of overlooking the dictates of African customary law not only stunts the growth of jurisprudence, it also nourishes uncertainty of law and at times winks at injustice. This often plays out in cases of bigamy and in cases involving custody of children born to parents or parties to a bilateral marriage, especially where one pays dowry.

What is quite astonishing, in cases involving conflict between statutory law and customary law, in marriage related cases such as bigamy, is that more often than not the court presents itself ready to accept that dissolution of statutory marriage invariably dissolves African customary law marriage because statutory law is said to be superior to African customary law. This is seen in the case of *The People v Paul Nkhoma*[337] where the court held that the accused's mistake of believing

[336] In the Case of *Rosemary Chibwe and Austin Chibwe* (2001) ZR 1 the Supreme court in acknowledging its own deficiency in Ushi customary law stated thus; We accept that looking at the record of the proceedings before both the local court and Magistrate court it was common ground that the marriage, which is subject to this litigation, was conducted under *Ushi* customary law. We are therefore surprised that both the Local and Magistrate Courts which sat with the assessors who are the experts of the *Ushi* customary law, made no reference to *Ushi* customary law in dissolving the marriage and in property adjustments…The other cardinal principle well-grounded in our justice system is the observance of the principle of *stare decisis*.
[337] *The People v Paul Nkhoma* (1978) ZR 4 (H.C).

http://etd.uwc.ac.za/

that the dissolution of his customary law marriage, simultaneously dissolved the statutory marriage was not a defence to a charge of bigamy. The court went on to convict the accused.

It is also interesting that in Zambia, knowledge of customary law had to be solicited from experts in the courts of law and yet the courts needed no help from experts to understand received statutory laws.[338] The lack of knowledge of customary law presents an inherent weakness in the development of jurisprudence that would rectify the scourge and promote the creation of a just and equitable society.

It should be noted that what the courts missed out in making such holdings is that bride price, among other things, is one of the payments that must be returned to signify divorce.[339] To gloss over such an important customary law practice, that there seem to be no evidence that the majority of the people practice such custom, is to treat a matter of this magnitude with unmerited simplicity.[340]

It is a well-known fact that in law procedural justice is an integral part of the justice delivery system, thus if the substantive dictates of law are to be honored in a dual legal system then procedure must be adhered to.[341] Under customary law, it is a matter of both procedural and substantive justice that certain payments be returned to the family of the man to signify divorce. Failure to adhere to this requirement should invariably mean that there is no divorce. Further, by insisting, in custody cases, that the custody of children be determined in the best interest of the children, the courts ignore the man's vested rights in the children, and to a great extent, throw the issue of their communal based inheritance in limbo.[342] It is worth explaining that this argument makes a deliberate distinction between property acquired by and belonging to the nuclear family, and that owned by the clan.[343]

---

[338] *Martha Mwiya v Alex Mwiya* (1977) ZR 113 (HC).

[339] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p80.

[340] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p 77.

[341] Munalula M Legal Process: Zambian cases, Legislation commentaries (2004) p5.

[342] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*' (2011) Vol 18. Iss. 1. Article 5 187.

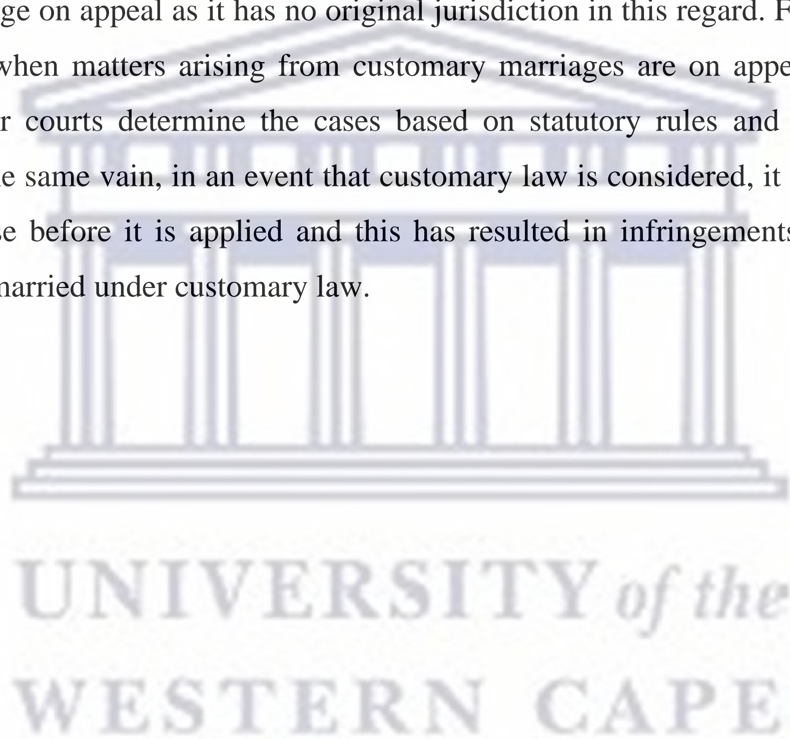
[343] Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*' (2011) Vol 18. Iss. 1. Article 5 187.

http://etd.uwc.ac.za/

The need to judicially navigate the delicate balance in bilateral marriages cannot be over emphasized. To do this, the courts need to adequately acquire knowledge on African customary law, so as to make informed decisions especially when wielding the powers vested in the courts by the repugnancy clause.

Conclusion

This chapter has discussed jurisdiction of courts to pronounce themselves on matrimonial affairs. It has also been shown that the High court only has jurisdiction to hear matters stemming from a customary marriage on appeal as it has no original jurisdiction in this regard. Further, it has been established that when matters arising from customary marriages are on appeal in the superior courts, the higher courts determine the cases based on statutory rules and customary law is disregarded. In the same vain, in an event that customary law is considered, it is subjected to the repugnancy clause before it is applied and this has resulted in infringements of spouse rights especially those married under customary law.


UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This chapter is the final chapter of this academic paper. It adduces forth a summary of the whole study which is grounded in the conflict arising from a bilateral marriage. This chapter will present reviews for all the chapters, from chapter one to chapter four. The chapter will then conclude on the judge's approach on conflicts arising from bilateral marriages. Appropriate recommendations on the subject matter will follow the conclusion.

5.2 Summary

The foregoing chapters have attempted to show the diversity of the definition of marriage in Zambia. It has been noted in the previous chapters that marriage varies depending on the nature or type of marriage in question. One can either define it as 'a contract for the voluntary union of one man and one woman to the exclusion of all others, until that union is terminated by death, or is dissolved or annulled by statute or by decree of a competent tribunal'.[344]

Marriage can also be defined as a marriage between one man and one or more women and between the woman's and man's families.[345] The former is a definition of a statutory marriage while the latter is a definition of a customary marriage. On the other hand, there is a silent type of marriage that exists in Zambia which is a religious marriage and it is loosely defined as a union of one man and one woman for life to the exclusion of all others.[346] While it is said that there are two types of marriages in Zambia, namely statutory and customary marriages, however, in practice there are three types of marriages being customary, religious and statutory marriages.

It has been observed in the previous chapters that marriage legalities in pre-colonial Zambia were based on customary law.[347] This law was grounded in local cultures and embodied people's customs, traditions and values.[348] The law was viewed as a unique possession handed down to them by their ancestors.[349] This law also nurtured strong family bonds. It conferred on the people certain beneficial interests and effectively regulated the institution of marriage.

---

[344] People v Katongo (1974) Z.R 366.
[345] Ndulo, M *Law in Zambia* (1984) p. 143.
[346] Mandy Manda *Marriage* (2020) p10.
[347] Winnie Sithole Mwenda *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia* (unpublished thesis for Ph.D, University of South Africa, 2009). P 62.
[348] Zambia Law Development Agency, Restatement of Customary Law, December, (2002), p33.
[349] Anthony Allot N *Essays in African Customary Law* (1960) p59.

http://etd.uwc.ac.za/

Further the preceding chapters show that dual legal system has silently created a platform for people to practice both customary and statutory law concurrently. In fact, it now appears fashionable and readily acceptable to attract bilateral marriages because it tends to offer what appears to be the best of both laws. Contrary to people's understanding, the reality could not be more different.

Bilateral marriages seem to cause conflicts which result in infringements on the rights of spouses in the marriage. The conflicting results of bilateral marriages can be attributed to uncertain legislation on marriages and the courts relaxed approach in interpretation of respective laws conferred on different types of marriages in Zambia. Little accountability is imposed on the parties because of their longing for culture. The parties' desire for identity and a sense of belonging embedded in their cultural.

As observed from the other chapters this research has been conducted within the legal framework of certainty of law, the need for certainty in the law regulating marriage cannot be overemphasized. It forms the bedrock of regulation in that it acts as a guide for the roles, responsibilities and antecedents available to the prospective parties to marriage will enjoy depending on the law the parties chose to guide the marriage. This research has established that in its present form, the law regulating marriage in Zambia has failed in that regard.

Further, the research has identified the cause of the conflict which include section 20 of the Marriage Act[350],because of its permissive nature to bilateral marriages, and secondly because of the legislature's failure to guide on the hierarchy of laws and how conflict arising between laws in their duality context, are to be resolved.

While it can be argued, and easily conceded by this research that the law on marriage in Zambia only allows parties to either contract marriage under statute or customary law, the reality, as shown by this research is that parties still have continued to contract their marriages under both customary and statutory law.

Presently, it has been noted that the Marriage Act[351] allows for religious ministers to solemnise civil marriage in church according to the rites and usages of marriage observed in such church,

[350] Marriage Act Chapter 50 of the laws of Zambia.
[351] Marriage Act Chapter 50 of the laws of Zambia.

http://etd.uwc.ac.za/

denomination or body.[352] The law however does not define or delineate the acceptable rites and usages. This has enabled the insistence of payments of bride price which is said to be biblically supported.[353] It is important to note though that while the Bible is used as justification for demanding the payment of dowry, the actual negotiation between families for dowry are premised on the dictates of customary law.

It has been observed that the other noted challenge emanating from section 20 of the Matrimonial Causes Act. The section vests power in the religious ministers, the rights to observe their respective church's rites and usage is one on consent to marry. The approach taken by most religious ministers, as shown above, is that they would only proceed to solemnize a marriage where consent from the parents of the bride is given, regardless of the bride's age. While this ties in with customary law, the consent of the bride's parents is mandatory, it is alien to statutory law for the brides above the age of 21.

Section 17 of the Marriage Act[354] only makes consent mandatory if either party to a marriage, not being a widow or widower, is below the age of 21.[355] To insist therefore that the parties to a marriage that are above the age of 21 are still duty bound to obtain parental consent or risk their marriage not being solemnized in church, is to defeat the import of section 17 of the Marriage Act. [356].

One other notable thing from the other chapters is that a cursory glance at customary marriage would reveal that there is no denying that it is flawed judging from the fact that Zambia has 73

[352] Section 20 of the marriage Act, Chapter 50 of the laws of Zambia

[353] Some Religious Ministers interviewed on this point made reference to Genesis 31:15, and Exodus 22:16-17 as justification for Payment of the dowry. On the text in Genesis, the Religious Minister stated that since dowry was mandatory, Jacob – who did not have a source of income at the time – worked for his uncle to fulfil the requirement of paying dowry. On Exodus 22:16 – 17 the Religious Minister reproduced the text which he said reads as follows; *if a man entices a virgin who isn't pledged to be married, and lies with her, he shall surely pay a dowry for her to be his wife*. He went on to state that the verve is couched in mandatory terms.

[354] Chapter 50 of the Laws of Zambia.

[355]If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Zambia, of the mother, or if both be dead or of unsound mind or absent from Zambia, of the guardian of such party shall be produced and shall be annexed to the affidavit required under sections ten and twelve and, save as is otherwise provided in section nineteen, no special licence shall be granted or certificate issued without the production of such consent.

[356] If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Zambia, of the mother, or if both be dead or of unsound mind or absent from Zambia, of the guardian of such party shall be produced and shall be annexed to the affidavit required under sections ten and twelve and, save as is otherwise provided in section nineteen, no special licence shall be granted or certificate issued without the production of such consent.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

ethnic groups, all of which has different customs and practices[357]. However, marriages under customary law do offer similar rights and obligations under different customs and practices. A woman is said to be ready for marriage as soon as she reaches puberty,[358] while a man is said to be ready for marriage when he grows a beard.[359] The age factor seems to collide with the statutory marriage requirement of a maximum of 21 years and minimum age of 18.[360]

The other chapters have also revealed further conflicts of bilateral marriages, seen in the requirement of parental consent which is mandatory under customary marriages, despite the fact that the parties intending to marry are above 21 years. On the other hand statutory marriages only require parental consent when the parties intending to marry are below 21 years and over 18 years.[361] The polygamous nature of customary marriages seem to collide with statutory laws under the penal code[362] which seem to criminalize it under section 166.[363] The said section is not certain in that, it does not recognize the polygamous nature of customary marriages and makes it a felony for any man or woman going through a marriage ceremony while in a subsisting valid marriage.

Despite all the perceived advantages of statutory marriage, such as adherence to monogamy, the conferment of equal rights to spouses with respect to children, and equal rights to matrimonial property, there appears to be a perception that statutory law is 'living law.' It does not adequately adhere to the needs and aspiration of the people, in that it does not speak to the inherent customs, traditions and values of the people.

Strict adherence to statutory law when contracting marriage alienates the parties from their customs, traditions and values thereby depriving the parties of a sense of identity. Evidently so, chapter 3 of this research has discussed the laws that regulate and champions spouse rights in

[357]Fredrick Mudenda S *Land Law in Zambia: Cases and Materials* (2006) p 12.
[358] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p76.
[359] Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) p76.
[360] Sections 17,18 and 19 of the Marriage Act Chapter 50 of the laws of Zambia.
[361] Section 19(2) of the Marriage Act Chapter 50 of the Laws of Zambia.
[362] Penal Code Chapter 87 of the laws of Zambia.
[363] "Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years:
Provided that this section shall not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time."

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

bilateral marriages. A cardinal aspect of this chapter are conflicts that arise from different rights under bilateral marriages and how these conflicts have affected the rights of spouses.

The conflict emanating from bilateral marriages and its practice has been laid bare. Since this conduct leads to a conflict of laws and consequently makes the law uncertain, it should not be allowed to subsist because it clogs the efficient adherence to duality and confounds certainty of law.

Notwithstanding the legislature's flaws, the judiciary plays a very important role in interpreting the rights of parties in any marriage, including a bilateral one. The research has shown that with regards to bilateral marriages, however, the Zambian courts seem to relax. The genesis of this position relates to the failure to determine the hierarchy of laws.

It can be seen from the research that the court seems to resolve any conflicts arising from bilateral marriages with the repugnancy clause. The repugnancy clause, which has often been used as a sledge hammer to sub judicate African customary law, has fallen prey to the minds of judges who often make little or no effort to understand the rationale behind the rights conferred on the parties to marriage.

While sections 12 of the Local Court Act,[364] and section 16 of the Subordinate Court Act[365] subjects' African law be consistent with written law. Although it can be argued that article 23 (4) ©[366] did not elevate African customary law above written law, it is also valid to argue that it did not denigrate it. It is further argued that the inclusion of African customary law, and allowing it to be an exception to the law on discrimination in the Constitution, goes to re-enforce the high regard the Constitution has for duality. Further, a notable amendment effected to the Constitution is the

---

[364] Chapter 29 of the laws of Zambia
[365] Chapter 28 of the laws of Zambia
[366] Section 23 (1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.
(2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
(4) Clause (1) shall not apply to any law so far as that law makes provision-
(d)for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;

http://etd.uwc.ac.za/

enunciation of the laws applicable in Zambia under article 7.[367] The said article clearly stipulates the potency of African customary law and makes it subject only to the dictates of the Constitution. The view taken in this research is that whether Article 7 is interpreted in accordance with the literal rule of interpretation which dictates that words in a statute should be given their plain, ordinary, and literal meaning. Another option is the *expression unius est exclusion alterius* rule of interpretation which stipulates that when one or more this of a class are expressly mentioned others of the same class are excluded. The resultant effect still remains that African customary law is only subject to the provisions of the Constitution. Notwithstanding this, there is little to no evidence indicating any alterations to the repugnancy clauses to conform to this article. Section 12 of the Local Court Act,[368] and section 16 of the Subordinate Court Act[369] continue to be applied in their present form.

Furthermore, the research has shown the judicature's serious contribution in fueling conflicts of bilateral marriages in its inconsistent decisions. The said decisions are mainly in relation to the application of African customary law in matrimonial causes and especially in property settlement and child custody matters. On the one hand, the courts have insisted on the strict adherence to the dictates of African customary law, yet on the other hand the courts have branded customary law as archaic and a vehicle used to perpetrate injustice. The cases of *Munalo v Vengesai*[370]*, Chibwe v Chibwe*,[371]and *Mwiya v Mwiya*[372] demonstrate this point.

The view taken by this research is that unless these issues are addressed, the development of jurisprudence in the law regulating marriage in Zambia will remain uncertain and more people will remain at sea. The conflicts will continue resulting in more infringements on the rights of parties contracting marriages. Unless the law becomes certain and more attuned to the needs of the society is seeks to regulate, such law loses relevance and is a stumbling block to spouse' rights in marriage.

---

[367] 7. The Laws of Zambia consist of—
(a) this Constitution;
(b) laws enacted by Parliament;
(c) statutory instruments;
(d) Zambian customary law which is consistent with this Constitution;
[368] Chapter 29 of the laws of Zambia.
[369] Chapter 28 of the laws of Zambia.
[370]*Munalo v Vengesai (1974)* Z.R. 91 (H.C.).
[371] *Rosemary Chibwe v Austin Chibwe* (2001) ZR 1.
[372]*Martha Mwiya v Alex Mwiya (1977)* ZR 113 (HC).

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

5.3 RECOMMENDATIONS

Having highlighted the conflict of law in the law regulating marriage in Zambia, and having identified the causes of these conflicts of laws, the following are the recommendations;

5.3.1 Repeal and Replace the Marriage Act chapter 50 of the Laws of Zambia

It is recommended that the legislature should repeal and replace the Marriage Act[373] and also repeal the Matrimonial Causes Act.[374] The basis for the repeal and replacing of the Marriage Act[375] is to consolidate the law relating to marriage, divorce and maintenance and provide for the registration of civil, religious and customary marriages. The first cure in the intended Marriage Act should commence with the definition of marriage to read as 'a voluntary union of a man and woman in a monogamous or polygamous union and registered in accordance with the Marriage Act.

This definition will be all encompassing, with no need to subject the definition of marriage to the nature of marriage in question. In the same vein, there is an urgent need to recognize other types of marriage and categorize them into civil, religious and customary. The civil marriage will include, English statutory marriage, Hindu marriage and Islamic marriages. Inclusion of other types of marriages will lessen the confusion among the unsuspecting marriage couples who have no knowledge of how their rights are affected if conflict arose in the marriages. Further, this will give room to other religions who seek to be married or divorce in Zambia as the Marriage Act will accommodate them as well, as have licensed ministers who will be endowed with the authority to solemnize such marriages.

UNIVERSITY of the
WESTERN CAPE

The recognition of three types of marriages will also remove the current confusion caused by section 20 of the Marriage Act, which seems to have created an innuendo of religious marriages, despite the rest of the Marriage Act[376] not providing for further regulation or jurisdiction of such marriages. There will also be an elimination of the requirement by religious ministers to request for parental consent before solemnizing a marriage of parties who are above the age of 21 years.[377]

---

[373] Marriage Act Chapter 50 of the laws of Zambia.
[374] Act No. 20 of 2007.
[375] Marriage Act Chapter 50 of the laws of Zambia.
[376] Marriage Act Chapter 50 of the laws of Zambia.
[377] Section 17 of the marriage Act, Chapter 50 of the laws of Zambia.

http://etd.uwc.ac.za/

It is also recommended that parties who intend to marry should all acquire marriage certificates upon marriage, notwithstanding the nature of the marriage. The intended Marriage Act should make it mandatory for all marriage certificates to be registered at the office of the Registrar of marriages, so as to avoid bilateral marriages. If any couple intends to convert to a different type of marriage for instance from a customary to a statutory marriage, then the Act should have a provision for conversion of marriages which will enable couples to convert and obtain a different marriage certificate.

It should also be a mandatory requirement that when parties convert to a different marriage, their old marriage certificate should be surrendered to the office of the Registrar of marriages for purposes of shredding so as to avoid any future confusion.

It is proposed that the jurisdiction of the courts should clearly be provided for under the intended Marriage Act.

This study proposes that since the Constitution of Zambia[378] created a Family Court,[379] all matrimonial matters should be referred to the Family Court, which is a division of the High Court. The Family Court should be well vested with judges and assessors of customary law, Islam and Hinduism. This will put all types of marriage on equal footing as one will not be seen to be superior to the other based on the jurisdiction of the Courts.

Further, this will resolve the conflicts of religious marriages being shun by the High Court and Local Court for want of jurisdiction. It should also be clearly provided for in the Act that Islamic marriages, Hindu marriages and customary marriages should be determined in accordance with their laws.

The Courts should determine matters arising from customary marriages in accordance with the customs of the communities of one or both of the parties to the intended marriage. This will not only uphold the customs and practices under which the parties marry, but also preserve the rights and obligations conferred on the parties under the custom in term of which they solemnized their

---

[378] Act no 2 of 2016

[379] 133. (1) There is established the High Court which consists of—
(a) the Chief Justice, as an ex-officio judge; and
(b) such number of judges as prescribed.
(2) There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

marriage. In the same vein, a wife in a customary marriage has, on the basis of equality with her husband, and subject to the matrimonial property system governing the marriage, full status and capacity. This includes the capacity to acquire assets and to dispose of them, to enter into contracts, litigate and have any rights and powers that a wife might have at customary law.

This will prevent customary marriages from subjection to statutory law especially when matters are on appeal in higher courts as the current status quo. Further customary rules and practices will be upheld by so doing. Another conflict which will be resolved will be that of custody and maintenance of the children which under customary law is dependent on whether parties in a marriage practice patrilineal or matrilineal systems but once the matter goes to court, that becomes immaterial, and the "best interest of the child" applies.

Finally, it is also proposed that the indented Marriage Act should specify the age of marriage. For avoidance of doubt the researcher proposes further that the Act should provide for the minimum age of marriage to be 18, while the majority age should be 21 for all types of marriage. The rationale behind this is that in the Zambian Constitution[380] a child is said to be below the age of 18 years of age consequently this will lesson issues of child marriage and issues of defilement as provided for under the Penal Code Act. Further there will be no conflicts with regards age in a bilateral marriage consisting customary and statutory law.

5.3.2 Amend the High Court Act

The researcher proposes an amendment to section 11(1)[381] of the High court Act [382] to extend its jurisdiction in matrimonial matters under the family division to customary, Hindu and Islamic marriages.

5.3.3 Repeal Repugnancy Clause

[380] Article 266 of Act not 2 of 2016

[381] 1) The jurisdiction of the Court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England

[382] Chapter 27 of the laws of Zambia

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

It is proposed that the legislature repeal section 12(1) [383] of the Local Court Act[384] and section 16[385] of the Subordinate Court.[386]

5.3.4 Further Research in Introduction to African Customary Law

The researcher recommends that the Ministry of General Education and Higher Education develop and introduce African customary law curricular in primary and secondary schools as well as tertiary law schools that will equip learners with concise knowledge on African customary law in Zambia. It is further recommended that for serving adjudicators and legal practitioners, the Laws Association of Zambia and the Judiciary could identify experts vested in African customary law to conduct workshops for their cadre on the topic under reference.

[383] 12. (1) Subject to the provisions of this Act, a local court shall administer- Law to be administered.
(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law;
[384] Chapter 29 of the Laws of Zambia.
[385] Section 16 of the Subordinate Court Act Chapter 28 of the Laws of Zambia.
[386] Chapter 28 of the laws of Zambia.

http://etd.uwc.ac.za/

BIBLIOGRAPHY

Books

Epstein, Arnold Leonard, *Urbanization and Kinship: The Domestic Domain on the Copperbelt of Zambia* (1981) Academic Press: London

Anthony N. Allot *Essays in African Customary Law* (1960) Butterworth Publishers Ltd: London

Cox Mumba *Customary Law of Marriage and Divorce among the Lenje of Central Province* (1990) East African Publication: Lusaka

Emmet Mittlebeeler V *Africa Customs and Western Law* (1976) New York and London: Africana Publishing Company

Licien Cornelious B *Marriage: The Golden Key to Unhappiness* (1994) USA: Dorrance Publishing, Inc

Martin E A & Jonathan Law A *Dictionary of Law* (2006) London: Oxford University Press

Fredrick Mudenda S *Land Law in Zambia:Cases and Materials (2005)*Lusaka: Unza Press

Henry Campbell Black M A Black's *Law Dictionary* ed (1968) West Publishing Co.

John Cresswell W *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* ed (2009) London: SAGE Publication

Lilian Mushota *Family Law in Zambia: Cases and Materials* (2005) Lusaka: UNZA press

Lucy Mair P A*frican Marriage and Social Change in Survey of African Marriage and Family Life* (1953) London: Oxford University Press

Mandy Manda *Marriage* (2020) Lusaka: Hartfield

Munalula, Mulela Margaret *Legal Process: Zambian cases, Legislation commentaries (2004)* Lusaka: UNZA Press

Mwizenge Tembo S *Satisfying Zambian Hunger for Culture – Social Change in a Global World*, (2012) Xlibris Corporation

Muna Ndulo Law in Zambia: Kenya: East African Publishing House

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

Mike McConville & Wing Hong Chui *Research Methods for Law* (2007) Edinburgh: Edinburgh University Press.

Robert Yin K *Case Study Research: Design and Methods* ed London: SAGE Publication Inc

Yizenge Chondoka *Traditional Marriage in Zambia; A study in cultural history*(1988) Ndola:Mission Press

Journals

Carlson Anyangwe, '*The Whittling Away of African Indigenous Legal and Judicial Systems'*, Zambia Law Journal, Special Edition (1998)

Earl L. Hover 'John C Piper & Francis O. Spalding, '*One Nation One Judiciary: The Lower Courts of Zambia'.* A Zambia Law Journal (1970) Vol. Nos. 1 and 2

Exnobert Zulu & Lungowe Matakala '*Conflict of Laws in Bilateral Marriages that fuse Statutory Law and Ngoni Customary Law in Zambia: The Need to Address the Conundrum'* (2019) V 1

Lungowe Matakala, '*Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws' (*

Muna Ndulo's '*African Customary law, Customs, and Women's Rights' Indiana Journal of Global Legal Studies*' (2011) Vol 18.Iss. 1. Article 5 90 p 187

Prof Chuma Himonga and Dr Fatimata Diallo, Report: What are the Interactions between Indigenous and State Legal Systems and how are Such Interactions Managed? (2012-2018)

Articles

Audrey I. Richards '*Bemba Marriage and Present Economic Conditions'* The Rhodes-Livingstone Papers (1969) Manchester: Manchester University Press

McClain, W T '*Legal Position of Women and Children Under Zambian Customary Law*' Kitwe: Mindolo Ecumenical Foundation Kitwe

Dissertations

Nchimunya Katowa *Evaluation of the Sanctity of Marriage Between Customary and Statutory Marriages vis-à-vis Divorce* (unpublished LLB Dissertation, University of Zambia 2011)11-30

UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/

Lungowe Matakala *Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws* (unpublished Ph.D thesis University of Cambridge 2009) 1-35

R.K.K. Mushota *The Control of Mining Companies under Zambian Mining and Company Law* (unpublished PHD thesis,University of Birmingham UK 1980) Chapter 2

Winnie Sithole Mwenda *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia* (unpublished thesis for PHD, University of South Africa 2009)

Cases

Ann P Nkhoma v Smart Nkhoma (1978) ZR 4,

Annette Chilima v Peter Chilima SCZ Judgment No. 22 of 2000

Esther Ngula Sitali v Fenias Mafemba (2006) ZR 143.

Fenias Mafemba v Ester Sitali (2007) ZR 215

Hafiz Ayub Durga v. Najmunisa Ismail (1992) ZR (HC)

Hide v. Hide and Woodmansee (1866) LRI P & D130

Janet Mpofu Mwiba v Dickson Mwiba (1980) Z.R. 175 (H.C.)

Lizzy Musauka v Mpasi Solomon Dube Supreme Court Judgment No. 64 of 2017

J v J (1970) A.C 668

Kaniki v Julias (1967), ZR 71

Martha Mwiya v Alex Mwiya (1977) ZR 113 (HC)

Mutale and Aubie, Willy Mwange v. Marjorie Mumbi Nyembele (2012) Appeal No 78

Musonda v Musonda SCZ Judgment No. 53 (Unreported)

Munalo v. Vengasai (1074) Z.R.91 (H.C)

Nkhata and Others v Attorney General (1966) Z.R. 124

Pettitt v Pettitt (1970) A.C 777

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

Rosemary Chibwe v Austin Chibwe (2001) ZR 1

R v Chinjamba 5 N.R.L.R. 384

R v Chapman (1959) 1 QB 100

Sithole v. Sithole (1969) ZR 92 (HC)

The People v. Chitambala (1969) ZR 143 (HC)

The People v Paul Nkhoma (1978) Z.R. 4 (H.C.)

The People v Katongo (1974) Z.R 366, at 369 per Care J

Van Deijil v. Van Deijil (1996) 4SA 260 (R)

Watchel vs. Watchel (1973) 1 ALL ER 829

Statutes

Children Code Act No.12 of 2022

Educational Act No. 23 of 2011

English Law (Extent of Application) Act Chapter 11 of the laws of Zambia

Marriage Act Chapter 50 of the laws of Zambia

Married Women Property Act, 1882

Matrimonial Causes Act No. 20 of 2007

Statutory Instrument No. 72 of 2018 The High Court (Amendment) Rules, 2018.

No. 23 of 2011 of the Laws of Zambia

The Constitution of Zambia, Act No. 2 of 2016

The High Court Act chapter 27 of the laws of Zambia

The Local Court Act chapter 29 of the laws of Zambia

The Subordinate Court Act chapter 28 of the laws of Zambia

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

The Penal Code Act chapter 87 of the laws of Zambia

The Royal Charter

Conventions

African Charter on the Rights and Welfare of the Child (ACRWC)

United Nations Convention on the Rights of the Child (UNCRC)

Internet Sources

Prof Chuma Himonga & Dr Fatimata Diallo available at https://www.legitimus.ca/static/uploaded/Files/Documents/Rapports/Rapports2/Formation-and-Patterns-of-Customary-Marriage-in-Zambia---a-Socio-Legal-Study (accessed 20 May, 2023)

Eleanor Maccoby E 'Custody of Children following Divorce' available at www.googlescholar – books.google.com (accessed on 13 July2022)

https://family.jrank.org/pages/1781/Zambia-Family-Formation.html (accessed on 22 July 2022)

Munshya, E 'Statutory Recognition of Customary Marriages in Zambia: Reforming colonial marriage laws 'available at http://www.eliasmunshya.org (accessed 17 March 2022)

UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/