

CONFLICT OF LAWS IN BILATERAL MARRIAGES THAT FUSE STATUTORY LAW AND NGONI CUSTOMARY LAW IN ZAMBIA: THE NEED TO ADDRESS THE CONUNDRUM

by

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Abstract

This article focuses on the conundrum attendant to the strict application of duality of laws in bilateral marriages. Important to state, on the outset, is that marriage in Zambia can only be legally contracted under either customary law, or statutory law. The law does not require the fusion of both laws to contract a valid marriage. The status quo notwithstanding, research conducted on point has established that a number of marriages in Zambia combine both laws so that these marriages are valid under both laws. These laws are simultaneously applied when contracting marriage so that it cannot be argued such are converted marriages. These marriages are herein referred to as bilateral marriages. While the challenges of duality in bilateral marriages abound, this article focuses on the conundrum relating to child custody and property settlement. It also endeavours to illuminate the courts' complicity to the prevailing challenges and suggests ways to address the problems existent in bilateral marriages.

The research conducted on the subject was qualitative. The doctrinal methodology was mainly adopted because of the need to conduct an in depth analysis of the meta-data, judicial decisions, archival documents, journal articles, books, the Constitution and statutes. The research also involved interviews with key informants. The methodology was preferred because of its flexibility to intellectual understanding of legal intricacies both substantively and procedurally more so that the study was 'in law' not about law. The law subjects of this discussion are Ngoni customary law, and statutory law.

Research findings established that, bilateral marriages stem from duality. The motivation for bilateral marriages is that it tends to provide a safe haven for monogamy while still allowing parties to quench their thirst for their culture. The continuous existence of duality has largely been due to its seemingly anodyne nature on society, and the judicature's lackadaisical and incongruent approach to customary related

matters. Anchored on the natural theory of acceptable standards of a legal system, this article argues that the conflict of laws existent in bilateral marriages clogs the legal principles of regularity, certainty and casts aspersion on the intelligibility of the Zambia legal system vis-à-vis marriage. The proliferation of bilateral marriages thus beckons the legal profession to critically focus on the laws regulating marriage in Zambia so as to address the exiting challenges.

1. Background

Marriage in Zambia can validly be contracted either under customary law or civil law. A civil marriage is contracted pursuant to the Marriage Act¹ and is monogamous. A customary marriage, Ngoni customary marriage, is potentially polygamous and is contracted pursuant to Ngoni customary law. Either provides the procedural niceties attendant to the contracting of valid marriage. Neither law requires the dictates of the other law to validate a marriage contracted pursuant to it. The fusion of the two laws to contract bilateral marriage is legally superfluous. The status quo notwithstanding, certain respondents interviewed, especially the clergy consider it contemptuous to solemnise a civil marriage where a man has not paid the bride price. While acknowledging that the practice may not be necessary, the argument advanced is that the practice is biblical and as ministers of religions, they are bound by the biblical dictates.² This position tends to enjoy the backing of the law in that the Marriage Act enjoins the ministers of religion to solemnise marriages in accordance with their religious rites.³

The argument advanced in this article is that the combination of Ngoni customary law and statutory law to constitute a single marriage embroils the institution of marriage into a quandary of laws that confer conflicting incidents or rights and benefits which are mutually exclusive. While

¹ The Marriage Act Chapter 50 of the Laws of Zambia.

² This information was obtained from most ministers of religion that were interviewed on the subject of some churches' insistence on the payment of *lobola* before the marriage could be solemnised in church. Most ministers cited the story of Jacob in Genesis 29:16-28 who had to work for his uncle Laban for 14 years as payment of dowry for both Leah and Rachel.

³ Section 20 of the Marriage Act; 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.

it is admitted that the conflict may not be manifest in a viable marriage, the conflicts manifest at the dissolution of marriage and courts are called upon to determine issues of child custody and property settlement among others.

To exude these conflicts, the article discusses the law governing bilateral marriages. It briefly discusses the procedural minutiae and the benefits attendant to payments made especially under Ngoni customary law so as to succinctly elucidate the point, but before delving into the said discourse, a brief history on the genesis and development of duality in Zambia is worth the space in this article.

1.2 The Genesis and Development of Dualism in Zambia

Zambia's legal history, like many other African countries, spans through three stages namely; pre-colonial era, colonial era, and post-colonial era;

Pre-colonial era legalities were premised on the African customary governing each ethnic group.⁴ Legal traditions were grounded in local cultures, and legal institutions were established based on African customary law. imperative to state is the fact that African customary was diverse in that each ethnic group viewed customary law as a unique possession handed down to it by the ancestors or God.⁵ It must be stated however that the diversity in customary law was mainly on account of lineage pursued by a particular ethnic group.⁶ Marriages in this era were mainly restricted to ethnic groups and were contracted in accordance to the laws governing a given group. Legalities in the colonial era were greatly affected by the colonial interests. The British South African Company (BSA Co.) which occupied the territory for mineral exploration took over the administration of the territory and administered it from 1891 – 1923. Although the company made efforts to formalise customary law systems, it made clear distinction between white settlers and the indigenous Africans especially in matters of personal law. The distinction led to the creation of a dual legal system. The legal system that the BSA Co. imported and imposed on the territory mainly applied to white settlers.⁷ The company adopted, in certain instances, a policy of qualified

⁴ Anthony N. Allott, *Essays in African Customary Law*, (Butterworth (Publishers) Ltd: London, 1960), p. 59.

⁵ Anthony N. Allott, *Essays in African Customary Law*, (Butterworth (Publishers) Ltd: London, 1960), p. 59.

⁶ Audrey I Richards, *Land Labour and Diet in Northern Rhodesia. An Economic Study of the Bemba*, (Oxford University Press: Oxford, 1935), p. 16-18.

⁷ Carlson Anyangwe, 'The Whittling Away of African Indigenous Legal and Judicial Systems' 1998, *Zambia Law Journal*, Special Edition, p. 4.

tolerance of indigenous laws.⁸ It recognised African customary law in areas of personal law which include laws governing marriage. Inter-racial marriages were proscribed, and Africans were not allowed to contract civil marriage. The development of African customary law during the colonial era could be summarised in the following four stages; neo-recognition or toleration, recognition, control and re-organisation.⁹

Post-colonial era legalities brought with it innumerable social and legal dynamics. Urbanisation dictated by, among other things, industrialisation intensified the rural urban drift. The net effect was an assembly of people from different ethnic groups. These people from different ethnic groups moved to mining towns and other industrialised towns in search of economic activities. The new schools and hospitals built post-independence and the One Zambia, One Nation philosophy encouraged ethnic co-existence and integration.¹⁰ The integration led to inter-marriages. These inter-marriages had inherent problem as Gluckman notes. It was Gluckman's postulations that conflict of laws in intermarriages included the rights and duties of wives as perceived by different ethnic groups.¹¹

The conflict noted by Gluckman, it is argued here, is further exacerbated by the introduction of civil marriages among Africans. The unstandardised repugnancy clause as a rule to resolve the conflict of laws has not helped to promote duality but instead often drawn African customary law within the hangman's noose. The colonial legacy existent in sections 2(b) of the English Law (Extent of Application) Act read with section 11 of the High Court Act, also works to relegate the application of African customary law in the High Court as a court of first instance. This is because it restricts the laws applied in the High Court to exclude African customary law.

⁸ Earl L. Hover, John C Piper and Francis O. Spalding, 1970 '*One Nation One Judiciary: The Lower Courts of Zambia.*' Zambia Law Journal Vol. Nos. 1 and 2, p. 4.

⁹ Nkambo, P.J Mugerwa, *African Conference on Local Courts and Customary Law*, p. 12.

¹⁰ Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)*, p. 209.

¹¹ Ibid.

2. Research Methodology

In terms of design, 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.¹² The research undertaken was mainly doctrinal. The following research methodologies were used to collect and analyse data.

2.1 Desk Research

This methodology was used because it focuses on what the law is on a particular point. It entails the location and interpretation of relevant primary and secondary sources of law and synthesise the sources to form a legal position. It also enables a researcher to suggest ways in which the law should develop.¹³ The sources include documentation, archival records, interviews, direct observation and physical artifacts.¹⁴

On data collection, both primary and secondary data was collected so as to add knowledge to the present subject. The sources of primary data include legislation, case law and unstructured interviews conducted with some key informants. This data was resorted to both for its originality, and for purposes of triangulation. Secondary data was obtained through evaluation of metadata which include archival documents at the National archives and Museum libraries, published books, articles, and other researched documents on the subject matter.

In terms of data analysis, the research used thematic and content analysis. This involved the identification, collection, evaluation and critique of relevant contending and inconsistent sources of data. The information so collected was categorised into themes. A coding system was then developed and used to code the material. The coded materials were later placed under major themes.

2.2 Key Informant Interviews

Part of the information that was required to fulfill the research objectives was collected during interviews with key informants. The interviews were unstructured so as to allow for

¹² John W. Cresswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 3rd Ed., (SAGE Publication, Inc. London, 2009) p. 4.

¹³ Lynne Taylor, *From Legal Writing: A Complete Guide for a Career in Law* (LexisNexis, 2014), www.google scholar.com/learnlawlife.co.nz as at 22:59 on the 12th December, 2019.

¹⁴ Robert K. Yin, *Case Study Research: Design and Methods*, 4th Ed. (SAGE Publication, Inc. London, 2009), 99.

opportunity to probe for in-depth information on new issues that would arise during the interviews. The probing of further information may not have been possible if questionnaires were used. The key informants that were interviewed include Ngoni elders based in Livingstone, and others based at Chimphonda, and Faisako village under Chief Maguya in Chipata. Other key informants include some Magistrates from Lusaka, Choma and Livingstone, some Ministers of Religion, and a former Chief Justice of the Republic of Zambia. Some of the information collected from the key informants relates to the reasons Ministers of Religion use to justify their insistence on parental consent, and the payment of dowry before a statutory marriage could be solemnised in church.

2.3 Sampling Method: Purposive

The purposive method was employed to identify the key informants. The research targeted particular people such as a former Chief Justice, some Ministers of Religion, and some magistrates, because of their experienced learnt through frequent interaction with the subject matter. Purposive sampling was preferred for this research in line with the objectives since most respondents were adjudicators, Ministers of Religion, and Ngoni elders either belonging to or serving royal families. From the sample identified, the sampling procedure consisted of simple random sampling from among the targeted groups.

3. Results

The research established that bilateral marriages are a creation of the users of the law under a permissive legal regime. Although not expressly supported by law, the law does not make bilateral marriages illegal. Bilateral marriages have in fact been made legitimate by the lackadaisical approach taken by adjudicators and other participants in the justice system in determining the rights of the litigants at the dissolution of marriage. It has also been argued that ill-informed adjudicators and the weak and nebulous rules promulgated to resolve conflict of laws have not helped the cause. The continued existence of bilateral marriages fetters the intelligibility of the Zambia legal system regulating marriage in Zambia in that its make the law irregular and conflict on certain incidents to marriage.

4. Discussion

When contracting marriage in Zambia, the parties to marriage need to first determine the law that would govern their marriage. Either law prescribes the procedure attendant to contracting a valid marriage and confers certain rights and obligations. In terms of civil marriages, the procedure guiding that contracting of a legally valid civil marriage is contained in Part II of the Marriage Act Chapter 50 of the Laws of Zambia. Central to the legal requirement is the issue of Notice. Once it is established that the parties have the capacity to marry; they are of requisite age and do not fall within the prohibited degrees of marriage, the law requires that the parties give a minimum of 21 days' notice to the Registrar before the date of the intended marriage. The Registrar is obliged to cause the notice to be entered in the Notice Book, and to publish such Notice at a conspicuous place.¹⁵ The rationale is to give the members of the public an opportunity to object to such marriage if necessary. Once satisfied that the parties have met the legal obligations, the Registrar is obliged to issue a certificate in a prescribed form. Important to state is that prenuptial agreements pertaining to child custody and property settle are neither proscribed or provided for under the Marriage Act. It is therefore safe to state that prenuptial agreements are not a mandatory requirement. In fact, there is little to no evidence suggesting that parties to a purely civil marriage in Zambia enter into prenuptial agreement.

Ngoni customary law marriage on the other hand is validly contracted pursuant to Ngoni customary law. The marriage is invariably preceded by procedural niceties and prenuptial agreements. The preliminary procedural niceties include betrothal locally called *chikole*, the delivery of *viphoko*; beer and various food stuffs prepared by the bride's family and served on the groom to introduce the groom to the kind of food he would be having once married.¹⁶

Once the preliminary minutiae are exhausted, the families meet to discuss the payment of the bride's wealth. These payments include *chijasi*; a payment made by the groom's family to the father of the bride appreciating the role he played in having, and raising the bride, *Kacheka*; a payment made to the mother of the bride in appreciation for raising the bride. The payment is ordinarily in form of a *chitenge* material. It symbolises the *chitenge* the bride's mother wore after giving birth to the bride to suppress the womb. In modern times this payment is made in monetary

¹⁵ Section 9 of the Marriage Act provides that upon receipt of such notice the Registrar shall cause the same to be entered in a book to be called the "Marriage Notice Book" which may be inspected during office hours without fee. He shall also publish such notice by causing a copy of the same to be affixed on the outer door of the office and to be kept exposed there until he grant his certificate as hereinafter mentioned or until three months shall have elapsed.

¹⁶ Yizenge Chondoka, *Traditional Marriage in Zambia, A study in cultural history*, (Mission Press: Ndola, 1988) p 44.

form. The Payment of *chijasi* ordinarily takes the form of apparel. Monetary payments suffice in modern times. Other payments include *chimalo* and *maloolo*. *Chimalo* is the bride wealth paid to the bride's parents by the bridegroom or his family.

In homogenous village settings payments could be in form of cattle, land, labour, sheep, goats, or money. It is regarded as a token of appreciation for the bride. It serves to equalize the 'loss and gain' between families.¹⁷ Rendering *chimalo* is a vital requirement to the validity of Ngoni customary law marriage. In certain instances, *chimalo* would be returned to the groom's family in case of death or divorce.¹⁸ Payment of *chimalo* makes the marriage potentially polygamous in that one of the expectations in a Ngoni marriage is that parties would procreate so as to enhance the lineage. Thus, in case of bareness, be it actual or imputed, on the part of the bride, then the bride's family would be duty bound to provide another wife to the groom, preferably a close relative, for purposes of procreation.

By way of definition, *maloolo* is a payment that the groom makes to the bride's family to buy the right to his children.¹⁹ It also has the effect of tying the bride to the groom's family so that even in the event that the groom dies, the groom's family appoints a successor to the deceased. The successor not only takes over the administration of the affairs of the deceased's family, he also inherits the deceased's wife for purposes of enhancing procreation. The widow is often times be inherited by the deceased's nephews. This custom is locally called '*kuloba chokolo*.' In homogenous set ups, payment of *maloolo* is rarely done at the inception of marriage. The parties would often wait until they have children of the family.²⁰

Once a couple has a child or children of the family, the man needs to indicate willingness to buy the rights to the child or children of the family by reverting to his wife's family to negotiate for the payment of *maloolo*. Without this payment, a man cannot lay claim to the right to the children of the family.²¹ Discernible from this practice is the fact that a woman's family has an inherent right to the children born of the bride. That right is only transferred to the groom upon this payment. Concomitantly, by making this payment, the rights to the children of the family vests

¹⁷ Mwizenge S. Tembo, *Satisfying Zambian Hunger for Culture – Social change in a Global World*, p. 74.

¹⁸ Mwizenge S. Tembo, *Satisfying Zambian Hunger for Culture - Social change in a Global World*, p. 74.

¹⁹ Yizenge Chondoka, *Traditional Marriage in Zambia, A study in cultural history*, (Mission Press: Ndola, 1988) p 45.

²⁰ This information was obtained during an interview with a Ngoni elder at Kaunda Square Stage II on the 10th December, 2019.

²¹ Mwizenge S. Tembo, *Satisfying Zambian Hunger for Culture – Social change in a Global World*, p. 74.

in the groom and his clan. The groom would thus have both the legal and legitimate expectation to retain custody of the children of the family in the case of divorce or demise of his wife. It is important to state that although the payment of *maloolo* has been included as a preliminary nicety to marriage, it often comes later during the subsistence of marriage. Its inclusion here is therefore intended to cover for those marriages where its payment is insisted upon at inception. Other small payments abound but for purposes of this article, the payment of *chimalo* and *maloolo* suffice to discuss the conundrum attendant in bilateral marriages. It should be stated that discussing these payments in their proper context would go a long way to reveal the need to critically look at the law.

4.1 The Conundrum in a Bilateral Marriage

As earlier indicated, the challenges of fusing African customary law and statutory law to constitute a bilateral marriage often manifests during the dissolution of the marriage. Areas of manifestation include the determination of custody of children, and property settlement. These issues will be discussed in turn.

4.2 Challenges Surrounding Custody of Children at the Dissolution of Bilateral Marriages

Custody of children of the marriage in a statutory marriage is usually determined during the proceedings for the couple's divorce. The Matrimonial Causes Act (MCA),²² being the law that governs the dissolution of a statutory marriage, gives a Judge of the High Court wide discretion when determining custody matters. The MCA however dictates that such discretion be exercised in the best interest of the child.²³ This requirement is in tandem with Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC) and Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC) which enjoin States Party to ensure that judicial and administrative decisions, among others, are made in the best interest of the child. Thus, either parent has an equal chance to persuade a Judge to grant custody of the children to that parent. A parent's chances are only dwindled when considering the best interest of the child given the

²² The Matrimonial Causes Act No 20 of 2007.

²³ Section 75 (1) (a) of the Matrimonial Causes Act No. 20 of 2007, this section provides thus; (1) In proceedings in which application has been made with respect to the custody, guardianship, welfare, advancement or education of children of marriage- (a) the Court shall regard the interest of the children as the paramount consideration.

prevailing circumstances. The Judge is not bound to consider any other primary interest that either parent may have regarding the children of the family.

The divorce petition may indicate the proposed custody arrangements. The arrangement usually becomes part of the divorce decree. The decree names the parent with whom the child will live, how visitation will be handled, and who will provide financial support. The Judge is however not bound by the proposed arrangements. The Judge is not even bound to grant custody to either parent. In appropriate circumstances, the Judge may even order that custody of the children be granted to a third party if that is what is in the best interest of the children.²⁴

In a typical divorce involving at least one child, permanent physical custody may be awarded to the parent with whom the child will live most of the time. The parent having custody of the child may share joint legal custody with the noncustodial parent. The custodial parent may be duty bound to inform and consult with the noncustodial parent about the child's education, health care, and other concerns. In such situations, the Judge may order visitation, sometimes called temporary custody, between the child and the noncustodial parent.²⁵ A schedule indicating dates and times may be written into the order. Alternatively, the Judge may simply state that visitation should be reasonable. Custody orders are not cast in stone. They are subject to change at the application of either party. This position remains true until the child comes of age. In most instances proof of a "change in circumstances" may overturn an earlier award. This flexibility is intended to allow for the efficient correction of poor or outdated decisions and safeguard the best interest of the child.²⁶ On the contrary, custody of children under Ngoni customary law is subject of prenuptial agreements. Thus, at the dissolution of Ngoni customary law marriage child custody rights are tied to the payment of *maloolo*. If *maloolo* is paid, the father is entitled to custody of the children. In such instance the mother may have access to the children at the discretion of the man. There is no evidence that custody of the children following the payment of *maloolo* is subject to review under any circumstance as is the case under statute.

If *maloolo* is not paid, the woman and her family lays claim to the children of the family.²⁷ The maternal uncles are the ones to determine issues pertaining to the children's welfare. This

²⁴ Section 75 (3) of the Matrimonial Causes Act No. 20 of 2007.

²⁵ Eleanor E Maccoby, *Custody of Children following Divorce*, 2014 www.google scholar – books.google.com as at 13th July, 2016.

²⁶ Paul Sayre, *Awarding Custody of Children*, *The University of Chicago Law Review*. Google Scholar. www.jstor.org/stable/1597338.

²⁷ Mwizenge S. Tembo, *Satisfying Zambian Hunger for Culture – Social change in a Global World*, p74- 80.

position is however subject to change upon payment of *maloolo*. It must be stated that *maloolo* can be paid even after dissolution of marriage.²⁸ It is imperative to note further that if at the time of dissolution of the marriage the children are infants, the mother might be allowed to retain temporary custody so that she can nurse and nurture the children during such critical period.²⁹ The status quo does not however grant custody as understood under Ngoni customary law to the mother of the child or her family in that, major decisions regarding the welfare of the child are still made by the child's father.

The above opposed legal positions pertaining to custody of children of the family invariably clash at the dissolution of a bilateral marriage. This is because the statutory aspect of the bilateral marriage which is dissolved pursuant to the MCA enjoins a Judge to determine custody of the children in the best interest of the child. Since a Judge is not bound to consider as paramount the rights of the parent to the child, payment or non-payment of *maloolo* is therefore inconsequential in determining custody of a child. A man cannot persuade a Judge to decide the custody issue in his favour because he paid *maloolo*, neither can a woman persuade a Judge to grant her custody on account that a man did not pay *maloolo*. A Judge may thus grant custody of a child of the family in a bilateral marriage to the mother even when *maloolo* was paid. Custody may equally be granted to a father even when *maloolo* was not paid. This in essence renders the payment of *maloolo* in bilateral marriages inconsequential yet it is still charged.

It must be noted however that by disregarding the payment or non-payment of *maloolo*, statutory law allows a Judge to divest the man's, or woman's vested right over custody of the children which vests in him or her by virtue of Ngoni customary law. This therefore relegates Ngoni customary law to an insignificant legal system. This, it is argued, is a panacea for injustice. The injustice becomes clearer when individual marriages are considered. That is to say, in a marriage where one paid *maloolo*, the man's legitimate expectation would be to have custody of the children, while in a bilateral marriage where *maloolo* was not paid, the woman's legitimate expectation would be that she be granted custody of the children of the family. This expectation is properly grounded in the legal principal of regularity. It follows therefore that the discretion given to a Judge in the determination of child custody renders the payment of *maloolo* inconsequential

²⁸ Mwizenge S. Tembo, *Satisfying Zambian Hunger for Culture – Social change in a Global World*, p74- 80.

²⁹ This information was obtained from a Ngoni elder based in Lusaka, Kaunda Square during an unstructured interview on the 26th November, 2016.

and thwarts duality on point. This position is oppressive to Ngoni customary law which makes *maloolo* an integral part to the determination of child custody. It is therefore difficult to appreciate how such a position would promote duality of law especially in the context of bilateral marriages. It is also not a far-fetched argument to state that this position offends established legal principle. Some obvious legal principles that seem to be violated by this position are the principle that makes illegal the unilateral divesting of vested rights, and regularity of law.

It is trite legal principle that once right vests, it cannot be unilaterally divested even by repeal of the law.³⁰ The right can only be legally divested if the right holder consents to the right being taken away. Admittedly the principle of vested right is prominent in Land Law. Its use here is however not misconceived because the import of the principle in relation to land is to protect the right holder's property in the land. Concomitantly, its application here would work to protect the man's right to perpetuate his lineage or clan through the children for whom he has paid *maloolo*. A similar argument suffices for a woman's clan in instances where *maloolo* is not paid. This challenge therefore needs redress.

4.3 Challenges Surrounding Property Settlement at the Dissolution of Bilateral Marriages

The parties' rights to property at the dissolution of statutory marriage are mainly governed by the provisions of the MCA and a plethora of judicial decisions. To this end, reliance on the position of the law is placed on section 24 of the MCA, the holding in the cases of *Musonda v Musonda*,³¹ *Scott v Scott*,³² and *Chibwe v Chibwe*.³³

The MCA vests in the court jurisdiction to make orders for property adjustments between spouses at the dissolution of marriage.³⁴ The orders may take the form of transfer of property from

³⁰ Maria E Montoya, *The Maxwell Land Grant and the Conflict Over Land in the American West, 1840 – 1900*, (University of California Press: Los Angeles, 1964), p. 175.

³¹ The Supreme Court of Zambia in the case of *Musonda v Musonda* SCZ Judgment No. 53 of 1998 (Unreported).

³² The Supreme Court of Zambia in the case of *Scott v Scott* (2007) ZR 17.

³³ The Supreme Court of Zambia in the case of *Chibwe v Chibwe* (2001) ZR .1

³⁴ Section 55 (1) (b) of the Matrimonial Causes Act No. 20 of 2007 which provides thus;

- (1) The Court may, upon granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter, whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute, make any one or more of the following orders.
 - (b) an order that settlement of such property as may be specified, being property to which a party to a marriage is entitled, be made to the satisfaction of the Court for the benefit of the other party to the marriage and of the children of the family or either or any of them.

one spouse to the other.³⁵ It may also take the form of variation of ante-nuptial settlement made by parties to a marriage.³⁶ The variation may result in the reduction of the interest of either party to the marriage under the settlement.³⁷ In this vein, the Supreme Court of Zambia in the case of *Musonda v Musonda*,³⁸ guided that the right to property of either spouse is proportional to the amount of each spouse's contribution to the wellbeing of the family. The starting point, however, is that each party has an equal share to the property of the family. This right will only be tampered with at dissolution of marriage if it can be shown that the other spouse had diminished contribution to the welfare of the family.³⁹ The distribution of matrimonial property at the dissolution of marriage therefore actualises the rights either spouse had to property during marriage. A Judge may however order that a more financially sound party maintains the financially weaker party. In that way a Judge may create a beneficial interest or right for the weaker party in the property in which the other party has absolute ownership.

On the other hand, the law on property settlement relating to Ngoni customary law marriage is premised on pre-nuptial agreements and the lineage system. On a broader scale, realty and livestock are owned by clans. Families within the clan are allotted realty and at times livestock and can own property separately from the clan but, often, within the confines of the clan. The property owned by the clan and families are subject to inheritance pursuant to the male preference primogeniture.⁴⁰ Since realty is owned by the clan, it is seldom transferable to other clans. Once realty, such as land, is allotted to a clan by the traditional leaders, the land remains the property of the clan as long as there are issues within the clan to whom property can escheat.⁴¹ In the context of marriage, the payment of dowry or bride price (*chimalo*) is intended to equalise the loss and gain between the clans. Thus, in a homogenous set up, when the groom's family

³⁵ Section 55 (1) (a) of the Matrimonial Causes Act No. 20 of 2007 which provides thus:

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as the court may specify in the order for the benefit of such a child, such property as may be specified in the order, being property as may be specified in the order, being property to which the first-mentioned party is entitled, either in possession or reversion.

³⁶ Section 55 (1) (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial settlement, including a settlement made by will or codicil, made by the parties to the marriage.

³⁷ (d) an order extinguished or reducing the interest of either of the parties to the marriage under the settlement.

³⁸ The Supreme Court of Zambia in the case of *Musonda v Musonda* SCZ Judgment No. 53 of 1998 (Unreported).

³⁹ The Supreme Court of Zambia in the case of *Scott v Scott* (2007) ZR 17.

⁴⁰ This information was obtained on the 11th December, 2019 during a telephone interview with a Ngoni elder based at Chimphonda village, under Chief Maguya in Chipata in the Eastern Province of Zambia.

⁴¹ *Ibid.*

approaches the bride's family to ask for the bride's hand in marriage a panel would be constituted to negotiate the bride price. The import of the bride price (*chimalo*) is to, among others, cushion the loss the bride's family will incur by letting the bride leave her clan to relocate to the groom's clan. The expectation is that since the bride will invariably indulge in economic activities, and procreation that will - to a large extent - exclusively benefit the groom's clan, the groom's clan is required to show appreciation by paying *chimalo*. This payment takes the form of live cattle. The number of cattle might vary but often times the bride's family demands for four heifers.⁴² The choice of the heifers is deliberate and strategic. The rationale is that when they become of age, the heifers will procreate and multiply thereby creating wealth for the bride's family. The longer the bride stays in marriage, the higher the multiplication effect of the animals that are paid. If the parties divorce within a short or relatively short time, the bride's family is made to return a part of the bride price (*chimalo*). The rationale is that the bride will most likely remarry, and her clan will accumulate some more wealth. The new wealth would not be accumulated if she stayed in marriage. The refund is therefore intended to avert unjust enrichment. However, if the couple stays in marriage for a long period without divorcing, the bride's family will get one of the animals from their kraal and return it to the groom's clan as appreciation for keeping their child well. Included in the payment of *chimalo* is also an element of property settlement. One of the heifers is for the bride. This heifer is often kept by her maternal uncle and considered as her wealth which the bride would fall back on should the marriage fail.⁴³

Once married, the bride physically moves to the groom's clan. Whilst at her matrimonial home, the bride will indulge in economic activities with the family. She will also be allocated some land which she may cultivate and generate her personal wealth. So during the subsistence of the marriage, whatever wealth is accumulated using family property is for the benefit of the family although the man exerts more control. However, in the event of divorce, the woman is only allowed to return to her clan with her personal effect on the understanding that her share of the wealth is in the bride price that was paid and the benefits arising from the attendant procreation by the cattle

⁴² This information was obtained on the 11th December, 2019 during a telephone interview with a Ngoni elders based at *Faisako*, and *Chimphonda* village, under Chief Maguya in Chipata in the Eastern Province of Zambia.

⁴³ This information was obtained on the 11th December, 2019 during a telephone interview with a Ngoni elders based at *Faisako*, and *Chimphonda* village, under Chief Maguya in Chipata in the Eastern Province of Zambia.

paid in that regard. The woman takes no share in realty because real property is often communally owned by the clan.⁴⁴ Her interest in realty is secured through her maiden clan.

On the weight of the above discourse, it is not difficult to see the irregularity that the combination of these laws creates as regards property settlement. This is because, like custody of children, property settlement under Ngoni customary law is subject of prenuptial agreement. This is one of the integral components that inform the payment of the bride price. Since the bride price contains an element of property settlement, which though seemingly minute at the time of payment, is anticipated to multiply with time through procreation (an investment), it follows as a matter of course that one who is party to a bilateral marriage needs not to be settled at the dissolution of the marriage.

Alternatively, given the rationale for the payment of dowry, it is difficult to rationalise and justify its payment in an urban set up where often times the bride does not physically leave her clan to join the groom's clan at the groom's village. Instead, both the bride and the groom, leave their respective clans to form a nuclear family. Whatever they earn, often times go to support their nuclear family, and at their discretion, support either or all their parents. In essence, the issue of loss and gain envisaged in a homogenous set up is non-existent. It ought to follow therefore that the need for payment of the bride price does not arise more so that the parties will be entitled to the equal share of the property that will be acquired during the subsistence of the marriage and their respective property may eventually benefit their respective clans. To demand for bride price at the inception of marriage, and later order that each party gets an equal share of matrimonial property at the dissolution of marriage not only confounds the law, it also promotes unjust enrichment for the bride and her clan. This, it is argued, is an issue that could be easily corrected if the legal system; the judicature and the advocates were well vest with knowledge of African customary law and appreciate the rationale behind each customary law and practice. This would also help in prescribing appropriate rules to regulate the resolution of the conflict of laws in this regard. The present rules which heavily rely on the repugnant clause and the perceived subservience of African customary law to written law may not present an accurate position of the present Constitutional order. Unless deliberate efforts are made to slow down the prevailing clamour for modernity and the elitist approach that currently exasperates African customary law, African customary law risks incongruent adulteration and consequent annihilation. An effort will

⁴⁴ Ibid.

be made to briefly discuss the resolution of conflict of laws in the post-colonial era, and the propriety of the repugnant clause in the present circumstances.

4.4 Regulation of Conflict of Law in the Post-Colonial Era and the Legality of the Repugnance Clause in the Present Constitutional Order

The Post-Colonial Constitutions have maintained the duality of laws regulating marriage in Zambia. The courts have remained central to the interpretation of laws governing the relationship between African customary law and statutory law. The regulation of conflict of laws in the post – colonial era has somewhat taken the same path as the pre-colonial era save to note the enactments of the various Constitutions which create various institutions and confer specific authority on these institutions. The Constitution however does not indicate explicitly the hierarchy of these laws.⁴⁵

On conflict of laws, the Constitution retains its supremacy and is the measure of the validity of every other law. Every other law must conform to the dictates of the Constitution or risk being void.⁴⁶ On the conflicts between the pieces of legislation, the Constitution makes no mention on how they are to be resolved. It arguably leaves the resolution of such conflicts to the canons of interpretation. The Constitution does not equally pronounce itself on how the disputes between African customary law and written law are to be resolved. The Constitution however suggests, subject to contrary interpretation, that the potency of either African customary law or statutory law is subject only to the provisions of the Constitution. To this end, article 7 of the Constitution of Zambia provides thus;

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

⁴⁵ See article 7 of the Constitution of Zambia as amended by Act No. 2 of 2016. The article recognises African customary law as one of the laws applicable in Zambia. It further states that African Customary law is applicable in so far as it is in tandem with the dictates of the Constitution. Article 118 further recognises the existence of traditional dispute resolution mechanisms and encourages their use provided they are in conformity with the Constitution, and any written law. It is argued in this research that the wording in these two articles deliberately distinguishes substantive African customary law – which is the focus of article 7, and the procedural aspects of procedural rules governing dispute resolution - such as the rules of natural justice – which re arguable the focus of article 118.

⁴⁶ See Article 1(1) of the Article 1(1) of the Constitution of Zambia as amended by Act No. 2 of 2016 which provides that; ‘this Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.’

Constitution; and (e) the laws and statutes which apply or extend to Zambia, as prescribed.

On the weight of the wording in this article, it is clear that there are no words that expressly suggest that the laws are listed in any hierarchical order, be that as it may arguments to the effect that the laws are in hierarchical order abound and are not without credence. Impetus for such arguments may be derived from the fact that the Constitution which is the highest law of the land is listed first, it would follow therefore that the order is couched in that manner. Further, the positions taken by the legislature on repugnance of certain customary laws, discernible under section 16 of the Subordinate Court Act,⁴⁷ and section 12 of the Local Court Act,⁴⁸ is one that subjugates African customary law to any written law. While these arguments are noted with a modicum of respectful admiration, the position taken by this article is that, unlike the previous Constitutions, the current Constitution only makes itself the measure of the validity of African customary law as can be seen in Article 7(d) which stipulates that Laws of Zambia...“consists of; (d) Zambian customary law which is consistent with this Constitution”.

It is herein argued that, by expressly stating the measure by which the validity of Zambian customary law is to be determined, the Constitution purposed it to exclude the measures stated in sections 16 of the Subordinate Court Act, and section 12 of the Local Court Act. This argument is aided both by the literal rule of interpretation which dictates that in the absence of absurdity, words should be given their natural meaning, and the *expression unius est exclusion alterius* rule of interpretation which enjoins that when one or more things of a class are expressly mentioned, others of the same class are excluded.⁴⁹ Had it been the intention of the Constitution to subject the validity of the Zambian customary law to the dictates of any other written law, article 7(d), or

⁴⁷ 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, 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.

⁴⁸ 12(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.

⁴⁹ <http://www.merriam-webstar.com> accessed on the 15th December, 2019 at 21:19 hours.

indeed any other provision of the article would have so provided. In fact, it is argued here that, to the extent that sections 16 of the Subordinate Court Act, and 12 of the Local Court⁵⁰ subjects the validity of Zambian customary law to the scrutiny of written law, these provisions offend article 1(1) of the Constitution and are thus null and void to the extent of the inconsistency. Otherwise, it would be absurd to suggest that a legal system that warms up to duality would subject the validity of one legal system to the scrutiny of another with which it stands on equal footing.

Imperative to state is that the provisions of articles 118(3), and 120 of the Constitution are well noted. Article 118(3) provides that traditional dispute resolution mechanism shall not contravene the Bill of Rights, and shall not be inconsistent with other provisions of this Constitution or other written law, or shall not be repugnant to justice and morality. Article 120 of the Constitution constitutes the courts of the judicature to include the superior courts, subordinate courts, small claims courts, local courts, and other courts as prescribe. It further provides that the processes and procedure of the courts shall be prescribed. It also provides that the jurisdiction, composition and grading of the courts shall be prescribed.

Having read articles 1, 7, 118 and 120 of the Constitution, the interpretation placed on these articles is as follows: articles 1 and 7 of the Constitution relate to the measure of validity of the substantive law; while articles 118 and 120 relate to the rules of procedure, constitute the courts and enjoin that the procedure, processes, jurisdiction, composition and grading of the relevant courts shall be prescribed. To the extent that articles 118 and 120 are limited to procedural law, the composition and grading of the court, it is argued that this does not prescribe the measure of validity of the substantive Zambian customary law. These provisions do not therefore affect the interpretation herein placed on article 7(d) of the Constitution. However, assuming this interpretation is wrong, and that the validity of Zambian customary law is subject to the repugnancy provision under article 118(3) of the Constitution, section 16 of the Subordinate Court Act and section 12 of the Local Court Act, the question begging an answer would be, how effective are the court to fairly interpret Zambian Customary law so as to actualise duality.

⁵⁰12 (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.

4.5 The Efficacy of the Judicature and Legal Profession in Actualising Duality

The Judicature is established and constituted in part VIII of the Republican Constitution. The Constitution establishes the superior court and other courts⁵¹, and confers on the courts varying jurisdiction. The common thread running through all courts though is that judicial authority vests in the courts who exercise it on behalf of the people.⁵² Save for the Constitutional court and the High court, the other superior court are mainly appellate courts thus exercises appellate jurisdiction. The Constitutional Court and High Court exercise both original and appellate jurisdiction. The Constitutional Court's original jurisdiction is not directly related to matrimonial causes, which is the focus of this article as such will not be discussed in any greater detail that outlined above. The focus will thus shift to the High Court which has original and unlimited jurisdiction.⁵³ The divisions of the High Court include the Industrial Relations Court, the Commercial Court, the Family Court and the Children's Court.⁵⁴ The Constitution vests in the Chief Justice authority to constitute specialised courts of the High Court to deal with specific matters.

On the weight of the above Constitutional provisions, one would quickly celebrate and argue that the High Court has the requisite jurisdiction to adjudicate on *Zambian* customary law matters regulating marriage thus better placed to effectuate duality. This mirage, however, quickly dissipates when one considers the empowering provisions of the High Court Act. The Act will be briefly examined to assess its attitude towards African customary law.

4.6 The High Court Act Chapter 27 of the Laws of Zambia

The preamble to the Act provides that the Act amends the law with respect to the jurisdiction and business of the High Court, and with respect to the officers and offices of the High Court, and otherwise with respect to the administration of justice and the validation of certain acts.

⁵¹ Article 120(1) The judiciary shall consists of the superior courts and the following courts; (a) subordinate courts; (b) Small claims courts; (c) local courts; and (d) courts as prescribed.

⁵² Article 118 (1) Judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner, and that exercise shall promote accountability.

Article 119(1) Judicial authority vests in the courts and shall be exercised by the courts in accordance with this Constitution and other law.

⁵³ Article 134 The High Court has, subject to Article 128 - (a) unlimited ad original jurisdiction in civil and criminal matters; (b) appellate and supervisory jurisdiction, as prescribed; and (c) jurisdiction to review decisions, as prescribed.

⁵⁴ Article 133(2) There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.

The Jurisdiction and law applicable in the High Court is provided under Part IV of the Act.⁵⁵ A perusal of this part clearly shows that there is no direct mention of the application of African customary law in the High Court. The application of African customary law seems to come to the fore by way of appeal.

⁵⁵ **PART IV JURISDICTION AND LAW**

9(1) The Court shall be a Superior Court of Record, and, in addition to any other jurisdiction conferred by the Constitution and by this or any other written law, shall, within the limits and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England.

(2) The jurisdiction vested in the Court shall include the judicial hearing and determination of matters in difference, the administration or control of property or persons, and the power to appoint or control guardians of infants and their estates, and also keepers of the persons and estates of idiots, lunatics and such as, being of unsound mind, are unable to govern themselves and their estates.

10 The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.

11(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.

Probate and divorce jurisdiction.

(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.

(3) The jurisdiction of the Court in probate causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911).

(4) No probate of a will or letters of administration granted prior to the commencement of this Act to any person shall be invalid by reason only that the right to the grant was determined in accordance with any law in force in England after the 17th August, 1911.

(5) No suit or other legal proceedings shall be instituted against any person by reason only that the deceased person's estate was administered in accordance with the law in force in England after the 17th August, 1911.

12(1) All statutes of the Parliament of the United Kingdom applied to Zambia shall be in force so far only as the limits of the local jurisdiction and local circumstances permit. Rules as to application of English statutes;

(2) For the purpose of facilitating the application of the statutes referred to in subsection (1), it shall be lawful for the Court to construe the same with such verbal alterations, not affecting the substance, as may be necessary to make the same applicable to the proceedings before the Court.

(3) Every Judge or officer of the Court having or exercising functions of the like kind or analogous to the functions of any Judge or officer referred to in any statute mentioned in subsection (1), shall be deemed to be within the meaning of the provisions thereof relating to such last-mentioned Judge or officer, and whenever the Great Seal or any other seal of a court is mentioned in any such statute it shall be read as if the seal of the Court or of a district registry, as the case may be, were substituted therefor.

13 In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters. avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. Law and equity to be concurrently administered.

The Court has re-affirmed this position in a number of its decided cases. These cases include *Ann P Nkhoma v Smart Nkhoma*,⁵⁶ and most recently, *Rosemary Chibwe v Austin Chibwe*.⁵⁷ The Judges in these cases stated in no uncertain terms that the High Court has no jurisdiction to determine the settlement of property as a court of first instance on an application by parties to an African customary law marriage. It was stated that the law applicable in the High Court and Supreme Court in divorce matters is the English divorce law applicable at the time. This interpretation is anchored on the provisions of section (11)(1) of the High Court Act, and section 2 of the English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia.⁵⁸

Imperative to state is that these provisions pre-date independence. When the development of duality in this jurisdiction is considered, it would be difficult not to discern the rationality of this provision at the time. The White settlers whose affairs were subject to received laws had little to no interest in the personal affairs of the indigenous and understood precious little, if any, African customary law. It was therefore expected, and reasonably so, that a Judge Smith who was totally ignorant of the indigenous laws and traditional justice system would advocate or at the very minimum acquiesce to such a provision to save face, but to excuse a Judge Musonda who ought to have an appreciation of some of the indigenous laws on the same premise as a Judge Smith is surely retrogressive and anathema to duality and consequently to justice.

Regularity and certainty are tenets of law that are nearly sacrosanct. The import of certainty of law is to guide the parties before-hand on the ramifications of a given action. Thus, one who contracts a bilateral marriage adheres to the customary aspect of it with reasonable expectation that the incidents of customary law for which he makes payments would be available in that marriage.

It is a fact that the High Court Act, and the attendant decisions tend to stifle and limit the jurisdiction of the High Court in relation to African customary law marriages. The reason for such limitation, though a manifest departure from the unlimited jurisdiction conferred on the High Court by the Constitution, is not immediately clear. Whatever the rationale for this legislation, it is doubted that this legislation serves to promote duality and improve the jurisprudence on bilateral marriage. The doubt is born from the premise that by merely relying on recorded testimony of

⁵⁶ *Ann P Nkhoma v Smart Nkhoma* (1978) ZR 4.

⁵⁷ *Chibwe v Austin Chibwe* (2001) ZR 1.

⁵⁸ Chapter 11 the English Law (Extent of Application) Act.

African customary law from records of courts inferior to it, the High Court is denied the opportunity to have firsthand information on African law more so that the Judge cannot probe for more information from the record. The Judge must rely on what is on record or in cases where the record lacks clarity may send the matter back for retrial. This position would undoubtedly be different if the Judges were to sit as courts of first instance either with aid of Assessors, or after receiving adequate training on African customary law. In any event, why should the law be presented as evidence in court? The provision in the law that allows adjudicators to sit with assessor is invariably an admission in a weakness in the judicial system and this weakness should not be permanently resolved by resorting to assessors. The need to educate counsel and adjudicators not only on the procedural aspects of customary law but also on the substantive position of the law cannot be over emphasised. To proceed to churn decisions that are tailored for urban setups and expect them to seamlessly regulate homogenous setups is utopian, for lack of a better word.

Conclusion

The proliferation of bilateral marriage under the guise of duality is a blight that has slipped into most Zambian societies with little secrecy. Its enchanted gain in prominence, though producing loud a sound as the loudest gong, has attracted little ire. In fact, it appears fashionable and readily acceptable to contract bilateral marriages because it tends to offer what appears to be the best of both laws. The luminosity of the conflict of laws it creates is often ignored mainly because of the Court's lackadaisical approach in the interpretation of the law on the import of the antecedents the respective laws confer on the marriage. Little accountability is imposed on the parties for the rights and duties conferred on either party to marriage by customary law especially where such custom is deemed to be in conflict with the written law. The repugnance clause, which has often been used as a sledge hammer to annihilate African customary law has fallen prey to the minds of adjudicators who often make little to no effort to understand the rationale behind the rights conferred on the parties to marriage. While the constitution confers on the High Court original and unlimited jurisdiction to determine civil and criminal matter, the High Court Act tends to fetter this jurisdiction. The reason for such fetter is not immediately clear.

Effort has been made to outline the conundrum obtaining in bilateral marriages. It has, arguably, been established that while the repugnant clauses in the Subordinate Court Act and Local

Court Act operate as one of the rules to resolve such conundrum, the legality of these provisions are doubted owing to the enactment of the Republican Constitution (Act No. 2 of 2016). The article also noted the knowledge gap on African customary law as noted by the courts' reliance on expert witnesses. This, it is argued, robs the court the opportunity to competently and adequately deal with the rights and duties conferred on the parties by African customary law since their knowledge is limited to the testimony of the experts. What makes the matters worse is that these experts are by and large led by Counsel that are more often than not, equally starved of the knowledge. It follows therefore the if an expert cannot explain to the court that a man's right to the children is premised on his duty to pay *maloolo*, or that a man's discretion to share property at divorce is premised on his duty to pay the bride wealth - in form of heifers which reproduce and create wealth for his wife's clan while the marriage subsists - then the court would never appreciate and understand the rationale or existence of these jural relations. Without such understanding, the court would invariably dismiss such right as repugnant. It is therefore desirable that the knowledge gap is bridged so that adjudicators can make rationally informed decisions aided by knowledgeable counsel.

BIBLIOGRAPHY

1. Books

- Atkin, P., *Survey of African Marriage and Family life*, Oxford: Oxford University Press, 1990
- Cresswell, J. W., *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 3rd Ed., London: SAGE Publication, Inc: London, 2009
- Emmet V. M., *Africa Customs and Western Law*, New York and London: Africana Publishing Company, 1976
- Epstein, A. L., *Urbanization and Kinship: The Domestic Domain on the Copperbelt of Zambia 1950-1956*, London: Academic Press, 1981
- Freeman, M.D.A., *Introduction to Jurisprudence*, London: Sweet & Maxwell, 2008
- Friedman, W., *Legal Theory*, UK: Sweet & Maxwell Ltd, 1967
- Gluckman, M., *Political Law and Ritual in Tribal Society*, Oxford: Basil Blackwell, 1971
- Gluckman, M., *The Judicial process among the Barotse of Northern Rhodesia (Zambia)*, Manchester: Manchester University Press, 1967
- McConville, M., and Chui, W. H., *Research Methods for Law*, Edinburgh: Edinburgh University Press, 2007

Megarry, R., and Thompson, M. P., *Megarry's Manual of the Laws of Real Property*, Sweet & Maxwell, 1993

Motoya, M. E., *The Maxwell Land Grant and Conflict Over Land in the Americas West, 1840 - 1900*, Los Angeles: University of California Press, 1964

Mtopa, A. M., *Labour Laws of Zambia*, Lusaka: Kenneth Kaunda Foundation, 1989

Mumba, C., *Customary Law of Marriage and Divorce among the Lenje of Central Province*, Lusaka: East Africa Publication, 1990

Mushota, L., *Family Law in Zambia: Cases and Material*, Lusaka: UNZA Press, 2005

Ndulo, M., *Law in Zambia*, Lusaka: East Africa Publishing House, 1984

Richard, A. I., *Land Labour and Diet in Northern Rhodesia: An economic study of the Bemba Tribe*, Oxford: Oxford University Press, 1939

Yin, R. K., *Case Study Research: Design and Methods*, 4th Ed., London: SAGE Publication, Inc, 2009

2. Articles

Anyangwe, C., 'The Whittling Away of African Indigenous Legal and Judicial Systems,' *Zambia Law Journal*, 1998, Special Edition Zam. L J. 46

Chanock, M., 'Constitutionalism and the Customary' <https://wb.up.ca.za>, [accessed on the 2nd November, 2014]

Du Plessis, E.W.J., 'African Land Rights in Private ownership Paradigm', ISSN 1727-3781 P.E.R 2011 Volume 14 No 7, www.nwu.ac.za/web_fm_send/43766 [accessed on the 2nd November, 2014]

Hoover, E.L. Phipper, J.C., and Spalding, F.O., *One Nation, One Judiciary: The Lower Courts of Zambia*, 1970, *Zambia Law Journal*. Vol. 2 Nos 1 and 2

McClain, W.T., *Legal Position of Women and Children Under Zambian Customary Law*, An article published by Mindolo Ecumenical Foundation Kitwe: Zambia

Ndulo, M., 'African Customary law, Customs, and Women's Rights,' Cornell Law Faculty Publication: 2011, Paper No. 187. <http://scholarships.law.cornell.edu/facpub/187>

Nkambo, P.J M., *African Conference on Local Courts and Customary Law*, Record of Proceedings of the Conference held in Dar es salaam, Tanganyika, 8th September, 1963 – 18th September, 1963

Robins, S., 'A place for tradition in an effective criminal Justice system: Customary justice in Sierra Leone, Tanzania and Zambia,' Policy Brief Nr 17, October 2009, Institute for Security Studies: Pretoria

Snyder, F. G., 'Colonialism and legal form: the creation of customary law in Senegal', Journal on Legal Pluralism, www.jlp.bham.ac.uk/volumes/19/syder-art.pdf [as at 2nd November, 2014]

UNICEF, 'Protecting children from harmful practices in plural legal systems with special emphasis on Africa', New York 2012

3. Theses

Kakula, L., *The Law of Marriage and Divorce among the MaLozi of Western Zambia*, JSD Thesis, University of Wisconsin-Madison, 1982

Matakala, L., 'Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambia Laws,' PhD Thesis, King's College, University of Cambridge, 2009

Mwenda, W.S., *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*, PhD Thesis, University of South Africa, 2006

4. Dissertations

Chilufya, C.M., 'Consent and Bride Price As Two Elements That Help in Determining the validity of Marriage and Custody of Children among the Bemba People of Northern Province of Zambia,' LLB Dissertation, University of Zambia, 2008

Kalela, M. E., *The Need for Legislation to Regulate Marriages Contracted Under Customary Law in Zambia*, LLB dissertation, University of Zambia, 2011

Katowa, N., *Evaluation of the Sanctity of Marriage Between Customary and Statutory Marriages vis-à-vis Divorce*, LLB. Dissertation, University of Zambia, 2011

5. Statutes

The Constitution of the Republic of Zambia Chapter 1 of the Law of Zambia

The Marriage Act Chapter 50 of the Laws of Zambia

The Penal Code, Chapter 87 of the Laws of Zambia

The Matrimonial Causes Act No. 20 of 2007

The Matrimonial Causes Act, 1973

The High Court Act Chapter 27 of the Laws of Zambia

The Subordinate Court Act Chapter 28 of the Laws of Zambia

The Local Court Act Chapter 29 of the Laws of Zambia

The Royal Charter of Incorporation of the British South African Co. 1889

6. Conventions and Treaties

The United Nations Convention on the Rights of the Child, 1989 - (UNCRC)

The African Charter on the Rights and Welfare of a Child, 1990 – (ACRWC)

7. Cases

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

Musonda v Musonda SCZ Judgment No. 53 of 1998

Scott v Scott (2007) ZR 17

Rosemary Chibwe v Austin Chibwe (2001) ZR 1

8. Interview

Interviewee 1, Interviewed by Author, Ngoni elder of Faisako village under Chief Maguya in Chipata District, interviewed via telephone, January 8th 2020

Interviewee 2, Interviewed by Author, Ngoni elder of Chimponda village under Chief Maguya in Chipata District, interviewed via telephone, January 9th 2020

Interviewee 3, Interviewed by Author, Ngoni elder of Kaunda Square in Lusaka, March 18th 2018

Interviewee 4, Interviewed by Author, Former Chief Justice of the Republic of Zambia, Avani Hotel in Livingstone, November 16th 2016

Interviewee 5, Interviewed by Author, Subordinate Court Magistrate – Livingstone, November 12th 2016

Interviewee 6, Interviewed by Author, Local Court Magistrate – Livingstone, November 10th 2016

Interviewee 7, Interviewed by Author, Pastor and Vice Chancellor of one of the Universities in Zambia, Lusaka, October, 2016

Interviewee 8, Interviewed by Author, Pastor and renown author on Marriage, Protea Hotel Lusaka, October, 2016