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.

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]

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[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).

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:

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[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.

"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.

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.

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]

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[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

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.

(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.

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.

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]

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[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)

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.

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.

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]

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[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.

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.

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

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.

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.

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.

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.

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]

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,

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.'

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

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).

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

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.

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-

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.

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.

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).

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.

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.

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.

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[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.

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.

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.

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."

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;

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).

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.

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]

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[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.

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.

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

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.

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