THE RESEARCH PARTNERSHIP

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Second Integration Report: What are the Interactions between Indigenous and State Legal Systems and how are Such Interactions Managed?

Title of sub-project:

FORMATION AND PATTERNS OF CUSTOMARY MARRIAGE IN ZAMBIA: A SOCIO-LEGAL STUDY

SSHRC -AUF Partnership 2012-2018

The objective of the research partnership *« The State and Indigenous legal cultures: law in search of legitimacy* » is to compare and assess -through case studies conducted in Canada, Africa and the Pacific- practices and experiences regarding the management of legal pluralism in order to identify models of interaction between western state law and indigenous law that are potentially more legitimate and effective. The study of these practices unfolds in three phases (observation, classification and evaluation) in order to answer the following research questions:

- How does legal pluralism manifest itself in the case studies?
- How are the interactions and relationships between indigenous law and state law managed?
- What practices or models are likely to create a more legitimate and effective management of legal pluralism?

The team is composed of four research groups, including three regional groups conducting field research (Africa Group, Canada Group and Pacific Group) and the Integration Group. The role of the latter is to foster a coordinated research approach in order (1) to achieve the team's comparative objectives as approved by SSHRC, (2) insure that the data collected will lend itself to a rigorous comparative analysis in accordance with our legal pluralism theoretical framework, (3) produce a comparative study of practices and experiences with respect to managing legal pluralism and (4) identify possible avenues for innovation in the management of legal pluralism in the regions being studied.

This second report shall contain the data that will answer the following question: *What are the interactions between the indigenous and state legal systems and how are such interactions managed in the regions studied?*

After receiving the reports from regional groups, the Integrator Group will conduct a comparative synthesis and propose a mapping of legal pluralism management in an overall integration report. A draft report will be shared and discussed with researchers and partners whose input will be key for the completion of the final overall integration report.

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PART I: OVERVIEW OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

I. General description and characterisation of relationship between legal systems

Describe in general the current state of interactions between the legal systems.

How would you describe the current relational dynamic that characterises the relationship between the legal orders? (Example: hierarchical, egalitarian, vertical, horizontal, etc.). Illustrate your analysis with several examples.

In this research, legal pluralism refers to the coexistence of a plurality of distinctive legal systems in a specific social field. Legal pluralism therefore occurs where 'laws and institutions are not subsumed within one system but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another'.[1] The socio-legal perspective taken in the research acknowledges that the fact that a legal order is irrelevant from the perspective of another legal order, or contradictory to it or subordinated to it, does not dismiss its usefulness as a legal order specific to a community or a particular social interaction.[2] Hence, we are interested in the concept of 'living customary law' although it has little significance in Zambia's legal and academic arenas. One insight of the sociological approaches to 'living law'[3] as representations of the norms governing the behaviour of people in real life is that the dichotomy of formal/informal in the social reality does not adequately fit the relation state/law, as each social law, be it from the state or not, is a dynamic field of structured and unstructured laws.[4] Hence, the idea of formality in this report refers more to a recognition by the state (similar to

[1] John Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism* 39.
[2] Santi Romano *L'ordre juridique* (French translation of the second edition (1946); first edition published in 1918), Jean-Guy Belley 'Pluralisme juridique' in André-Jean Arnaud et al (eds) *Dictionnaire Encyclopédique de théorie et de sociologie de droit* 2 ed (1993) 447.
[3] Eugen Ehrlich *Tatsachen des Gewohnheitsrecht* (1907) 7; *Vergic des Rechts* (1913) 67–69; *Fundamental Principles of the Sociology of Law* (1936). Another concept used is 'social law' (Georges Gurvitch *Eléments de sociologie juridique* (1940)).
[4] Jean-Guy Belley 'Pluralisme juridique' in André-Jean Arnaud et al (eds) *Dictionnaire Encyclopédique de théorie et de sociologie de droit* 2 ed (1993) 447.

the understanding of the idea of 'legality') in the legal field than to the structured/unstructured nature of the given laws or institutions.

These features of legal pluralism provide the basis for the analysis of the interactions of the different normative orders. The interactions noticeable in the different aspects of customary marriages are characterised by four patterns. Firstly, the judiciary is an arena where state law interacts with other normative orders. The judicial officers are the ones in charge of implementing both state law and customary law, and their daily work is an intertwinement of norms, ideas, interpretations and decisions based on multiple sources. Thus, they constantly navigate in a hybrid ideological sphere that comprises religious beliefs, traditions and state values. This is connected to the very idea that 'law in action' can be of a different nature to legislation on paper.

Secondly, from the indigenous actors' perspective, the interactions defined as the borrowing from one system to another, although multidirectional, is not characterised by uniform application by all communities' members. The stratification of the society according to social, economic and religious status has a significant impact on the hybridisation phenomenon of certain processes, rules, principles and values. In other terms, how the legal systems borrow from one another is affected by the specific community's members who apply these systems. While some segments of the community might endorse norms from a different system, others might not. This lack of uniformity of individual behaviour is strongly linked to the dynamic nature of living customary law itself.

Thirdly, the overall impact of the interactions might, to some extent, lead to the gradual alteration of customary law given the fact that, in many areas of interaction, state law supersedes customary law for various reasons, including hierarchical relations between the two legal orders.

The relationship between these legal orders tends to be hierarchical as state law can simply impose its rules and principles whenever customary laws are deemed 'repugnant to natural justice, equity or good conscience', as exclusively defined by state institutions, 'or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia'. In *Chibwe v Chibwe*,[5] to which we shall return shortly, the Supreme Court, the highest court in the land, reinforced this hierarchical relationship between the legal orders by invoking the Constitution and

[5] 2001 ZR 1.

reprimanding the courts for ignoring it. The court stated: '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,[6] a point which some judicial officers at local court and subordinate levels fail to put into practice.'[7] The implication of this statement within the context of the repugnancy clause test is that customary law must at all times be under surveillance to ensure that it is aligned to the principles of equity, a deviation from which would be tantamount to a constitutional violation. Because of these hierarchical relationships, the state laws and institutions remain the winners in most of the structural frictions between the two legal orders.[8]
Furthermore, in a number of cases, judicial officers applied common sense and court precedents that led to the striking down of principles of customary law. Hence the customary law specific to each case is not invoked as the principles crystallised in some precedents are applied relevant norms, regardless of the parties' ethnic backgrounds. This leads to the application of a standardised form of customary law. The judicial officers and some of the non-state actors justified this standardised form of customary law by referring to the perceived notion of the 'identical nature' of the customary laws of Zambia, since these laws share common characteristics.

Fourthly, a complex hierarchical-horizontal pattern of interaction, which is not independent of the other state and non-state actors in the other three patterns, emerges from the position of judges as state actors and family members who are subject to customary law. This pattern exhibits a case in which judges act as agents of both state law and customary law. In this respect, all judicial officers interviewed are members of the various ethnic groups of Zambia, and they mostly conduct their own marriages in accordance with customary law (or a mixture of customary law and other legal orders that operate in the country). Some judicial officers gave examples of their own marriages in which the role of customary law in the formation of the marriage was highlighted, and sometimes used as a broad basis for their knowledge of customary law for the purpose of deciding cases. In such cases, the state actors themselves, as individuals, carry their notions or perceptions of the values, principles and rules of both state law and customary legal orders into the sphere of state judicial decision-making (and perhaps vice versa as well[9]).[10] In this sphere there is an

[6] The court does not refer to any specific provision of the Constitution, and there does not appear to be such a provision in the Constitution.
[7] See appendix D.
[8] For a detailed discussion of the way in which this limitation on customary law has been applied in the field of customary marriages and family law generally see C Himonga *Family and Succession Law in Zambia* (2016) para 64.
[9] Our research did not investigate the extent to which the judges themselves carried state norms back into their communities.

intertwinement of state law, the 'customary law of the individual judges' (i.e. as experienced in their own marriages and families), and the customary law of others (i.e. others whose customary law they adjudicate, which in a given case may be different from their own). Yet, since state law itself is permeable to other forms of normative orders, especially in its phase of 'law in action', its nature is reformed by the agencies of both state and non-state actors. This indicates the horizontal nature of the relationship between state law and customary law. An example of this horizontality can be seen in the judicial officers' involvement in premarital counselling and in the way in which they have used the ages and the gender of the children as the most important barometers when making custody decisions. Their systematic rhetoric of the best interest of the child, a principle from state law, is downplayed by the common beliefs and practices that tend to position women as the natural care givers and the most suitable custodians of female and younger children.

The agreement whereby the interaction between the customary law (as it is found among non-state actors i.e. ordinary members of society) and the state law through its judicial officers occurs is legal in character. It arises from section 16 of the Subordinate Courts Act, which provides that customary law applies to, among other things, marriages entered into by persons who are subject to customary law. The issue of who is subject to customary law is determined by conflict of laws rules.[11]

[10] This is not to suggest that the judges represent their customary communities' living customary law or that they apply their respective customary law communities' living customary laws, contrary to Woodman's well-considered view (see GR Woodman 'Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria' in AN Allott & GR Woodman (eds) *People's Law and State Law: The Bellagio Papers* (Dordrecht: Foris Publications, 1985).

[11] For a discussion of this subject see Himonga note 8 above, paras 61–67.

PART II: DETAILED PRESENTATION OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS IN TERMS OF VARIABLES

I. Actors/stakeholders

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific actors.**

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific actors.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

State and non-state actors together determine the customary law of marriage applied by the courts in matrimonial disputes before them. The state actors are the judicial officers of the various courts (judges of the High Court and Supreme Court as appeal courts, magistrates of the subordinate courts, and magistrates of the local courts) that have jurisdiction to apply customary at first instance or on appeal.[12] The non-state actors are witnesses, assessors and marriage counsellors under the Zambian Traditional Counselors Association (hereafter Alangezi). The family members are also important actors in customary marriages as they play key roles in

[12] The new Constitution of the Republic of Zambia of 2015 has introduced a new system of courts, which has added two new courts – the Constitutional Court and the Court of Appeal (see articles 118–148 of the Constitution Act 2015). However, the research on which this report is based was conducted before this new system took effect. The report does not therefore cover the new courts; it is restricted to the courts under the old system, all of which continue to exercise the same jurisdiction they had over customary law before the introduction of the new court system. Although the High Court is listed in this section as an appeal court, it has concurrent original jurisdiction with local courts to apply customary law at first instance. However, the established practice is that the High Court hears customary law matters only on appeal (see Himonga note 8 above, para 53). Thus, local courts hear all matrimonial matters regulated by customary law at first instance while the subordinate courts, the High Court and the Supreme Court hear these matters on appeal.

contracting and concluding marriages.

The nature of the interaction between the various actors is revealed at different levels of the report i.e. the analysis relating to actors, processes, principles, rules, values etc.

The context in which the interaction between the actors takes place is that the living customary law of marriage is neither uniform nor written nor codified. It consists of the customs and practices of the 73 ethnic groups of Zambia. Because of its oral and evolving nature,[13] and the absence of a single authority that defines it, the content of living customary law is fluid. These features make its ascertainment in matters before the courts extremely difficult. Added to this is the fact that the judicial officers in the subordinate courts and superior courts are not trained in the content of living customary law, although they may have been superficially exposed to the content of official customary law while receiving their legal education for professional degrees.[14]

Local court magistrates, on the other hand, are lay persons with no formal professional qualifications. They are appointed to their judicial offices on the basis of their age, but the process of appointment does not take into account their knowledge of customary law as a standard requirement. Some of those interviewed in Lusaka stated that they had been appointed at the age of 40 or 45 years; their age was used as an indicator of their maturity, indicating their capacity to adjudicate conflicts between communities' members. Only a minority of local court magistrates interviewed at the Chongwe local court, which has jurisdiction over Runfunsa, indicated that their age was related to their knowledge of the customary law in the appointment process. However, in practice, their assumed knowledge of customary law does not assist them in

[13] An important feature of living customary law is that it adapts to changing conditions, including social and economic conditions and is, therefore, not fixed in time. For a detailed discussion of this concept see TW Bennett 'Official vs living customary law: dilemmas of description and recognition' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2018); C Himonga 'The future of living customary law in African legal systems in the twenty-first century and beyond with special reference to South Africa' in J Fenrich et al (eds) *The Future of African Customary Law* (2011) 31–57.

[14] Magistrates of the subordinate court are not all professionally qualified; some of them are lay magistrates, but they would have been trained in legal matters at the Institute of Public Administration. Two of those interviewed had completed this course, but none mentioned any training in customary law being included in this course. This group of magistrates therefore received no formal training on (official or living) customary law whatsoever.

executing their judicial duties. This is due to a number of factors, including the fact that the matters before them often involve customary laws other than those with which they are familiar (i.e. their own customary laws or customary law they may have come to know in a previous position).

Thus, judicial officers in all levels of courts that apply customary law have little or no direct knowledge of the customary law they are required to apply in matrimonial matters before them, other than the state (official) customary law in legislation or court precedents or recorded in textbooks. The majority of judicial officers interviewed acknowledged their lack of knowledge of all the customary laws of Zambia or their limitations in this respect. The only way these courts can ascertain living customary law is through the mechanisms that the state provides for this purpose.

State customary law provides mechanisms by which living customary law can be brought before the courts – through judicial notice, written sources, expert witnesses and assessors – thus creating room for non-state actors to participate in the judicial process. The Local Courts Act,[15] the Subordinate Courts Act[16] and the High Court Act[17] all provide for one or other method of ascertaining customary law.

The Local Courts Act[18] provides for assessors as follows:

'[a]ny local, or any other court before which a case from a local court has been ordered to be tried or retried, or which has before it for revision a case from a local court, or to which an appeal has been made from a local court, or any authorized officer in the exercise of [the powers of inspection and review of local court decisions], may, in dealing with any such matters, require the assistance of assessors and make such use of such assessors as advisers on matters of African customary law as may be necessary.'

[15] Cap 29 of the Laws of Zambia.
[16] Cap 28 of the Laws of Zambia.
[17] Cap 27 of the Laws of Zambia.
[18] Section 61(1) of the Act.

The High Court Act similarly provides for ascertaining customary law by calling chief or other persons that the court regards as having special knowledge of customary law as witnesses or assessors. This is in addition to the court's authority to consult and give effect to any book or publication it considers to be an authority on customary law.[19] On the other hand, the relevant section of the Subordinate Courts Act only authorises these courts to call as a witness to customary law a chief or other persons considered to have special knowledge of customary law.[20]

Thus, according to these statutes, the chief is, expressly, the central non-state actor who assists the court in determining the customary rules of his ethnic group that are applicable to matters before the court. The expert witness may be a member of the ethnic group or any other person, for example, a scholar who has special knowledge gained through research of the customary law concerned.

Two cases decided by the High Court, one a colonial decision[21] and the other a post-independence decision,[22] have confirmed this scheme of ascertaining customary law. In the first case, based on the assumption that the local court's judicial officers knew customary law, the High Court held that:

'A Native court [...] may be presumed to know the native law and custom prevailing in the area of its jurisdiction. [...] But I cannot regard this presumption as extending to non-native courts [e.g. the subordinate courts and High Court]. It seems to me that native law and custom must be a matter of proof in all cases taken on appeal. It is [...] more or less in the same position as foreign law and it must.'

In the second case, the court held that a magistrate (i.e. presiding in a subordinate court) cannot

[19] Section 34 of the Act.
[20] Section 49 of the Act.
[21] 1957 VI *Northern Rhodesia Law Reports* 29.
[22] *Kaniki v Jairus* 1967 ZR 71.

take judicial notice of African customary law but must sit with assessors or receive evidence from expert witnesses.

Our study found that judicial officers referred more to the use of assessors than to any of the other mechanisms identified above. Some judicial officers interviewed also distinguished between rural and urban local courts. In the former, no assessors were used because the officials appointed to these courts are drawn from the same community as most parties litigating in the courts, while assessors are used in urban courts. One local court magistrate stated:

'In urban areas, local courts deal with matters of people from different parts of the country. So they would not know the customary law of marriage before them. So they are entitled to use assessors, elders from different regions to advise them on customary law. But it is different from local justices in rural areas. Here local court justices are usually from the local area who know the customs and there is no problem of ascertaining customary law.'

The assessors employed by the courts are drawn from the same communities as the parties before the court. One participant said that headmen and chiefs in the area where the parties come from are asked to identify assessors.

Another method of ascertaining customary law is for the local court justices to consult other local court magistrates who come from the parties' area as to how they deal with such matters in their area of origin.

Despite the possibility of ascertaining customary law through the various state mechanisms, this research found that in practice all the courts seldom call witnesses or assessors. One judicial officer explained: *'As magistrates we have never used assessors to help us understand the given custom. I've been a magistrate for 8 years and I've never sat with an assessor.'*

Even court officials that cannot be presumed to know customary law by virtue of their connection to the customary law communities, such as magistrates of the subordinate courts and judges of the superior courts, do not call assessors. This finding was also confirmed by the court records of judgments from all the courts, where assessors were called in only one case. Instead, the courts depend on, among other things, several methods of ascertaining customary law that are outside of the official state (statutory) schemes. These include consultations among local court magistrates concerning the content of customary law before a particular court, and their understanding of customary law as consisting of identical rules across the different ethnic groups, or their own notions of customary law as they have experienced it within their own families.

The reasons that were cited for this deviation from the statutory mechanisms ranged from pure negligence on the part of the presiding officers to the need to avoid the delays that would result from calling assessors or witnesses.

In sum, our findings show that in theory state customary law requires the courts to sit with witnesses or assessors connected with living customary law to determine the customary law in the matters before them. The 'law in action' is, however, different in most of the cases: the courts do not use these methods but use other techniques that tend to completely isolate or ignore the role of non-state actors in determining the relevant customary laws in litigation processes. Moreover, the isolation of non-state actors by state actors in 'law in action' also occurs in some cases where the non-state actors are given an audience in the courts simply as a matter of process. For example, in *Chibwe v Chibwe*, although both the local court and the subordinate magistrates called Ushi customary law assessors, they paid no attention to their statement of customary law. The Supreme Court expressed surprise at the stance of these magistrates and stated disapprovingly:

'Looking at the record of the proceedings before both the local court and magistrate court, it was common ground that the marriage […] was conducted under Ushi customary law. We are

therefore surprised that both the local court and subordinate which sat with the assessors who are experts of the Ushi customary law, made no reference to Ushi customary in dissolving the marriage and in property adjustment. This was improper and a misdirection.'[23]

However, as already intimated, we found at least one case, *Chibwe v Chibwe*, in which interactions between state actors and non-state actors (the assessors) occurred at the levels of the High Court and the Supreme Court. These levels of the case enabled us to see other dimensions of the interaction between the two legal orders.

The case was an appeal from the local court to the subordinate court and all the way to the Supreme Court. It involved the maintenance and property rights of the parties to a marriage that had been concluded in accordance with Ushi customary law, after their divorce. In the subordinate court, the case was heard *de novo*, and the court called assessors on Ushi customary law. The assessors presented the rule that 'a divorced woman who found her husband with few properties and later acquired more properties' was 'entitled to a reasonable share after divorce'.[24] The magistrate dismissed the appeal, and the wife then appealed to the High Court.

Apparently[25] basing its decision on Ushi customary law as presented by the assessors in the subordinate court, the High Court upheld the appeal and awarded the appellant a lump sum amount for both maintenance and as a property adjustment. She appealed this decision on the grounds, among others, that while the High Court was right in its decision that she was entitled to a share of the matrimonial property in accordance with Ushi customary law, the amount the judge awarded was not a 'reasonable amount' as required by this law. The Supreme Court upheld her appeal. However, in reaching this decision, the court relied largely on the received English matrimonial causes law that governs a civil marriage on the distribution of assets post-divorce. It barely made reference to Ushi customary law for this purpose.[26]

[23] See appendix D.
[24] See appendix D.
[25] The decision was not adequately reasoned so it is difficult to establish on what basis it was decided.
[26] See Himonga note 8 above, para 65.

The effects of this interaction at the level of actors are that of recognition and co-operation between state actors and non-state actors in determining the rules applicable to customary marriage disputes. The consequences of the interaction in terms of the rules applied by the different levels of the courts in the case are discussed in the section on rules and principles below.

II. Processes (rituals, ceremonies etc.)

1. Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific processes.

2. Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific processes.

3. Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific principles (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).

The processes of customary marriages relate mostly to the formalities of contracting and dissolving these marriages. Conercerning the contracting of marriages, several formalities

orginating from different legal systems seem to be interwined.

As already stated, there are two distinct forms of marriage recognised in Zambia, namely, customary marriages and marriages solemnised in accordance with the Marriage Act (referred to as civil marriages). In practice, couples married under African customary law tend also to engage in the formalities required for civil marriages.

For example, the formalities of customary marriages include registration at the local court. The registration refers to the process by which the local courts in urban areas[27] or the Rural District Councils in rural areas issue to the parties to a customary law marriage a marriage certificate upon the payment of a fee. This process is not compulsory, and neither is it part of the requirements that are essential for the validity of a marriage, although the marriage certificate represents one form of proof of the existence of a customary marriage.

In contrast, civil marriages may be solemnised in any licensed place of worship by any licensed minister of the church. They can also be directly registered at the City Council (at municipal offices) or at any place authorised by a special licence and charged with the function of registering marriages in terms of section 4 of the Marriage Act.[28] However, customary marriages can also be solemnised at the church: couples often go to churches for their unions to be blessed by a priest,[29] but such blessings do not usually have legal consequences as far as the status of the marriage is concerned.

The interaction between these specific processes of the legal systems is triggered when the parties to a customary marriage combine all the procedures of contracting different types of marriage, which are normally distinct. As stated by a senior magistrate in the Boma local court:

[27] Section 8 (2) of the Local Courts Act.
[28] Marriage Act: Chapter 50 of the Laws of Zambia.
[29] *Chaila v Chaila* 1982/HE/101.

'Sometimes people […] come here [the local court] and get a certificate, go to church and then go to Civic Centre [where the Town Council is located]. It's a way of securing their marriages and – maybe it's a bit of ignorance on really what they want – because they could go for one.'

The evidence from the empirical data collected from respondents married under customary law has shown that the majority of the marriages are unregistered and often respondents did not know about registration. This lack of knowledge had no correlation with the level of education or religion of the participants. Only about four couples had their marriages registered in church and had certificates. The rest went to church only for blessings and did not register their marriages. Quite a few were registered at the civic centre. Two couples were born in the 1960s.

This intertwinement of customs, statutory law procedures and religious processes has some effect on the relationships between the state and the customary legal systems. The hierarchical nature of the relationship between statutory law and customary law in Zambia is evident from the mixture of marriage processes. A magistrate at the local court clarified this consequence in these terms:

'This marriage ceases to be customary marriage because the one under the Act supersedes – so that one [the cusotmary marriage] goes out – even if in their [the parties to the marriage] mind they think it's under customary but the marriage now is constituted under the Act. In fact, there is a casewhere somebody married under customary law. Later this person went to constitute the marriage under the Act and then he wanted to bring another wife under customary law. I think he was convicted [of a criminal offence] because he moved from customary marriage and then he wanted to move back and bring a second wife. It was said: No, no, no, it is bigamy – you are married under the Act. So him – his argument was that I started with customary so I have to continue with customary – they said no, no, no – it ceased at that particular moment [when he constituted the marriage under the Act.'

This legal consequence is a result of the fact that one can change a customary marriage into a civil one, but not the other way around.[30] Also, since civil marriage is not potentially polygamous, a party cannot intend to marry by African customary law any person other than the person with whom he intends to contract a civil marriage.[31] These legal options lead to a gradual suppression of customary marriages.

Another example of the mixture of formalities can be seen in the increasing importance of premarital counselling in the judicial sphere, especially by the local courts. In fact, counselling of the couple before marriage is a key feature of customary marriage. How it is done, for how long, and by whom depends on the particular couple. The majority of the respondents in this research, especially women, had some form of counselling before marriage. The duration of the counselling differed depending on the tribe and how their families felt about their respective cultures. Those who married in the villages and were strongly attached to their customs had longer periods of counselling. Those who lived in towns and were more educated and/or were less familiar with their cultures had very short periods of counselling. The counsellors were mostly elderly women (for the brides) or men (for the grooms). Some respondents, especially those in towns, paid their counsellors, while others did not, mainly because they were family members or friends of the family. The importance of the practice has led to the appearance of marriage counsellors – the so-called 'Alangezi' – in urban contexts.

The relevance of this process in the concluding of customary marriages has led to the local court magistrates taking on the role of counsellors of the parties who come to local courts to register their marriages. The mimic goes to the level of the similarity of the content of the marriage advice given to the parties. In fact, traditionally, the marriage teachings for the women included a number of issues, such as how to manage the house, children and husband, how to engage in sexual intercourse with the husband, how to keep clean, and also how to live with and relate to in-laws. The men's teachings served to remind them of their responsibilities to provide for the

[30] Section 34 of the Marriage Act. For a detailed discussion see Himonga note 8 above, para 101.
[31] Section 10(1) of the Marriage Act.

family and on how to live with and please a woman. The magistrates at the local courts described their 'self-proclaimed' function of counselling as a result of the fact that they have seen numerous cases of marriage breakdown, and this has given them insight into the 'dos and don'ts' of these marriages. They also related the counselling function to their practice of the conciliation of parties who face problems that could lead to divorce, and some of them regard the Bible as their source of wisdom that they are sharing with the parties. The importance of this role has led to certain magistrates expressing the need to have legislation that gives them counselling functions and even asking that a department be established for that purpose. A magistrate at the Boma local court in Lusaka explain the idea as follows:

'I think there should be a provision for counselling also because you find that certain cases of marriage disputes are [consolable]. Some people are prepared to be taught by the court – not necessarily to divorce. They come here to say: we need only the court's guidance. They have come to this court specifically for the court to assist. Now, that's where I'm saying maybe there can be an extra provision in the court system where there is a counselling system that does not necessarily put orders to divorce. When people come for reconciliation for example there can be a certain section within the judicial system – counselling system – where those who really want to just reconcile are referred to; to say [to them] there is a department now for reconciliation where each of the parties will be taught how to behave. So, I'm suggesting that maybe the judiciary should establish a counselling department for those who have got marriage disputes so that it confirms if there is an irreconcilable dispute – that's when the counselling department refers to the main court for and the grant of divorce. So, the provision of a counselling section at the local court level may be a necessity.

If this suggestion were to be followed, it would legalise and institutionalise the already existing practices of the local court magistrates, leading to further hybridisation of the plural processes applied to customary marriages in Zambia. This reality resonates with the idea of alternative dispute resolution systems that are often presented as an area of interaction between non-state conciliatory methods (such as the ones in customary law) and the state adversial adjudicative systems.

III. Rules

1. Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific rules.

2. Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific rules.

3. Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific rules (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).

The rules applied to customary marriages originated both from customary law and state legislation in Zambia. Interaction between the rules from these systems can be seen in the different aspects of customary marriages where state actors and non-state actors tend to combine the rules from different legal systems.

Divorce is one area where the rules were combined. For example, the rule of the 'irretrievable breakdown of the marriage' which is known to the common law system, which applies to civil marraiges, is applied to customary marriages by judges. Yet, in case no 2989 of 2005, the magistrates held that:

'Based on the statements of the plaintiff it is clear that she endures a lot and there is no peace in the home. The court cannot force two parties to remain together if the marriage has broken

irretrievably. It is better if the parties just divorce. [The case involved an accusation of adultery of the wife and domestic abuse by the husband. According to the local court magistrates, the underlying argument behind this concept is that the court grants the divorce, as it cannot force two parties to be together]. '[32]

The rule about the irretrievable breakdown of marriage appears in section 8 of the Matrimonial Causes Act of 2007 that applies to civil marriages. The section states that 'A petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably'. The rule is however alien to African customary law which governs customary marriages. By bringing the rule into their interpretation of the grounds for the dissolution of customary marriages, the judiciary is imposing state law on people who opted for a different legal system. This imposition is related to the state-centrist approach of judges who are trained in common law and have little knowledge of customary law, and are influenced by the application of precedents based on the laws of England.

The interaction between state law and customary law works both ways: some rules of customary law or widely spread practices that could reflect living customary law are also raised during the adjudication of customary marriage disputes. 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 affliation of the children is to the father in a patrilineal kinship, to the mother in a matrilineal kinship, and to both families in the bilateral one. Yet, in the judical practice of the local courts, irrespective of the type of kinship, custody is often granted to women while men are granted access to children after the divorce. 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. However, these practices are a result of the fact that the customary kinship principles are subject to section 15(1) of the Affiliation and Maintenance of Children Act of 1995. The rule in this legislation that

[32] LC case no 462 of 2014.

applies to custody is that the best interest of the child and the welfare of the child should be the paramount considerations when granting custody.[33] Yet the magistrates, especially those of the local courts, seem to have adopted the traditional rule that 'women are natural care givers'. In fact, the court records show that of the 45 cases selected randomly, custody was granted to the father in only one case,[34] and joint custody was awarded in another case.[35] In all other divorce cases, custody of the children was granted to the mother and the father was often obliged to pay maintenance. Unless one can demonstrate that the best interest of the child will always be served by awarding custody to the mother, this judicial approach can be only understood with reference to the influences of social practices on the implementation of the official law. This is a case of the horizontal appropriation of non-state rules by the state actors.

[33] Section 15(2) of the Affiliation and Maintenance of Children Act of 1995: Chapter 64 of the Laws of Zambia.
[34] LC Case 300 of 2014.
[35] LC Case 384 of 1998.

IV. Principles

1. Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions of processses observed with respect to specific principles.

2. Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific principles.

3. Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).

The sources of the principles applied by the different legal systems are gradually hybridised as social, economic and political changes affect the communities' culture and traditions.

In certain circumstances, these changes lead to the endorsement of certain principles already common to state laws. For example, gender equality in the form of equality beetwen spouses is a principle gradually borrowed from state law as it is invoked by educated parties who enter into customary marriages. This incorporation of the principle of equality beetwen the spouses can be seen from two main aspects of the marriage relationship, such as decision-making in the family and property ownership. According to the state law, obtaining equal shares of the matrimonial property should be the norm governing the patrimonial consequences of the dissolution of customary marriages. A magistrate from the local court explained this approach as follows:

'Regarding property, I think sometimes back beforewe were guided by some case law. There was a case law of Martha Mwiya v Mwiya. So in this case the matter of course was based on divorce and the court held that there's no Lozi custom which compelled a husband to share property and if the husband so wished he could share the property but was not bound by the custom. So the wife lost on the other claim too – on account that there was no Lozi custom which supported her. That was then Zambian case law. But now the case of Chibwe v Chibwe which went up to Supreme Court reversed that because they said this particular law or custom is repugnant. So, Chibwe v Chibwe now stated that the wife is entitled to share; but under the Lozi customary law they said (no) the husband is not bound to share with the wife when they divorce except if he wishes he can actually give her something. But all these cases which were unfair to the wife – or to the divorced wife were changed in the case of Chibwe v Chibwe which stated that the wife is now entitled notwithstanding that she was just a "kitchen wife" – she was just – [laughter] – staying in the kitchen – because she was also contributing to the husband looking nice, entertaining the visitors or the wife for the husband – so she is entitled also to the share of property.'

This approach is also well entrenched in the views of the subordinate court magistrates as one of them stated that:

'[In traditional society there was the] aspect of believing she doesn't deserve anything. [This approach is] coupled with [the fact] that initially local courts would, when giving judgment, look at two issues - one who sued the other and two who caused the divorce. But with the change in the approach [which has introduced] the 50/50 sharing courts now don't look at who has sued the other. …We are still telling them it doesn't matter all this property you got it together so you have to share…. The courts - from local courts upwards - all apply the 50% principle based on Chibwe. This change in the way subordinate courts magistrate approach this matter has taken place over the last 10-15 years.'

Another judicial officer said:

'But the standard approach taken by the courts according to Chibwe case is that even if she was just a housewife she was contributing in the sense that she was maintaining the household, she cooks for you, she washes for you, she takes care of the children that is maintenance towards marriage. The 50/50 itself is a new gender equity concept. In the past local courts shared

property but they only gave the woman a few things. Now it is simple, 50/50.'

However, the empirical evidence on these two aspects yielded many different approaches among community members. More than 50 percent of the participants claimed that property was equally shared. This was because most of the respondents did contribute to the property they owned as a family. Participants who practised the matrilineal lineage system referred to property as belonging to the children. Most reasoned that in case of any misunderstanding between the spouses or their death, the children would rightfully benefit from their resources. Less educated participants who were from the patrilineal lineage regarded the man as the owner of property. This was especially common among patrilineal couples, who regarded the man as the only income earner. Also, whereas more than 60 percent of the respondents claimed to make decisions together and collaborate with each other, age, monetary contributions, nature of lineage and even religion had a bearing on these decisions. Those from a strong Christian faith believe that the man is the head of the house and the decision maker. Even if the couple discussed issues, the man's opinion held sway. This was also the case with participants who had strong attachments to custom and belonged to a patrilineal lineage. Couples who were more attached to their customary roots and followed a matrilineal lineage also regarded the man as the head of house but the woman had a great deal of influence in decision making. Women made all the decisions in the house and managed the available finances. Male participants from this group asserted that the woman is the one responsible for budgeting and allocating funds. This was the case even where their wives were housewives. Participants who were educated and were both wage-earners shared decision making and consulted each other before making decisions.

As shown from the findings, the application or invocation of some of the principles of state law, such as gender equality, are not always uniform across the population. The participants in the research largely accepted that most less-educated persons have rejected principles of state law. Despite the lack of uniform popular endorsement, the judicial officers apply the principle of property sharing uniformly during divorce proceedings to any citizen who uses the state adjudicative systems. The principle is therefore a consequence of the state's imposition of its law on customary law.

V. Values/beliefs

1. Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (Example: imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processes observed with respect to specific values.

2. Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific values.

3. Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific values (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).

Communality or solidarity as a value underlies the marriage relationship. According to this value, the families of the parties to the marriage are as central to the marriage negotiation and conclusion as the parties to the marriage themselves. This value is seen throughout the marriage relationship: elders in the families of the parties to the marriage are the main negotiators for the

marriage contract to be concluded, including negotiation of the lobola, which is central to the validity of the marriage; they are the counsellors for the spouses when the marriage is in trouble and mediators when there are actual disputes requiring external intervention; and they act as forums for the dissolution of the marriage. Individual participants from Lusaka and Rufunsa furthermore stated that dispute resolution in marriage was done within the family, and very few said they would consider going to court. They even made a qualification that if they were to take the dispute to court, it would only be to seek assistance to reconcile with their spouse rather than for divorce. For example, a community member in Rufunsa explained that as a couple they tried all measures to resolve disputes within the family and when all measures failed they went to a local court where they were reconciled but shortly after decided to separate permanently.

The value of communality is recognised by both state officials who apply customary law and ordinary members of society in their application of customary law to their lives. Both sets of actors emphasised the value of parental consent as an essential requirement of a valid marriage, as well as the role of family members in negotiating the marriage. For example, in an interview with a community member who had eloped, she said she was not comfortable in her marriage and years later the couple returned home to seek forgiveness and blessings from the parents. The majority of the respondents confirmed that customary marriage is a union of two families. If friends and peers went to ask for a woman's hand in marriage it would be considered to be disrespectful towards the woman's family.

Respect for the family is the second value of customary marriage that is recognised by both state actors and non-state actors. Both judicial officers and ordinary members of society interviewed recognised this value, which is signified by, among other things, the payment of lobola for marriage. One non-state actor stated that the payment of lobola is a symbol of respect to the parents of the woman who raised her. The value of respect is also signified by the rules of marriage which require each spouse to respect his or her in-laws. Disrespect may be a ground for the dissolution of the marriage.

In the scenario where persons enter into both civil marriages and customary marriages, the value of communality influences the negotiation and formation of marriage before the parties conclude the civil marriage. The contracting of a customary marriage in these cases is not legally required, but a matter of choice by the parties to the marriage. Arguably, since there is no formal process involved in these cases, the process by which the interaction between state and non-state values is fostered is an informal one, through imposition and imitation. In other words, customary law informally imposes its value of communality (involvement of family members in the contracting of the marriage) on parties marrying under civil law.

The effect of the interaction between state actors and non-state actors with respect to the value of communality is recognition. The state recognises the value of communality in its application of customary law to the disputes before them.

PARTIII: FURTHER ANALYSIS OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

I. Reactions of indigenous and state actors

How the actors perceive and experience the interactions between the legal systems? Illustrate your analysis with as many examples as possible.

State actors perceive the interactions between official customary law and living customary law in a number of ways.

First, a number of judicial officers interviewed see the interactions in terms of the dichotomy between rural and urban areas. The rural population is seen as conducting their marriages traditionally while the urban population combines customary marriages with civil marriages, thereby intertwining both legal systems. One of them stated: *'In a typical village set up customary marriage is basically the same, but as you come to the peri- urban and urban areas you find that people can contract a marriage under customary law but they [also] want the benefit of the statutory marriage.'*

Secondly, some state actors see the interaction between official customary law and living customary law as the role state actors (the courts) play in unifying and amputating the living customary law rules of marriage. A typical perception is expressed in the following statement:

'The approach of courts in matrimonial matters is beginning to affect people's thinking. The court imposes the 50/50 rule whether you married in urban areas or in the village. So that is also waking people up [to the fact] that whether it is a civil or customary union equality is there. That is beginning to affect the community they read about these court decisions in newspapers and people are beginning to realize oh so it doesn't matter how you married or where you live.'

Thirdly, some state actors see the interaction in terms of undesirable inequalities before the law. The judge delivering the judgment in *Chibwe v Chibwe* was implicitly concerned that the co-existence of two justice paradigms representing state law and customary law creates undesirable inequalities. She observed:

'The dichotomy resulting from the application of an unrecorded customary law […] and common law with changes in social values influenced by the international values received by Zambia through its ratification of various international instruments more or less [create] 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.'

Finally, some state actors prefer uniformity as opposed to the co-existence of legal systems regulating customary marriages, as apparent from the statement of one judicial officer:

'I think the change that I would like to see in the solemnization of marriages under customary law is [the] need [for] uniformity, a codified way of solemnization customary marriages. This is because the local court justices [magistrates] are also not experts in customary law so they depend on these very many people, witnesses, who might have subjective views on customary law. So codification of how a customary marriage is solemnized I think is important. And also dissolution of such a marriage I think we need guidelines to determine whether a marriage has broken down. And also just a law that specifically states that equity and not customary law will apply to how the property would be shared taking into account various factors that determine how the property is shared.'

However, the above perception is not shared by all state actors. Some of them do not approve of any state approach that would foster the unification of living customary law or its demise. Speaking about the need to enforce constitutional rights, one judicial officer said:

'The best people to enforce [constitutional rights] particularly in the outlying areas of the rural areas and so on are the chiefs and the chiefs must be sensitized about the need to stop early marriages, they must work together with the parents. There maybe even the police to help reduce those infringements. But legislation should not be used to sort these issues of fairness of how women are treated in the local courts etc. If you want to legislate on customary law you will actually be killing it. It must be left to flow with time and there

would be improvements. What is needed is just people being sensitized on what the sense of justice is. … Legislating I don't think would be an answer when it comes to customary law matters. Rather it just flows, let it mature it is replaced and repealed naturally. It evolves.'

II. Other aspects of the interactions between legal systems

What other aspects or issues of interaction between the legal systems do you judge relevant and why? Illustrate with examples the points raised.

The interactions between the different legal systems show an intertwinement between state regulation, customary law, and religious rites and customs applied at the same time to customary marriages. While the Christian laws and practices have not been categorised in this research as a separate legal system, they remain a normative system of high importance for people subject to customary law. In fact, religion has a larger impact on customary marriage than education and the influence of other cultures. In this research, all participants from the communities were Christians and about half of them were 'born again' Christians, especially the women. Religion had a bearing on their understanding of marriage, the responsibility of spouses and even dispute resolution, because Biblical teachings on marriage and other aspects of life play a significant role in the participants' way of life, particularly the women.

Another aspect of interaction between legal systems concerns marriages that are influenced by both customary law and civil law. As already noted in the discussion of processes under part I of the

report, the concluding of customary marriages is affected by the Christian religion in the sense that, in some cases, a customary marriage only comes into existence after the celebration of the marriage in accordance with Christian beliefs and rituals. Thus, even though a customary marriage comes into existence immediately after the payment of lobola, the parties consider themselves married only after the celebration of the marriage in church. For example, two judicial officers explained:

'In customary law, marriage comes into existence as soon as lobola is paid. But Christians who marry under customary law consider the marriage to come into existence after the church, white wedding, even if lobola has been paid. This also includes cases where the families [of the parties] have agreed for the marriage to start immediately. For me and my wife we were influenced by Christian principles. For us the marriage comes into being in church. I paid half the dowry and then we said okay we are going to have a wedding one year from now. So a month before the wedding we paid the balance and then had our actual wedding [in the church]. That wedding we regarded as a civil marriage that's when we started living together.'

'In cases where both parties embrace Christianity they are looking for a common ground [to regulate their marriages], and they just take Christianity as the guiding principle and not to dig into their marriage customs.'

For example, women whose parents were also strong Christian believers did not go for customary marriage counselling but went to counselling through the church.

Thus, customary law is enmeshed with religious law in the marriages of persons who are subject to customary law but also adhere to the Christian religion.

Furthermore, there is an interesting interaction between the Alangezi and the state in which the latter channels its principle of gender equality and other processes of customary marriage through to the regime of living customary law through counselling and training programmes.

The Alangezi consists of 10 cousellors who counsel parties intending to marry and married couples

experiencing matrimonial problems in different parts of the country. According to one consellor interviewed, *'all of the counsellors speak the same language in counselling'*. In fact, the Association is in the process of producing a book to guide all the counsellors country-wide. The book standardises the substantive content of counselling. The counsellor continued:

'We are expecting to preach one vision through the book which will be distributed to all 10 committee members. They must have one book which they can photocopy to give others so that we speak one language everywhere in Zambia. This book will be out as soon as possible. … We had a workshop in December of about 24 districts to finalise this book so that that knowledge which we gather together, which we agreed together from different tribes should go into that book even gender issues also it should be in that book. Gender based violence should be in that book so that when we are teaching people out there we must have a very good guide with good information inside of the book. … As Zambians we are a Christian country everything is in that book.'

The Alangezi also conducts public education as part of counselling in a broad sense, to disseminate its views on customary marriage to the public.

It claims to use African traditional values to counsel parties who intend to marry and those experiencing matrimonial problems on how to live happily in their marriages and maintain their marriage relationships. From our assessment of its role and ideology, the Alangezi seems to be a re-invention of traditional counseling institutions[36] in urban contexts.

The informal process by which the Alangezi promotes the state legal principle of gender equality and the state processes of marriage is mimicking. However, it is clear that it does not wholly embrace the principle of gender equality, in particular. Instead, it mimics this principle by 'peppering' living customary law with aspects of the principle in a manner that leaves the Alangezi deeply committed to traditional marriages. Thus, the medium through which the state seeks to intertwine the principle of gender equality with living customary simply mimics the principle,

[36] For example, the role of the grandmother or family elders in the socialisation of children, especially girl children for marriage and other adult responsibilities.

leading to the combination of two normative systems. The following statement of a female Alangezi counsellor reflects the interaction and process of interaction described:

'My job countrywide is to do counseling in a better way than following typical tradition which my grandmother was doing at that time [in traditional society in the past]. That was in another world but now it's a new culture we have changed things, and you cannot just change things. ...

'It is important for the couples anyway to be counselled before their marriage even if they are in a hurry but they should remember to go to traditional counsellors so that they are counselled to give them wisdom, good knowledge which can help the marriage in future. ... With regard to what we counsel the parties about, we counsel on sexual matters ...'

The 'peppering' of traditional norms with gender equality is evident from the following statement by the same counsellor:

'Although we are saying because of gender men should also help they can only chip in just to help but mostly the housework is for the woman. It is also good for a woman to know that she should not refuse sex in bed because there is HIV/Aids. When he is going to look for another woman outside he is going to bring a lot of problems. ... So it is good to keep her husband properly when it is sex time. At bathing time she must put bath water in a bath tub to prepare him when he wants to go to work in time. All these things should be shown to the husband, that's when there is a good marriage. …'

The participant continued:

'From my gender equality view it is really difficult to deal with this matter because we are just naming [it as] gender, but for those of us like me who were born after my age, I'm more than 50 years, this gender thing is working slowly, it's not a must and we cannot force men to help us as we teach or as we expect. This change is very difficult. Somehow somewhere it works but somewhere somehow it doesn't work because it was not our law as traditional values and norms or as traditional culture. Our culture did [not] allow a man to perform women duties. It did arrive and we are just learning. It is good but not for some because every man and a woman has the roles to play in every home. And those roles can be different. They don't have to be equal. It is very rare or few people who can be doing gender to be equal. Sure people who can understand especially these educated younger people some they do equal equality but is not 100%.'

Another example of how Alangezi promotes state law concerns the registration of marriages. To advance this goal, it combines state documentation of marriage with respect between spouses and by third parties. For example, it counsels parties intending to get married to have their marriage documented as a way of ensuring respect for their marriage, as the following statement shows:

'And also we advise the parties to the customary marriage to have a document of marriage so that they can be respected, they can fear each other, they can respect each other that this is customary marriage and we must follow law] in the way we should live in our family. [In this respect] we advise them to go to civic centre, for example, so that they can get that document. Sometimes they go to Boma to the government there in courts; there are some certain documents which they give and you pay little money. They give you that marriage [document]. They interview you and you give information from the father's side and witnesses and also there should be witnesses from the mother's side. And both people sign to agree that there is a customary marriage in this written document, which is going to give a lot of respect that those people have married customary marriage. ...

'So first we counsel them on how they should handle themselves, how they should organize themselves, then finally we advise them, now that we have the first step it is good for you to go and conduct some documents, you go and meet your parents, talk to them that you need a document so that the customary marriage that you are going to have must have respect, and even a man cannot just go with girlfriends because there's a document which is witnessing that as a couple you should keep your marriage properly. So after that you are supposed to go to court, the nearest court or civic center, ask about how much they charge there and then tell the parents to organize themselves so that you can go to civic center or to the court to go and get that customary document in your marriage. ...'

APPENDICES

I. Appendice A: Diagram of the Presentation (mandatory, but template optional)[37]

THEME				
REGION / CASE				
Step 2: What are the interactions between the indigenous and state legal systems and how are such interactions managed?				
VARIABLES	**EXAMPLES OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS**	**EFFECT OF INTERACTIONS ON LEGAL SYSTEMS**	**REACTIONS OF STATE-ACTORS AND ABORIGINALS TO THESE INTERACTIONS**	**COMMENTS**
Values / beliefs 	Communality Respect of family	Recognition of customary law by state law		

[37] The template provided is optional. You may opt for any graphic design that will effectively sum up your findings

Principles 	Gender equality Equal share of property Joint decision making	Hybridisation, Amputation of customary law by state law		
Rules 	irretrievable breakdown of the marriage, custody of children to woman	Hybridisation, Amputation		
Actors 	Involvement of non-state actors in state judicial process	Cooperation, Recognition		
Process, rituals, ceremonies 	Intertwined process of registration of customary marriages	Hybridisation, Amputation		

Others				

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III. Significant Extracts from the Collected Data (optional)

a. On Counselling by local courts magistrates

Interview 1 Boma local court, Lusaka

« **INTERVIEWEE 2**: When two people want to get married they come to court – and in fact that's one of the issues - the things that we do here - we also - marry them here in the courts – and when they come we ask them the two conditions of a customary law marriage that we follow here is that there must be dowry be paid first and the consent from the bride's parents most of the time. So, if these things are met then we go ahead and marry them. And during the process of marrying them we also do counselling on the expectations – you know what they should expect when they get married. It is not a long process but we try you know to give them at least the basics – (…) – so we try and counsel the husband – we'll also try to counsel the wife – and guide them through (….)

INTERVIEWER: Let's say I'm here now to be married and you are supposed to counsel me, what are the issues you advise usually?

INTERVIEWEE 1: [Laughter] - there are a lot - in brief yes we talk about the roles because we are aware of the husband's role and the wife's role – okay - basically. So we will counsel the husband on what to do when they are in marriage and what they are not supposed to do.

INTERVIEWEE 2: The dos and the don'ts of marriage…

INTERVIEWER: what are the dos and the don'ts?

INTERVIEWEE 1: Of course when people are married then they – you know - they become one. And that is one thing we always talk about that you become one – and so all decisions that you have to make should be in consultations with the each other party – and also learn that you are bringing in somebody - Husband take your responsibility as the head of the house – you are the provider, the vision carrier, the goal setter, so you have to set the path – and love your wife – and the wife also submissiveness – that you're married to this man now – so you've got to submit – and its easy if you're loved - it's very easy to submit –take your role as a wife - find out what his needs are and try and meet them –so both parties

are counselled on their roles and then you know we reach a point of telling them that you should love each other just like you have started today –

INTERVIEWEE 2: And also you know - we go further to tell them that the fact you have married and you have seen that the parent of the lady has consented. It means that you have to love also the family. In fact you have shifted camps like now you are no longer Mr. A, you'll go into Mr. B's camp; and Mrs. B – your wife will now move into A's camp – so you have to show love to this family and these are the families - for if you have got a problem they are the ones who will be your state counsel to defend you because of your goodness – your love which you were showing to this family –they will be on your side – so you have to embrace –you are marrying people – not all of the same level of understanding, behaviour – (…) so we counsel them on all aspects of life ».

Interview 3 Boma local court Lusaka

INTERVIEWEE 1: In… Just at the beginning some people when getting married usually they do all the necessary things at home; then here they come to get a certificate; customary marriage certificate; and before we issue that marriage certificate to them at least we do a bit of counselling. Although they have already been counselled at home we do a bit of counselling also here.

INTERVIEWER: What is the content of that counselling?

INTERVIEWEE 1: Counselling – okay we tell them how to live; how a good marriage is constituted; the advantages and disadvantages of a customary law marriage. I think you can add more…

INTERVIEWEE 2: Usually we also try to establish if that couple has gone through religious counselling which is very, very important because we have noticed you know when you are building a house you lay a weak foundation – that house will never last; but if the foundation is strong as it goes on, that house will last forever and ever. So, we try to make sure that the foundation of that marriage is strong and by doing so we encourage to take the 'god' issues to be very, very important first. So, the counselling has to start we have to establish if they are Christians; yes, they have been counselled at church – then we also add… we fuse in our counselling and all that.

INTERVIEWER: And what are the 'god' issues when it comes to the woman? Which usually you advise people…

INTERVIEWEE 1: Pardon…

INTERVIEWER: What are the 'god' issues which usually you tell people when it comes to the counselling of marriages?

INTERVIEWEE 2: To a woman?

INTERVIEWER: Yes…

INTERVIEWEE 2: The 'god' issues to a woman? Well, it's just we follow the Bible; just like what the Bible says; it says respect your man and be submissive. So, it tells a lot; then we also encourage on love – just like what the Bible says –just the contents of the Bible. Yes, basically…

INTERVIEWER: And what do you say when it comes to men? What are really some of the elements of counselling?

INTERVIEWEE 3: We equally do so. We follow the – we ask them to follow the Bible. We also – whether others get married when they are still young; So, whether they are married when they are still young or they have come as adults the emphasis usually is that they might have been in courtship for a few years but that's not enough. Two individuals are two different people – they come from different backgrounds and also they were brought up differently. So that's what we emphasise – to say that there are certain things that you would expect a woman to do for you which she may not be able to do for you, which maybe the way you were brought up there were certain standards. So, we ask the man equally the woman to forgo those things because they are one so that they are partners so that they should not think where I came from this is not the way I was eating, this is not the way dressing and so on; and also to a man – we ask the man to be sincere, to be open… Usually what brings problems is a man thinking that being the head then he cannot receive advice from the woman. So, we try to fuse them together that they are one fresh now. So, whatever the man is doing it's better to be open or to be transparent to the wife so that there are no conflicts because conflicts sometimes come as a result of the other part hiding what he is doing or what she is doing. So, those are the areas where conflicts come – lack of sincerity.

IV. Annex D: Other Documents Deemed Relevant (optional)

CASE LAW

ROSEMARY CHIBWE *v* AUSTIN CHIBWE

Supreme Court

Sakala, Ag D.C.J, Chirwa and Chibesakunda, J.J.S.

6th June, 2000 and 5th December, 2000

(SCZ Judgment No. 38 of 2000)

Flynote

Family Law –Customary Law- application of Divorce – Property settlement and maintenance awards – When appeal court may intervene Customary law duality of legal system – Repugnancy clause

Headnote

This is an appeal from the Local Court to the Magistrate's Court, then to the High Court and eventually to the Supreme Court. The appellant, Rosemary Chibwe was originally in the Local Court the respondent in a divorce petition brought by her former husband Austin Chibwe now the respondent. The respondent sued the appellant for divorce before the local court in Mufulira under customary law alleging inter alia, unreasonable behaviour and adultery with some unknown person. The local court granted as prayed the said prayer on the said grounds.

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 8th July, 1991, to the date of Judgment which was 25th June 1998, the appellant appealed against the decision of the learned trial commissioner.

Held:

(i) In Zambia courts must invoke both the principles of equity and law, concurrently

(ii) It is a cardinal principle supported by a plethora of authorities that court's conclusions must be based on facts stated on record.

(iii) 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.

(iv) Customary law in Zambia is recognized by the Constitution provided its application is not repugnant to any written law.

Case referred to:

1. Watchel v *Watchel* [1973] 1 All E.R 829 at 838.

Legislation referred to:

(1) English Law (Extent of Application) Act, Cap. 11;

(2) High Court Act, Cap. 27;

(3) Matrimonial Causes Act 1969;

(4) Matrimonial Proceedings and Property Act, of 1970 (1) s.5 and s.4 *(b).*

(5) Matrimonial Causes Act, 1973.

W. Mubanga of Messrs. Permanent Chambers for the appellant.

Chitabo of Messrs Chitabo Chiinga and Associates for the respondent.

Judgment

CHIBESAKUNDA, J. S., delivered the judgment of the court.

This is an appeal, which comes right from the Local Court first to the Magistrate's Court, then to the High Court and now to the Supreme Court. The appellant, Rosemary Chibwe was originally in the local court the respondent in a divorce petition brought by her former husband Austin Chibwe now the respondent. The respondent sued the appellant for divorce before the local court in Mufulira under customary law alleging inter alia, unreasonable behaviour and adultery with some unknown person. The local court granted as prayed the said prayer on the said grounds. The appellant appealed to the Magistrate's 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. She also alleged that the local court justices were prejudiced in favour of the respondent in handling the case before them. The learned Magistrate heard de novo the evidence and sat with assessors in Ushi customary law. At the end, he still dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant then appealed to the High Court and raised the following grounds:-

(1) that the learned trial Magistrate was biased in favour of the respondent and that he never considered the appellant's evidence before him;

(2) that the learned trial Magistrate failed to order a lump sum maintenance or monthly maintenance for the appellant;

(3) that the learned trial Magistrate failed to make any property adjustment order;

(4) that the learned trial Magistrate misinterpreted the provisions of section 16 of the subordinate Court's Act; and

(5) that he failed to appreciate the principle of equity so as to provide for the appellant upon granting divorce.

The learned High Court Commissioner chose to receive submissions from the two parties and held that since the appeal was not against divorce in principle, his main concern was property adjustment. After he considered the Ushi customary law, he ruled that the respondent had to pay a lump sum of K10,

000,000.00 with simple interest at the rate of ten per cent from 8th July, 1991, to the date of judgment, which was 25th of June, 1998, to the appellant. The appellant has now appealed against that decision of the learned trial commissioner.

The facts of the case on which there was no dispute are that the appellant and the respondent married in 1977 under Ushi customary Law and at the time of the divorce they had five children, not including nine born by the respondent from his previous marriage. Some five years after the marriage in 1982 the couple started encountering problems. The main ones being, according to the respondent, the appellant's constant late coming to the matrimonial home each time she went to church gatherings and visitations and her alleged adultery with a man who was not cited in the proceedings and which accusation was not supported by evidence before the local court and the Magistrate's court. According to the appellant, however, the main reason was that the respondent after 1982 started to refuse to have sexual intercourse with her without any reasons. It is evident from the record that the said marriage was riddled with problems such that at the local court although she, during the proceedings, pleaded that she was not for dissolving of the marriage, in the end she conceded to the fact that she and her husband could not stay together and as such she accepted the dissolution of the marriage. At the Magistrate's court level, one of the grounds of her appeal was that she challenged the local court's decision to dissolve the marriage as she alleged that there was no proof on the allegations levelled against her by the respondent. But during the proceedings she did not pursue it with vigour. At the High Court level, although one of her grounds of appeal was that the learned Magistrate was biased against her by not considering her evidence and thus supporting the findings of the lower court in dissolving the marriage as there was no proof of the allegations levelled against her by the respondent. Nevertheless, in her arguments before the court she did not press challenges of the Magistrate court's findings in dissolving the marriage. Her contentions were on her entitlements vis-à-vis the matrimonial property and her claim to maintenance for herself and children of the marriage who were in her custody and control after divorce.

Now before us, the submissions by the learned counsel for the appellant hardly touched on the merits for divorce but rather concentrated on her claim to property adjustment or/and an order for maintenance for the appellant and the children.

It was also common ground throughout the proceedings that the respondent was a very successful businessman and that he acquired a lot of personal and real properties listed at pages 40 to 47 of the main record of the appeal. Some personal ones are listed at pages 28 and 29 of the record of appeal.

The respondent before the subsistence of the marriage in question had acquired a few of these properties but most of those listed were acquired during the subsistence of this marriage in question. Those properties included leaseholds, household goods and business properties. Some of these properties, e.g. the garage and motor vehicles were originally in the respondent's name but were transferred to a company called AMC Contractors Limited, which company, the respondent, according to evidence was the sole shareholder and/or director. It is also common ground that some of these properties were transferred to AMC Contractors Limited during the proceedings for divorce. It was common ground that appellant's occupation was that of a secretary in a bank and that she brought into the family a small salary she was earning from her employment at the bank. The appellant was awarded in another court's proceedings a house in Kamuchanga Compound, a property that the respondent built for her during the subsistence of their marriage. There was also no dispute that the appellant lived a very luxurious life whilst married to the respondent.

Before this court neither the appellant nor her counsel appeared. Mr. Chitabo, counsel for the respondent, appeared and submitted that upon consent by both parties, both parties were to rely on written submissions. We accept that approach and we wish to encourage parties to adopt this approach whenever they are satisfied that all issues they seek this court to consider are well articulated in the written heads of argument or written submissions. In the written submission before us we note that there are five grounds of appeal raised by the appellant. She has argued on:-

Ground (1)

That although the learned commissioner was on firm ground in law and fact when he held that she was entitled to property adjustment and maintenance in accordance with the evidence on record and Ushi customary law and the doctrine of equity (fairness), surprisingly the sum he awarded of K10,000,000 plus interest for both entitlements was totally inadequate and thus erroneous in law and fact. She argued that as could be seen from pages 53 to 55 in the supplementary record, the assessors were unanimous that under the Ushi customary law, the appellant ought to have been given a reasonable share of the matrimonial property. She pointed out to us the views of the assessors that according to Ushi customary law a divorced woman, regardless of any accusation of any matrimonial offence, is entitled to a reasonable share of matrimonial property acquired before and during the subsistence of the marriage.

According to the Ushi customary law if a divorced woman found her husband with few properties and later acquired more properties she was entitled to a reasonable share after divorce. Her argument is,

therefore, that as it was well established by evidence, and fact that was unchallenged, that during the marriage the respondent acquired lots of personal and real property, the learned High Court Commissioner misdirected himself in awarding a sum of K10,00,000.00 as this was not a reasonable share.

Ground (2)

That it was common cause that the respondent was a very successful businessman, the argument that there ought to have been a means assessment test before awarding must be viewed by this court as legally unattainable and a misdirection.

Ground (3)

That although the principle of a company existing as a distinct and separate legal entity from the shareholders is a well established principle, in this case, however, the respondent being aware of these proceeding before the court, transferred some properties registered in his name to AMC Contractors Limited, a company incorporated by him, and in which he had fifty per cent shares. Her argument is therefore that the transfers were done mala fide and a deliberate manoeuvre to deprive the appellant of her share of that property acquired during the marriage.

Ground (4)

That contrary to the views of the respondent that because the appellant was working as a secretary in a bank with a low salary, she would not and did not contribute to the welfare of the house in accordance with the principle laid down in *Watchel* v *Watchel (1),*Matrimonial Causes Act and Matrimonial Proceedings and Property Act (2), she the appellant contributed in kind as a mother to five of his children and that even as a housewife she contributed in kind to the running of the house in carrying out household chores.

Ground (5)

That the award by court of K19,000,000.00 to her as damages for wrongly and fraudulently change of property known as No. 305, Kamuchanga, Mufulira, (the award this court made to her in a civil claim brought by her against AMC Contractors Limited, SCZ Appeal No. 123 of 1998) cannot be said to bar her claim now before the court. She maintained that under the law she is entitled to maintenance and property adjustment order.

The respondent in response responded that they accepted in principle that there is a distinction between property adjustment and maintenance orders. They argued the following grounds:-

(1) That there was no need for the High Court to award any other entitlement to the appellant as she had taken her share of the matrimonial property before the marriage was dissolved and as such the K10,000,000 order made by the learned High Court Commissioner was adequate. They emphasized this point by saying that in addition, she was given a restaurant and a house in Kalukanya. It was also argued on behalf of the respondent that the maintenance of the children of the marriage and payment of the educational requirements had already been taken care of by the respondent. They tried to adduce evidence to the effect that at the time the appeal was being heard by the learned High Court Commissioner, the appellant was cohabiting with another man;

(2) That the principle of equitable sharing of matrimonial property would not apply as according to them, the appellant had not contributed in kind because as a full time secretary in a bank she did not have enough time to do household chores. Also the little money she earned as a secretary she made it a point to spend it on herself, not on the welfare of the children nor the matrimonial home;

(3) That the learned Commissioner was on firm ground when he did not award the local court costs to the appellant because the local court does not allow appearances of advocates. They however, argued that granting of costs is entirely in the discretion of the court and the learned High Court Commissioner used his discretion correctly. But they concluded that the learned High Court Commissioner erred and misdirected himself in awarding costs at High Court level because their argument is that the whole appeal had no merit. It is therefore, their argument that the costs awarded to the appellant should be quashed; and

(4) In the alternative they submitted that there was no legal basis on which the learned High Commissioner awarded the sum of K10,000,000.00, plus simple interest as there was no means test of the respondent and the appellant had already been awarded a K19,000,000 in the case referred to in SCZ Appeal No. 123 of 1998.

These were the arguments before us. We have considered the evidence and arguments before us. 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 macroeconomic 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.

It was argued that the lower court misapprehended the provisions of Section 16 of the Subordinate Act which says:

"Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes between African 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.

Provided that –

(i) no party shall be entitled to claim the benefit of any African customary law, if it shall appear either from express contract or from the nature of the transactions out of which any civil cause, matter or question shall have arisen, that such party agreed or must be taken to have agreed that his obligations in connection with all such transactions should be regulated exclusively by some law or laws other than African customary law:

(ii) in case where no express rule is applicable to any matter in issue, a Subordinate Court shall be guided by the principles of justice, equity and good conscience:

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. This was improper and a misdirection. Also both the Local Court and the Magistrate Court made certain findings of facts, which were not supported by evidence. It is a cardinal principle supported by a plethora of authorities that courts' conclusions must be based on facts stated on record. In our view this would have been a proper case for us to interfere with the findings of both the Local Court and the Magistrate Court had it not been for the fact the appellant in both these courts, granted reluctantly, conceded to the fact that she and her former husband could not live together and that the marriage had broken down irretrievably.

At the High Court level, although in her grounds of appeal she made references in ground (1) to the learned trial Magistrate's biases against her, she, nonetheless, did not pursue these grounds of appeal before the learned High Court Commissioner. Rather she concentrated on her claim on maintenance and property adjustment. In our view, therefore, she abandoned this ground. In fact before us, she made no reference whatsoever to this ground. However, be that as it may, we would like to point out in this judgment the cardinal principle in our justice system that all the judicial officers are duty bound to be impartial and to be fair to all parties thus invoking the principle of equity before the law. The other cardinal principle well-grounded in our justice system is the observance of the principle of stare decisis. The courts must also be alive to the well-established principle of giving reasons for their decisions.

The appellant's first ground of appeal is that the learned High Court Commissioner was on firm ground to have held that the appellant was entitled to property adjustment by awarding her a lump sum of K10,000,000.00, but that he erred in awarding her the lump sum for maintenance and property adjustment as that was not adequate. The customary law in Zambia is recognized by our Constitution provided its application is not repugnant to any written law. According to the Ushi customary law which ought to have been invoked at the High Court level, the appellant was entitled to a reasonable share in property acquired during the subsistence of the marriage. Additionally, the law applicable both at the High Court and in this court in divorce matters is normally the English Divorce Law applicable at the time. This is by virtue of Section 2 (b) of the English Law (Extent of Application) Act (1) as read with section 11 of the High Court Act (2). The leading English case of *Watchel* v *Watchel* (1)

demonstrates the developments of the law with regard to distribution of assets post divorce after 1970 English Act. The whole concept of apportioning blame was removed when a marriage has broken down irretrievably.

Now the court inquires and concludes in most cases that both parties contributed to the breaking down of the marriage in question. In this case, the learned counsel correctly made no reference to the alleged adultery of the appellant in arguing on the distribution of assets and in any case the Ushi customary law referred to, according to the record, does not recognize the concept of apportioning blame. What was in issue before the High Court and us was the percentage of sharing the family assets. Family assets have been defined in *Watchel v Watchel* as items acquired by one or the other or both parties married with intention that these should be continuing provision for them and the children during their joint lives and should be for the use for the benefit of the family as a whole. Family assets include those capital assets such as matrimonial home, furniture, and income generating assets such as commercial properties. Looking at the list at page 40 to 47 in the record of appeal, the list of properties listed at 40, 41, 43, 44, 45 and 46 comprise of all income generating properties and as such covered in principle enunciated in *Watchel v Watchel* cited supra. We have asked ourselves whether or not the learned High Court Commissioner misdirected himself when he ordered a lump sum as both maintenance and property adjustment. Maintenance orders are meant to be periodical payments to maintain either children or the other party. Whereas property adjustment means allocation of one or more properties among the family assets to provide for a divorced person. Section 24 of the *Matrimonial Causes Act* (5) deals with property adjustment.

Under this section a party to divorce proceedings, provided he/she has contributed either directly or in kind (that is looking after the house) has a right to financial provision. The percentage is left in the court's discretion. In the exercise of that power the court is statutory duty bound to take into account all circumstances of that case. For instance, the court is to take in to account all circumstances of that case. For instance, the court is to take into account the income of both parties, earning capacity, property and other financial resources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of each party and standard of living of each of the parties.

Under sections 2, 3, 4 and 5, the Court has been vested with widest possible powers in readjusting financial positions of the parties to the divorce. Under section 5, for instance, the court has powers to reallocate family assets between parties. The court has powers after divorce to effect transfer of one of the assets to the other party. However, in this case it is well beyond any doubt that the wife, now the

appellant devoted her energies every time she was not working to the welfare of the family. We are satisfied that she contributed in kind even as a mother to five of the children. She contributed in kind to the acquisition of the properties listed.

We have addressed our minds as to whether or not the learned High Court Commissioner was correct in awarding a lump sum and not periodical maintenance. In our view, these financial arrangements are inter-related. They are not meant to cripple the other side. They are meant to support the divorced party to maintain the standards she/he had during the marriage. Although there are no hard and fast rules in making awards either in lump sum or periodical payments of maintenance or property adjustment, the court is guided by the principle of doing justice, taking into account the circumstances of a given case. We have considered all the circumstances of the case. The learned High Court Commissioner was right in choosing one of the two methods. However, we are not satisfied that he did take into account all the circumstances of the case. We are satisfied that he misdirected himself in awarding only a lump sum of K10,000,000.00 in light of the number of properties acquired during the marriage and the fact that the appellant led a life of comfort with him. We take that view even after taking into account the fact that she was awarded a sum of K19, 000,000.00 in Cause No. 123 of 1998. We also do not accept the respondent's submission that he has now taken over the education expenses of the children, as this was not supported by any evidence on record. We are not persuaded by the assertion by the respondent that the appellant was by the time we heard the appeal cohabiting with another man as this was not supported by evidence on record and the learned counsel for the respondent tried to sneak in that evidence by giving it from the bar. It is with those reasons that we intend to interfere with the order made by the learned High Court Commissioner.

In addition to that order by the High Court we order the transfer of one viable income generating property to be specifically named by the learned Deputy Registrar. We also order a lump sum to be assessed by the learned Deputy Registrar to meet all the educational expenses of any of the five children of the family if any of them would not have completed their education and training.

We find no merit in ground (2), (3) and (4) of the appeal. We hold the view that they are covered in ground (1). We are also of the considered view that in this case there is no need for a means test as there was conclusive evidence on numbers of properties acquired by the respondent during the subsistence of the marriage and these properties were valued with the consent of the respondent by the government valuers. We also hold the view that all properties which were listed at pages 40 to 47 belonged to the respondent and that those which were transferred during the proceedings to AMC Contractors, a

company owned by the respondent, cannot escape the order of this court as the transfer of such properties must have been done to avoid the outcome of these proceedings. In our view those transfers have no effect on our order. In conclusion we uphold the appeal and we order costs in this appeal and High Court costs to be borne by the respondent and to be taxed in default of an agreement.

Appeal allowed