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*First Integration Report:
How does Legal
pluralism manifest itself?*

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

SSHRC-AUF Partnership 2012-2018

BRIEF DESCRIPTION OF THE PROJECT

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-AUF, (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 first report provides the data regarding the manifestations of legal pluralism in the regions studied.

The working definitions of two key concepts in the development of the report are as follows:

Law: values, principles, rules and processes for the regulation of a group and the settlement of conflicts.

Legal pluralism: the existence within the same space, with respect to the same subject-matter and the same actors, of more than one law.

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PART I: SUBPROJECT DESCRIPTION AND METHODOLOGY

I. Subproject description

1. Background and objectives of the subproject

In Zambia, family law is one of the legal fields mostly affected by the tensions between multiple legal systems. This study is an investigation into how these tensions manifest themselves in the regulation of customary marriages.

2. Research questions

The study seeks to examine the taxonomy of interactions between the legal normative orders established by state laws and the customary norms governing the formation and consequences of customary marriages. This is important because very few researchers have gone into the relevant communities to investigate the state of customary laws of marriage and the nature of their relationship with the Constitution and other pieces of legislation.

The research seeks to answer the following questions:

1. What indigenous laws and state laws exist with respect to customary marriages, and what are the interactions between the two legal orders?
2. Through which formal or informal processes are these interactions organised?
3. What is the effect of these processes and interactions on indigenous law and indigenous groups?
4. What is the effect of these processes and interactions on state law and state agents?

This report focuses on the first two research questions. The last two questions are the subject of the next stage of research and reporting.

3. Theoretical framework

This sub-project revolves around the concept of legal pluralism – a term used to describe the existence of two or more legal normative orders alongside each other and governing the same subject(s). Legal pluralism is a common feature of African societies. This is partly because the continent's colonial past brought an overlap between different normative systems which led to the need for constant dialogue and negotiation between these systems. This notion of legal pluralism is perpetuated in the post-independence legal systems. In Zambia, a dual system of official marriage law exists, namely, civil marriages entered into in accordance with legislation¹ and customary marriages. The consequences of marriage and those of its dissolution are predominantly regulated by the system of law under which it was contracted. However, the state

¹ That is, the Marriage Act Cap 50 of the Laws of Zambia.

has, in some cases, crossed the customary law boundary by introducing legislation to regulate some aspects of the marriage in this enclave.

At a deeper level, legal pluralism arises from the need both to promote indigenous communities' right to self-determination and to recognise the fact that even the indigenous norms and values that have no state recognition continue to be part of the legal system in almost all post-colonial states. In addition, it is important to foster positive interactions between multiple normative orders and to create, whenever this is possible, hybrid legal systems that are legitimate in the eyes of significant segments of society. Indigenous communities' continued quest for their own legal heritage and the tension generated by the inconsistency between non-state normative systems and the state's official laws, demonstrates the fragility of dominant legal systems that ignore the role indigenous norms play in ordinary people's appreciation of, and respect for, the legal system.

Any discussion in Southern Africa of legal pluralism at a deeper level must take cognisance of the conceptualisation of customary law as official and living customary law, albeit concepts which lack clear-cut distinction.² The term official customary law applies to customary rules that are applied by the state courts and other state institutions, and they may be completely different from the customary rules that regulate the lives of people whose customary law is under consideration. In the case of Zambia, official customary law takes the form of rules formulated in terms of *stare decisis*³ (or in other words court precedents) on customary law, or 'norms derived from descriptions of African customs and practices in out-dated anthropological literature.'⁴ The application of this form of customary law is supported by the High Court Act, which provides that the Court may ascertain customary law through publications it considers authoritative.⁵ Unless the judges are aware of the conceptualisation of customary law as official and living customary law, they are likely to apply the readily ascertainable rules of official customary law as living customary law.

Living customary law consists of customs or practices that emerge from relatively widespread social practices⁶ that regulate the day-to-day lives of a "customary law community". This form of customary law is dynamic, it adapts to changing socio-economic and other conditions in which the people of the communities that are subject to customary law live.⁷ This is the kind of customary law we designate as indigenous law in this report. The official customary law is designated as state law. Because living customary law changes, its values and principles are also bound to change albeit more gradually than rules. Zambia has a legal system based on the English common law tradition. The Constitution has provisions that shield discriminatory traditional practices from the egalitarian provisions of the Bill of Rights. For instance, whilst the Constitution contains far-reaching provisions on equality and non-

² See Himonga *Family and Succession Laws in Zambia: Developments since Independence* (Hamburg Lit, 1995) 13 et seq.

³ This western law doctrine permits a court to use a rule derived from the ratio of one case to decide another case which is deemed to be similar to it (see Himonga, *Family Law in Zambia* (2011) 26.

⁴ Himonga *Family Law in Zambia* 37.

⁵ See s 34 of the Act pertaining to the proof and ascertainment of customary law.

⁶ See J Hund 'Customary law is what people say it is' in Hamnett, *Chieftainship and Legitimacy* (1975).

⁷ For detailed discussion see Bennett in A Claassens & Cousins (eds) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) UCT Press, pp 3-31; 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 (ed) *The Future of African Customary Law* (2011) Cambridge University Press 31-57; Himonga 'The nature and concept of customary law' in Himonga & Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Customary Law Perspectives* (2014), 23.

discrimination, these provisions are subject to several caveats, which limit their application to customary marriages.⁸ Notably, the equality clause does not apply to marital relationships under customary law. However, there seems to be a need to change the constitutional framework regulating customary marriages through the adoption of a new transformative Constitution or comprehensive legislation regulating marriages contracted under customary law.⁹

This study investigates how this stagnation affects the recognition, status and consequences of customary marriages, and considers the way in which living customary law might have evolved to address some of the challenges confronted by spouses in customary marriages. While the country has passed legislation and made court precedents regulating certain specific aspects of customary marriage, such as maintenance, custody and the dissolution of marriages and legitimacy, it is important to examine the interplay between these formal laws and the ‘real’ marriage practices which persons living under customary law observe. Furthermore, the study investigates the values, principles, rules, processes and actors who implement and manage the different legal orders. The aim is to reveal:

(a) the taxonomy of interactions (conflictual and non-conflictual, positive and negative, collaboration, co-operation, mutual indifference, hybridisation etc.) between the different normative legal orders and how these processes are managed in the specific domains and,

(b) the interplay between different normative orders and to understand how different normative orders appropriate and impact on each other in the specific domains.

4. Glossary (if needed)

Lobola: payment(s) made by the prospective husband and/or his family to the family of the prospective bride for the purposes of contracting the marriage. This payment serves to validate the marriage and performs other functions in respect of the duties and rights of spouses in the marriage and their relations to their children. Zambian ethnic groups have different names for these payments.

Alangizi: traditionally this is a traditional marriage counsellor(s) who instructs the prospective bride in the ways of marriage. Today, this institution seems to have been “professionalised” by men and women who render both pre-marital counselling and spousal counselling for a fee, especially in urban areas.

Bashibukombe: A Bemba term for a marriage go-between, usually a family friend or grandfather of the prospective groom. He initiates the marriage negotiations on behalf of the groom as he is not permitted by custom to initiate or negotiate his own marriage. Traditionally bashibukome was the first port of call for the spouses when the marriage was in trouble. Like alangizi this institution seems to have been “professionalised” in modern times, in urban areas.

⁸ Section 23(1) and (4) of the Constitution read together.

⁹ This is evident from efforts made by state institutions, such as the Law Development Commission to investigate the reform of the customary law of marriage.

II. Methodology:

1. Description of data collected and analysed (source, forms, etc.)

Two methods of data collection were employed, namely, desktop review and analysis and empirical research. The desktop literature review analysis focused on statutes, court proceedings and decisions that deal with customary marriage issues. This desktop research also encompassed analysis of the Law Development Commission reports in the area of family law and national assembly debates on legislative reform in major areas of customary law. In the course of this research, seventy eight (78) cases were collected from the Local Courts, thirty-seven (37) from the subordinate courts, seven (7) from the High Court and one (1) from the Supreme Court.

The empirical research included interviews with key informants and individuals married under customary law. The information collected from judicial officials as key informants consisted of interviews with twelve (12) Local Court magistrates from the Boma Local Courts¹⁰ in Lusaka; two (2) magistrates of the Chongwe Local Court,¹¹ two (2) sitting and two (2) former Subordinate Courts magistrates of Lusaka; one (1) Subordinate Courts magistrate from Chongwe, two (2) judges from the High Court and three (3) judges from the Supreme Court.

In addition, information was collected from interviews with two (2) reputable “*alangizi*” in Lusaka, identified through snowballing and acting separately as counsellors for men and women; four (4) participants from the leadership of both the Law Development Commission and Women and Law in Southern Africa Trust (WLSA). The latter is one of the most important research-oriented Non-Governmental Organisations working on women’s rights.

To understand ordinary people’s perspective, about eighty (80) individual interviews were conducted with participants married under customary marriages and randomly selected in both Lusaka Central and Rufunsa constituencies of the Lusaka province. In each location, the participants were equal numbers of men and women.

2. Description of connection between data and research objectives/questions

¹⁰ The Boma Local Courts hear disputes from Lusaka central and other constituencies of Lusaka district. They comprised six different courts with a total number of sixteen (16) judges.

¹¹ There are three Local Courts in Rufunsa. One of these courts was closed. Since the closure of this court, the villagers in Rufunsa living close to Chongwe take their cases to Chongwe Local Court.

The interviews with individuals married under customary law aim to understand how marriages are contracted or conducted, and how different persons experience the marriage process. They helped to collect the peoples' views on the processual nature, the conditions and patterns of contraction and the patrimonial and non-patrimonial consequences of marriage. This information was relevant to understand the living customary law systems and how political, economic and social changes have affected the traditional normative systems in both rural and urban areas. The living customary law as depicted from individual's informants was complemented by the information from the different key informants.

First, the Law Development Commission, for example, interacts with different ethnic groups and religious, traditional, economic and political stakeholders around the country in its law reform projects. From these interactions, the Commission has an accurate holistic picture of the indigenous systems and its changes. Secondly, the magistrates and judges from different levels of courts hear cases from spouses as they bargain daily challenges that affect their marital relationships and lead to disputes before the courts. Thirdly, the "alangizi" who recreate deemed traditional counselling institutions brought in their perspective about the values and norms of customary marriages in modern Zambia. At the same time, the interviews with the leadership of the Law Development Commission, the magistrates and judges lay down the state of art of the official legal framework that governs customary marriages. This information, together with the different reports, cases, legislative debates in Parliament, court judgments and transcripts of courts' hearings, gave the full picture of the extent of recognition and challenges of customary law and its interactions with state law.

3. Data selection criteria

a. Research areas/sites selection

The fieldwork for this study considered the need of representation both of ethnic diversity and level of urbanization. For this reason, the sampling and choice of the research sites were based on two elements: First, the co-existence of different ethnic groups in the areas and, secondly, the intersection of rural and urban life and settlement. Ethnic representation is important because, although African customary laws share broad common principles of marriage, depending on matrilineal, patrilineal or bilateral principles, the practices of different groups differ in details. Furthermore, the customary practices of marriage may differ within matrilineal, patrilineal and bilateral societies respectively depending on whether the parties establish a patrilocal (in the home area of the husband home) or virilocal (in the area of the wife's home) homestead. The level of urbanization was an important dimension because of the different pace of social and economic change taking place and impacting on marriage practices and relationships in rural and urban areas. For example, intertribal marriage is likely to be more common in urban areas than in rural areas where the communities still maintain a higher degree of face-to-face relationships than in urban areas.

In order to accommodate the ethnic representation and urban/rural settings, the identification of the research sites started with the examination of statistical information on the distribution of ethnic groups across urban and rural areas in Lusaka.¹² The mixed settlement of ethnic groups

¹² Two provinces were initially chosen, namely, Lusaka and Copperbelt as desktop research revealed a mixed distribution of ethnic groups in Lusaka and a concentration of the Bemba representing a certain level of ethnic homogeneity in the Copperbelt despite the urbanisation of large areas of that province through its copper mining

in Lusaka province is premised on the province being the home of the capital city of Zambia, which attracts migrants from different parts of the country traditionally inhabited according to ethnic groupings. It was found from the statistical information in the national census of population and housing of 2012 that, as expected, Lusaka was more heterogeneous in terms of ethnic composition than any other province in the country.

The choice of areas representing the most rural/urban intersection in the province was informed by statistical information and mapping about the ethnic distribution within the province.¹³ After screening this information, the Central Lusaka constituency in Lusaka district and Rufunsa in Chongwe district were considered as the two field areas for the research. Central Lusaka was the most cosmopolitan and urban area of the province and Rufunsa was the only area considered officially as a rural settlement although it presents a certain level of ethnic heterogeneity.¹⁴

b. Methods of data collection

The method of data collection was qualitative based on structured and semi structured interviews.

The key informants were partly identified during the desktop research on the Zambia legal system, based on their relevance to the legislation and application of customary law, and partly in the course of the fieldwork. They were made up of the following:

- (a) Judicial officers - Local Court justices (also called Local Court magistrates), Local Court officers, magistrates sitting in subordinate courts who hear civil matters, including customary marriage appeals from Local Courts, and judges of both the High Court and Supreme Court. Local Court justices hear the majority of customary marriage disputes, as they are in practice the court of first instance. Local Court Officers can review decisions of Local Court justices. Subordinate courts in practice hear appeals from Local Courts. Judges of the High Court hear both matters of customary law originating in their courts and those coming on appeal from the subordinate courts. The Supreme Court on the other hand only hears matters coming on appeal from the High Court.
- (b) The director and deputy director of the Law Development Commission.
- (c) The director and a senior member of WLSA.
- (d) Other informants, such as the “*alangizi*” who perform the important role of customary marriages counselling.

While the semi-structured interviews with these key informants were meant to be administered on an individual basis, six of them were conducted in mini groups of two or three judges. Such arrangements were justified by the fact that some judges, sitting together in judgment in the cases and sharing the same office where the interview was to take place, only allowed a discussion which included all of them. From their point of view, this arrangement would also save time as they had to postpone some court hearings in order to accommodate the research.

history. However, because of financial and time constraints, the research team decided to concentrate on one province, Lusaka.

¹³ The mapping was based on the last Zambian national census. The Central Statistics Office in Lusaka generated all the information, both at the constituency and district levels, about ethnic distribution and level of urbanization of the province for the research team.

¹⁴ The main ethnic groups are: Soli (23.60%), Nsenga (21%), Chewa (11.50%), Tonga (10.80%), Bemba (4.90%), Ngoni (4.50%) Chikunda (4.20%).

The structured interviews were based on random selection of individual people who concluded their marriages in accordance with customary law and living in the research areas.

4. Data collection tools

Empirical research was based on structured and semi-structured interviews, which aimed at collecting from key informants in-depth information relevant to the understanding of customary law, legislation, litigation and practices, on one hand, and individuals who contracted a customary marriage (whether or not the marriage still existed), on the other hand. (See appendixes).

5. Limitations or reservations regarding the reliability or interpretation of data

While researchers from the Chair themselves conducted the interviews with key informants in English, research assistants from the University of Zambia collected the data from the individuals married under customary marriages because of language barriers and time constraints. The research assistants conducted the interviews in local languages mainly in Nyanja, Tonga and Soli. Professional translators assisted in translating the different interviews guidelines from English to those local languages, in order for all the researchers to have a common understanding of the different terms and notions in their own dialects and to bring a level of accuracy in the interpreting process during the interviews.

Although one day methodological training and one day of pilot test of the research tools were organised, the administration of that part of the research by assistants not implicated in the conceptualisation of the research project and in the data analysis might bring some caveats as each step of translation is subject to a level of alteration of meanings that might impact the final interpretation. To reduce the possible bias related to translation, the researchers who were all sociologists and anthropologist were encouraged to record verbatim the interviews. However, possible bias loomed as other researchers were called upon to transcribe the recorded material from the local language into English. Since translation is never a neutral and objective exercise this challenge, which is inevitable in cross cultural research of this kind, should be borne in mind while assessing the validity of the data collected¹⁵.

Furthermore, a small amount the data collected through interviews of ordinary people is still in the process of being transcribed and therefore the complete analysis of the whole data collected is not yet possible. But for the purposes of this report, the research team scrutinized the finalised transcripts at this stage and relied on their experience during the fieldwork and on the desktop research.

¹⁵ Pui-Hing Wong, M. and Dahlberg K. (2010) 'Interpreters in Cross-Cultural Interviews: A Three-Way Construction of Data,' *Journal of Transcultural Nursing* 21(2) 151–158.

PART II: PRESENTATION OF LEGAL ORDERS/SYSTEMS OBSERVED

III. Values/Beliefs

1. Indigenous Law

Various aspects of marriage – the contract of marriage, guardianship/custody of children,¹⁶ maintenance of spouses and children, matrimonial property and divorce – seem to be all based on the value of solidarity or, in other words, the communitarian ethic that unites the interest of the parties to the marriage and that of their respective families into a group interest. The concept of family itself bears the value of solidarity in that it consists of members of many generations and a wide group of relations.¹⁷ This group is loosely known as the extended family or kin group as opposed to the nuclear family, which consists of husband and wife and their children. Reciprocity as a value is closely connected to solidarity; it is the glue that binds the group as individual members expect to give to, and to receive from, each other the material, spiritual and emotional goods and resources of life. In what follows, we demonstrate the value of solidarity in relation to each of the aspects of marriage.

With regard to the contract of marriage, the value of solidarity is manifested by the involvement of the parties and their respective families in the formation of the marriage as follows: (a) the families, especially of the bride have to consent to the marriage; (b) the families of the parties (defined in terms of patrilineal, matrilineal or bilateral kinship) negotiate the marriage, including the *lobola*, which serves to validate the marriage; (c) *lobola* is paid by the prospective groom/his family to the family of the bride, not to the bride; (d) in traditional society, the consent of the parties' families was sufficient to constitute a marriage without the consent of the parties; and (e) in modern society the groom who has the means may pay the *lobola* on his own, but the responsibility to pay it still rests on his family.

The value of solidarity is also evident from the fact that marriage is not necessarily terminated by the demise of one of the parties to the marriage. Upon death, the widow or widower may continue the marriage with another member of the family of the deceased husband/wife with no extra formalities associated with the celebration of a new marriage.

In the same way as contracting a marriage is a family group matter, dissolving the marriage is a family group affair in several respects: (a) the marriage is dissolved within the family forum and by the family; the spouses cannot simply agree to end the marriage and walk away from each other; (b) in some cases *lobola* has to be repaid by the family of the wife (not by the divorced wife), in order for the divorce to be valid; and (c) the natal family is ideally responsible for absorbing the divorced wife (and children, as the case may be) into its group for future support purposes.

¹⁶ Indigenous law does not draw sharp distinctions between guardianship and custody in the same way as the received western law does. These concepts are therefore used interchangeably for the purposes of this report.

¹⁷ See generally, Women and Law in Southern Africa Trust, *The changing family* (1997) 46-72.

Furthermore, solidarity underlies custody of children in that the children of the marriage are affiliated to the family of their parents depending on the applicable principles discussed in the next section. While the day-to-day care of the child may be left with the parent (for practical reasons or due to the economics of the family), this arrangement does not give exclusive rights of affiliation of children to that parent. Moreover, it has been shown in other countries that group interests or the communal good tend to overshadow determinations of what is in the best interests of the child.¹⁸

With regard to maintenance of spouses and children, while the husband (and father) has the primary responsibility of maintaining his family during the marriage, he can expect his family members to support his wife and children if necessary. This expectation is based on the mutual obligation that exists among members of the extended family to support each other in times of need or distress. As already intimated, the extended family bears the responsibility of supporting the divorced wife and her children depending on the type of kinship organisation. This brings us to variations in the values of marriage that exist among ethnic groups.

In line with the value of solidarity, the payment of *lobola* is used as a vehicle to transfer the productive capacity of the wife from her family to her husband/his family, with the result that all the property acquired during the marriage, including property to which the wife has contributed in acquiring, belongs to the husband/his family. Therefore, upon divorce, the wife is not entitled to a share in the matrimonial property. Instead, she (and her children in some cases) is reintegrated into her natal family and its property arrangements. In contrast, in ethnic groups, such as the Ushi which, subscribe to what appears to be the value of individualism,¹⁹ the wife is entitled to claim matrimonial property if she contributes to the amassing of the husband who had little property upon marriage. Assessors on Ushi customary law in one case²⁰ were unanimous on this rule of customary law and on the right of the wife to a reasonable share of the property upon divorce.²¹

2. State Law

Solidarity, public morality and individualism typify the values of the state regarding various aspects of a customary marriage as demonstrated in what follows.

Except the aspect of maintenance of children, the same value of solidarity that applies to various aspects of marriage under indigenous law applies under state law. This is because the state merely recognises customary law (indigenous law) as a source of law, but it does not impose its own values of the customary marriage. In other words, the state endorses the values of people who are subject to customary law regarding various aspects of marriage except the value regarding maintenance of children where it has imposed its own values of individualism. An example of how the solidarity value manifests itself in the state view of customary marriage

¹⁸ See F Banda 'Custody and the best interests of the child: Another view from Zimbabwe' *International Journal of Law and the Family* (1994) 8 at 200.

¹⁹ In our view the concept of group interest in African family law discourses is relative. There is no situation in which the group interest is absolute in the sense that it does not recognise the interests of the individual members of the group. We, therefore, use the term individualism, guardedly, in ideal terms to loosely refer to situations of accentuated individual interests of members vis a vis the group.

²⁰ *Chibwe v Chibwe* 2013/HP/0039 [2014] ZMHC 18.

²¹ *Chibwe v Chibwe* at J 6.

may be drawn from the area of custody of children. In one case²² involving parties from a patrilineal society, the court held that once created,²³ genitricial rights ‘are held by corporate patrilineages and not by individuals. A husband therefore holds such rights....as a member of the patrilineage. This distinguishes genitricial rights from uxorial rights [that are] personal to the husband.’

However, maintenance of children is outside the sphere of solidarity, and is instead underpinned by the value of individualism. This is because in 1995, the state introduced legislation, the Affiliation and Maintenance of Children Act, on child maintenance that applies to all children regardless of the form of marriage of their parents or birth status. In Zambia, customary law applies subject to written law, so this Act has replaced indigenous law. The underlying value of this legislation is individual responsibility of parents to maintain their children according to the principles stated in the next section. The value of individualism also manifests itself in matters of custody where the courts may override the value of solidarity where it does not serve the best interests of the child, as well as in other matters where the state seeks to protect the interests, particularly, of vulnerable family members.

State law also subscribes to public morality as a value. This value has its roots in the colonial policies of the application of customary law in Anglo-phone African countries’ courts. Colonial legal systems introduced what has come to be known as the repugnancy clause to enable the courts to make moral judgments as to whether specific African customs and practices were repugnant to natural justice and morality as a test for their continued application as a source of law.²⁴ Once a custom was found to be repugnant to public morality, it was struck out and ceased to be a source of law. The post- independence legal system in Zambia continues to apply the repugnancy clause, which is contained in legislation pertaining to the application of customary law. This clause states that customary law applies provided it is not ‘repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia.’²⁵

Thus, the state subjects all customary values pertaining to various aspects of customary marriages to the values of public morality embodied in the principles of justice, equity and good conscience, as well as to the value of individualism through legislation.

²² *M v T* 1968/HN/CA (HC Nd.)

²³ The creation of genitricial rights is facilitated by the patrilineal/matrilineal and payment of lobola principles discussed in the next section.

²⁴ See, for example, Armstrong, Zimbabwe: ‘Away from the customary law’ 27 *J. Fam/ L.* 1988-1989), 339-350 at 392.

²⁵ Section 16 of the Subordinate Courts Act.

IV. Principles

1. Indigenous Law

This section may be divided into five parts for purposes of stating relevant principles – the contract of marriage, custody of children, maintenance of spouses and children of the marriage, matrimonial property and divorce.

We could not identify any indigenous principles relating to other aspects of marriage listed above except maintenance and custody of children.

Maintenance of children during the marriage and after divorce seems to be guided by the principle of affiliation of children in which children are maintained by the natal family of the parent to whom they are affiliated according to the patrilineal/matrilineal/bilateral principles.²⁶ Custody of children is governed by the same principles coupled with the payment of *lobola* and autonomy (choice) of the child principles. Thus, according to these principles, children are affiliated to the father's or the mother's family or to both families according to whether the parents' kinship organisation is patrilineal, matrilineal or bilateral respectively. Additionally, in some ethnic groups, the father must have paid *lobola* to claim parental rights of custody for him/his family. However, these principles are also now subject to s 15(1) of the Affiliation and Maintenance of Children Act of 1995 as stated in the comments below.

2. State Law

While the state recognises the value of solidarity with respect to the contract of marriage and divorce, we could not find any principle that embodies this value in these two areas. But the value of public morality, which additionally applies to both areas, is embodied in the principles of justice, equity and good conscience. This means that the state will strike out any indigenous or customary principle on marriage or divorce that is repugnant to the principles of justice, equity and good conscience.

We could also not find any principles on the maintenance of spouses after divorce. Some courts hold that a wife is not entitled to maintenance by the other spouse after divorce.²⁷ Others decide that the wife is entitled to be compensated by the husband, and that this compensation takes the place of conventional maintenance.²⁸ However, there is no apparent principle on which these decisions are made. In contrast, we found at least five positions representing the approach of the state courts to the sharing of matrimonial property upon divorce,²⁹ but with no single or clear principles on which the positions are held. These positions are elaborated below.

First, some courts apply the principle of equality in which the spouses are deemed to own all property acquired during the marriage equally, whether or not they technically contributed to

²⁶ Himonga *Family Law in Zambia* 119.

²⁷ *Mwiya v Mwiya* 1977 ZR 113.

²⁸ See, for example, *Nkwabulo v Sithole* LCA/16/85.

²⁹ For further discussion see, Himonga, *Family law in Zambia* 153-154.

the acquisition of the property. Upon divorce, they share such property in equal shares or according to shares determined by the court as it deems just.

Secondly, the husband owns all the property during the marriage and he takes his property after the dissolution of the marriage. In some cases, property given to the wife by the husband as a gift is deemed to belong to her, while in others the husband has a right to claim back his gift upon divorce.

Thirdly, all the matrimonial property belongs to the husband except where the wife has contributed substantially to the acquisition of the property; upon divorce she is entitled to an unspecified share of the property.

Fourthly, the property owned by a spouse or both of them is transferred to the minor children of the family on the ground that such transfer is in the best interests of the children. Under this position, the welfare of the child principle plays a part, but the principle on which the property of the parent or parents is passed on to their off-spring in the first place is not apparent. Why, for example, is it the responsibility of the parents to maintain the child according to their means and the needs of the child not sufficient to secure the welfare or best interests of the child?

Finally, some courts exclude the application of customary law relating to matrimonial property on the basis of the principle of justice and equity (repugnancy clause). A case decided by the High Court in 2002³⁰ provides an example of how the principles of justice and equity have been applied in the redistribution of matrimonial property.

The case was an appeal to the High Court. The Subordinate Court of the first class had awarded the divorced woman an equal share of the rental income from a house owned by her husband. The house had served as the matrimonial home of the couple. In awarding a share of the rental income to the wife, the Subordinate Court reasoned that although the parties had been married under customary law, justice demanded 'that the parties be put in an equal position in order to avoid destitution on either of them. The husband appealed the decision to the High Court. The High Court agreed with the decision of the trial court. Invoking the principle of equity, the Court reasoned: '[D]espite the fact that this was a marriage contracted under customary law...where customary law is defective in terms of equity, it can be overridden by the general [state] law.'³¹

In sum, the five positions above show that there are no discernible principles for the approach taken by the courts in some cases, while the principles of equality, contribution, justice and equity play a role in other cases. Furthermore, it appears from the interviews with judges from the different courts that strong support exists for the principle of equality between the spouses and they refer often to the 50/50 rule in the sharing of property as a guiding principle.

With regard to custody and maintenance of children, we identified three sets of principles that underpin the values of solidarity, public morality and individualism. These are (a) patrilineal/matrilineal/bilateral and *lobola* payment principles, (b) justice, equity and good conscience principles and (c) the best interests/welfare of the child principle respectively.

The patrilineal/matrilineal/bilateral and the payment of *lobola* principles embody the value of solidarity in the allocation of custody in some ethnic groups. Under these principles, custody awards to the fathers depend on whether the kinship system is matrilineal, patrilineal or bilateral, coupled with the payment of *lobola* by the father in some cases. In other words, if the father

³⁰ *Mwanamwalye v Mwanamwalye* 2002/HP/no. 0029.

³¹ For detailed further discussion, see Himonga, *Family law in Zambia* 154.

from a patrilineal society, for example, does not pay *lobola* he has no claim to custody. On the other hand, although children belong to the mother/her family in matrilineal society, the payment of *lobola* by the father entitles him to their custody.³²

With regard to maintenance, some courts hold that the obligation to maintain a child after the parents' divorce rests on the patrilineal/matrilineal/bilateral principle – i.e. the obligation to maintain is upon the parent to whom the children are affiliated according to this principle.

However, some courts use the justice, equity and good conscience principles³³ and interests/welfare of the child principle,³⁴ which underpin the values of public morality and individualism respectively, to oust all of the principles underpinned by the value of solidarity. The patrilineal/matrilineal/bilateral principles that underlie the value of solidarity in the field of child maintenance are also ousted by the principle of equality evident in the approach of the Maintenance and Affiliation of Children Act discussed above. In other words, both parents must maintain their children according to their means and the needs of the child regardless of whether the children are affiliated to the families of their mother and father according to the matrilineal/patrilineal/bilateral principle.

V. Rules

1. Indigenous Law

This section discusses the rules that apply to various aspects of the customary marriage.

First, the group or solidarity value of the contract of marriage is enforced by rules that create mutual duties between parents and their children. On one hand, parents have a duty to negotiate marriage for their children and to render necessary goods for the marriage of their children. On the other hand children have a duty to respect their parents and senior family members. With regard to contracting the marriage, children have a duty to inform their parents about their intentions to marry and a duty to respect the involvement of their parents in the marriage process necessary to conclude the marriage.

Comparable rules apply to the dissolution of marriage and distribution of the matrimonial property. There is a duty on the families of the spouses to initiate processes that are necessary for the dissolution of the marriage – e.g. the duty to convene the relevant forum for divorce, the duty to repay *lobola* where applicable; the duty to absorb the divorced wife (and her children) in the natal family's support and property systems and arrangements.

Secondly, in the area of custody of children, rules create the duty of the father/his family to pay *lobola*, and the duty of the mother's family to yield custody to the father and his family. At

³² See Himonga, *Family law in Zambia*, 177.

³³ See, for example, *N v M* 1989/MO/9 (Sub Court Lusaka).

³⁴ *M v N* 1982/HN/CA/6; *Kosochi v Zimba* 2006/SSP/MIS/15.

the same time rules create duties for both sides of the family to respect the choice of the child regarding custody, as well as duties to negotiate issues of custody with respect to the choice or autonomy of the child to decide where he or she wishes to live. In other words, the father who wants to have custody of his child must pay the relevant *lobola* upon his marriage or at any other time as agreed by the wife's family. However, the child is, in some cases given the right to choose whether to have his/her day-to-day care with the mother without depriving the father of his right to demand custody at any time. A process of negotiation between parents/their families may follow to resolve the issue.

Thirdly, rules create mutual obligation/duties of maintenance among family members.

However, it should be observed that indigenous law defies categorisations that are rule-driven. In some cases, issues are decided not on the basis of rules but on broad principles. An example is custody in which broad guiding principles under the influence of *lobola*, individual autonomy (choice) of the child, kinship organisation and negotiation determine the custody of the child.

2. State Law

The state generates rules to regulate and enforce the values underpinning customary marriages. Rules and procedures exist for invalidating custom/customary practices that are contrary to the values and principles concerned with public morality, solidarity and individualism. Thus, the state courts recognise and enforce the duty of the father claiming custody to pay the relevant *lobola*, while subjecting the rules concerned to other rules aimed at securing the best interests of the child. Similarly, the state enforces the duties of parents to maintain their children in accordance with its values of individualism and public morality, as well as the duties of husbands and wives to maintain each other or share matrimonial property.

VI. Actors³⁵/Stakeholders

1. Indigenous Law

The families of the parties determine some of the conditions that define a specific marriage. For example, there is no fixed amount of *lobola* for all marriages. Each family defines the amount to be paid, as well, sometimes, as the terms of payment (i.e. whether in part or in full) for the marriage to come into effect. In this way the families create aspects of the law that regulate the marriage, along with the ethnic group of the parties. The extended families of the parties also act as forums for dispute resolution relating to the marriage, along with other traditional institutions, such as headmen and chiefs and their respective councils or 'courts'.

³⁵ The section 'actors' may include institutions and stakeholders.

2. State Law

The state makes laws regulating customary marriages through the legislature and through the courts under the doctrine of precedent. The courts enforce these laws. The Local Courts are the principal courts that have jurisdiction over customary marriages. Their powers are derived from statutory law – i.e. the Local Courts Act and not from any customary judicial rights or duties which chiefs may have had in the past. The decisions of the Local Courts can be appealed to the Subordinate Court of the first or second class or the High Court.

VII. Process

1. Indigenous Law

The source of customary law is custom or practices that ethnic groups invest with normative force. The conditions for the conclusion of a customary marriage, the allocation of custody and maintenance obligations, divorce and the sharing of matrimonial property are determined by the customary laws of the parties to the marriage. These customary laws are, in turn, defined or created by the repetitive actions of members of the community to which the marriage parties belong, but actions that are motivated by a sense of obligation.³⁶

2. State Law

The sources of state customary law on various aspects of customary marriage are custom; received common law through the doctrine of precedent; legislation and norms created at the discretion of courts based on the principles of justice, equity and good conscience. In other words, the state recognises the role of custom under customary law in the allocation of rights and duties relating to the conclusion of marriage, custody of children, matrimonial property and divorce. At the same time it creates sources of law based on the received law principles, e.g. the welfare and best interests of the child principle as well as legal sources based on justice and equity in the course of application of customary law by the courts.

In sum, in some cases, the state recognises custom as the sole legal source, but in others it introduces legal sources such as legislation, precedents and norms emerging from the application of principles of justice, equity and good conscience, as well as principles of best interests of the child. Apart from custom, all these sources are associated with western (received) law.

³⁶ See Hund, *supra*.

III. Other variable

Other legal systems

The influence of Christianity on the celebration of customary marriages is such that some parties to a customary marriage may seek the religious blessing of their marriage. In this case the priest or pastor of the denomination of the parties' choice conducts a marriage ceremony according to the rites of the particular denomination. This ceremony is on top of a customary marriage already concluded by the parties.³⁷ Thus, although the marriage remains a customary one from the perspective of state recognition of customary law, from the actor's viewpoint, the religious component of the marriage introduces another layer of regulation of their customary marriage, grounded in religion.

IX. Comments

Three observations are worthy of note. First, Zambia, like other countries in Southern Africa, does not have a single customary law of marriage that applies to everyone. There are about 73 ethnic groups in the country, and each one of them has its own customary law. In some cases, the details of marriage law differ from one family to another.³⁸ For these reasons, it should be born in mind that even though we speak of indigenous law, there is no such single system of law.. Our treatment of customary law as a system of law for our present purposes is based on broad similarities in the customary laws along the ideal patrilineal, matrilineal and bilateral kinship organisation that is characteristic of Zambian ethnic groups. An example of the variations observed in the values underpinning customary marriages is drawn from the ownership of matrimonial property during the marriage and its distribution on divorce. For example, in some ethnic groups solidarity underlies the relationship of the spouses regarding matrimonial property while individualism governs this relationship in others.

Secondly, the principle of affiliation of children for maintenance purposes has been taken out of the sphere of indigenous law by the enactment of the Affiliation and Maintenance of Children Act of 1995, which applies to all children in the country, including those of customary marriages.³⁹ In Zambia, any written law limits the application of customary law; which can only

³⁷ For further discussion see Himonga, *Family Law in Zambia* 108-109.

³⁸ See Himonga *Family Law in Zambia*, supra, 108.

³⁹ However, there is uncertainty as to whether this Act applies to children of customary marriages (see Himonga, *Family Law in Zambia*, 118-119; M Munalula 'Family Law in Zambia' *International Survey of Family Law* (1997) 507-523. Should it not apply, then s 35 of the Local Courts Act, as amended by Act 8 of 1991, applies. This section gives the Local Courts (the lowest courts in the judicial hierarchy) power to make an order for maintenance of any

apply if it is not inconsistent with such written law. The Act provides its own principle based on the ability of both parents as individuals to provide reasonable maintenance for their children,⁴⁰ and it stipulates its own guidelines for determining what constitutes reasonable maintenance. Since customary law does not share the same principle of maintenance as the Act, it has no application. Therefore from the view of the state any indigenous principles on maintenance are irrelevant.

Similarly, custody is no longer entirely in the province of indigenous law. In terms of s 15(2) of the Affiliation and Maintenance of Children Act, if a court makes a maintenance order in respect of a child, it has power to make whatever order it thinks fit with regard to the custody of the child for the duration of the maintenance order. Furthermore, the section expressly stipulates conditions that introduce the principles of equality between parents and the welfare of the child. In this respect, it states that in making an order for maintenance, the court must, first, not take into account whether from any point of view the claim of the father is superior to that of the mother and vice-versa (equality principle) and, secondly, it must have regard to the welfare of the child as of paramount consideration (welfare principle).⁴¹ Based on these principles, the court may also award custody to anyone, including a person who is not related to the child.⁴² The welfare principle has also been applied to customary marriages by some courts in other contexts.⁴³ Thus, the principles governing custody under indigenous law can be ousted by the principles of equality between parents and the principle of the welfare of the child.

Finally, the evolving nature of customary is worthy emphasising. With changing social, economic, and cultural conditions evident in both the rural and urban areas of Zambia, the family, customary law and the underlying values and principles of the latter cannot remain static. It has been noted, for example, that ‘a changing socio-economic environment (...) has led to changes in the family from large to small (...) Gender roles have been reversed in the urban areas due to retrenchment. Women have moved from contributing something small to the household to being breadwinners of the families. There has been a move from matrilinearity to patrilineality.’⁴⁴

child below the age of 18 years. But even before the intervention of these statutes, some state courts awarded maintenance for children of customary marriages.

⁴⁰ Section 8(3) of the Act read with s 11.

⁴¹ Section 15(2) of the Act.

⁴² See s 15(3) of the Act.

⁴³ For example, some judges of the High Court apply the best interests of the child principle derived from s 75 of the Matrimonial Causes Act of 2007 to customary marriage divorces even though this section is intended to apply to civil marriages only (see Himonga, *Family Law in Zambia* 126).

⁴⁴ Women and Law in Southern Africa Trust, *supra* 87.

Annexes

1. Annex A: Diagram of the presentation

Integration Table

THEME (family, justice, land, etc.)					
REGION/ CASE					
Step 1: How does legal pluralism manifest itself in the case study?					
VARIABLES	QUESTIONS	INDIGENOUS LAW	STATE LAW	OTHER LAW	COMMENTS
Values/beliefs  Principles  Rules 	What values are at work? (ex. <i>solidarity, harmony, responsibility</i> etc.)	Solidarity, Communitarian ethic	Solidarity, public morality and individualism		
	Which principles embody these values? (ex. <i>good faith, reconciliation, sharing, reparation</i> etc.)	patrilineal/matrilineal/bilateral kinship <i>lobola</i> payment	justice equity good conscience best interests/welfare of the child		
	What rules apply these principles? (ex. <i>duty to share the hunt, duty to honour a commitment, duty to compensate</i> etc.)	Parent's responsibility to negotiate marriage for their children Parent's render necessary goods for the marriage of their children	Recognition and enforcement of the duty of the father claiming custody to pay the relevant <i>lobola</i> Duties of parents to maintain their children		

	<p>Children's duty to respect their parents and senior family members.</p> <p>Children's duty to inform their parents about their intentions to marry</p> <p>Children's duty to respect the involvement of their parents in the marriage process</p> <p>Duty on the families of the spouses to initiate processes that are necessary for the dissolution of the marriage – e.g. the duty to convene the relevant forum for divorce, the duty to repay <i>lobola</i></p> <p>Responsibility to absorb the divorced wife (and her children) in the natal family's support and property systems and arrangements.</p> <p>Duty of the husband/his family to pay <i>lobola</i>,</p> <p>Duty of the mother's family to yield custody to the father and his family</p> <p>Duties for both sides of the family to respect the choice of the child regarding custody</p> <p>Duties to negotiate issues of custody with respect to the</p>	<p>Duties of husbands and wives to maintain each other or share matrimonial property.</p>		
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		choice or autonomy of the child to decide where he/she wished to live.			
		Mutual obligation/duties maintenance among family members.			
Process, rituals, ceremonies/ Actors 	- How is the law created? (ex. <i>custom, consensus, majoritarian decision-making, central authority, natural law, sacred law</i> etc.)	Custom Social coercion	controversial procedures		
	- Who interprets the law? (<i>Elders, judges, ad hoc processes</i> etc.)	Families Alengazi	Local Court Subordinate Courts High Court Supreme Court		
	- How is the law implemented? (ex. <i>group pressure, institutionalized constraint</i> etc.)				
Other variables		Pastors			

2. Annex B: Significant extracts from the collected data⁴⁵

Extract from interview with one of the judges of the superior courts of record, February 2015, Lusaka

- Facilitator: I think I will ask two more questions about the grounds of divorce.
- Participant: There could be violence; irresponsibility, failure to maintain the family; adultery, etc. These are the main causes
- Facilitator: But that's on the side of the man?
- Participant: Either way
- Facilitator: One can divorce for failure to maintain either way?
- Participant: Maintenance is either way not only about the man failure to maintain, family violence is only the man, and adultery is both sides
- Facilitator: You did mention something at the beginning about social benefits of marriage in terms of maintenance and property distribution. What are the factors the court takes into account in awarding maintenance and matrimonial property? Are they quite flexible? How is that managed?
- Participant: Yes the criteria used is the same. All the property acquired during the subsistence of the marriage must be shared equally including houses. They [the courts] say those which the man acquired before marriage those of the woman acquired before marriage they are part of matrimonial property, you must go and share matrimonial property, and the property you acquired during the time you were married must be shared equally there are the main list especially when it comes to houses those are the cases that end up here [in court].
- Facilitator: [you mean] Property sharing?
- Participant: Property sharing that's a contentious one
- Participant: So do you see [what you described] as an approach just by the state, by the judiciary or is it also something that is supported in the communities where customary law is practiced?
- Participant: [indistinct] both by the community and the state and the judiciary yes.
- Facilitator: why would the men resist if, in fact, in the communities where they live there is that norm of sharing property, including houses?
- Participant: The commonest argument [is] that it's me who got them she was just a house wife you should read *Chibwe vs Chibwe*. They [the courts] say no, even if she was just the house wife 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's maintenance towards marriage. Yes that's the standard approach."

Extract from interview with Magistrate from the Subordinate Court, February 2015, Lusaka

⁴⁵ The extracts have been lightly edited by the facilitators (as opposed to transcribers) for readability and comprehension.

“(...) Facilitator: The first one is the jurisdiction of the court; are there a lot of customary marriage cases that come to this court on appeal?

Participant: Quite a number. In fact, of the cases that we receive I think about half that come from the Local Court have something to do with divorce cases. And most of the time you find that the most thing that people appeal against is the amount of money that they were charged to compensate the other spouse, and mostly it's a man paying the former wife. So you'll find that they'll say, no but I do not have the capacity to pay that type of money because I'm not in employment and so forth and so forth, but normally we have those cases and little also involving property where the female mostly will feel that the property has not been fairly shared between the two.

Facilitator: Okay. And what's your perception of the state's recognition of customary marriages? Do you think the state recognizes customary marriages in Zambia?

Participant: It does because our legal system as far as marriages are concerned is dual one there's statutory marriages that are under cap fifty of the laws of Zambia. We also recognize customs and traditions of the people. So when I'm going to look at a case I'll look at the type tribes - is it matrilineal or patrilineal in this case. Where we are here [in Chongwe] is matrilineal. So the government recognizes that even in our legal system because a case that comes from the Local Court to this court can go up to Supreme Court. If a person isn't satisfied here we apply to go to the High Court from the High Court it can go up to Supreme court, there've been cases of that nature so it's something that is recognized.

Facilitator: And what's your own perception of customary marriages?

Participant: For me I believe that customary marriage is not bad in itself, but I think maybe we could bring a bit of legislation to control it especially on the age of people getting married because under customary marriage a person under the age of 16 can be married. There's a case, Chinjamba case of 1952, which says that if a person marries a minor with the consent of the family that person is not committing defilement but the law which is supposed to be supreme statutory law indicates that any person having sexual intercourse with a child who's under the age of 16 years is committing defilement which is a serious sexual abuse case. So for me I tend to believe that if legislation could be put even for customary marriages that a person should not marry if this person is under the age of 18 or 20 it would be better, it would give the girls an opportunity to have an education before getting married.”

Extract interview with Marriage counsellor for men (“Alangizi”), Lusaka, February 2015.

Facilitator: Now let's come to those people who you counsel, is it people getting married or who are married under customary law. You have just said that you learnt how people marry. How do Africans who want to marry under customary law marry?

Participant: First of all when an African like me either they coming from Ghana, Nigeria, Zambia, and South Africa or anywhere else in Africa, usually the way to marry is almost the same. You have to pay a dowry, and it is not a direct thing as if you are buying a car or anything from the shop, no not at all. The one who is marrying must find somebody, an independent person who is going to pay the dowry on your behalf as

the mediator. Not straight forward. They tell you to say that you are going to pay K5000 kwacha maybe 50 dollars or 1000 dollars and so on like that, and then you have to pay by yourself as a person who's marrying a woman. No, that's not the way; it's not in that way. You have to look for an independent person, it could be your [indistinct] it could be your lawyer it could be your pastor and so on like that or somebody who is independent you see.

Facilitator: And why? What is the underlying value? Why must you find an independent person?

Participant: It is something like a person. Money is not a credit let's say somebody or you are buying a human being not at all but is marriage. It must be somewhere somehow a written message to say that I have married this person, have paid this so on and then the balance is so much then the person who's giving that money to the family of a woman is called names (even in Nigeria or wherever). The names such as in Zambia language is bashibukombe. Those are people who are giving money for dowries on behalf of a man who's marrying a woman, yes.

Facilitator: I would like to understand why a man can't just bring the money to the family but has to go through bashibukombe. What is the value underlying the reason that it has to be someone else?

Participant: They could be two or more reasons. One reason is this that as you know there's human trafficking, and money's involved so you are not selling that person to the other person because otherwise some people marry a woman from here in Zambia, but they go to separate in Europe, you see that. And if her marriage was witnessed by a relation witnesses and not independent witness it could be a set up. He [husband] can say no it was just an arranged thing between this and that, but an independent person like a lawyer cannot be my wife to defend me not at all or my brother not all. But any independent person to be a lawyer, to be my mediator, you should stand on my behalf.

Facilitator: And the other reason?

Participant: And those are concept and the other reason is that there should be some understanding - you see this person is marrying this one - me I'm not a relation to either the woman or this man but I'm just there to be the middle man or the middle person to witness this ceremony.

Facilitator: Now, you said, in Zambia, we have 73 tribes, about 73 customary laws. From your experience how do you advise people about the rules of marriage? How do you get to know [how people marry], and is there one way of marrying in Zambia?

Participant: No as I said earlier on we as Africans we don't differ very much even in language itself we don't very much differ in customary laws we don't even differ it's almost the same it's a same pattern."

**Extract interview with individual participant married under customary law, Rufunsa
January 2015.**

Respondent: like for me, an Ngoni man I would say I am patrilineal. But when it comes to the Nsengas, as my mother is Nsenga from Mbuluma in Luangwa, according to their custom I am matrilineal. (...)

Interviewer: When it comes to the customary rules applicable to marriage in Ngoni, what customary rules are applicable to marriage especially according to your tradition?

Respondent: Even if I am Ngoni, I was not brought up in the Ngoni tradition; neither did I follow the Ngoni tradition when I was marrying. Instead, I got married using the Soli custom. But, I grew up with my Nsenga parents. So the rules I was given were that marriage is about taking care of one another. Then I just have to figure out on my own what it means to take care of my partner and like I had earlier own stated, working together. (...)

Respondent: I was 24

Interviewer: did you make marriage payments at the time of your marriage?

Respondent: yes, there were

Interviewer: okay. In your language, what term do you use to refer to these marriage payments?

Respondent: I am not quite sure, because the money that is firstly taken to the female's family for the man to declare his intentions is called "Nsalamu" in almost all languages. "Nsalamu" is the first money that we take for the marriage process to start. Then after we take what we call "Chimalo" in our language, but in other languages it is called "Ntengo"

Interviewer: oh okay. Did you pay using money or cattle or.....?

Respondent: it was money

Interviewer: okay. When you were charged, did you pay at once or in instalments?

Respondent: when I was charged; upon getting my wife from her parents, I paid the first instalment. Then when immediately she reached my house, they demanded for the balance and that's how I paid up the balance

Interviewer: so you do not owe anything?

Respondent: no

Interviewer: how much did you pay?

Respondent: it was in 1998, I was first charged K50, 000 (old currency) then we reached K35, 000(old currency) after negotiations. (...)"

3. Annex C⁴⁶: Selective bibliography

3.1. Legislation, court cases and official reports

Court Cases

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Fenias Mafemba v. Esther Sitali, 2007 Z. R. 215

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Mwanamwalye v. Mwanamwalye 2002/HP/no. 0029.

N v. M 1989/MO/9 (sub court Lusaka)

Legislation

High Court Act, Cap 27 of the Laws of Zambia

Local Courts Act, Cap 29 of the Laws of Zambia

Marriage Act, Cap 50 of the Laws of Zambia

Marriage Bill, 2014 Republic of Zambia

Official Reports and National Assembly Hansards

National Assembly of Zambia *Report of the Committee on Legal Affairs, Governance, Human Rights and Gender Matters for the Second Session of the Ninth National Assembly* appointed on 30 January 2003 (Ref: LAGHG)

⁴⁶ The bibliography may contain sub-sections.

National Assembly of Zambia *Report of the Committee on Legal Affairs, Governance, Human Rights and Gender Matters for the Constitution of Zambia (Amendment) Bill (N.A.B NO 22 of 2009) for the Third Session of the Tenth National Assembly* Appointed on 22 January 2009. (Ref: LAGHG) 2092

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Zambia Law Development Commission *Report on the Project for the Development of Comprehensive Legislation to Combat Gender-Based Violence*

Zambia Law Development Commission *Report on Legislation to Regulate Marriages Conducted under Customary Law* August 2013

Zambia Law Development Commission *Report on the Review of the Intestate Succession Act* August 2013

Zambia Law Development Commission *Restatement of Customary Law Project: Lusaka Province Findings Report*

Zambia Law Development Commission *Restatement of Customary Law Project: Copperbelt Province Findings Report*

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4. Annex D: Data collection tools

4.1. **Semi-structured interviews guidelines** (with key informants involved in the practice, litigation of customary law)

- ✓ Presentation of the participant
 - Position, functions, career trajectory
 - Number of years in service,
 - Educational background, etc.

- ✓ Perceptions on the state's approach towards customary marriages
- ✓ Personal perspectives on customary marriage and its evolution
- ✓ Perspectives on the social benefits of and constitutional violations caused by the current systems regulating customary marriages
- ✓ Conditions and procedural formalities for the solemnization of customary marriages
- ✓ Regulation of polygamous marriages

- ✓ Process of settling marital disputes under customary law
 - Ascertainment of the existence of the customary marriages
 - Ground of dissolution of customary marriages
 - Custody, division of assets and maintenance during the dissolution of customary marriages

- ✓ Recommendations:
 - On how to reconcile discrepancies between the principles of the Marriage Act which govern the civil marriage and the living customary marriage laws,
 - On how to improve settlement of issues related to customary marriages
 - On any issues deemed relevant by the participants

4.2. **Structured interviews Guidelines** (individuals participants married under customary law)

Interview number _____ Date _____

Site: _____ Started: _____ Ended: _____

Name of Interviewer: _____

Name of Transcriber: _____

I. Introduction

a) Introduction of the researcher

b) **Introduction of the research topic** [Introduce the topic as follows: “We are conducting a socio-legal research on the ways customary marriages are concluded, their actual patterns and dynamics in modern Zambia. We aim to gather information about the experiences and views of people married under customary law in order to understand the ways in which customary marriages are done and the values and norms that govern them”.]

c) **Permission to interview** [read consent letter and ask permission to record. If the participant doesn’t consent, the interview must stop. If the participant does not consent to the recording, take note during the interviews.]

Pause [Thank the participant for their time/willingness to afford you an interview.]

II. Background of interviewee

a) **Date of birth** [If the participant doesn’t know the exact date, ask year of birth or approximate period he/she can remember.]

b) **Place of birth and actual residence** [Ask detailed description of the place(s). If different ask reasons for relocation and when such relocation(s) took place.]

c) **Marital status and type of marriage** [Ask for the date/year of marriage. Ask what kind of marriage the participant has – civil or customary law. If the participant is not married under customary law or not married at all, the interview must stop].

d) **Traditional forms of marriage** [Ask if the participant has entered into any specific traditional form of marriage, such as forced marriage, levirate, widow/widower inheritance, ukuthwala (find local name), etc. If yes, ask the process and the reasons.]

e) **Nature of Marriage** [Ask the nature (polygamous or monogamous) of the participant’s marriage. If the marriage is polygamous and the participant is a woman, ask what position is she as the wife in the marriage.]

f) **Level of Education** [Ask the level of education of both the participant, his/her direct parents. Ask the level of education of his spouse and his/her parents]

- g) **Occupation/ Job** [Ask if the participant has an occupation. If yes, since when they have been employed. Ask the participant for a description of his/her occupation, and to specify whether she/he had her occupation before, during or after the marriage and if the actual occupation is still the one held during the time he/she was entering into the marriage. If not the same occupation, ask for the description of the occupation at the time of the marriage and the reasons that led to the change of occupation).
- h) **Religion** [Ask for religions of both the participant and his/her spouse]
- i) **Ethnic group** [Ask specification of ethnic group and language(s) spoken. Ask if the ethnic group is the same as the one of the participant spouse(s). If not, ask from which ethnic group is his/her spouse (s). **If the participant has child (ren)** with the spouse (s) in the case of ethnic intermarriage, ask to which ethnic group, he/she thinks the child (ren) belong. Ask the detailed reasons of the response.]
- j) **Family history** [Ask if both the participant and his/her spouse parents are alive. If not, ask when they passed away. Ask if they passed away before the participant's marriage. Ask if the participant or the spouse **was from child-headed family**]
- k) **Kinship system** [Ask if the participant is from matrilineal, patrilineal or bilateral kinships. Ask specifically if the members of the participant's large family (throughout generations) are considered to be those with whom the participant shares the common female or male ancestor; or all the members from the same blood. Ask as well if the members of his/her spouse(s) large family (throughout generations) are considered to be those with whom he/she shares the common female or male ancestor; or all the members from the same blood.]
- l) **Marriage institution** [Ask what marriage means in the eyes of the participant and his/her community and why did he/she decided to get married. Ask how married people are viewed by his/her community and how unmarried peoples are seen by the community. Ask if there is any stigma associated with divorce by the community and, if yes, ask detailed description of the nature of the stigma and the reasons.]

Pause [Assess if the participant is really following the line of discussion that will lead to the information needed and if he/she is still comfortable with the questions addressed. If no, explain again the objectives of the research and information sought and ask general questions that will put the participant at ease. **If yes, continue** with the next section which you should introduce as follows: "Now that you have given me valuable information about yourself and the structure of your family, I would like to know more about the process of that led to your marriage]

III. Process and conditions of formation of marriage

- a) **Customary rules applicable to marriage** [Ask for a detailed description of the rules applicable to marriage in the participant's specific ethnic group. Ask how those rules have been defined and whether they are widely respected. Ask, if those rules are still prevalent in the specific areas of his/her residence. **Ask for detailed responses to answers**]

- b) **Conditions of marriage** [Ask what key conditions were taken into consideration both by the participant and his/her spouse and their respective parents/families when they decided to enter into a marriage. Ask if those conditions were considered as important for the validity of the marriage by the participant and by his/her spouse or their respective families and/or communities]
- c) **Consent to marriage and marital age** [Ask what was the age of both the participant and the spouse at the time of the marriage. Ask if the consent of both the participant and the spouse was sought to the marriage. Ask if the consent of their respective families was sought. Ask details reasons for each response]
- d) **Process of marriage formation** [Ask for a detailed description of the different steps of the marriage process. Ask who were involved in the negotiation and realisation of each specific step. Ask what roles the spouses played (if any) and what roles both the parents of the participant and the parents of his/her spouse(s) played. If their parents passed away before the marriage, ask who played the roles they should have played]
- e) **Marriage payments during the marriage negotiation** [Ask if any payment (*find local names of the different marriage payments*) was important in the negotiation of the marriage and why. If so, ask the nature and the amount of payment. Ask who were involved in the negotiation of the marriage from both the participant's side and the side of his/her spouse. Ask if the marriage was fully paid during the negotiation or was paid over a period of time. If the marriage payment was paid over time ask how long it took to be fully paid or if the payment is still going on. Ask the consequences on the marriage if the arrangement about the marriage payment is not respected. If the marriage payment was made over a period of time, ask when the spouses and their families considered a valid marriage to have come into effect – at the time of the celebration of the marriage or at the time of the completion of the marriage payments]
- f) **Marriage counselling** [Ask if both the participant and his/her spouse have gone through any marriage counselling process before they entered into the marriage and, if yes, who performed such counselling. Ask for detailed description of such counselling process, what it involved in terms of rituals and finance and its values and rationales.]
- g) **Celebration of the marriage** [Ask for the different ceremonials and rites during the marriage process and if the participant and his/her spouse has respected them. Ask about the values and reasons of each of the rituals. In case of intermarriage, ask about the values and reasons of the rituals performed from the perspectives of both the participant's ethnic group and that of his/her spouse and how the possible differences between the rituals from the two sides were handled during the performance of the marriage.]
- h) **Notification of customary marriage** [Ask if the participant and/or his/her spouse have notified their marriage to any traditional authority or any official institution. In case of notification to an official institution ask for a specification of the institution, the reasons, the process and the outcome of such notification. Ask who were involved in the notification (*to the traditional authority or official institution*) and what roles they played in the marriage. If there was no

notification, ask how people of the spouses' respective communities knew about their intention to marry.]

- i) **Registration and/or solemnization of marriage** [Ask if the marriage has been registered or solemnized by any institution. If yes, ask the date, the reasons, the actors and the process of such solemnization or registration. Ask what the reasons and impact of such process solemnisation or registration on the marriage and for the participant and his/her spouse(s). If the marriage has not been solemnised by an institution or registered, ask for detailed reasons of the response.]

Pause [Assess if the participant is really following the line of discussion that will lead to the information needed and if he/she is still comfortable with the questions addressed. If not, explain again the information researched in this subsection of the interview and give more clarification for questions misunderstood and seek specific answers again. Assess if the participant is still at ease. If yes, continue with the next section by introducing it as follows: "Now that you have discussed the process of the marriage, I would like to know more about your opinions and experiences about the obligations and rights related to marriage]

IV. Conjugal relations and the rights and obligations related to marriage

- a) **Duties and obligations related to marriage** [Ask for a detailed description of the duties and the obligations of the participant (as a husband or a wife) and those of his/her spouse(s) in the marriage according to their respective family values and customs. Ask if such duties or obligations are respected by the participant and his/her spouse(s). If not, ask why. Ask if the changing socio-economic conditions have any impact on the respect of such duties and obligations by the participant and/or his/her spouse(s)]
- b) **Power structure within the marriage** [Ask for a detailed description of how the power for decision-making is structured in the family. Ask what things are done by men only and women only in the family. What things are done by both men and women; who has the decision-making power and who controls the resources according to or/and his/her spouse's customs. Ask if the participant has been consulted about the choice of the matrimonial house and who owns the house. Ask detailed description of who owns the different matrimonial properties and who controls the resources in the family and why. Ask if the participant has his/her own assets and can freely dispose of them. Ask detailed reasons. Ask if, according to the participant's customary rules, he/she or his/her spouse (s) can enter in a (formal or informal) contract without the consent of the other spouse. If so, ask if she/he has already entered in a contract, for example, a debt or any other form of contract in his/her own capacity. If yes, ask on what basis and values the spouses are able to enter into contracts in their own capacities.
- c) **Individual capacity to litigate within the marriage** [Ask if, according to the participant's ethnic group customary rules, he/she or his/her spouse (s) can go to court or to any instance of dispute resolution in their communities without the implication of one of them. If so, ask if she/he has already been to court or other institutions of dispute resolution in his/her own capacity. If yes, ask what was the problem(s) or matter (s) she/he took to such institutions and financial values

involved in the case. Ask in such case, if the participant spouse(s) was supportive. Ask detailed reasons of the answers]

- d) **Conjugal roles and Social network** [Ask if the participant and his/her spouse(s) share the same social network (i.e. the same friends or, acquaintances, professional, religious or cultural associations). Ask which social network is specifically frequented by the participant and which one is frequented by his/her spouse. Ask if the participant thinks that their social network has an impact on the running of their marriage, children education, etc. Ask detailed responses.]
- e) **Children under care** [Ask how many members are in the family and if the participant has child (ren) under care. If so, ask if they are from his/her actual marriage (s). If yes, ask who between the participant and his/her spouse(s) are responsible for the maintenance of these children. Ask if the extended members of the family have any responsibility towards the married couple and their children. Ask if they have played or are playing any roles.]
- f) **Polygamous marriage** [If the marriage of the participant is polygamous, ask how the negotiation of the second marriage was conducted, and what were the views (disapproval) of the parents and the siblings of both the participant and spouse (s) and the extended family. Ask specific reasons of such view (s). If the participant is the first wife, ask if she had been informed about the second marriage and if she had consented to that marriage. Ask the reasons of (dis) approval. If the participant is not the first wife, ask if she had informed the first wife and sought her approval. Ask for detailed reasons of answer].
- g) **Property regime of the marriage** [Ask what the arrangements for the ownership of property by the parties in the marriage (i.e. property regime of the marriage) are. Ask detailed reasons of the response. Ask who has chosen this property regime of the marriage. Ask if the participant has been consulted in such choice and if he/she has agreed on the actual regime]

Pause [Assess if the participant is still at ease. If yes, continue with the last section to be introduced as follows: “Now that you have described to me your experiences as a married person, I would like to know your views about the change that affects marriage nowadays]

V. **Marriage and social change**

- a) **Change in customary rules governing marriage** [Ask what changes are noticeable in the customary rules that govern the marriage when the participant compares his/her marriage with those celebrated in the past, such as those of his/her parent(s)/grandparents. Ask for detailed description with examples. **Ask what changes are noticeable in the customary rules that govern the marriage when the participant compares his/her marriage with those of the people from her community being married (nowadays) after his/her marriage.** Ask detailed description with examples. **Ask which key customary rules** the participant thinks was specific to his/her ethnic group’s customary law and which are changing. Ask the detailed description of the factors responsible for the change and the consequences of these changes].

- b) **Change in the conditions and process of the formation of marriage** [Ask what changes are noticeable in the conditions and process of entering into customary marriage when the participant compares his/her marriage with those celebrated in the past such as those of his/her parent(s)/grandparents. Ask detailed description with examples. **Ask what changes are noticeable** about the conditions and process of entering into a customary marriage when the participant compares his/her marriage with those of the people from her community being married after his/her marriage (nowadays). Ask for detailed description of factors responsible for the change and the consequences of the change].
- c) **Change in the rights and duties related to the marriage** [Ask what changes are noticeable in the obligations and rights of the spouses related to marriage when the participant compares his/her marriage with those celebrated in the past such as those of his/her parent(s)/grandparents. Ask detailed description with examples. **Ask what changes** are noticeable about the rights and duties related to marriage when the participant compares his/her marriage with those of the people from his/her community being married after his/her marriage (nowadays). Ask detailed description of factors and consequences of change with examples].

Stop [“Thank you again for this highly important information. Conclude with “I know that this is personal information about your life and I appreciate your willingness and effort in discussing this. **Is there anything** you would like to ask?” If the participant has any question, respond to them based on your own knowledge and do not make any unrealistic promise that you would not keep and which might end up in deception to the participant. **Conclude** by reminding the participant about the confidentiality and anonymity of the discussion].