

The Dual Legal System and Its Effects in the Administration of Justice in Zambia

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Abstract

This article highlights the lack of uniformity in the administration of justice, mainly where African customary law needs to be administered by superior courts on appeal from the local courts. Suffice it to state that this scenario results from conflicts between the imported English law and African customary law and within the African customary laws themselves. For instance, marriage in Zambia is governed by the applicable Zambian customary and the Marriage Act, Chapter 50 of The Laws of Zambia, which reproduces the essential elements of English law. One would, for instance, encounter a conflict of laws if one of the parties at the time of contracting a customary marriage was below the age of 16 years and then decided to convert their marriage into a statutory one at a later stage. The issue is whether such a marriage should be considered valid, given that it was constituted under customary law when one of the parties could not marry under the statute. The article will also highlight the argument of which African customary law must prevail in administering justice when there is a conflict between one customary rule or practice against another. When such a conflict arises, the effect on the Judiciary is that the Court would be in a dilemma as to which customary rule or practice must prevail over the other. Currently, in Zambia, no statute guides what should happen when conflict occurs between two or more customary practices or rules. The result is that African customary law is disregarded because there is no certainty as to which customary law should prevail in conflict. The article will highlight such problems and prescribe possible recommendations, solutions, or remedies to the situation so that the law is specific and uniform.

Keywords

Dual Legal System, African Customary Law, Statutory Law, Constitutional Supremacy, Legal Pluralism, Legal Unification

1. Introduction

A Dual Legal System denotes the existence of two separate legal systems existing side by side in a nation, state, or republic. The introduction of English law into Zambia brought about a dual legal system; as of now, both systems of law are at work. These systems of law are expected to operate simultaneously, and as such, conflicts are bound to occur with adverse effects on the ultimate justice to be delivered by the courts (Mogomotsi, 2014; Zulu & Matakala, 2020; Soko, 2020). The conflicts are firstly between the indigenous African Customary law and the imported English law (Zenker & Höhne, 2018). Secondly, the conflicts within the African customary law are due to many ethnic groupings, each with distinct and diverse customary laws (Zulu & Matakala, 2020).

One notable feature in the administration of justice in the Dual Legal System is the lack of uniformity in the administration of justice in the Superior Courts on Appeal from the lower Courts, mainly where African Customary Law is to be administered (Holleman, 2019).

In Zambia, for instance, there is a problem resulting from conflicts between the imported English Law and the indigenous African Customary Law (Honig & Mulenga, 2015). These conflicts are particularly prevalent in Areas of Family Law such as Matrimony, Succession, and Inheritance. This article will focus on conflicts arising from the existence of the dual legal system and how it has ultimately affected the administration of Justice in Zambia. Suffice to mention that this scenario is generally similar in other African Countries that were former colonies of Britain.

Under the Laws of Matrimony, for instance, one may encounter conflicts in Zambia because Marriage is governed by African Customary Law and The Marriage Act, which essentially are just elements of the English Law. Where parties or a party contracts a marriage before attaining the age of 21 years under African Customary Law and later decides that they convert it to a Statutory Marriage, the issue that would arise is whether such a marriage was valid, for the parties contracted it at the time the parties had no capacity marry under the statute. The Marriage Act, Chapter 50 of The Laws of Zambia provides under section 17 provides that “if either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father...shall be produced...no special license shall be granted or certificate issued without the production of such consent.” The aforesaid provision of the law entails that no marriage shall be valid because the parties or a party to a marriage is below the age of 21 if there is no consent from the parent or guardian. However, on the contrary, in an African setup, a marriage would be valid because one has come of age, i.e., reached the age of maturity (puberty) and the necessary prerequisites of dowry paid.

Hence, the article brings to the fore that there are still lacunas in the law regarding the administration of justice by the courts of law due to conflicts between the imported English law, the indigenous African customary law, and the

African customary law within itself.

The problems above or shortcomings are what this Journal article is trying to bring out and suggest solutions on how these shortcomings can be cured and recommendations made too. One of the leading solutions to the problems mentioned above would be the unification and codification of the diverse African Customary Laws and giving equal recognition to the African customary law just as the English law is recognized. This would, in turn, make the laws predictable and more specific, and there would be improved justice delivery concerning both civil and criminal matters in the Zambian Judicature.

2. Features of a Dual Legal System

One of the critical features of the dual legal system in Zambia is the statutory law. Statutory law represents the codified written laws that govern various aspects of society, such as personal affairs, political matters, trade, and commerce. Statutory law was inherited from the colonial masters and remained in force even after independence in 1964. It represents England's legal traditions between the late 1800s and the mid-1900s, which were exported to Zambia and formed the basis for the statutory law in Zambia (Chigudu, 2021).

Another key feature of the dual legal system in Zambia is the customary law. In contrast with statutory law, customary law reflects the unwritten, deep-seated cultural heritage and traditions of the Zambian people, which have been transmitted through generations. Different cultures have had different rules followed way before Zambia was colonized. Customary law is applied differently among different cultures across Zambia (Mushinge & Mulenga, 2016).

The constitutional supremacy is another crucial feature of the dual legal system in Zambia. The constitution is grounded in the statutory law and serves as the highest law of the land. This means the constitution takes precedence where the customary law presents conflicting rules. However, it is essential to consider the co-existence feature where both customary and statutory laws exist side by side. Despite the rules, norms, and authorities for decision-making, the Zambian legal system recognizes and respects customary law. Customary law is considered a source of law, and courts often refer to it in cases involving family, land, and inheritance disputes (The Constitution of Zambia Act, Chapter 1(3)).

Legal pluralism is another feature of the dual legal system in Zambia and is created by the dual legal system, which means that when resolving disputes, individuals can choose customary law or statutory law. An individual can choose to resolve their disputes traditionally by following the customary law or may choose the formal legal proceedings under the statutory law (Mushinge & Mulenga, 2016).

Overall, the dual legal system presents the courts with the challenge of balancing the two legal systems, especially in areas where they may conflict, such as the conflict concerning human rights and gender equality. There can be disparities between customary and statutory law in these matters, presenting the need

to harmonize the dual legal system to ensure it conforms to constitutional principles and international human rights standards.

3. Recognition of African Customary Law

Hatchard, J and Ndulo, M., in their works on the origins of African Customary law, state that before the arrival of the white settlers, the indigenous population enforced customary laws through their system of courts. In their works, they also give a typical characteristic of African Customary law and state that the distinction between criminal law and civil law was not apparent to the native mind except in so far as offenses against the King were placed in an entirely different category and assigned different punishments from those meted out to similar offenses of the ordinary people to each other. Thus, for example, adultery with the wife of the King meant death for the man and death or mutilation for the woman. Adultery, in other cases, was dealt with the payment of compensation (Hatchard & Ndulo, 1994).

Lillian Mushota, in her scholarly works, highlights that African Customary law varied from one ethnic group to another. She states that ‘before colonization, the indigenous people of Zambia practiced traditions and rules of customary law which they enforced through their traditional elders, leaders, and chiefs (Mushota, 2002). Until colonization, the indigenous people of Zambia practiced traditions and rules of customary law, which they enforced through traditional elders, leaders, and chiefs, and the rules varied from one tribe to another.

The aforestated scenario merely illustrates that African customary law existed before the importation of the English common law to form a dual legal system that is expected to operate simultaneously.

At this juncture, it would even be correct to state that there were many customary laws as several tribes were present. This African customary law was specifically tailored to the needs of the people it served and was informal.

Despite African customary law varying from one ethnic group to another, it is essential to note that it has been sustained for a very long time, for it has been passed from generation to generation and effectively administered. Margaret Munalula, in her research work, asserts that “African customary law has endured or has withstood the test of time despite these inconsistencies because it was effectively administered within the African societies” (Munalula, 2004). It is also imperative to opine that the Zambian Republican Constitution recognizes the validity of the African customary law, sometimes even where the same is discriminatory. However, statutory law limits the application of customary law in the sense that much as it is valid, it will only apply to such an extent that it is not repugnant to natural justice, equity, and good conscience. Section 12 of the Local Courts Act (Chapter 29 of the Laws of Zambia) affirms that African customary law may not be applied if it is repugnant to natural justice and morality or incompatible with written law. However, a challenge still needs to be resolved, and the question of this repugnance to natural justice and morality is yet to be de-

terminated.

4. Conflict between the African Customary Law and the Imported English Common Law

The co-existence of African customary law and the imposed English law is never short of conflicts, mainly where an African and a European were to be involved in the same lawsuit. These conflicts are prevalent in the law dealing with marriages, property and inheritance, and other civil matters. Bennet (1968), a legal scholar, researched this topic and discussed whether African customary law should be repealed or discarded completely due to conflicts with English law or, indeed, statutory law. Should customary law be changed and developed to govern situations unknown to the Zambian society, or should it be excluded in favor of the more developed system of statutory law?

In the case of **The People v. Florence Katongo** (1974), the Accused person had entered into a customary union with and later, Mr. Chibesa converted that union into a statutory one on the 18th of July, 1969, under the then Marriage Act, Chapter 211 of The Laws of Zambia at the Boma in Ndola. The Accused Katongo went through another ceremony of Marriage with Mr. Dennis Siwale while the Husband was still alive. The High Court Judge Justice Care held that a customary union cannot be a valid marriage in the sense of a monogamous marriage in the Marriage Act, whether the Husband is alive or not. The question that would arise before the Court would be, can the Accused be charged with the offense of Bigamy? Bigamy is an offense that is constituted when one is already married and further goes to contract another Marriage. The customary marriage is invalid under statutory law, as was decided in the case of **The People v. Florence Katongo**. However, certain schools of thought or Courts would treat the initial customary marriage as valid, and the Accused would be convicted of Bigamy as was decided in the case of **Nkhoma v. The People** (1978). The brief facts of the case were that the Accused Nkhoma was married under African Customary law to his first wife. The Accused later contracted a subsequent marriage under statutory law. At the same time, the first wife was still alive, and Justice Ngulube, in the said case, stated that “customary marriages are valid under section 38 of The Marriage Act and therefore, any person who commits an offense under this section of The Marriage Act shall be guilty of bigamy”. This certainly brings about a lack of uniformity when administering justice due to the existence of the dual legal system. Some Courts would contend that the initial customary marriage was invalid, mainly where parties cannot contract a marriage, while other Courts would contend that the marriage would be valid despite one party being a minor, for all the customary rites were satisfied, such as the payment of a dowry or indeed the bride price. That finding is critical in determining whether an Accused person must subsequently be found liable for Bigamy or not.

W. L. Church, in his scholarly works, asserts that “we have seen and will again see examples of common law rigidity of the refusal of some courts and com-

mentators to adjust to new realities” (Church, 1974). The Author endeavors to explain the effects of the dual legal system in the administration of Justice in Zambia. He cites the Court’s unwillingness to recognize new attitudes and policy pressure as just one of the many issues at hand. Irrespective of how good an African customary law may be, it cannot be applied to a matter before the Judiciary for its inconsistency or incompatibility with the written law. Further, when there is a conflict between African customary law and English law or statutory law, the Courts will apply statutory law, making the African customary law inferior to statutory law. Section 16 of The Subordinate Court Act (Chapter 28 of The Laws of Zambia) opines that apart from an African customary law being inconsistent with the rules of natural justice, equity, and good conscience if it is in conflict or compatible with statute or written law, then statute law shall prevail. This scenario is replicated in Section 12 of The Local Courts Act and provides that African customary law will not be applied if it is incompatible with written law (Chapter 29 of The Laws of Zambia).

The **Katongo** case highlighted herein illustrates a typical example of the conflicts between the African customary law and the statute law, a replica of the basic tenets of English law. It is also important to note that the issues surrounding matrimony are just a few areas where conflicts between African Customary Law and English Law exist. Other areas prevalent include laws governing succession and inheritance.

5. Conflict between One African Customary Rule or Practice against Another

One of the essential factors that put Courts in a dilemma as to whether they should continue to administer African customary law or English law is when there is a conflict between one customary practice and another customary rule or practice. This dilemma as to which customary rule should be followed when there is a conflict can be attributed to the fact that no statute or authority lays down any guidelines to be followed in such a scenario in a Court of law. Currently, in Zambia, no statute guides what should happen when conflict occurs between two or more customary practices or rules. The result is that African customary law is disregarded because there is no certainty as to which customary law is to prevail in times of conflict.

Although, as a general rule, Local courts apply the customary law prevailing in the area over which they have jurisdiction (The Local Courts Act, Chapter 29 sec 16 and 49). It is further necessary to note that people in Zambia are entitled to move freely and reside in any part of the country (Part 3—Bill of Rights in The Republican Constitution. Article 29), and it is for this reason that the urban areas are cosmopolitan, with people from various areas and ethnicities within Zambia. However, no law has so far been enacted to deal with the apparent potential conflicts between one customary law and another, as already alluded to and in the case of **Trinity Chivweta v. Mailosi Jere** (1973), where the parties to the suit were once married and upon divorcing the petitioner sought for proper-

ty settlement, as per Lunda custom. However, the respondent contended that, as per Ngoni custom, a woman is not entitled to any property settlement when divorced. This scenario put the Court in a dilemma as to which customary law should prevail between the Lunda or Ngoni customary practice concerning property settlement after divorce. Nevertheless, the parties to the suit later decided to ouster customary law and merely gave effect to what the parties decided. These circumstances show how much customary law may be disregarded in preference to English or statutory law, which is more specific and uniform.

6. Importance of Statutory and Customary Law

Although statutory law in Zambia is regarded as supreme compared to customary law, it is essential to note that the relative importance of customary law and statute law in Zambia's dual legal system is a complex issue. Customary law has played a significant role in preserving the cultures and guiding the lives of the Zambian people for generations. It is an integral part of cultural identity as it embodies the customs, beliefs, and social norms of the various ethnic groups in the country (Chanock 1991). On the other hand, based on the imported English law and statutory provisions, the statutory serves a critical role in providing a standardized, written set of rules that serves as the backbone of Zambia's legal framework. The statutory law helps govern the various aspects of society, including personal affairs, commerce, and politics (Joireman, 2014).

It is also essential to consider looking at each legal system from the perspective of how it helps the administration of justice. Customary law is best suited for addressing matters deeply associated with local cultures. For example, matters may be related to inheritance, family, and land disputes. It helps resolve issues unique to specific ethnic groups and hence helps preserve the cultural identity of the locals (Kane et al., 2005).

On the other hand, statute law has its unique place. It offers a legal framework that is structured and consistent, thereby helping ensure fairness and equality in the adjudication of matters. It makes the legal environment predictable and, hence, best suited in areas requiring standardization of rules and regulations (Kane et al., 2005).

Overall, it can be concluded that it is not a matter of one system being more critical than the other but appreciating the different roles each system plays in the legal landscape. Customary law preserves cultural heritage and traditions, while statute law offers legal clarity and consistency. This entails the need to promote harmony between the two, giving due recognition to the significance of both systems in the administration of justice to achieve a balanced legal system.

7. Recommendations and How to Deal with the Conflicts between English and the Indigenous African Customary Law

As noted in this paper, the dual legal system presents several challenges, necessitating recommendations to improve the administration of justice in Zambia. The

following recommendations are made.

There is a need for the unification and integration of African customary law. This can be achieved by promoting consistency and clarity within the customary law by unifying and integrating similar customary rules and practices (Allott, 1968). Typical elements within the different rules followed by different cultures need to be unified into a framework.

African customary law is unwritten and hence may produce uncertainty in conflict situations. This presents the need to codify customary law to provide an explicit and written legal framework. However, given the diverse nature of customary law, the codification process should involve the input of the various ethnic groups to ensure that their customs and traditions are adequately represented.

The current legal system makes statutory law supreme, thereby undermining customary law (Allott, 1968). Therefore, there is a need to make the legal system in Zambia balanced by recognizing both the statutory law and customary law. The system should not give precedence to the statutory or customary law where a valid reason but rather take a balanced and fair approach when resolving disputes.

There is also a need to develop legal or legislative guidelines for resolving conflicts that may arise between customary rules or practices. These guidelines will give the courts a clear path to follow during dispute resolution.

Public awareness and education about the dual legal system is one of the essential steps that should be promoted. The public should be informed about the existence of the dual system, raising awareness about the similarities and differences. In this way, individuals can make informed decisions regarding dispute resolution and legal matters.

The existing laws should be periodically reviewed and reformed to align with international human rights standards and contemporary societal values. The reviews and reforms would help bridge the gap between statutory and customary law, especially in human rights and gender equality.

Lastly, there should be continuous research and consultations with legal experts, representatives from different ethnic groups and scholars. The purpose of this process should be to help the development process for legal solutions that recognize and respect cultural diversity and promote consistency.

8. Conclusion

Irrespective of the fact that several scholars and authors have researched this subject of the dual legal system, the conflicts arising from the same, and ultimately how they affect the administration of Justice in Zambia, it is cardinal to note that the said problems remain unresolved. Hence, this article suggests recommendations and possible solutions that will make the administration of Justice in Zambia uniform, with the necessary predictability, certainty, and consistency. The possible solutions to this problem range from unifying and integrating the diverse African customary rules or practices, mainly because most Afri-

can customary rules and practices are similar with minor variations. Secondly, codifying African customary law would undoubtedly diminish the uncertainty as to which African customary practice or rule should prevail over the other in times of conflict before the Courts. The easier and better way would be to codify African customary law, which has been done in Botswana and Ghana, reportedly successful (Allot, 1970). Finally, the giving of equal legal recognition to each system, unlike the current situation where the English law or statute law overrides African customary law even when the same is not repugnant to natural justice, equity, and good conscience, will go a long way in the administration of justice in the Judicature concerning certainty and uniformity of the law to be administered.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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Appendix

Statutes

- The Local Courts Act, Chapter 29 of the Laws of Zambia.
- The Marriage Act, Chapter 87 of the Laws of Zambia.
- The Subordinate Courts Act, Chapter 28 of the Laws of Zambia.
- The Constitution of Zambia Act, Chapter 1 of the Laws of Zambia.

Cases

- Nkhoma v. The People (1978) Zambia Law Reports.
- The People v. Florence Katongo (1974) Zambia Law Reports 290 High Court.
- Trinity Chivweta v. Mailosi Jere (1973) Zambia Local Courts, Case number 12.