

**INFORMED THUMB SUCKING: THE CHALLENGES AND  
PROBLEMS FACED BY THE MAGISTRATES COURTS IN THE  
DISTRIBUTION OF MATRIMONIAL PROPERTY ON THE  
DISSOLUTION OF MATRILINEAL CUSTOMARY MARRIAGES IN  
BLANTYRE, MALAWI**

**Abstract**

**Using the latest research methods to highlight the condition of women, this dissertation (written by a professional Magistrate) explores an apparently ludicrous, but nevertheless pressing real problem: Magistrates being forced, since the abolition of Traditional Courts in 1995, to act apparently *ultra vires* (i.e., beyond their powers) when they order the dissolution of customary law marriages and distribute matrimonial property. Focus is upon the prejudicial consequences to women of matrilineal customary law marriages, who find themselves before Magistrates, largely untrained in that law and, hence, insensitive to their rights. In order for Malawi to honour these women's rights in terms of binding/persuasive local and international HR instruments, she suggests sound reforms, including the introduction of Family Courts, similar to the now defunct Traditional Courts.**

**BY**

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## CHAPTER ONE

### 1.0 MY PASSION FOR THE TOPIC

I developed the interest to study this topic due to the lived realities I experienced after I finished my studies in the Law school and I joined the judiciary as a magistrate. In the law school we were taught the history of the courts in Malawi. Part of the history of the courts was the integration of the Traditional courts into Magistrate courts. When the Traditional Courts were in operation they were the only courts that had exclusive jurisdiction in applying customary laws. On integration the courts the law did not provide the jurisdiction as to which courts will be applying customary laws. I was so curious to find out what was happening in practice. In the first matter I presided over involving a customary law marriage divorce petition, I was at pains as to what I was supposed to do since I realised that I did not have jurisdiction to preside over such matters. I went to ask a colleague who was a lay magistrate. He told me that since the integration of the courts in 1995 they are presiding over such matters. This was in 2005. I went to my immediate boss who was a professional magistrate. I explained my dilemma to him. He also responded that indeed the law did not give us jurisdiction to preside over the matters but to help the society at large I should preside over the matters. Who was I to say no new as I was in the system I did what I was told but deep down in my heart I realised that something was wrong and it needed to be made right. As I was presiding over the customary marriage divorce after consulting the magistrates the ones who were older than me in the system on the customs and traditions that govern the customary marriages. I noticed that women were losing out on property after divorce. Firstly, the majority of the women never claimed a share in the marital property on divorce. They did not view themselves as having a share in such property. Secondly, for most women when they were in court for divorce the property was with the man as they were on separation. By the time I made the order the man had sold all the valuable property. If the women were not in a paid job the man would insist that all the property was his as he was the one doing the actual buying of the items with the proceeds from his paid job. Women's work in the home was not considered as work. The women due to all this were losing out on the property. When I joined this course and interacted with different issues that concern women, these interactions ignited my passion to conduct a study in this area.

### **1.1 JUSTIFICATION FOR THE STUDY**

This study is focusing at the customs and practices in matrilineal customary marriage relating to property on divorce. It seeks to establish the challenges the magistrates face to establish whether they have jurisdiction or not for the redistribution or non-distribution of such property. It is the intention of this study to interrogate the legal provisions that grant the magistrate's jurisdiction after the integration of traditional courts into magistrates' courts as the traditional courts had exclusive jurisdiction to preside over the customary marriage divorces.

The other focus of the study is to look at women proprietary rights in matrilineal customs and to establish whether their rights are during the subsistence of marriage at divorce.

There are several forums where a woman or a man can take a family dispute for resolving. At custom the institution of Ankhoswe<sup>1</sup> that has the mandate to mediate over all the disputes in the family seem to be overtaken with time. This study seeks to find out the effectiveness and efficiency of these other actors in assisting the woman to resolve family disputes.

### **1.2 OBJECTIVES OF THE STUDY**

The main objectives of this study are:

To investigate the challenges, problems and difficulties judicial officers are facing in distributing matrimonial property on divorce in matrilineal customary marriages.

To investigate the actual items that women get on divorce when the court undertakes distribution of matrimonial property.

To interrogate the law of divorce and matrimonial property and suggest recommendations for intervention aimed at securing women's proprietary rights.

### **1.3 ASSUMPTIONS**

The following were the assumptions for the study:

1. That women go to a variety of forums for assistance with their matrimonial problems before approaching the courts.
2. a) That the main aim of the organisations that refer women to court is reconciliation  
b) The referral organisations give women legal advice on divorce.
3. a) That court clerks at the magistrate court frame the claims on the divorce petitions.

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<sup>1</sup> These are people who supposed to duly witness the marriage at custom. There are usually maternal uncles. In case of disputes in the marriage they are mandated to mediate over all the disputes. Also known as marriage advocates, sponsors or sureties.

3. b) That the divorce petitions do not cover all the necessary claims in a matrilineal customary divorce.
4. That the remedy available at the court in matrimonial disputes is divorce
5. That the court may refer the parties in a divorce matter to other actors and agencies
6. (a) That magistrate courts have jurisdiction to preside over customary disputes but their civil jurisdiction is a maximum of MK50000.( 1US\$ =MK139)
6. (b) That property claims may exceed the maximum civil jurisdiction of K50000.
6. (c) That the High Court has unlimited jurisdiction but will not preside over divorce matters in customary marriages as a court of first instance.
6. (d) That some lay magistrates extend their jurisdiction to preside over the property claims in the divorce matters in matrilineal customary marriages.
7. a) That women approaching the courts are not aware of their rights to:
  - (i) Property
  - (ii) Custody of children
  - (iii) Maintenance
  - (iv) a house as at custom.
- 7.b) That the women are not able to prove their contribution as required by law on the acquisition of matrimonial property.
- 7.c) That the court has criteria it follows/considers when making the property distribution on divorce.
8. In cases where a party has a favourable order courts have:
  - a) Enforcement challenges and
  - b) the property may be sold by the party who has custody of the property.

#### **1.4 RESEARCH QUESTIONS**

The following were the research questions:

1. Do women go to a variety of forums for assistance with their matrimonial problems before approaching the courts?
- 2.a) What is the main aim of the organisations that refer women to court.
  - b) What advice do the referral organisations give women on divorce?
- 3.a) Do the court clerks at the magistrate court frame the claims on the summons\divorce petitions?
- 3.b) Do the divorce summons/petitions cover all the necessary claims in a matrilineal customary divorce?

4. What are the remedies available at the court in matrimonial disputes?
5. Do the court refer the parties in a divorce matter to other actors and agencies?
6. a) Do magistrate courts have jurisdiction to preside over customary family disputes? What is their maximum civil jurisdiction?
6. b) Do property claims may exceed the maximum civil jurisdiction of K50000.
6. c) Does the High Court which has unlimited jurisdiction preside over divorce matters in customary marriages as a court of first instance?
6. d) Do some lay magistrates extend their jurisdiction to preside over the property claims in the divorce matters in matrilineal customary marriages?
7. a) Do the women approaching the courts aware of their right to:
  - (i) Matrimonial Property?
  - (ii) Custody of children?
  - (iii) Maintenance?
  - (iv) a house as at custom?
- 7.b) Are the women able to prove their contribution as required by law on the acquisition of matrimonial property?
- 7.c) Does the court have criteria it follows/considers when making the property distribution on divorce?
8. In cases where a party has favourable court order does the courts face:
  - a) Enforcement challenges and
  - b) the risk of property being sold by the party who had custody of the property?

## **1.5 DEFINITION OF TERMS:**

### **1.5.1 Matrilineal Customary Marriage**

Matrilineal Customary marriage is one of the types of customary marriages in Malawi. It is characterised by having ankhoswe from both parties to duly witness the marriage. The man leaves his village and stays in the village of the woman. He builds a house for the woman in her village. On strict application of custom he is suppose to build the house before they start to cohabit. The issues of the marriage follow the maternal side.

Ankhoswe, the marriage sureties, sponsors or advocates are responsible for organising the contracting of the customary marriage. They are also intended to mediate between the spouses in all cases of matrimonial disputes. In this custom your brother is responsible to take



care of his nieces and nephews. The matrilineal custom will be discussed in detail in the findings chapter.

### **1.5.2. Matrimonial Property**

There is no definition of matrimonial property in all the statutes that relate to marriage in Malawi. Based on common law matrimonial property includes the matrimonial home, the land on which it is built, household property, bank accounts held in the names of husband and wife, and insurance policies in respect of members of the nuclear family.<sup>2</sup> The report of the Malawi Law Commission on the review of the laws on marriage and divorce has defined matrimonial property in its proposed Marriage, Divorce and Family Relations Bill in section 2 as follows<sup>3</sup>:

“Matrimonial property” includes-

- (a) the matrimonial home or homes
- (b) household property in the matrimonial home or homes
- (c) any other property whether movable or immovable acquired during the subsistence of a marriage which by express or implied agreement between the spouses or by their conduct is used, treated or otherwise regarded as matrimonial property.”

For the purposes of this discussion I have adopted the definition in the proposed Marriage, Divorce, and Family Relations Bill.

### **1.5.3 Divorce**

The Oxford Dictionary of Law defines divorce as the legal termination of marriage and the obligations created by marriage. In Malawi the grounds for divorce under the marriage Act and under custom are different. Under the Marriage Act<sup>4</sup> in Section 5 divorce can be granted on the following grounds: cruelty, adultery, desertion for a period of three years immediately preceding the presentation of the petition, being incurably of unsound mind and has been so for five years and the husband being guilty of the crime of rape of other women.<sup>5</sup> Under Customary Marriage the following are grounds for divorce persistent infidelity, disregard of marriage taboos, neglect, ill treatment or desertion, witchcraft, impotence on the man’s part, laziness and barrenness of a wife. Customary marriages are potentially polygamous. For the purposes of this study divorce means the legal termination of marriage and the obligations created by marriage.

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<sup>2</sup> Bromley’s Family Law, 1981

<sup>3</sup> Law Commission Report No. 16, June 2006

<sup>4</sup> Cap 25:02, Laws of Malawi.

<sup>5</sup> The law in Malawi does not provide for marital rape.

**1.5.4. Resident Magistrate/ Lay Magistrate.**

The law does not define a resident or a lay magistrate. The Constitution of Malawi in section 110 states that there shall be such courts subordinate to the High Court presided over by professional magistrates and lay magistrates. The Courts Act<sup>6</sup> in section 2 states that:

“a magistrate means a magistrate appointed under s 34 of the Court Act and includes a Resident Magistrate. Resident Magistrate includes a Senior Resident Magistrate.”

In section 34 of the Court Act it states:

“the court of a Resident Magistrate shall consist of a fit and proper person appointed by the President to be a Resident Magistrate.”

There is no definition of a ‘fit and proper person’ in the Courts Act or the General interpretation Act. In practise the court of the resident magistrate consist of professional magistrates who have law degrees. The lay magistrates go for training to qualify as a lay magistrate. Majority of the magistrates are lay magistrates. In this study out of the 22 magistrates interviewed only five were professionals with two female professional magistrates including myself.

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<sup>6</sup> Cap 3:02, Laws of Malawi.

## CHAPTER TWO

### 2.0 THE METHODOLOGICAL FRAMEWORKS

The research used various theoretical frameworks to describe, analyse, explain and understand the position of women as regards matrimonial property after divorce in customary matrilineal marriages. All the theoretical frameworks that were used complemented each other.

#### 2.1 WOMEN'S LAW APPROACH

In order to find out the challenges faced by Magistrates in distribution of property on the dissolution of marriage I used the women's law approach. This approach helped me to take women lived experiences as the starting point. I looked at the position of women in family laws in relation to matrimonial property in matrilineal custom, the constitutional provisions on women and specifically on matrimonial property and the realities on the ground. This approach was useful in so far as it helped me to uncover the problems that the women are facing and critically analyse the laws. I looked at the law and how women are considered in the law. I looked at the Family laws in Malawi. There are three official marriage law systems in Malawi. All the three systems are inherently discriminatory. Firstly, there is the customary law system and it is the law that governs most marriages and is the primary marriage law for Malawians.<sup>7</sup> Under this system the marriage is potentially polygamous and kin relations are given strong recognition.<sup>8</sup> Secondly, there is the Asiatic family law system, which governs non-christian Asiatic marriages.<sup>9</sup> Thirdly, there is the common law based system of monogamous marriages. The three systems of family law raise problems. The three systems are not the only family systems that exist in Malawi. Some family forms exist outside the official law. These are marriages by repute and permanent cohabitation. For a long time the law in Malawi refused to recognise the validity of such families. The customary family law does not recognise any union which does not have marriage advocates or which no lobola was paid.<sup>10</sup> Although all three systems insist on formalities for a valid marriage, they differ in some respects as to their regulation of the on-going family and consequences of marriage

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<sup>7</sup> Jamal v Jamal, Matrimonial Cause No. 1 of 1989, HC (Unreported) Justice.Mwaungulu stated that 95% of the Malawian marriages are contracted under customary law.

<sup>8</sup> Sections 8 and 12 of the Traditional Courts Act 1962, Cap 3:03 of the Laws of Malawi

<sup>9</sup> See Section 2 and 3 of the Asiatic Marriage, Divorce and succession 1929, Cap 25:03 Laws of Malawi

<sup>10</sup> The 1995 constitution in S22 has provided for marriage by permanent cohabitation and by repute but there are no guidelines to regulate such marriages.

termination. There is inherent discrimination. For instance the African customary law facilitates polygamy and allows the husband to claim compensation from a male who has sexual intercourse with his wife. In contrast the wife has to be exclusively faithful to one husband and cannot claim damages for her husband's adultery although she can complain to the ankhoswe.

## **2.2 GROUNDED THEORY**

In Grounded Theory there are four developmental stages. The theory building, next question technique, concept building and constant comparative method. I started the research with an open mind that women go to the magistrate courts for resolution of the matrimonial problems that they face. Using grounded theory I found that there are other disputing resolution forums that the women go before coming to court. Sometimes even where women come straight to court they are sent by the court to some of these forums. Especially, they are sent by the court to church if, the marriage was celebrated in church and to ankhoswe. Initially my respondents were just judicial officers. The Grounded theory assisted me to generate new insights as I was collecting the data and I derived new issues and concepts. While in the field I realised that it was necessary to find out from the other forums how they are assisting the women. The Grounded approach helped me to adjust my assumptions and to include other respondents. I included two non-governmental organisations, Women's Voice, the Civil Liberties Committee (CILIC) and the Police (Victim Support Unit (VSU)). At the court from the interviews I had with the magistrates using grounded theory. It was revealed that the court clerks play a vital role in the whole divorce process. They are the gatekeepers at the court. The initial assumptions were adjusted to include the court clerks as it was found that the clerks are the ones who receive all the civil litigants and they frame or draft the claims on the divorce petitions. In this research the grounded theory helped me to see the whole picture as compared to when I set out initially I wanted to see the picture just from the lens of the Magistrates. Grounded theory helped me to widen the lens and include other respondent that initially were not part of the study.

### 2.3 FEMINIST LEGAL PERSPECTIVES

“The feminist perspective to law entails; 1) a description and evaluation of existing law, 2) an identification of areas of strong legal support, weak legal support and judicial voids where ‘legal’ issues have not even been addressed and 3) discussion of whether and how the body of law ought to be expanded, contracted or replaced.”(Dahl: 1987)

The feminist legal approach assisted me to describe, explain and understand the legal position of women in matrilineal customary marriage law. Equal laws do not preclude discrimination. The Malawi Constitution in section 20 has an equality clause. Discrimination is prohibited on several grounds including property as one of the grounds. In section 24 of the Malawi Constitution women have been accorded the same rights as men to acquire and maintain rights in property, independently or in association with others, regardless of their marital status. The presumption is that both men and women have the capacity to acquire property. The lived reality is that the majority of the women are housewives. All the magistrates that I interviewed stated that the women in the cases they have presided over are housewives.

Most women are housewives, either full-time, part-time or overtime (Dahl: 1987). They contribute indirectly in the acquisition of matrimonial property through the housework they perform in the home. Even where the woman is working outside the home she spends her money on consumables.<sup>11</sup> The courts have held that the contributions must be financial and the standard of evidence is strict proof.<sup>12</sup> Contributions in the form of the maintenance of property items, housekeeping and child-care by spouses are not accepted as sufficient for any proprietary rights which disadvantages women, most of whose contribution in the household is not monetary. Marxist feminism helped me to see how women’s work is undervalued or not valued in the home. In the study it was revealed that some magistrates consider housekeeping as contribution in acquisition of matrimonial property. The values placed on housekeeping vary from court to court. Some will value it at ¼ of the property and others at a ¾ share of the property. In all the analysed court records in this study there was no a fifty-fifty share of the matrimonial property. The private-public divide determines what paid job is and what is not paid job. What is done in the public is productive and paid job. What is done in the private sphere is for love and affection and with no dollar value. Most women are in the private sphere.

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<sup>11</sup> Beyond Inequalities Women in Malawi, (2005) p 34

<sup>12</sup> Malinki -v- Malinki, 9 MLR, 441.

‘In marriage, equality between a woman and man is problematic from a money law perspective, principally because care of the house and the family earns no economic payment. If work in the home and work outside the home was valued equally.’ (Dahl: 1987).

If work in the home and work outside the home was valued equally then women would have a fifty-fifty share of the property on divorce.

On the custody of children, in matrilineal custom children follow the clan of the wife. In giving regard of the best interest or welfare of the child the research found that there is a tendency to give custody of very young children to the mother. Radical feminism was useful as it caused me to realise that the maternal preference of awarding very young children to women perpetuates the stereotype of women as primary care givers.

## **2.4 LEGAL PLURALISM**

The colonial government defined Malawi’s official family law systems. The Marriage Act 1902, the African Marriage (Christian Rites) Registration Act 1923, the Asiatic (Marriage, Divorce and Succession) Act 1929, the Divorce Act 1905 all these were passed before 1964, when Malawi had not attained independence from Britain. Reflecting the plurality of the society there were official three marriage systems in Malawi. The customary family law, the Asiatic family law and the common law based system. Although the 1995 Constitution provides for marriage by repute or permanent cohabitation there is no definition of these marriages in the law. It is not clear what rights and obligations in respect of property, children, divorce and death accrue to such arrangements. Marriage under statute and marriages under customary law have different grounds for divorce. The customary family law is subject to the repugnancy clause<sup>13</sup>. The Traditional courts applied customary law prevailing in the area of the jurisdiction of the court in as so far as it was not repugnant to justice or morality or inconsistent with the Constitution or any written law in force in Malawi. As regards the customary family law there is choice of law dependant on patrilineality and matrilineality. The focus of this research is the matrilineal customary family laws. The doctrine of precedent operates in the courts. The High Court, which presides over statutory marriage, has used strict proof to prove contribution on the acquisition of marital property. There have been no fifty- fifty shares in the High court on divorce. This standard has also been used in the subordinate courts in marriages under customary law.

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<sup>13</sup> Section 11 and 12 the Traditional courts Act, Cap 3:03, Laws of Malawi.

## **2.5 ACTORS AND STRUCTURES**

The actors and structures approach helped me to analyse the impact of the different actors and structures that women face when they are pursuing to resolve their matrimonial problems in matrilineal customary marriages. Apart from the magistrates there are other actors who are equally playing a vital role in resolving matrimonial disputes. The research by using the actors and structures approach revealed the paralegals in non-governmental organisations, the police officers at the victim support unit, the chiefs, the church and ankhoswe as some of the actors. At the court the other key actors are the court clerks and court messengers. The structures that are in place where each of these actors are exercising their role to resolve the matrimonial problems pose a challenge to most women in terms of cost. The time that is wasted moving from one actor to the other and also financial cost in terms of transport.

## **2.6 SEX AND GENDER ANALYSIS**

Sex is the physical distinctions between men and women, where as gender is a social and cultural construct. Sex and Gender analysis helped me to analyse the way your sex can determine the type of property that you will get on divorce. A gender role in the family determines the work that is valued and the work that is not valued. The research revealed that the work that a man performs outside the home is valued more than the household chores. Women's gender role of cooking for the family informs the court that they should be awarded more of the kitchen utensils than the men. With this approach I was able to analyse the genderisation of property and the factors that the court take into account to award young children to the women on divorce in the matrilineal customary marriages. The court has stated that young children need care and motherly love. Women provide childcare in the home. The court on divorce gives women young children to the woman to continue the childcare after divorce and this perpetuates the gender role of the woman in the home.

## **2.7 THE RESEARCH PROCESS**

As I set out to carry out the research my focus was on Magistrates. I wanted to find out how the magistrates make a distribution of matrimonial property on divorce and the factors that they consider in making the distribution. At the back of my mind the issue that was so central to this is the civil jurisdiction of the magistrates, which I strongly believe they were extending to preside over the property claims on divorce. The other issue was to establish whether the magistrates take into account the contribution that each of the spouses made on the

acquisition of the property. Since my focus was the magistrates I wanted to have a sample with as many magistrates as possible. The reasons for this being that the lay magistrates are of different grades and it is the grade that determines their jurisdiction.<sup>14</sup> The professional magistrates are very few in the system. The jurisdiction of all professional magistrates is the same.<sup>15</sup> To achieve a reasonable sample I chose Blantyre district. In this district most of the courts are functioning and it has more magistrates as compared to other districts where most of the courts are closed and in extreme cases there is only one court operating with one magistrate. In other districts you have a maximum of only three lay magistrates. Blantyre was also chosen because at the time of the research it was the only district in the judiciary southern division that had professional magistrates. When the assumptions were adjusted the sample included two Non Governmental Organisations (NGOs), the police (the Victim Support Unit) and court clerks. These two NGO's were sampled out of the other NGO's because they were the ones that were most referred to by the magistrates and the court clerks. The court clerks were included because they are the gatekeepers at the court and they are the ones who draft the divorce petitions. In the court cases that were analysed the two NGO'S were indeed the ones that featured in most of the cases.<sup>16</sup> 21 magistrates were interviewed. Eight of these were Second grade magistrates with a maximum civil jurisdiction of K30000. The other eight were First grade magistrates with a civil jurisdiction of K40000. Five were professional magistrates with a maximum civil jurisdiction of K50000. All the court clerks I interviewed were clerks in charge at the civil registry of the court. I sampled clerks in charge because he or she is the one who is the overall in charge of the civil registry and they are very conversant with all the activities at the registry. Below are tables of all the respondents in this study;

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<sup>14</sup> Section 39 Courts Act

<sup>15</sup> Section 39 courts Act

<sup>16</sup> Out of 81 files that were analysed 5 had been to CILIC and 8 to Women's Voice.



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**KEY**

**F-** Female, **M-** male, **SGM-** Second Grade Magistrate, **FGM-**First Grade Magistrate, **SRM-** Senior Resident Magistrate, **PRM-** Principal Resident Magistrate, **CRM-** Chief Resident Magistrate.

**TABLES OF RESPONDENTS**

<b>Name of the Court</b>	<b>Gender</b>	<b>Lay</b>	<b>Professional</b>
Blantyre Magistrate Court	M	FGM	
Limbe Magistrate Court	M	SGM	
Blantyre Magistrate court	F		SRM
Limbe Magistrate Court	F	SGM	
Blantyre Magistrate Court	M		SRM
Chisenjere Magistrate Court	F	SGM	
Blantyre Magistrate Court	M	FGM	
Blantyre Magistrate Court	M		SRM
Mtonda Magistrate Court	F	SGM	
Blantyre Magistrate Court	M		PRM
Blantyre Magistrate	M		CRM
Blantyre Magistrate Court	F	SGM	
Limbe Magistrate court	F	FGM	
Midima Magistrate Court	F	SGM	
Dalton Magistrate Court	M	SGM	
Midima Magistrate Court	F	FGM	
Midima Magistrate Court	M	SGM	
Limbe Magistrate Court	F	FGM	
Dalton Magistrate Court	F	FGM	
Midima Magistrate Court	M	FGM	
South Lunzu Magistrate Court	M	FGM	
<b>Total</b>	(22) F-10 M-11	16 (8 FGMs and 8 SGMs)	6 (one female professional magistrate)

<b>Position and Name of court</b>	<b>Gender</b>
Clerk in charge Limbe court	M
Clerk in charge Midima court	M
Clerk in charge Bt court	F
Clerk in charge High Court Bt (civil registry)	F
<b>Total</b>	4 (2 males, 2 females)

<b>Position/ Designation</b>	<b>Gender</b>
Paralegal- Women's Voice	M
CILIC, Deputy Director	M
CILIC, Civic Education Officer	M
Paralegal Officer	M
Police –VSU, Police Constable	F
Police-VSU, Police Sergeant	F
Police- VSU, Police Constable	F
<b>Total</b>	7 (4 males, 3 females)

## **2.8 METHODS**

The following are the methods that were used to collect the data.

### **2.8.0 EXPERIENTIAL DATA**

I explored my own experiential data as a magistrate. I invoked my initial reactions when I was presiding over the divorce matters in customary marriages. The reactions of the men when I was distributing the property were still vivid in my mind. Most of them responded by saying they are the ones who were working and buying all the items while the woman was at home. All the items belong to them. I used to tease them and ask them what the woman was doing in the home. It came out that she was the one doing all the housework and in addition taking good care of the property. I used the experiential data to triangulate what the other magistrates were telling me. This experiential data also helped me to inform the research process when I was formulating the research assumptions and it also assisted me in the actual collection of the data. Especially in the analysis of the court records. Due to my experience on recording evidence in court, I knew where to find them, whom to ask and what to look for in the record in line with my study.

### **2.8.1 INDIVIDUAL IN-DEPTH INTERVIEWS**

This type of interviews was mainly used for interviewing the magistrates and court clerks. In most of the interviews it was easy for me to secure the appointments being a magistrate myself. I was conducting an insider research and this had great advantages for me. I conducted a total of 21 interviews with the magistrates from seven courts and four interviews with the court clerks in four courts. I introduced the topic for the study and with the help of an interview question guide with open-ended questions. The interview guide helped me to make sure all the important issues were dealt with and the interview did not go off track. This method was useful in that the magistrate narrated his or her story on how they deal with divorce matters and the property distribution from his or her perspective without interruption and restrictions. This method afforded the magistrates the privacy and the freedom to explain how they deal with the matters as they were interviewed in their private chambers. This was also inline with the judicial independence that each magistrate exercises when handling matters that come before his or her court. I strongly believe that if I had done a group discussion with the magistrates I would not have collected the same information as I did. In group discussion method it would be the most senior magistrate narrating what he or she does and the rest of the junior magistrates

would be in agreement. With this method I was able to see the gaps that exist between the law and practice. This was evident on the aspect of jurisdiction. It was clear that most of the magistrates were extending their jurisdiction to preside over the matrimonial property to assist the parties.

### **2.8.2 GROUP DISCUSSIONS.**

In the two non-governmental organisations and the police that I sampled I intended to use group discussions. This was done only at one of the organisations at the Civil Liberties Committee (CILIC) and the Police the Victim Support Unit (VSU). Due to the circumstances at Women's Voice there was only one staff member present as they were facing funding problems. With just one person present I conducted an individual in depth-interview. The advantage of group discussion method was that the members of the group were making collective responses to the issues under discussion. What I observed is that the two groups where I conducted group discussions they asked for the questions in advance stating that they wanted to prepare for the discussion in advance.

### **2.8.3 OBSERVATIONS**

I made an observation that most of the magistrates were overwhelmed with their work due to shortage of staff at most of the courts I conducted the interviews. I observed that when I made the initial contact with them to make an appointment for the interview they emphasised that I should be punctual since if I am late and they have gone in court I will have to wait for them for hours on end. I observed that, when I went to make an appointment if they are already in court I had to wait for along time for them to come out of court in some instances it took four to six hours of waiting. In one case one of the magistrates saw me coming to the court premises while he was in court. Since he knows me he adjourned the hearing and come out of the court to attend to me although I was not officially dressed, as he may have thought that I was visiting the court on official duties. This method of observing made me to look at the magistrates' daily court records. I looked at the daily court records to appreciate the tight schedule the magistrates were operating on. I observed from the daily court records that most of the magistrates had specific days in a week for hearing civil matters. When I asked for the reason for setting civil matters on specific days they stated that civil matters were taking much of their time as a result it was difficult to combine with criminal trials. On days that are set for civil matters they just entertain criminal pleas. This assisted to ease the pressure of work they

are facing now as a result of presiding over the customary marriage divorces. Most of them were quick to say that the traditional courts should be re-opened to preside over divorce in customary marriages as it were before the integration.

#### **2.8.4 COURT RECORDS- DECIDED CASES, COURT REGISTERS AND DAILY COURT RECORDS.**

Everything that takes place in a civil hearing is recorded in a court record and has a case number. I read these court records to find out who were the petitioners on those matters. Whether by the time they were coming to court they had been to other fora. I also wanted to find out whether the magistrate were extending or not extending their jurisdiction to preside over the property distribution. How many cases were referred to the High Court? How the high court was making the property distribution. On the actual distribution I wanted to find out what items were the women given by the court. In their prayers to court, if women were able to make all the claims in a customary divorce i.e. custody and maintenance of children if any, house at custom and the property claims.

I managed to analyse 81 cases from four magistrate courts. These cases were from 2003 to 2007. In these four courts the records were available in the other courts the records could not be found due to poor record keeping. The court cases were very useful in that I made the following conclusions from the cases. Most of the petitioners in these matters are women. They go to several forums before coming to court with their matrimonial problems. The courts sometimes send them to their ankhoswe if they have not been to their ankhoswe with the matter. If the marriage was celebrated in church the parties may be sent to their church by the court on request by one of the parties before the matter is heard in court. Chiefs referred most of the cases to court. The magistrates were extending their jurisdiction to preside over property matters. Some of the files had a list of the property they couple had but the court made no distribution. At the High Court there was no file sent there for property distribution from the magistrates' court.

The court registers were not useful to me. Ideally when I included the registers I assumed that the registers would have information on how many matrilineal divorce matters were registered and judgements were delivered on them. Then I would trace the files using the case numbers from the registers. The registers were just registering in general all the civil matters including small claims and all divorce matters i.e. marriages by lobola, repute and by cohabitation. From the register one would not know what system of marriage the

parties followed to contract their marriage. The register on the column for claims just read 'Divorce'. One then had to go to each case and find out under which system of marriage the parties followed. This was to improve on how the records are recorded and kept was cumbersome but the court clerks were helpful. Being an insider doing the research also helped me to gain easy access to the records. The court clerks made the task easier for me they helped me to identify the relevant records. The clerks also entrusted me with the records I could read them over weekends. Since it was a rainy season I started with interviews before the rains. When the rains started I concentrated on the court records. The challenge was that since the records are not written with a researcher in mind and they are on freehand or long hand writing it was sometimes difficult to read the record. This has helped me to see my work with different lens and to improve on how the records are recorded and kept. In addition, other secondary sources of data involved the perusal of books, unpublished literature and the internet.

## **2.9 PROBLEMS ENCOUNTERED**

The other side of being an insider is that the magistrates said "as you already know" as a response to my questions. Dealing with people who are used to asking all the questions and receiving answers made the interviews sometimes difficult. Sometimes I was being asked questions. I tried to deal with this by politely saying that I was interested in hearing their views and learn from what they were doing and not answer the questions from what I was doing in my own court.

In all the two organisations and at the Police station they were not able to give me the statistics of the women and men they have assisted on matrimonial problems. They all stated that they do not have the records at the VSU the officer in charge for the section was not available. They told me that she was the one in a position to give me the statistical records. Efforts to get them from her were made but it proved impossible she was out of office and apparently on transfer to another police station. At the Women's Voice as stated there was only one member of staff who was not the custodian of the statistical records. At CILIC they stated that they combine the records for all the clients ranging from industrial disputes to all sorts of issues they deal with. They did not have records specifically for family disputes. And they did not have the statistics readily available. They told me that they had to consult with the officer who compiles reports to check for the statistics. I tried to get them but it also proved not possible. They kept

saying they are not ready. Due to limitations in terms of time I was not able to get the statistics.

The problem of court records, the records are not done with a researcher in mind the registers do register all the divorce matters in general. It does not indicate that this marriage was contracted under *lobola* or *chinkhoswe*. It is only you go to the actual case and read that you know the customary system the marriage was contracted. One of the courts I visited went through renovations and they had to move out of the building and some of their records could not be traced due the renovations they lost some of their cases. Due to all this it could result in some records being left out because some cases could not be found. This gave me an insight that the civil clerks and the criminal registry records office needs to be properly supervised to make sure that the records are properly kept.

#### **2.10 LIMITATIONS OF THE STUDY**

Due to time and finances the focus of this study was the magistrates, court clerks, VSU and the two NGOs. The picture is not complete without hearing from the women and men who are divorced and the court did property distribution. The house at custom to hear if a court orders money to be paid if the men pay the money and if the women use this money to build a house. In the mean time without a house where do the women stay? What is their coping strategy? On custody of children in view of the maintenance orders that are made by the court, how are the women coping with the young children awarded to them? These areas need further research.

## CHAPTER THREE

### 3.0 THE LEGAL FRAMEWORK

#### 3.1 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Like most of the countries in the Southern African Development Community (SADC). Malawi has ratified a number of the Conventions for its good international image and to gain favour in the financial institutions and the donor community. Malawi is a signatory to the Universal Declaration of Human Rights, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People's Rights just to mention a few.

There are several principles that are enshrined in the International Human Rights Instruments that are being dealt with in this study are equality, non-discrimination, right to property and access to justice with a specific focus on Marriage.

The International Covenant on Civil and Political Rights (ICCPR) in article 23(4) states that:

‘State parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.’

In article 15 (1), (2) of CEDAW:

‘1.State parties shall accord to women and men equality with men before the law  
2. State parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.’

Article 23(4) ICCPR and article 1 CEDAW gives women and men equality before the law and in article 2 CEDAW equal rights to administer property. Since CEDAW is a Women's Convention it lays out various specific rights within marriage. In article 16 (1) h:

‘‘State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relation and in particular shall ensure on a basis of equality of men and women: the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration’’

Both men and women have the same rights to own, acquire, manage, administer, enjoy and dispose property on paper. The reality of this is gendered. The spouse who owns, acquire and who has the ownership in his name is the one who determines how the property will be managed, administered, enjoyed and disposed off. These are usually men since they have the capacity to acquire and own property. Most men are in the public sphere and engaged in productive paid work.

The CEDAW General Recommendation 21 on article 16 (1) (h) on paragraphs 30 to 33 states that:<sup>17</sup>

“There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage... many countries recognise that right, but the practical ability of women to exercise it may be limited by legal *precedent* or *custom*.

Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce *may be managed by a man*... there is no legal requirement that a woman be consulted when property owned by the parties during marriage ...is sold or otherwise disposed of. This limits the woman’s ability to control disposition of the property or the income derived from it.

In some countries, on division of marital property, *greater emphasis is placed on financial contributions to property acquired during marriage, and other contributions, such as raising children, caring of elderly relatives and discharging household duties are diminished*. An often contribution of a non-financial nature by the wife enable the husband to earn an income and increases the assets. *Financial and non-financial contributions should be accorded the same weight.*”<sup>18</sup> (Emphasis mine)

The research it was revealed that before or after the divorce the majority of the men dispose of the valuable marital property especially in cases where the parties are on separation before the divorce. Women lose out as the court do not consider the share of the woman in the disposed of property. Indeed there is a great emphasis on financial contribution. The research revealed that where there is consideration of non-financial contribution it is not accorded the same weight.

In the Protocol to the African Charter on Human and People’s Rights of Women in Africa (hereinafter referred as Protocol) provides the following in article 6(j):

“State parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that during her marriage, *a woman shall have a*

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<sup>17</sup> <http://www.unhchr.ch/tbs/doc.nsf/0/7030ccb2de3baae5c12563ee00648f1f?Opendocument> 2/11/2008.

<sup>18</sup> My emphasis



*right to acquire her own property and to administer and manage it freely.*”(Emphasis mine)

The assumption in article 6(j) of the Protocol is that the woman has the capacity to acquire her own property, administer and manage it. This is contrary to the lived reality, as it will be discussed in the findings.

In article 7(d) Protocol

“...In case of separation, divorce or annulment of marriage, women and men shall have the right to *an equitable sharing of the joint property deriving from the marriage.*”(Emphasis mine)

In article 7(d) of the Protocol equitable sharing suggests justice and fairness rather than fifty-fifty sharing. If the non-financial contributions of women are accorded the same weight as financial contribution then women deserve at least fifty-fifty sharing not equitable sharing.

In article 13 (h) Protocol it states that:

“State parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall take the necessary measure to *recognise the economic value of the work of the women in the home.*”(Emphasis mine)

Article 13(h) of the Protocol should have gone a step further and stated that in recognising the value of the work of the women in the home; the work will be accorded the same weight as the work outside the home.

Recognising the economic value of the work of women in the home depends on judicial discretion. Judicial discretion in taking into account the woman’s contribution through housework presents problems as much depends on the judges’ outlook regarding women’s unpaid work. Much depends on the judges’ sensitivity to unpaid work.

The Universal Declaration on Human Rights in article 17 provides that:

‘1. Everyone has the right to own property alone as well as in association with others.’

The Protocol in article 8 provides for access to justice and equal protection before the law. One of the measures required of the state is to reform existing discriminatory laws and practices in order to promote and protect rights of women.

The African [Banjul] Charter on Human and People’s Rights (hereinafter referred as the Charter) states in article 18(3) as follows:

“The states shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

The Malawi government has domesticated most of these provisions in the Constitution.

### 3.2 THE CONSTITUTION OF MALAWI

In Malawi, the position of the family as it relates to marriages is provided under section 22 of the constitution of Malawi. It provides as follows:

- “(1) the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
- (2) Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.
- (3) All men and women have the right to marry and found a family.
- (4) No person shall be forced to enter into marriage.
- (5) Subsections (3) and (4) shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation...’

Prior to this 1995 constitution in Malawi there were mainly three systems of marriages that were recognised in the different laws. The common law based system of monogamous marriage, the Asiatic family law system and the customary family law system. In section 22(5) the constitution is providing for two more systems of marriage, marriage by repute and marriage by permanent cohabitation.

The meaning of marriage by repute or cohabitation is not defined in the law. There is need for a law that specifically defines expressly as to what constitutes marriage by repute or cohabitation. For instance how far and wide that reputable ‘marriage’ should be known in order for it to be recognised as such?<sup>19</sup>For how long should couples live with each other for such an arrangement to be recognised as marriage by cohabitation? The absence of definitions of marriage by repute or permanent cohabitation and the lack of provisions in the law as to which courts will preside over these marriages makes the implementation of this law difficult.

The Constitution also recognises marriages by custom, which is the predominant form of marriage in Malawi.<sup>20</sup>Under the customary marriages, as customary law is always in a fluid state there is no fixed code of customary laws. Marriage customs vary among different tribes but there are certain principles that are common to all. No customary marriage is recognised as a legal union unless there are sureties, sponsors, advocates ‘ankhoswe’ for each party. The ankhoswe in most cases are the maternal uncles but in a

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<sup>19</sup> Beyond inequalities 2005 women in Malawi p 34

<sup>20</sup> see footnote number 6

situation where there is no maternal uncle the brother, sister cousin or any relative can play the role of the advocate. In patrilineal custom the marriage ankhoswe from both sides meet and give consent to the proposed marriage and agree on the dowry to be paid. Once dowry has been paid in full or in part the two in question are husband and wife. In matrilineal custom when the ankhoswe have given consent of the marriage the couples are married in law, the woman's ankhoswe will show the man where to erect a house as the man moves from his village to live in the woman's village. Upon finishing construction of the house they start to cohabit and he is also shown a piece of land for farming. The man has only user rights to this piece of land. In both customs the ankhoswe see to it that the marriage is a success between the spouses. There are also intended to mediate between the spouses in case of matrimonial disputes.

On property in S. 28 of the Malawi Constitution it states that every person shall be able to acquire property alone or in association with others. The Constitution makes the same assumption as in the Human Rights Instrument as in article 17 UDHR that the woman has the capacity to acquire property alone. The same appears in s. 24(1) a (ii) of the Malawi Constitution which states:

'S24 (1) a (ii) women have the right ... to acquire and maintain rights in property, independently or in association with others regardless of their marital status  
Section 24(1) b (i) women have a right ... to a fair disposition of property that is held jointly with a husband. The presumption is that the property is held jointly yet in reality most marital property is not held jointly'

Access to justice is provided for in sections 41 and in 41(3) of the Malawi Constitution. It states:

'Every person shall have a right to an *effective remedy* by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.' (Emphasis mine)

With no fifty fifty sharing of marital property on divorce an effective remedy is difficult to achieve.

On equality s. 20 of the Malawi Constitution has the Equality clause and it provides:

'(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.'

In the Human Rights Instruments and the Constitution the assumption is that the customs and practices are discriminatory and disadvantageous to women. As will be discussed in detail the women's proprietary rights in matrilineal custom are advantageous to women.

The Human Rights Instruments do not capture positive aspects of customary laws and state accurately the position of such positive customs. The African Charter in article 29 states:

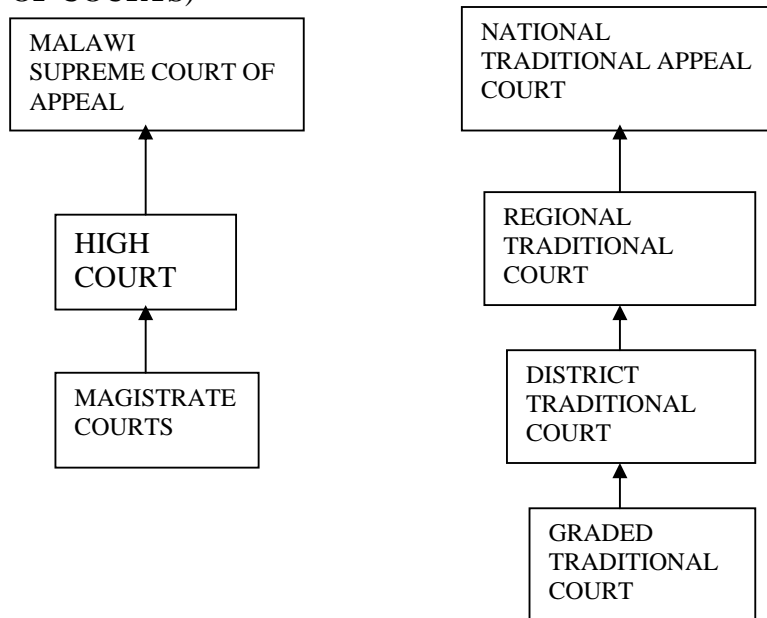
“The individual has a duty...to preserve and strengthen positive African cultural values in relations with other members of society in the spirit of tolerance, dialogue and consultation and, in general to contribute to the promotion of the moral well-being of society...”

Armstrong (2002) on this provision of the Charter commented as follows:

“Inclusion of the term ‘positive’ African values in the African Charter shows an awareness of the necessity to discard negative and retrogressive values...values of custom in Africa have a dynamism reflected in the spirit of tolerance, dialogue and consultation which bear out custom as a process whereby claims and disputes are negotiated. The difficulty is that the outcome of this process may largely depend on power relations which disadvantage women...”

Most of the provisions are catering for women in patrilineal customary practices or set ups. There is need for the Human Rights provisions to seriously consider positive African values that are in consonant or even advanced with the Human Rights principles.

### 3.3 HISTORY OF THE COURT IN MALAWI 1969-1994 (THE DUAL SYSTEM OF COURTS)



The history of the courts in Malawi is diagrammatically represented above. From 1969 to 1994 there were two parallel systems of courts in Malawi. Prior to the establishment of the National Traditional Appeal Court (N.T.A.C.) appeals used to lie from the Traditional Courts to the High Court. In presiding over the appeals from the Traditional Courts the

High Court was sitting with one Judge with powers to summon assessors. When the N.T.A.C. was established there were no appeals from the Traditional Courts to the High Court or the Supreme Court of Appeal. The doctrine of precedent that operated in one system did not operate in the other system. The decisions made in one system did not bind the other system. The N.T.A.C. composed of two Chiefs, a Traditional Court Chairman from the ordinary Traditional Court and a Lawyer. In practice the court was sitting with a Senior Resident Magistrate for the region and not a Lawyer. The court moved from region to region to hear appeals for the convenience of the parties and their witnesses. There are four judicial regions in Malawi. These are the North, Central, South and East regions.

The Regional Traditional Courts were presided over by two Chiefs, a trained court chairman and a qualified magistrate. The Traditional Courts Act in section 4 grants the Minister the power to appoint court Chairman. In the District Traditional Court and the Graded Traditional Courts the court Chairman would sit with at least one assessor selected by the Chairman from a panel of assessors appointed by the Minister.<sup>21</sup>

Later the president Dr Kamuzu Banda was not happy with how the High Court system was handling matters. According to him, the High Court was not delivering the Malawi sense of justice. Most of the judges were not Malawians. They were dwelling much on technicalities and one could be acquitted purely on technicalities when the Malawian sense of justice felt that he could not be acquitted. In 1976 section 2 of the Traditional Courts Act was amended and it gave additional powers to Traditional Courts to try treason and murder cases. Political cases went to the Traditional Courts.<sup>22</sup> There was no right of legal representation in the Traditional Courts presided over mostly by chiefs. The Traditional Courts had the exclusive jurisdiction on customary law.<sup>23</sup> The Traditional Court was to apply customary law prevailing in the area of jurisdiction of the court, so far as it was not repugnant to justice or morality or inconsistent with the Constitution or any written law in force in Malawi.<sup>24</sup>

Upon Malawi attaining multi-party politics in 1995 the Traditional Courts were integrated into Magistrates Courts specifically of Third and Fourth grade.<sup>25</sup> The Traditional Courts Act was not repealed it is still on the statute book. This was done I believe because of the

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<sup>21</sup> This is the Minister of Justice. In most cases the Court Chairman was a Chief.

<sup>22</sup> Orton and Vera Chirwa case was heard in the Traditional Courts

<sup>23</sup> section 12 (d), Traditional Courts Act, Cap 3:03 Laws of Malawi

<sup>24</sup> *ibid*

<sup>25</sup> Statute Law (miscellaneous Amendments) Act No. 19 of 1995

possibility of these courts being reintroduced as provided in the 1995 Constitution.<sup>26</sup> Parliament may make provision for Traditional or Local Courts presided over by lay persons or chiefs. The jurisdiction of such courts will be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament. These courts will be subordinate to the High Court. The Traditional Courts were integrated into the Magistrates' Courts without stating how the Magistrates' Courts will exercise their jurisdiction as Traditional Courts had jurisdiction limited to the area in which they were situated. This omission of not expressly providing for the jurisdiction of the integrated courts is causing challenges to magistrates to date in dealing with divorce in customary marriages. The Magistrates court exercise civil jurisdiction in accordance with the provisions of the law as contained in the Courts Act.<sup>27</sup> The magistrates have territorial or they exercise jurisdiction through out Malawi.<sup>28</sup> While the Traditional Courts had exclusive jurisdiction in customary law and their jurisdiction was limited to the area they were situated, as they had to apply customary law prevailing in the area of the jurisdiction of the court.<sup>29</sup> Thus Cram J. in *Kandonje –v- Mtengerenji*<sup>30</sup> stated that:

“The High Court is the only court in Malawi that is competent to dissolve a marriage entered into under the marriage Act. The High Court does not have jurisdiction to dissolve a customary marriage although section 62 of the 1966 constitution of Malawi provided the High court with unlimited original jurisdiction in all civil and criminal matters in Malawi. The Magistrates courts do not have jurisdiction to dissolve customary marriages by virtue of section 39 of the courts Act.”

Unyolo, J *Beartice Mungomo –v- Mungomo*,<sup>31</sup> reiterated this in 1996 after the integration in 1995. The parties in this case were lawfully married in July 1987 at Zomba. The marriage was celebrated under customary law and was duly witnessed by the parties' ankhoswe. Later on the 8<sup>TH</sup> of September 1988, the couple had the marriage registered at the district council office. That process did not in any way alter the status of the marriage.

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<sup>26</sup> Section 110 (3) of the Constitution of Malawi.

<sup>27</sup> Section 39 as amended states that the civil jurisdiction of magistrates courts shall be to deal with, try and determine any civil matter whereof the amount in dispute or the value of the subject matter does not exceed a) Resident Magistrate K50000, b) First Grade Magistrate K40000, Second Grade K30000, c) Third Grade Magistrate K20000, Fourth Grade Magistrate K10000.

<sup>28</sup> Section 39 of the Courts Act Cap 3:02 Laws of Malawi

<sup>29</sup> Section 3 (2) of the Traditional Court Act every Traditional court exercised the jurisdiction conferred on it by or under the Act within such area and to such extent as may be specified in the warrant by the minister.

<sup>30</sup> (1964-1966) ALR Mal 558

<sup>31</sup> Matrimonial Cause No. 6 of 1996, High Court, Principal Registry,

It remained and continued to be a customary marriage. The petitioner brought the matter before the high court for divorce on grounds of adultery and cruelty.

The judge stated that:

“The case raises several issues of some novelty and characteristic difficulty. There is, for example the question whether the High Court is competent to dissolve a marriage contracted under customary marriage? That is to say, a customary marriage, and if the answer to the question be in the affirmative, they is a rider question as to what law the court would apply in deciding the case. It is common knowledge that the cases of this nature, involving petitions for the dissolution of customary marriages were in the past brought before the former Traditional Courts which were set up under the Traditional Courts Act, the High Court had and still has, all the jurisdiction and powers, civil or criminal, which the subordinate court has, the said Traditional Courts fell outside the ambit of subordinate courts, that is to say, Magistrates Courts (see *Kandonje –v- Mtengerenji*)<sup>32</sup> The National Traditional Court of Appeal from the Traditional Court was viewed as the final court of appeal within the Traditional Court system. The said National Traditional Court of Appeal is now no more and the lower Traditional Courts also no longer exist, having been integrated into the magistrates’ Courts in or about 1995. Observably, these Magistrates Courts at all material times had no jurisdiction or powers to hear divorce petitions involving customary marriages. It appears that in strict sense this is still the position now.”

The judge went on to say:

“Be that as it may, it is common knowledge further that the said Traditional courts, turned Magistrates Courts have continued to exercise jurisdiction over customary marriages even now, long after the integration process described above, *I will deliberately refrain from delving into the question whether or not those courts are properly exercising jurisdiction.* <sup>33</sup>The matter was not argued before me, but it could be argued that the said courts still have jurisdiction and by virtue of the saving clauses under the constitution.” (Emphasis mine)

In my opinion this was a chance that was lost for the Judge to set the precedent or the record correct. Although the matter was not argued before him, he correctly observed that the magistrates’ courts were not properly exercising jurisdiction. In short the Traditional Courts turned Magistrate courts have no jurisdiction or powers under the law to hear divorce petitions involving customary marriages. The saving clauses in the constitution of Malawi does not give the magistrates courts the jurisdiction to hear divorce petitions involving customary marriages.<sup>34</sup>

The judge went on to say that:

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<sup>32</sup> see footnote number 20

<sup>33</sup> My emphasis

<sup>34</sup> see section 110 of the 1995 Constitution of Malawi

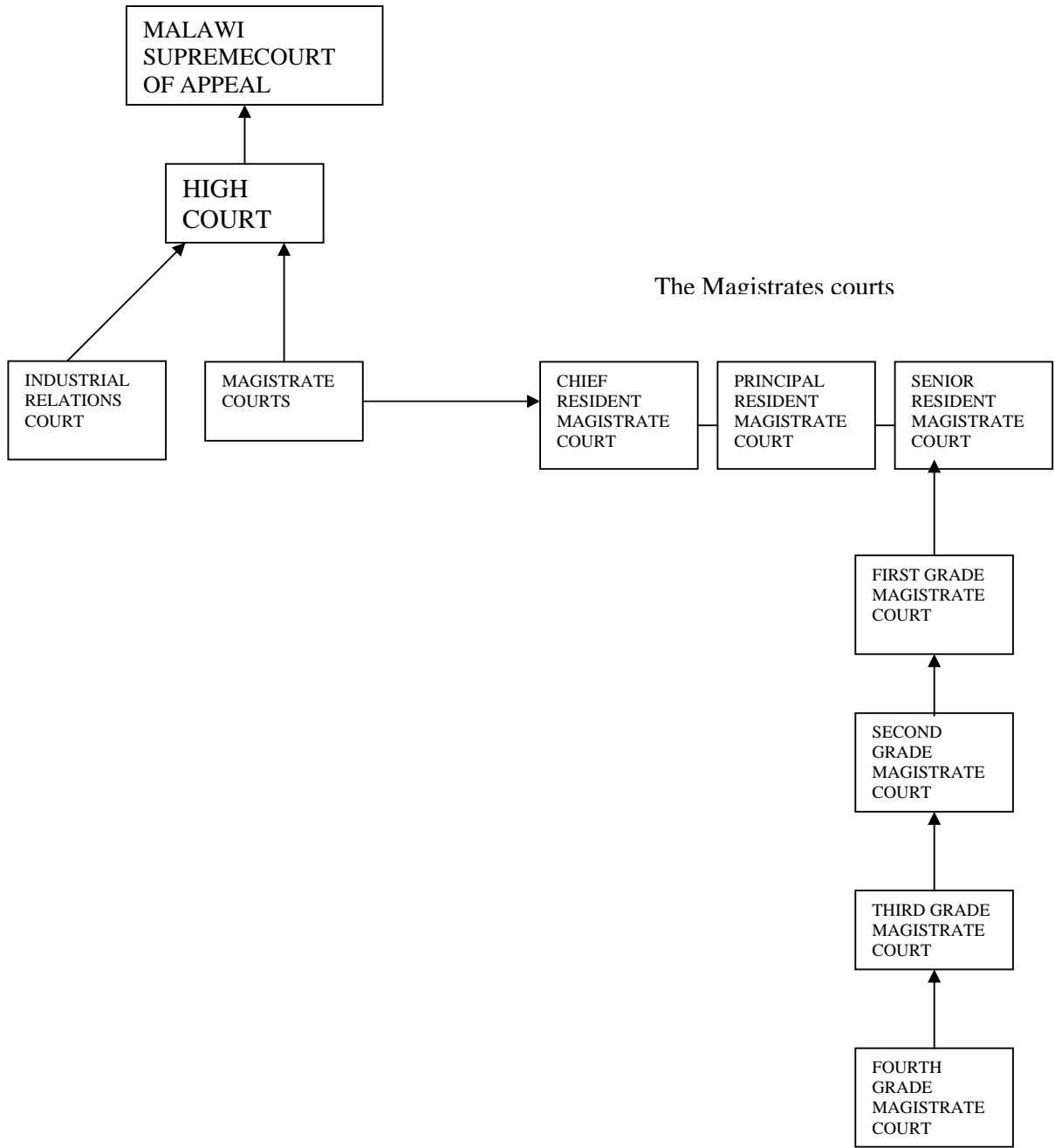
“Under s 108 of the new constitution of Malawi, which provides that the high court “shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.” The High Court is competent to hear divorce petitions even in cases involving a customary marriage as in the present case. However although this is the position, the High Court has to look at the matter from a practical point of view. It would be both inappropriate and wrong for the High Court to proceed and assume jurisdiction over proceedings which fall within the jurisdiction of subordinate court simply because the high court has unlimited original jurisdiction. Such an approach would create confusion, as parties would be left to their whims to bring proceedings willy-nilly in the High Court. In short, the High Court should recognise the subordinate courts and decline jurisdiction in matters over which the subordinate courts have jurisdiction, unless exceptional circumstances exist which necessitates or require the intervention of the High Court.”

The petition was dismissed for these reasons. The petitioner was told to go with the case to the Magistrate’s Court. In my view the High Court was the right court to hear the matter because it has unlimited original jurisdiction. From my analysis of the law that grant the magistrates’ court civil jurisdiction S39 of the Courts Act and as the Judge in this case rightly stated the Traditional Courts turned into magistrates courts have no jurisdiction to preside over divorce petitions involving customary marriages.

I submit that the judge should have determined the matter and condemned the petitioner in costs rather than sending her to the magistrates’ court that does not have jurisdiction in such matters.



**THE COURT SYSTEM FROM 1995 TO DATE**



The recent system of the courts in Malawi is as depicted above from 1995 to date. There is now only one system of courts with the Malawi Supreme Court of Appeal at the top with the highest appellate jurisdiction.<sup>35</sup> The High Court which has unlimited original

<sup>35</sup> Section 104 Constitution of Malawi

jurisdiction,<sup>36</sup> the Magistrates and the Industrial Relations courts which are subordinate courts to the High Court.<sup>37</sup> According to Section 39(1) of the Courts Act<sup>38</sup> as amended:

“Subject to this or any other written law, in exercise of their civil jurisdiction the courts of magistrates shall have jurisdiction to deal with, try and determine any civil matter whereof the amount in dispute or the value of the subject matter does not exceed-

- a) Resident Magistrate K50000,<sup>39</sup>
- b) First Grade Magistrate K40000,
- c) Second Grade K30000,
- d) Third Grade Magistrate K20000,
- e) Fourth Grade Magistrate K10000.”

The Resident Magistrate’s court comprises of the Chief Resident Magistrate, courts of the Principal Resident Magistrate and Senior Resident Magistrate. These courts are presided over by professional magistrates with law degrees. The rest of the graded magistrate courts are presided over by lay magistrates.

I found that most of the Magistrates are extending their civil jurisdiction to preside over the customary marriage divorce and property claims in which the value of the property exceeds their civil jurisdiction. The maximum civil jurisdiction of the magistrate court is an approximate of \$360 United States dollars. Obviously in divorce proceedings in customary marriages the property exceeds this amount. And the magistrates are ideally supposed to send the matter to the High Court on the ground that they do not have jurisdiction. Bearing in mind that there are only four Chief Resident magistrates and few professional magistrates. The majority of the magistrates are lay magistrates. This means most matters are dealt with magistrates with a lower civil jurisdiction below K50000 maximum jurisdiction, as this is for Resident magistrates only. There are only four High courts in Malawi in the major towns. If the property matters were to be sent to the High Court for lack of jurisdiction this will lead to delays. The High Court is not accessible to the majority of the population. It has a backlog of cases. In terms of physical or geographical accessibility and costs. The costs in terms of court fees and legal representation, much as there is no rule that one needs to be represented by a lawyer in the High Court the practice is that matters in the High Court are conducted by lawyers.

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<sup>36</sup> Section 108 *ibid*

<sup>37</sup> Section 110 *ibid*

<sup>38</sup> Cap 3:02 Laws of Malawi

<sup>39</sup> as of today (2 March 2008) \$1 US Dollar is equivalent to MK139.

### **3.4 THE SIGNIFICANCE OF MATRILINEAL CUSTOMARY LAW OF MARRIAGE (ANKHOSWE, CHILDREN AND A HOUSE AS AT CUSTOM).**

There are two customary system of marriage in Malawi, the patrilineal and matrilineal customs. As explained earlier the most significance feature of the matrilineal custom is that for the marriage to be valid the parties' marriage advocates called Ankhoswe in the vernacular must duly witness it. Children of the marriage follow the maternal side or they are affiliated / attached to the clan of the female spouse. The man leaves his village and goes and stays in the village of the woman. This is known as 'chikamwini' in the vernacular. This necessitates the man building a house at the village of the woman. Under strict application of custom the spouses could not start cohabiting until the house was built. If the man did not build the house divorce does not discharge the man of this obligation. If the parties are able they may conduct a chinkhoswe ceremony and the man would bring symbolic gifts with him these were a hoe, axe, panga knife basic kitchen utensils a metal cup, pail, plates and pots, a mat and a 'chitenje'<sup>40</sup>, head square for the wife. Access to the children of a customary law marriage is never restricted because at customary law the termination of the marriage does not sever the relationship that was created by the defunct marriage. Maintenance of the children did not arise on dissolution of marriage because at matrilineal custom it is the duty of an uncle (brother of the woman) to take care of his nieces and nephews. While in the patrilineal custom the most significant feature is the payment of the bride price. The woman stays in the village of the man no need for the man to build a house for the woman and children follow the paternal side.

### **3.5 WOMEN'S CUSTOMARY PROPERTY RIGHTS IN THE MATRILINEAL FAMILY SYSTEM.**

In the matrilineal customary marriage law women had customary property rights. They had rights in land as the husband had user rights to the land where the family was gardening. The land belongs to the clan of the woman. <sup>41</sup>In cases of divorce the male spouse leaves the matrimonial home upon which the house belongs to the woman as of right. The wife and the children live in it if, she has any children. If there is property it is shared equitably between the spouses, if it were jointly acquired, on divorce. If some items were individually acquired then that individual may be entitled to that item exclusively. At custom the items that the

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<sup>40</sup> A 2m cloth that a woman wears or wraps herself at custom it symbolises self respect every woman in the village wears one. At custom each item that is given on the Chinkhoswe ceremony has a meaning.

<sup>41</sup> If the land is to be registered it cannot be registered in the name of the husband.

couples would have in the past were the kitchen utensils some may be brought by the man on the chinkhoswe ceremony, a radio<sup>42</sup> and a bicycle and in rare cases livestock. On divorce the man could take his personal clothes, the radio, and a bicycle and if they have farm produce they will share too bearing in mind the children who will be in the custody of the woman. The children will remain with their mother as per custom. The husband was not allowed to take with him the kitchen utensils, iron sheets, door and window frames which have been fixed to the house upon leaving the village of the woman.<sup>43</sup>This is a rule of customary law in the matrilineal system and it stems from the fact that matrimonial residence for the married couple in this system is uxori-local and therefore the wife must have a home where she, her husband and the children of the marriage must live. It is immaterial that the husband is the one who built the house in question because he is in fact under a legal obligation to build a house for his wife. Divorce does not discharge the man of this obligation as illustrated in the following cases.

In the case of *Matimati v Chimwala*<sup>44</sup> the husband petitioned for divorce before Milonde Local court. The petition was granted, and the Local Court ordered the husband to pay £20 to build the house. The husband appealed to the Mulanje Local Appeal Court, which quashed the order of the lower court. The wife appealed against the order of the appeal court, the husband's explanation for not providing her with a house was that he was sick. The petition for divorce was based on the ground that the husband found the wife in possession of a letter addressed to her by another man. Southworth J. held that; that under customary law applicable in this case the husband has an obligation to provide his wife with a house when he married her. The granting of the divorce cannot relieve him of his obligation to provide his wife and child with a house in which to live. If he had carried out his duty to provide her with a house at the due time the house would not have been pulled down when three years later he divorced her. The husband was ordered to pay £15 instead of £20 for the construction of the house.

At matrilineal custom the women's property rights were secure by the customs but also by the fact that socially the woman was in her village with her people, relations and her family. The man could not do much; in extreme circumstances if he was at fault the whole village could team against him and chase him away in broad daylight.

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<sup>42</sup> This is a small radio the old brand radios not the radios that people have today Hi-Fis and Home theatres.

<sup>43</sup> *Fabiano Blake V Malombe Agness*, NTAC, Civil Appeal No. 43 of 1978.

<sup>44</sup> (1964-66) ALR Mal. 34

### **3.6 THE MATRILINEAL CUSTOMARY PROPERTY REGIME (PAST)**

Ideally as explained above the matrilineal customary law worked in favour of women. The system worked, as the communities were not mobile. Most of the communities relied on subsistence farming. There was also strong adherence to one's customs and traditions. Most of the population had not undergone the formal education. Divorce was at very minimal levels. With time and with the coming of colonialisation and urbanisation there were significant changes to this custom. The forms of property started to change as people started to be employed in the urban areas. They were able to acquire forms of property that were not within the ideally customary forms of property. People started to be mobile moving from the rural areas to the urban areas. In the urban areas they would be cohabiting in a rented house or a company house, or buying property using a loan facility. Later couples were able to buy land or a house(s) in the urban areas. The prevalence of ideal customary forms of property was slowly being eroded. This called the courts to also adjust their approach in line with the changes to deal with property on divorce in such changed circumstances.

### **3.7 THE MATRILINEAL CUSTOMARY PROPERTY REGIME (PRESENT); TIMES HAVE CHANGED THE LIVING MATRILINEAL CUSTOMARY MARRIAGE LAW**

The Traditional courts insisted on the formalities for a valid customary marriage. If there are no ankhoswe it does not matter the length the parties have cohabited there was no marriage.<sup>45</sup> In view of this, the new Constitution (1995) marriages without formalities are provided for as marriage by repute or permanent cohabitation.

When the forms of property and rights in property started to change the National Traditional Appeal Court adjusted to the realities on the ground. The customary law as applied in these cases appears to follow the English law beneficial interest approach. Both Judges in the cases were white judges, in my opinion made just decisions on the property claims in the following cases:<sup>46</sup>

In *Leo Maruwasa –v- Kaiyo*,<sup>47</sup> the parties were married in 1965 and lived together up to 1973 when their relationship was dissolved. The parties were staying on a plot at Chilomoni

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<sup>45</sup> *Brown Eliasi v Beatrice Magaisa* High Court, Civil Appeal (T.C) No. 7 of 1970  
*Namasina John v Kambeta*, Civil Appeal Case No. 29 of 1971 NTAC.

<sup>46</sup> These cases were heard by the high court on appeal before the National Traditional Appeal Court was established. The High Court in such appeals from the Traditional court composed of a sitting with one Judge with power to summon assessors.

<sup>47</sup> Civil Appeal Case No. 23 of 1973. Although the court found that there was no marriage, as the marriage was no duly witnessed by ankhoswe but in my view it made a fair decision on the property.

belonging to the husband. Since 1965 the husband was receiving the earnings of the wife, who was a teacher. In 1967 the parties decided to build a house on the plot, using money for the husband and wife. They also used their money to buy cattle and a gun. They used their common income to develop the farm. It was held that; the wife spent a large fortune on the house in issue. It will be impossible for the husband to return to the wife all the money he took from her. The house in issue was awarded to the wife. The husband was awarded a gun, the farm and some cattle. All the property in the house in issue was the property of the wife, the husband was to collect and retain his clothes and cartridges for his gun. The plot on which the house stood was to belong to the wife.

Another fair decision on property is in the case of *Liundi-V- Bandawe*,<sup>48</sup> the wife divorced the husband. During the marriage the wife assisted considerably in the husbands' business ventures, helping him in particular to build and to buy a maize mill. In recognition of this the husband bought and licensed another maize mill in his wife's name. The lower court granted divorce and awarded the house and the second maize mill to the wife. On appeal, the Appeal Court set aside the judgement awarding the house to the wife but upheld the decision regarding the maize mill. The husband further argued that he did not intend his wife to have the maize mill until after his death.

Southworth, C.J held that; the court was satisfied that the wife did indeed materially contribute to the husband's success in the business and that the husband, in recognition of this bought the maize mill for her. The maize mill was awarded to the wife. My opinion is that the court was persuaded to award the maize mill to the wife because the husband licensed the maize mill in her name.<sup>49</sup>

In *Malinki's* case the court did not award to the wife a car that the husband bought. During the subsistence of the marriage the car was used by the wife. The court stated that the car belonged to the husband as the registration of the car was in the husbands' name. If the husband wanted the car to belong to the wife the husband would have registered the car in the name of the wife.

The courts have extensive powers to reallocate marital property as between spouses. Such extensive powers of the court need to reflect the lived realities on the ground otherwise it may

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<sup>48</sup> (1964-66) ALR, Mal, 137.

<sup>49</sup> In *MALINKI's* case the court did not give the wife the car. The car was bought by the husband and was being used by the wife. The court stated that the registration of the car was in the husband's name. If the husband wanted to give her the car he would have registered the car in her name.

result in injustices to women in cases where the property is not in their names which is the case in most cases.

On property the Constitution in of Malawi in Section 24 states that a woman is entitled to a fair share of only that property held jointly with her husband. The constitution assumes joint ownership of property, which is contrary to the lived realities on the ground. The presumption in courts is that an inference of joint ownership of property is not to be made from a mere fact of marriage. Men tend to hold most of the valuable property alone.<sup>50</sup> As explained earlier women were better off at matrilineal custom than they are now with this constitutional provision on distribution of only the property held jointly. The courts insist on strict proof of ownership for a spouse to be allocated a piece of property. Any spouse wishing to claim a share in any property that is not in her or his name must prove that he or she contributed.<sup>51</sup> The courts have held that the contributions must be financial.<sup>52</sup>

Contributions to the maintenance of property items, housekeeping, and child-care by spouses are not accepted as sufficient for any proprietary rights,<sup>53</sup> which disadvantages women, as they are the ones most of whose contribution in the household is not monetary.

On custody of the children, at matrilineal custom they follow the maternal side. With the Welfare principle from the finding of this study the courts may award custody of children who are above seven years old to the father. Custody of children who are below seven is usually awarded to the women. This led me to the conclusion that the impact of the welfare principle which entails that the interest of the child is of paramount consideration. The principle is employed only as far as children above seven are concerned. In the 81 files that were analysed in 57 files custody of children was granted to women and only in two files to men. The stereotype that women are caregivers is emphasised by awarding small children to women. In my opinion very young children are very much difficult to take care of than older children. This constructs women's role as being to look after children. This places uneven burden on the women. (Banda: 2005).

In terms of resources to raise them, they are more demanding, labour intensive than the children who are above seven apart from school fees and other daily needs. Most of the women who were financially dependent on the men in marriage are finding it hard to raise these below seven children bearing in mind that even where the court orders maintenance for

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<sup>50</sup> Malinki-v- Malinki, 9 MLR 441.

<sup>51</sup> Nyangulu -v- Nyagulu 10 Malawi Law Reports 435

<sup>52</sup> Malinki -v- Malinki, 9 MLR 441

<sup>53</sup> Nyangulu -v- Nyangulu 10 MLR 435

such children most men do not pay the maintenance and there are enforcement challenges.<sup>54</sup> At matrilineal custom maintenance was the duty of the maternal uncle. So on divorce at custom the issue did not arise. Due to change in the family structure as people are opting for the nuclear family and due to economic hardships the issue of maintenance is now on the spouses.<sup>55</sup>

As of now most men are not building the house as at custom due to the fact that people are in the urban areas where they live in rented houses or company houses. They buy already built houses or they buy land in urban areas and build a house. On divorce in such situations women are losing out. They may go back to their village from the urban area with the young children below seven and they have no house to stay with the children. This put pressure on the family of the woman to provide the woman with the children accommodation.

### **3.8 DIVORCE OF MATRILINEAL CUSTOMARY MARRIAGES IN THE MAGISTRATES COURT**

In the Traditional Courts customary divorce was dealt with including all the ancillary orders. The Traditional courts had jurisdiction to do this.<sup>56</sup> In the magistrates court it is different. The magistrate courts are limited by their civil jurisdiction. In practice, the lived realities on the ground are that it all depends on the court the magistrate the matter is before. Some magistrates especially the professionals wait to be moved. They do not move on their own motion to deal with the ancillary matters to the divorce. Others will say:

“The value of the property in the matter exceeds my civil jurisdiction I am sending the file to the High Court.”

Most of the lay magistrates are extending the jurisdiction knowingly to assist the parties. There is no certainty in the way the matters are being handled. The Magistrates Handbook states that:

“The magistrate must be able to justify all his actions by pointing to some section of the law under which he has acted, and by showing that he has kept strictly within the powers, which that section confers upon him. He has no inherent authority to make such orders as he may think fit. He is as much under the law as the man in the dock is, and has no power over the latter beyond what the law has given him”<sup>57</sup>

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<sup>54</sup> (WLSA Zimbabwe, 1992; WLSA Botswana, 1992; Armstrong 1992).

<sup>55</sup> S. 23(3) Malawi Constitution.

<sup>56</sup> Section 17(1) d and Section 36 of the Traditional Courts Act, Cap 3:03 Laws of Malawi.

<sup>57</sup> Malawi Judiciary, Handbook for Magistrates, Revised Edition, September 2005, at page 9.



CHIMWEMWE KAMOWA

There is an urgent need to reform the law on civil jurisdiction of the magistrates to cater for this confusion that the integration of Traditional courts into Magistrates courts has created.

## CHAPTER FOUR

### 4.0 LAW OR LOTTERY? THE MAGISTRATES VOICES

The magistrates were very eager to share with me their experiences in customary divorces. Below is the detailed discussion of the findings.

#### 4.1 PROBLEMS THE DIVORCE PETITIONERS FACE IN COURT.

The majority of the divorce petitioners are women. As they come to court most of them have been to other forums where reconciliation has failed. Out of the 81 cases that were examined 51 had been to *ankhoswe*. Eight to CILIC, four to church, three to the Victim Support Unit at the police station and 18 had been to the chief. Out of these four of the petitioners had been to more than four other places before coming to court.

In court it is evident that the women still want to reconcile with their husbands. One of the magistrates had this to say:

‘‘It is difficult for a court to offer reconciliation to the parties it has no mandate. This is the duty of *ankhoswe* or the church if the marriage was celebrated in church. When the woman is looking for reconciliation because of the children it wastes the courts time. As a court you have to explain the court procedure and refer them to their advocates or the church’’

From the findings it shows that women go to other forums with their matrimonial problem before going to court. This will be discussed in detail later. Under the customary marriages the *ankhoswe* have an important part to play apart from being involved in the contracting of the marriage, the marriage *ankhoswe* are also intended to mediate the spouses in cases of matrimonial disputes. Under custom reconciliation of the spouses is valued a great deal. The *ankhoswe* will try their utmost best to reconcile the parties. This is emphasised by the adage that ‘*banja ndi kupilila*’ meaning that one has to persevere for a marriage to work.

#### 4.2 JURISDICTION PROBLEMS

As discussed earlier there is a jurisdiction challenge to the magistrates. There is no law that is granting the magistrates jurisdiction to preside over divorce in the customary marriages. The assumption is that during the integration of the Traditional courts to magistrates’ courts the jurisdiction of the traditional courts was also transferred to the magistrates’ court. According to the findings all the magistrates said they have jurisdiction to preside over the customary marriages. The difference between the lay and the professional magistrates was on the property claims.

They all know their civil jurisdiction is provided by s 39 of the Courts Act. The professionals stated that if the value of the property in a divorce matter exceeds their civil jurisdiction i.e. K50000 they will not preside over that matter. They send the file to the High Court for property distribution. They wait to be moved on the ancillary matters to the divorce. The lay magistrates preside over the property distribution even where the property exceeds their civil jurisdiction as stipulated in the Courts Act. They do not wait to be moved on the ancillary matters to the divorce.

#### **4.3 (NON) EXTENSION OF JURISDICTION TO PRESIDE OVER CUSTOMARY MARRIAGES PROPERTY CLAIMS**

All the Lay magistrates extend their jurisdiction to preside over the property claims on divorce in the customary marriages. Out of the 16 lay magistrates I interviewed, all stated that they do not take into account their civil jurisdiction when dealing with property on divorce. One of the male magistrates had this to say:

“I do not take into account my civil jurisdiction when making a determination on property after divorce in customary matters. I do this to help the parties. If I were to take into account my civil jurisdiction then I cannot deal with property on all the divorces I have granted. I will end up sending all my files to the High Court. At the High Court the matter will take a long time to be determined and considering that the parties have divorced. The one in custody of the property can deal with the property in a way that is disadvantageous to the other party. For instance selling some of the valuable items. Meanwhile the matter will be pending in the High Court”

Of the 81 court cases that were analysed, in ten cases the magistrates exceeded their jurisdiction to preside over the property claim. One file was referred to the High Court for property distribution. 14 files had a list of the property but the record did not indicate whether the court made any determination of the property. In 54 cases it was difficult for me to say if the magistrate exceeded his or her jurisdiction due to the fact that to ascertain as to whether the value of the property was within the magistrates jurisdiction or not was difficult. In the cases where I am saying that the magistrates exceeded their jurisdiction it is due to the fact that the property comprised of items like cars, land (plots), houses, television screens, fridges and a cooker. This is the dilemma that one has sitting on the bench to make a quick mental note of whether the items are within or beyond your jurisdiction without knowing the value of the property.

All the ten cases where the magistrates exceeded their jurisdiction in the property distribution were presided over by lay magistrates. There was only one file presided over by a

professional magistrate.<sup>58</sup> He just dealt with divorce. The file was silent on children and a house at custom. I followed up the magistrate who presided over this file. He stated that:

“In a divorce matter I deal with only the issues that are prayed for. I wait to be moved I do not move on my motion. If I do that I will be seen to have an interest in the matters”

For most women who do not know the prayers to make before the court in such courts they lose out on property. This led me to conclude that the women who go to lay magistrates courts are in a better position than those who go before professional magistrates as far as ancillary orders are concerned.

#### **4.4 WOMEN’S CONTRIBUTION TO THE ACQUISITION OF MATRIMONIAL PROPERTY.**

Women’s work is not valued. The women’s work in this study is of two types. The productive work consists of labour that a woman performs within the home and outside the home, and the reproductive work-the production of new human beings. Feminists have argued that the production of new human beings is in itself a form of production. Stitcher and Parpart (1998) state:

“In this productive process, the physical body of the woman above all, but to a certain extent that of the man supported with food and shelter, constitutes the basic means of production. For the women the actual labour process consists of sexual intercourse, birthing and lactation. For men it consists of sexual intercourse ...the body of the birth mother is the central instrument of production; the woman must be primary labourer at least until the child is born. At this level of development of the forces of reproduction, there is a given imbalance in the male and female tasks.”

There is a dialectical link between women’s work and the cultural context within which it exists. Cultural ideology determines not only the perceptions of others regarding women’s work and contribution but also that of the women themselves. (Agarwal: 1994)

The unpaid domestic labour that women perform in the home is not considered as contribution on acquisition of assets. In effect the work becomes invisible. The invisibility perpetuates underestimation and undervaluation. (Beneria, 1988)<sup>59</sup> All the 21 magistrates that were interviewed stated that the majority of the cases they dealt with the women were

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<sup>58</sup> This could be because there are few Professional Magistrates in the system. The other explanation could be that most of them are in senior position as compared to the lay magistrates so they tend to preside in criminal matters rather than civil matters. They do the allocation of cases. Civil matters tend to take a lot of time so they prefer criminal matters and allocate civil matters to the lay magistrates.

<sup>59</sup> Beneria (ed) (1982) Women and development: The sexual division of labour in rural societies, ILO, Geneva

housewives. From the 81 case records that were studied there was no record as to the type of contributions that the women made towards the acquisition of the matrimonial property. In one file it was just stated that both the parties were primary school teachers. Out of the 81 cases 63 were women as petitioners in the divorce matters.

The proposed marriage, Divorce and Family Relations Bill (2006) has defined ‘non-monetary contribution’ as:

“...the contribution made by a spouse for the maintenance, welfare or advancement of the family other than by way of money and includes-

- (a) domestic work and management of the home;
- (b) Child-care
- (c) Companionship
- (d) the endurance of the marriage; or
- (e) any other manner or form of contribution as the court may consider fit.”

This definition captures most of the non-monetary contributions that the women contribute on the acquisition of property.

In the Kenyan case law in *Nderitu -v- Nderitu*<sup>60</sup> Kwach Justice of Appeal considered bearing children as a form of contribution. And in *Kivuitu -v- Kivuitu*<sup>61</sup> Omolo Acting Justice of Appeal stated that the wife’s non-monetary contribution should be taken into account, he stated:

“A wife’s contribution and more particularly a Kenyan African wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge hearing an application... to take into account this form of contribution in determining the wife’s interest in the assets under consideration”

The same can be said of a Malawian African wife she too takes the form of a back up service on the domestic front rather than the direct financial contribution. The Malawi Constitution makes things difficult for such a woman by stating that on the dissolution of marriage women have a right to a fair disposition of property that is held jointly with a husband. There is no definition of what it means for property to be ‘held jointly’ it is left to the discretion of the court to interpret what it means to hold jointly. The assumption is co-ownership or joint ownership of matrimonial property. The lived reality is that most of the matrimonial property is held by the man. On divorce women’s work is not given the valued that it deserves. The matrimonial property for distribution is only that property that is held jointly. Holding jointly

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<sup>60</sup> Civil Appeal No. 203 Of 1997 (unreported)

<sup>61</sup>[1991] 2 KAR 241 unfortunately these two progressive judgements were overruled in *ECHARIA-V-ECHARIA*, Civil Appeal No. 75 of 2001.

is based on evidence (strict proof) that poses challenges to women.<sup>62</sup>At the end of the relationship the woman fails to account for her contribution in real terms and later the reality dawns on her that all along her labour has been exploited during the relationship. Women do not view the work they do in the home as ‘work’ due to socialisation.

#### **4.5 COURT’S DISCRETION – ACTUAL DISTRIBUTION AND NON-DISTRIBUTION OF PROPERTY.**

The magistrate’s court has a wide discretion on distribution of matrimonial property. The wide discretion is coming in because of the gap that is in the law. As explained earlier they assumed jurisdiction in customary marriages on integration of traditional courts into magistrate’s courts, while the Courts Act defines their civil jurisdiction in terms of fixed amounts. From the data collected from all the 21 magistrates who were interviewed are aware of their civil jurisdiction and the 16 extending their civil jurisdiction do so knowingly in the guise of assisting the parties. There are some of the professional who do not distribute property unless moved. There are professional magistrates who do not extend their jurisdiction if the value of the property is above their jurisdiction send the files to the High Court. As stated earlier only one file was referred to the high court for property distribution by lay magistrate of the first grade. From this it can be concluded that there is lottery at the court. There is no certainty as to what the court will do in property claims. The professional magistrates are waiting to be moved by a party who does not know that he or she has to move the court. For the magistrates who are extending their jurisdiction to distribute the property their actions are *ultra vires*. For files that are sent to the High Court the matters are not determined. In the High Court the research revealed that there was not a single file to be found at the Blantyre High Court sent from the lower courts for matrimonial property distribution. The clerk at the High Court explained that this could be due to the fact that the parties after divorce due not pursue the matter further in the High Court. For the women in such cases they are loosing out on property after divorce. It is difficult for those women who go to their rural home after divorce to pursue the matter further in the high court due to costs one need to incur to proceed with the matter in the High Court.

On the distributions that are made, the research revealed that some magistrates take into account non-monetary contribution mainly by women. However there is no consistency as to

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<sup>62</sup> Malinki –v- Malinki, 9 MLR 441 and Nyangulu-v- Nyangulu 10 MLR 435

the value attached to such contributions. All the magistrates stated that it all depends on the facts of each case. The majority of the magistrates stated that with non-monetary contributions they usually award a ¼ proportion of the matrimonial property. There was no fifty-fifty share of the property. They also stated that they give ¾ of the kitchen utensils to the woman. Kitchen utensils did not include a cooker or refrigerator. According to the magistrates' kitchen utensils are pots and pans, plates, cups, pails, basins and cutlery. The male magistrates said they give a fridge to the man and a cooker to the woman so that if the man drinks beer he should have a cold beer. While the female magistrates stated that they would rather give a fridge to the woman so that it can assist her to run a business of selling soft drinks and freezes. Of the 81 cases that were examined in three files the property included refrigerators. On distribution two of these fridges were given to a man. Only one went to the woman and it was a female magistrate that awarded this fridge to the woman. The gender roles determine the items that one will get on divorce. Your sex also determines what items you will get.

The research also revealed that there are contentious items. Contentious items are the items that the parties fight over them. Items like cars, houses, plot and items bought on loan or mortgaged. The magistrates stated that these items pose a challenge to them on how to make a fair distribution on them. Most of them stated that for houses, cars and plots they order a sell of the item so that parties can share the proceeds. On an item that is bought using a loan and the party has not finished paying the loan this item is not subject to distribution, the same applies on items that are mortgaged usually it is a house. In the Traditional courts in Mangisa-v- Mangisa<sup>63</sup> it was stated:

“That in the event of a realty, where the property is leasehold, the wife is entitled to a fair share of the leasehold property. Such a fair share should be monetary compensation for her leaving the leasehold property left to the husband. The only exception the courts said; is where the realty is subject to mortgage. If the mortgage is subsisting on divorce the mortgaged property belong to the spouse who is paying the mortgage because he or she carries all the liabilities under the mortgage. If the mortgage has been discharged, however, then the spouses must each have a fair share because it is now matrimonial property free from any liability attaching to it.”

The Traditional Court in Chimbalawala Teresa –v- Chimbalawala Edward, stated similar sentiments<sup>64</sup>

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<sup>63</sup> Civil Appeal Case No. 52 of 1987 (NTAC) (unreported)

<sup>64</sup> Civil Appeal Case No. 155 of 1978 (NTAC) (unreported)

“On the dissolution the dissolution of a marriage the court will not order the husband to give his wife a share of the real property leased from the Malawi Housing Corporation since such land is usually leased subject to conditions and restrictions binding on the husband; nor will the court order the two parties to live in the same house or on the same premises since their relations are strained. The court will, however, order some pecuniary compensation to be paid by the husband to the wife for the loss of her interests in the real properties.”

The monetary or pecuniary compensation order to the wife in leasehold or mortgaged property has its enforcement challenges. Enforcement of orders by the court will be discussed in detail below. The issue is how the court makes sure that the man fulfils the court order. If the court has no enforcement mechanisms for its orders then this is meaningless to the women in terms of what they get out of such orders

#### **4.6 HOUSE AT CUSTOM- INNOVATIONS BY THE COURT.**

As discussed earlier in matrilineal custom the man goes to live in the village of the woman and he has to build a house to stay with his wife and children. At custom the parties started to cohabit upon completion on the house. Due to changes with time as people are the urban areas in company houses or rented houses most men are not fulfilling this customary obligation. Out of the 81 cases that were examined in 12 cases the house was built. In 23 cases the man promised the court that he would build the house. In 28 cases the record was silent there was no mention of the house as at custom. In one case the woman stated that she does not want the man to build the house for her. This is the same woman who stated that she does not want a share of the matrimonial property.

The courts have some innovative way of dealing with the house issue where the man has not built the house. If the parties have a house or several houses they give the woman one of the houses to be a house as at custom. They also make monetary orders with the assumption that the woman will use this money to build a house. From the 17 cases that were analysed where the monetary orders were made the amount varies from MK5, 000 to MK60, 000. (Approximately USD\$36 to USD\$432).

The money is not paid as a lump sum. It is paid in instalments of MK1000 to MK3000 per month. In such a situation I believe the women do not use the money for building the house. If they have children in their custody on divorce the money is most likely used to fend for the children. The research revealed that out of the 81 files in 57 cases custody of the children was given to the woman. In five cases the couples had no children. In only two cases custody of the children was given to the man, in one of these cases both parents were primary school



teachers they were on separation before divorce they had two children and custody was split between the spouses. The court maintained the status quo. In one case all the three children were adults. In 16 files the court was silent on children no order was made neither did the file indicate that the couples had children. Considering an amount like MK5000 surely even in the village one cannot build a house with such a small amount.<sup>65</sup> On divorce most women have no shelter in which to stay with the children, if they have custody of children. This is causing hardships to the women especially the women who were totally dependent financially on the man.

#### **4.7 ENFORCEMENT OF COURT ORDERS.**

A major challenge for the court is the enforcement of the orders that it has made. From the research, all the Magistrates stated that after they have made a property distribution order and where the parties are not cooperating in giving each other the items according to the court order they follow the following procedure. They stated that most men do not voluntarily comply with the court orders on sharing of matrimonial property.

The court writes a letter addressed to the local leadership (chief, village headman, chairman of the area) in the area to witness the parties as they are sharing the matrimonial property. If the advocates of the parties are available the court orders them to be present when the parties are sharing the property. A court clerk or a court messenger serves the letter from court to the local leadership. The parties bear the costs for the court official to serve the letter. In areas that are far from the court this is a challenge, as most parties cannot afford to bear the costs of the court official to serve the letter to the local leadership. In the Traditional court enforcement of the orders was easier due to the set up of the courts. The area limited their jurisdiction. In Section 3 of the Traditional Courts Act states that:

“(2) Every Traditional Court shall exercise the jurisdiction conferred upon it by or under this Act within such area and under such extent as may be specified in the warrant

(6) b the minister shall cause the particulars of the name and area of jurisdiction of every Traditional Court to be notified in the Gazette.”

The operations of the court were to a specific area and this made enforcement of the orders easy. The magistrate courts have territorial jurisdiction and this makes the enforcement of the orders difficult. The government during the one-party system had a facility of travel warrants

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<sup>65</sup> There need for further research to find out how many women have built houses from the monetary orders made by the courts.

for government officials on duty. The court officials on duty during this era were also using this facility. On acquiring multi party system this facility was removed and the court has no means to serve court documents and bearing the cost of the service. The cost is on the petitioner. Bearing in mind that majority of petitioners in these divorce petitions are women, the women are bearing this burden of costs. In a situation where the woman cannot afford the enforcement costs the woman loses out. In my opinion being granted a court order that cannot be enforced is worse as not going to court at all.

#### **4.8 THE COURT CLERKS' VOICES**

The court clerks are there to ensure that all the paperwork in the court record is properly issued and kept. However in practice they also work as court interpreters and in other courts as cashiers.

When a petitioner in a divorce matter comes to a magistrate court a court clerk serves her at the Civil Registry. The court clerk plays a crucial role at the court. After listening to the petitioners' story they determine or frame or draft the claims on the divorce petitions.<sup>66</sup> The court clerk opens a file, gives it a case number and brings it to the magistrate to endorse and give it a date for hearing. The divorce petitions are in triplicate. One copy is for the court file; the other copy for the petitioner and the third copy is served on the other party. Due to shortage of stationery sometimes the clerks are not able to draft the divorce petition in triplicate. They prepare one copy and ask the petitioner to make photocopies at her cost. Most of the time the court has no papers, writing materials, folders, files or petitions necessary for them to maintain proper court records. They improvise divorce petitions out of notebooks. The petitioner pays the court fee for the petition and the service costs for the court messenger to serve the petition to the other party. The divorce petitions are very brief and they are faint as they are photocopied forms.<sup>67</sup> The court clerks stated that they do not have the training and resources to properly conduct their duties. The other factor is they are overwhelmed by the work due to shortage of clerks in the courts. If a woman cannot afford the court fees, cost of serving the petition and sometimes cost of photocopying she gives up the case. The right of the woman to access to justice and effective legal remedies are curtailed.

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<sup>66</sup> This is in matters that the petitioner has no Lawyer. Majority of the petitioners in customary marriage divorces have no lawyers.

<sup>67</sup> See Appendix 1

#### **4.9 ENFORCEMENT OF ORDERS**

The court clerks stated that enforcement of court orders is the duty of court messengers. They are the process servers. In some cases they are involved in the enforcement of the property orders. It depends on the distance. If it is far most of the parties cannot afford to pay for their transport costs. As per their conditions of service they are also supposed to get allowances. If the place is far they need a night allowance if they will spend a night out on duty. They do not receive such allowances. Most of the parties cannot afford to pay their accommodation and food while on duty. In such a case enforcement of orders at areas that are very far from the court is not done. This means for women to access justice in the magistrates' courts is costly for them to bear all these costs.

#### **4.10 THE NON-GOVERNMENTAL ORGANISATIONS (CILIC AND WOMEN'S VOICE) and POLICE- VICTIM SUPPORT UNIT VOICES**

Reconciliation as the main or the primary goal of CILIC, Women's Voice and the Victim Support Unit.

The two organisations and the Victim Support Unit have the same main goal in handling matrimonial disputes.

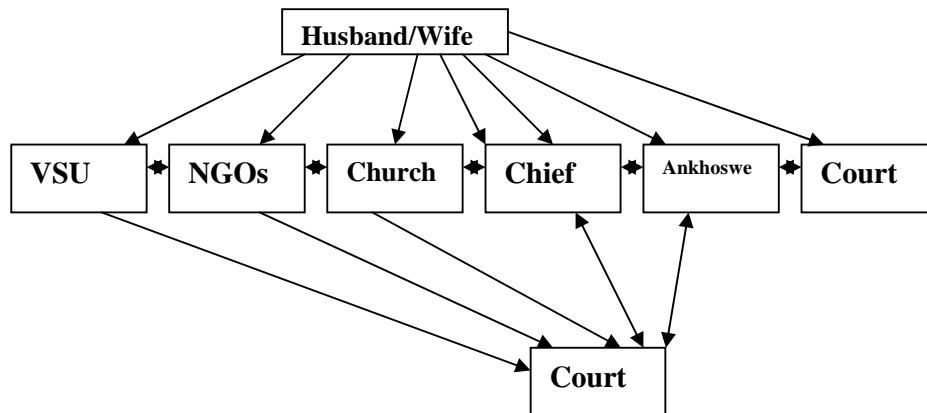
The paralegal officer at CILIC stated that:

“Women are the majority of our clients in matrimonial disputes. When the matter is brought to us, we call all the parties with their advocates and we mediate over the issue with the sole aim of reconciling the parties. If reconciliation fails then we send them to court or in other cases depending on the issue to Victim Support Unit if there was domestic violence involved or to church if the marriage was celebrated in church.”

This was also echoed at the Women's Voice and the Victim Support Unit. The organisations make referrals to each other and when the parties fail to reconcile they send them to court.

From the 81 cases that were examined 63 petitioners were women. 19 petitioners had been to the chief, 12 had been to Victim Support Unit, four to church, three to CILIC and in three cases they had been to three or four forums before coming to court. There is in existence a multiplicity of forums in which family disputes can be resolved. In most cases the women will go to a forum that is close to them. The situation is illustrated in the following diagram.

**THE MAZE IN SEARCH OF JUSTICE**



Some lawyers who work hand in hand with CILIC give legal advice to the women, depending on the complexity of the matter. The lawyers give advice to the women whom the paralegals deem that their matters are complex and they need legal advice on how to pursue their matter further. Most of the legal advice in the matters that are deemed not complex is done by the paralegals. At Women’s Voice the provision of legal advice about divorce is done by paralegals. At the Victim Support Unit legal advice is done by the police officers.

I found that the women are not advised on how the court functions. They are not told the remedies that are available at the court in a customary marriage divorce. This is the reason the women are still hoping for reconciliation at the magistrates’ court. The magistrate court has divorce as a remedy in all the matrimonial matters before it. In the traditional courts, the court ordered reconciliation in some cases before it.<sup>68</sup>For the women it is costly in terms of time and finances to move from one forum to the other. Considering that most of the women may have young children who need their care, they move with them as they seek justice. If the parties are on separation or there are still cohabiting but their relations are estranged and the woman is financially dependent on the man in such cases the woman is in a tight situation such that, the search for justice to her is an uphill battle.

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<sup>68</sup> Chisi Wilton –v- Banda Josephine Civil Appeal Case N0. 125 of 1978(NTAC)  
 Personally in my court what I do in cases where a party genuinely is pleading for reconciliation I refer the parties to their ankhowse if they have not been to them with the option that, if reconciliation fails at the ankhowse the parties can come to court again.

## CHAPTER FIVE

### 5.0 COBBLED TOGETHER SOLUTIONS TO COPE WITH THE SITUATION

The research revealed the following challenges that the magistrates face and the coping mechanisms the magistrates have come up with to be able to discharge their function in spite of all these challenges.

### 5.1 INTEGRATION OF THE TRADITIONAL COURTS INTO MAGISTRATE COURTS.

The integration of Traditional Courts into Magistrates Courts created a gap in the law that needs to be addressed. The magistrates have no jurisdiction to preside over the customary matters. The magistrates are however still assuming jurisdiction on the assumption that the integration of the courts also gave them the jurisdiction that was exercised by the traditional courts. This assumption is technically misdirecting the magistrates and there is urgent need for this to be corrected.

### 5.2 PROCEDURES\FORMALITIES IN THE COURTS

The Traditional Courts were presided over by chiefs. The procedures were informal and they used the vernacular languages. The chiefs are considered as the custodians of customs and traditions. They are closer to the people they live in the communities where the parties live. Considering that these courts were limited by area in their exercise of jurisdiction and applying the customs prevailing in their area. The magistrates' courts are not as accessible as the traditional courts were.<sup>69</sup> The magistrates are not conversant with the customs and traditions of the parties as their jurisdiction is territorial.<sup>70</sup> The magistrates in some cases conduct these matters in the vernacular but still with the strict adherence to civil procedure. The magistrates make an effort on their own to be conversant with the local customs and traditions. When they are in doubt they ask someone with knowledge of such customs and traditions.

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<sup>69</sup> Most of the structures that were used as Traditional courts are closed. The judiciary is not able to have magistrates to preside in these courts due to shortage of Magistrates and other court personnel.

<sup>70</sup> I remember I presided over a case where a man denied having committed adultery with a sister of the wife. He alleged that the sister of the wife was given to him as per their Sena custom for being good to his parents in law. He used a vernacular term to say the sister was given to him as 'nthena'. I did not know this custom, as I am not familiar with Sena customs and traditions. I had to adjourn the matter to a later date to verify this custom. Someone told me from the Sena tribe that it is true this custom exists in his culture.

There are no standard procedures or guideline to value non-monetary contributions. The courts in practice are awarding  $\frac{1}{4}$  shares or  $\frac{3}{4}$  shares out of the total matrimonial property to the women. There are no fifty- fifty shares of the matrimonial property.

### **5.3 PAYMENT OF COSTS AT THE COURT**

There are several costs to be borne by a petitioner in the divorce proceedings. Divorce petition fee, service fee, enforcement of the orders fee and if there is no stationery at the court photocopying charges. The only fixed fee and a receipt is issued at the court is the petition fee.<sup>71</sup> The court clerk or the court messenger fixes the other costs. There is no accountability in the other costs. The court clerk and court messenger decides what the petitioner should pay. This has been abused and the court has no system in place to monitor this. Sometimes the court messengers receive the money for serving the petition and use it for personal use without serving the divorce petitions.<sup>72</sup> The court has no system in place to make sure that the petitions were served and how much the petitioner paid for the service of petitions.

### **5.4 HOUSE AT CUSTOM**

Although the men promise the court that they will build the house for the woman after divorce, the court has no mechanisms to enforce this order. On the Monetary orders their effectiveness is a challenge. Either the men do not pay the money or if, they pay in instalments the women may use the money to fend for the children they have in their custody or other uses not for the house. The best way to go round this is where there are houses as part of the matrimonial property and the woman is given one house as a house at custom. The other pertinent issue is that for the women who continue to stay in the urban area after divorce a house in the urban area is more useful to her than at her rural home.

### **5.5 HUMAN RIGHTS AT STAKE.**

The rights at stake are equality, access to justice and right to property. The duty bearer is the State. It has the obligation to respect, protect and fulfil these rights.

Although the Constitution of Malawi has made provisions for these rights, there is still more work to be done. For instance in access to justice the courts are not accessible to the people especially the rural masses. There is a shortage of trained human personnel Magistrates, court

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<sup>71</sup> It is K30 now and the court cashier issues a general receipt.

<sup>72</sup> Sometimes when pressed to find out if they served the petition the messenger would lie that he did not find the respondent.

## CHIMWEMWE KAMOWA

clerks. The infrastructures are not there. Most courts are in need of renovations. There are no proper channels for accountability and transparency. In the human rights framework institutions are very important. If the institution network is weak the realisation of Human Rights is a challenge.

## CHAPTER SIX

### 6.0 RECOMMENDATIONS\ WAYFORWARD\ ACTION PLAN.

The following are the suggestion to solve the problems and the challenges of the Magistrates identified in this study.

#### 6.1 LAW REFORM

There is need for a holistic law reform to amend the law to expressly give the Magistrate courts jurisdiction to preside over the divorce in customary marriages. The amendment of Section 39 of the Court's Act to provide for jurisdiction of magistrates to preside over customary marriages.

#### 6.2 MAKE USE OF SECTION 59 COURTS ACT

In section 59 of the Courts Act it provides that the Chief Justice may make rules of court regulating practice and procedure in subordinate courts.<sup>73</sup> The chief Justice can issue a Practice Direction on the divorce in customary marriages using this section.

#### 6.3 INTRODUCTION OF A FAMILY DIVISION IN THE COURTS SYSTEM.

Since the Magistrates are overwhelmed with criminal matters<sup>74</sup>. There is need for the introduction of the family courts. These courts will hopefully be equipped with well-trained personnel to deal with Divorce matters.

#### 6.4 DEFINITION OF TERMS

Some of the terms need to be defined. These are terms like property '*held jointly*' with a husband, 'equitable sharing' of property. These can be included in the definition section in the proposed Marriage, Divorce and Family Relations bill. The Courts Act should include in the definition section the definition of a 'fit and proper person'.

#### 6.5 CO-OWNERSHIP OF MATRIMONIAL PROPERTY

In the Constitution there is a presumption of joint ownership of property in marriage. In the proposed bill there is no provision of how such property will be redistributed. This is crucial

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<sup>73</sup> Justice Unyolo see footnote 30 later became a Chief Justice and did not take this opportunity to issue a Practice Direction to the Magistrate Courts

<sup>74</sup> From my Observations on the Daily court Records and the crowds of litigants I found in most of the courts I conducted the interviews. The magistrates are burdened with matters and they do not give divorce matters the attention that these matters deserve. Some magistrates were of the view of the re-opening of the traditional court so that they can be handling the divorce matters as they used to do.



especially in non-monetary contributions. The nagging question is how to quantify the women's work i.e. the domestic work, child-care, companionship, and endurance of the marriage.<sup>75</sup> Will these be given a monetary value? The equal weight is it in terms of monetary value or equal to what? What will be the basis? What if the husband decides that the least valuable assets be co-owned? What rights will the wife have to demand that the assets acquired be jointly owned? There is need to reform the law to regulate the marriage relations as the marriage is subsisting.

#### **6.6 SUPERVISORY ROLE OF THE HIGH COURT.**

The High Court has supervisory role over the subordinate courts in criminal matters.<sup>76</sup> It reviews or confirms sentences passed by the subordinate courts. The high court can also have this supervisory role in civil matters. This will need an amendment to the civil procedure rules in the subordinate courts.<sup>77</sup> For instance to include property claims where there are contentious items like houses, plots, cars and mortgaged property the file can be sent to the High Court.

#### **6.7 PRESCRIBED FORMS FOR COMMENCEMENT OF DIVORCE IN CUSTOMARY MARRIAGES.**

Prescribed form for commencement of divorce in customary marriages can be used, to make the work of the court clerks easier and efficient. This will assist the magistrate to know the issues that are before him or her for determination. It will assist the litigants in directing them on the evidence to adduce in court considering that most of them do not have a lawyer to represent them in court. The form will assist the court clerks and messengers to be transparent and accountable on the service fees. It will also indicate the messenger, who was the process server of the divorce petitions. They form need to be translated into the national vernacular language Chichewa to be user friendly. See (Draft Form) Appendix 2

#### **6.8 CIVIC EDUCATION ON DIVORCE IN CUSTOMARY MARRIAGES**

Since these matters were dealt with in the Traditional Courts. There is need for training of the magistrates in customary marriage divorce, by educating them on different customs and traditions. The court clerks also need training on drafting of the divorce petitions and how to

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<sup>75</sup> S 2 proposed Bill

<sup>76</sup> SS 362, 340 Criminal Procedure and Evidence Code

<sup>77</sup> Subordinate Court rules, O. 15, rr 3. Courts Act, Cap 3:02, Laws of Malawi.

use the prescribed forms. The population at large needs civic education on divorce law just as there is civic education on bail. However when the marriage is going on well all is rosy no one ever imagines that divorce can arise.

### **6.9 NON-GOVERNMENTAL ORGANISATIONS AND THE POLICE-VICTIM SUPPORT UNIT – CAPACITY BUILDING AND NETWORKING WITH OTHER ACTORS.**

As there is a multiplicity of fora where a party can take matrimonial disputes for resolving, there is a need for the organisations to network so that they complement each other. These organisations are concentrated in the urban areas. They need to extend their services to the rural areas to serve the rural masses. Training of the Paralegals on Marriage and Divorce Law to enhance their skills in giving legal advice.

### **6.10 EMPOWERMENT – EDUCATION.**

For the women there is need for empowering the women with education and finances. Some women are housewives due to gender disparity in education. Socialisation plays a vital role in building the self-esteem of women. Women are socialised in a way that their ultimate goal in life is marriage. In most African cultures women are socialised or groomed on how to be a good wife. Customary beliefs that it is better to educate a male child than a female child adversely affect women's advancement and economic status in later life, There is need to empower women so that they are able to acquire property on their own.

### **6.11 PRE AND POST DIVORCE CARE**

In an era of HIV/AIDS, the law on divorce should be able to cater for counselling on Divorce and HIV/AIDS. Divorce is traumatising and there need for parties to be counselled before and after the Divorce. The Pentecostal churches are offering this in their Divorce Care Ministries.<sup>78</sup>

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<sup>78</sup> At the Celebration Centre Church in Harare they have Divorce Care held every Thursday from 6:00p.m to 8:00p.m in one of the rooms at the Church Premises

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The Criminal Procedure and Evidence Code

The Proposed Marriage, Divorce and Family Relations Bill

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Convention on Civil and Political Rights

Convention on the Elimination of All Forms of Discrimination Against Women. (CEDAW)

African [Banjul] Charter on Human and People’s Rights.

Protocol on the African Charter on Human and People’s Rights

The General Comment Number 21 of CEDAW.

Appendix 1

REPUBLIC OF ZAMBIA  
MAGISTRATES' COURT

In the ..... SRM ..... LIMBE

Case No. 178 of 2007.

SARRA CHIRAMBO. COMPLAINANT


AND  
GIRBERT CHIRAMBO. DEFENDANT

You are ordered to come to Court at ..... LIMBE COURT WEDNESDAY  
the ..... 14 Nov ..... 2007. at ..... 9:00 ..... o'clock in the .....  
..... forenoon.

To answer a claim against you that ..... PETITION FOR .....  
..... DIVORCE

If you fail to come to Court, judgement will be given against you in your  
absence.

(seal) LIMBE MAGISTRATE COURT  
SEAL.



**Appendix 2** Draft of a Prescribed Form for Divorce in Customary Marriages

**PRESCRIBED DRAFT FORM FOR DIVORCE IN CUSTOMARY MARRIAGES**

DATE.....CASE NUMBER.....

Petitioner's name .....

Age.....

Occupational status.....

And Postal address.....

Home Address.....T/A.....Village.....District.....

Telephone number.....

Respondent's name.....

Age.....

Occupational status.....

And Postal address.....

Home Address...T/A.....Village.....District.....

Telephone number.....

Under what system of marriage was the marriage contracted.....

Patrilineal.....

Lobola( Bride Price) cash/cattle (how much was the amount? cattle- how many?)

(Part payment, full payment not paid).....

Matrilineal .....

House (built, not built).....

Do you have children yes/no?

If yes how many and their ages and sex

Number of children.....

Ages.....

Sex of the children.....

Are the parties on separation Yes/No?

If yes who has custody of the property. Man/ Woman

List of the property/ items

.....  
.....  
.....

CHIMWEMWE KAMOWA

What is the approximate value of the property?.....

Who has custody of the children? Woman/man

If the custody of the children is with the woman is the man supporting them? Yes/No

Name of Court Messenger

Signature of the Messenger

.....

.....

Name of Court Clerk

Signature of the Court Clerk

.....

.....

.....

MAGISTRATE