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I recommend that the Obligatory essay prepared under my supervision by Bubile Grace Lungu
entitled

**A COMPARATIVE STUDY ON WOMEN'S PROPERTY RIGHTS AFTER
DIVORCE: STATUTORY AND CUSTOMARY LAWS.**

be accepted for examinations. I have checked it carefully and I am satisfied that it fulfils the
requirements relating to the format as laid down in the regulations governing obligatory
essays.



SUPERVISOR

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DECLARATION

I Bubile Grace Lungu solemnly declare that this work represents my own ideas and is not are production of any other work produced or submitted by any person to the University of Zambia or to any other institution.

WORDS OF WISDOM

Writing this essay has been a battle but it must be remembered that nothing ventured is nothing gained. Likewise remember that its the harder the battle we see, that the sweeter the victory.

Bubile G. Lungu

DEDICATION

For Adada and Amama,

Everything I am and everything I will be is a product of the love and encouragement received from you. Thank-you for having confidence in me even when I lacked it myself; Thank-you for the moral and financial support and Thank-you for teaching me how to reconcile custom with modern day expectations.

I Love you.

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Finally and far from least of all, to Edward Chitembwe Mupeso. Thank you for your constant encouragement, patience and guidance. Thank you for your understanding and assistance which made my work a little easier. Thank you for the inspiration, I owe you one.

TABLE OF STATUTES

Royal Charter of 29 October 1889

A. Northern Rhodesia Legislation

- BAROTSE NATIVE COURT ORDINANCE 1939
- Marriage (Amendment) Ordinance, 1963
- Native Courts Ordinance No. 10, 1936

B. Zambia: Acts of Parliament

- English Law (Extent of Application) Act, Cap 4
- High Court Act, Cap. 50
- Local Courts Act, Cap 54
- Local Courts Act No. 20 of 1966
- Local Courts (Amendment) Act No. 21, 1976
- Marriage Act Cap 211
- Subordinate Courts Act, Cap 45

C. U.K. Legislation

- 1857 The Matrimonial Cause Act
- 1870 The Married Women's Property Act
- 1882 The Married Women's Property Acts
- 1884 The Married Women's Property Act
- 1893 The Married Women's property Act
- 1907 The Married Women's Property Act
- 1908 The Married Women's Property Act
- 1925 The Property Legislation
- 1935 The Law Reform (Married Women and Tortfeasor) Act
- 1949 The Married Women (Restraint Upon Anticipation) Act
- 1958 Matrimonial Causes (Property and Maintenance) Act
- 1970 The Matrimonial Proceedings Property Act
- 1973 The Matrimonial Cause Act
- 1981 Matrimonial Homes and Property Act

TABLE OF CASES

1.	Alfa v. Arepo	(1963) W.R.N.R. 95. p.83
2.	Boothe v. Amos	1975 2 ALL ER 321,CA
3.	Chiyota v. Chiyota	Case # 2040/1/84
4.	Christina Ndhlovu v. J. Nyirongo	LC 24 # 300/2/80
5.	Earing Nkhata v. Suzyo	LC 1621/81
6.	Edina Chizuka v. Paul Chizuka	LC 423/82
7.	Edna Chanda v. Mwenda	LC 653/81
8.	Emily Mhiti v. Jackson Banda	LC 243/2/80
9.	Habenga Jaru	Case # 204/1/92
10.	Habenzu v. Habenzu	LC 303/79
11.	Joyce Phiri v. Chipeta	LC 24/1782/94
12.	Lee v. Lee	(1952) 2QB 489
13.	Lillian Mutale	Case # 2/95; LC 21
14.	Luciano Lungu v. Mainess Tembo	Case # 2/95; LC 21
15.	Martha Chikulu v. Lwiindi	LC 1437/81
16.	Martha Muyombo v. Jack	LC 24 434/95
17.	Mutenda v. Phiri	LC 24 1432/1/95
18.	Muyunda v. Kaluba	LC 737/94
19.	Mwiya v. Mwiya	(1977) Z.L.R. 113
20.	Pettit v. Pettit	(1970) AC 777
21.	Precious Zimba v. E. Nyirongo	2024/1/86
22.	River Banda	LC 24 1395/94
23.	Tunstall v. Tunstall	(1953) 2 ALL ER 310 CA
24.	Wachtell v. Wachtell	(1973) 1 ALL ER 829
25.	Zimba v. Zimba	LC 1023/94

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ABSTRACT

Married women have had a discriminatory history where their rights to own property are concerned. For instance, until the nineteenth century, English common law did not recognise any rights of a married woman to exclusively own property. This position was justified by the doctrine of the unity of personality. Despite the fact that in many instances, married women contributed directly or indirectly, the position remained unfavourable to women.

It followed therefore, that the plight of the married woman pertaining to property rights extended to, and manifested itself on the dissolution of marriage. Women initially had little, if any at all, claim to family property after divorce. The predicament was however, remedied by the passage of a number of legislation which recognised married women's property rights during matrimony and on divorce.

In a number of English speaking African developing countries, on the other hand, the advent of colonialism introduced a dual legal system of customary laws and imported English law operating concurrently. The problem of such duality has been the difficulty of reconciling the two legal systems.

Apropos of women's property rights on divorce, the problem has been acute in that although English law recognises such rights, the indigenous customary laws do not. In Zambia, for instance, customary law is unwritten and uncertain. This nature of customary law, coupled with the practice of mixing the two legal systems which are divergent especially in the area of family law, has rendered the whole issue of women's property rights after divorce undefined.

Subsequently, it will be the contention in this paper, that certainty and lack of

definition of women's property rights after divorce, together with the practice of the indigenous customary laws are of graver effects on the woman married under customary law when compared to her counterpart married under statutory law.

The primary aim and objective of the research will therefore be to illuminate the fundamental and distinguishing features of statutory and customary law pertaining to women's property rights after divorce in an attempt to discover how best a unification of the two Zambian systems may be achieved, so as to ameliorate any inequalities, injustice and hardships likely to ensue.

This paper will begin with an introduction which will focus on tracing the historical development of Zambian laws appertaining to women's property rights after divorce. This will include the major developments introduced by various legislation. Further, focus will be placed on tracing the influence of traditional society in women's property rights after divorce and its development to modern society.

After discovering the relevant historical developments of both statutory and customary laws, chapter two will analyze specific provisions of statutory law and varying customary law relating to the procedure of property disputes. The analysis will be made with a view of pointing out the common factors in the customs which will in turn highlight the contrast with the statutory provisions.

Consequently, chapter three will emphasise the influences, inequality and hardships which are likely to ensue from the varying laws. Further, this chapter will address the contemporary inconsistencies in the application of customary law to an unauthorised and whimsical deviation towards statutory methods. Subsequently, this will lead us to the concluding chapter.

The final chapter will wind up the comparative study by making conclusionary

remarks, observations and recommendations on how best to achieve the desired results vis a vis the unification and codification of the law on women's property rights on divorce.

CHAPTER ONE

HISTORICAL DEVELOPMENT OF ZAMBIAN LAWS PERTAINING TO WOMEN'S PROPERTY RIGHTS AFTER DIVORCE

It is imperative to note at the outset that the current legal system is that of a dual system of law.¹ This dual system, can be described as a residue of the colonial era, comprises of customary laws and statutory laws. As a result of this dualism, two types of marriage laws apply in the country leading to two types of marriages: customary and statutory marriages. Matrimonial causes such as divorce and property disputes arising therefrom are governed by both customary and statutory laws depending on the type of marriage the parties contracted.² Despite the two laws operating side by side they have different effects on the actors within their respective spheres of operation. The contention in this paper is that the distinctive effects of the customary and statutory law pertaining to women's property rights after divorce inevitably means that the woman married and divorced under customary law is *exposed to grave injustices and hardships as compared to the woman married under statutory law*.

In order to understand the varying effects, and in an attempting to highlight the injustices prevalent in such a dual system of law, the sources and nature of the two laws must be examined individually from their geneses. Initially this paper will deal with statutory laws.

1.1. STATUTORY LAW

It is manifest that Zambia is a common law jurisdiction by the statutory legacy remaining from the pre-independence era. As a former English colony, Zambia has a basic reception law duly codified into legislation.³ The existing laws of the colony were carried over after independence in accordance with section 4 of the Zambia independence Order, 1964 which provided that "the existing laws ... shall continue in force." As a result, the old reception law are still in existence. There are however, specific references to English law in

Zambian statutes such as the Subordinate Courts Act, Cap 45, section 12; the High Court Act Cap.50, section 11; and the Supreme Court Act, Cap52, section 8, all refer, persistently, to the law and practice of their counterpart English courts. Chapter 4 of the laws of Zambia (1970), THE ENGLISH LAW (EXTENT OF APPLICATION) ACT, has provision to the effect that the common law; the doctrines of equity; the statutes which were in force in England on 17th August 1911, and any later English statutes applied to Zambia shall be in force in the Republic. In addition to this, most of the statutory law on marriage is composed of "received law", which in view of the colonial history, is in effect English law. The English law of marriage applies to Zambia by virtue of section 11 of the High Court Act⁴ which provides that the law of probate and divorce in Zambia is the law in force in England at a given moment. Apart from the received law, there is a Zambian Marriage Act⁵ intended to modify English law made applicable to the country to suit local conditions and also to set up the administrative machinery necessary to administer marriage laws. Owing to the above mentioned provision of the High Court Act which renders the Zambian law of probate and divorce a mere carbon copy of English law, it is only logical to recapitulate the historical development of women's property rights after divorce under English law.

The word "property" has several meanings, and in law we must be careful to distinguish between two meanings of property. Property may mean the things or things capable of ownership. Used in this sense the word includes both physical(corporal) things and incorporeal (non-physical) things such as patent rights, copyrights and debts. This is the popular sense of term. Property may also mean ownership. Thus, we may say in law that ⁶ "A" has the property in a watch, or in other words 'A' owns a watch. The working definition of property in this research will be the former definition alluded to above.

1.2. **COMMON LAW**

The common law doctrine of unity of legal personality produced stunning consequences in the law property. Once parties were married, the husband had an interest in all of his wife's property⁷. An interest in return for which he would be liable to maintain her

and liable for all her ante-nuptial torts and contracts. By marriage, a husband gained seisin of all freehold lands which his wife held at the time of the marriage or that acquired during coverture and he was entitled to the rents and profits of them. This was justified by the fact that medieval law looked to the husband rather than the wife for the performance of the feudal dues. The wife had no power to dispose of her realty at all during coverture and the husband alone could not dispose of it for more than his own interest. The married woman therefore lost her personal right to her freehold property.⁸ The law relating to freehold property was the same as that relating to copyhold and the wife's leaseholds belonged to the husband upon marriage and he therefore had the absolute power to dispose of them inter vivo. All chose in possession or in action belonging to the wife at the time of the marriage or acquired by her during coverture vested absolutely in the husband.⁹ However, the husband must have had the wife's chose in reduced into possession or obtained judgement in respect of them during coverture. It is clear, therefore, that under common law all property rights vested in a woman prior to and during marriage automatically vested in the husband thus denying a married woman any property rights.

1.3. EQUITY

As a general rule equity followed the law and thus the husband had the same rights over his wife's equitable freeholds, leaseholds and her equitable interests in pure personality and the same power to dispose of them as he had in respect of her legal estates and interests.¹⁰ By the end of the sixteenth century it was established, by equity, that if property was conveyed to trustees to the separate use of a married woman, she retained in equity the same right of holding and disposing of it as if she were an unmarried woman. Moreover, if property were conveyed, devised or bequeathed to a married woman to her separate use so that the legal estate vested in the estate, he was deemed in equity to hold it in trust for her and he acquired no greater interest in it than he would have done if it had been conveyed to trustees on similar terms. The separate estate in equity was therefore the first step to the development of women's property rights¹¹

1.4. **LEGISLATION**

By the middle of the nineteenth century there was an increase in the number of women earning incomes and thus an increase in women acquiring assets. No relief could be obtained by the woman whose husband deserted her and took all her property with him. It was clear that the old rules would have to be reformed and eventually a series of Acts of wider scope were enacted in favour of the married women. The most important of these Acts were, inter alia, the Matrimonial Causes Act 1857; the Married Women's Property Act 1870; the Married Women's Property Act 1882; the Married Women's Property Acts 1884, 1893, 1907 and 1908; the property Legislation of 1925, the Law Reform (Married Women and Tortfeasor) Act 1935 the Married Women (Restraint upon Anticipation) Act 1949; the Matrimonial Proceedings and Property Act 1970; and the Matrimonial Causes Act 1973.

The Matrimonial Causes Act, 1857 assisted women's property rights in two ways. Firstly, so long as a judicial separation was in force, the wife was to be treated as a single woman with respect to any property acquired¹² This was the first time in the history of English law where the married woman had the sole power to dispose of a legal interest. Secondly, if a wife were deserted, she was able to obtain a protection order which would protect any property, which she became entitled to after the desertion, from seizure by her husband and creditors.¹³

The Married Woman's Property Act, 1870 further presented a series of exceptions to the common law rule which denied married woman property ownership by providing that in a number of specified cases property acquired by the wife should be deemed to be held for her separate use. This Act is of historical significance as it gave a statutory extension to the equitable concept of the separate estate.

The 1870 Act was repealed by the Married Women's Property Act 1882 which is historically the most important of the series of Acts and whose provisions shall be analysed in chapter two. The Act provided under section two that any woman marrying after 1882

should be entitled to retain all property owned by her at the time of the marriage as her separate property, and that any property acquired after 1882 should be held by her in the same way.¹⁴ Thus, it was the end of a man's dominion over his wife's property. The man could no longer acquire further interest in his wife's property by operation of law. The wife was vested with the legal interest in her property. In 1935 the Law Reform (Married Women and Tortfeasors) Act, completely abolished the concept of the separate estate and gave the wife the same right and powers as were enjoyed by other adults of full capacity.¹⁵

Due to the changing social, political and economic environment in England, the position of a married woman developed from the medieval subservient member of the family with no rights in family property during marriage and after divorce to the co-equal head of the family with legally protected rights in respect of family assets. It is obvious from the foregoing that under English law a married woman has a right to family property and maintenance; and that there is a unified codified procedure laid down by legislation to ensure uniformity in matrimonial disputes especially as they effect property rights of married women on divorce.

2. CUSTOMARY LAW

Any endeavour to give a brief historical development of Zambian African customary law requires the initial step of furnishing a working definition of the term customary law. The search for such a definition has dictated that one borrows one from the Nigerian context owing to the fact that there is no stated definition in the statutes or judicial decisions in Zambia.

The inherently prominent feature of the Zambian customary law such as being unwritten, not static and variable according to locale facilitates its inclusion in the boundaries of the definition enunciated in the Nigerian case of Alfa v. Arepo¹⁶ as "... the unwritten law or rules which are recognised and applied by the community as governing its transactions and code of behaviour in any particular matter ... it owes its authority to the fact that it has been established from the ancient days. It is not static ... the law can and does change with the

times of the rapid social and economic developments."

Zambia is, and has since time immemorial, always been a heterogeneous nation with seventy-three tribal or ethnic groups.¹⁷ In the pre-colonial era, each group had its own system of rules governing personal relations in its community. These rules were administered by either the chief with a council of headmen of the community or solely by the chief.¹⁸ Zambian customary law is neither unified nor codified and as such the term customary denotes not a single or common system of law governing the entire indigenous population of the country, but different laws regulating the rights, liabilities and duties of the various ethnic or tribal groups.

The advent of the colonial era introduced a system of judicial administration which from inception differentiated between Europeans and native Africans.¹⁹ Section 14 of the Royal Charter of 29 October 1889 authorised this differentiation whilst entrusting the administration of Rhodesia to the British South Africa Company (BSA). The provision directed the administrators of justice to attach careful regard to the laws and the customs of the indigenous population especially with regard to, inter alia, marriages, divorces, and property rights. These laws were subject to any British laws which may have been in force in the territory.

In 1939, the Native Courts Ordinance and Barotse Native Courts Ordinance were enacted. The Barotse Ordinance applied to Barotseland, now Western Province, where the Lozi court institutions operated on their own. The Native Court Ordinance applied to the rest of Zambia and it empowered the Governor to establish native courts by a warrant which would stipulate whether a native court was an urban native or rural native court.

These courts had jurisdiction in the trial and determination of any civil cause or matter, matrimonial causes inclusive, in which both the parties were Africans. Native courts were re-organized and renamed local courts in 1966, thus repealing both the Native Courts Ordinance

and the Barotse Native Courts Ordinance. This was facilitated by the Local Courts Act No. 20 of 1966. Legal practitioners are not permitted to practice before local courts by virtue of section 15(i) of the Act. The local courts are the modern day administrators of customary law marriages.²⁰ Customary law is recognised as applicable today by virtue of section 16 of the Subordinate Courts Act provided that such law is not repugnant to natural justice, equity or good conscience and is not incompatible with any written law in force in Zambia. The Local Courts Act impliedly recognises customary law as it provides that African Customary Law shall apply to any matter before the local courts, in so far as such law is not repugnant to natural justice or morality, or incompatible with provision of any written law.²¹

It must be noted that, although it is now possible for anyone to contract a statutory marriage, Africans in Zambia were not free to do so until the enactment of the Marriage Ordinance Amendment No. 48 of 1963 which changed the law and allowed Africans to marry under the Marriage Ordinance.

As a result of the customs, there is nothing like customary marriage and divorce law prescribed for the whole of Zambia. There are as many customary laws as there are tribes but the various laws in their concepts exhibit broad similarities and characteristics. One important similarity is the recognition of marriage as social institutions of remote antiquity which regulates sexual activities, locates children of such unions in a kinship system and influences inheritance and other property rights.²² A customary marriage in this regard refers to a union of a man, whether married or not to an unmarried woman. Dissolution of such a marriage by divorce may be accomplished by either instituting proceedings in the local court which may order a divorce or by an arrangement between the parties to the marriages and their relatives out of court.²³

2.1 TRADITIONAL SOCIETY AND ITS INFLUENCE ON WOMEN'S PROPERTY RIGHTS AFTER DIVORCE

Traditional customary law, which in this context refers to the indigenous rules and institutions which arose with the main agents for addressing the needs of a given community before the colonial period²⁴, denies women rights to family property and rights of maintenance after the dissolution of a marriage.²⁵

The position pertaining to women's property rights under traditional customary law was justifiable by the traditional social and economic structure within which these customs were developed. Traditional society was based on a subsistence economy characterised by a self-sufficient joint kinship organization.²⁶ At that time, there was an elaborate system of reciprocal obligations between members of a family which ensured that the needs of every member for food, shelter, and clothing were adequately met.

The now existing plight of divorced women under customary law was then non-existent as divorced women were absorbed into their kinship group after divorce and this self-sufficient family organization ensured her future support. A divorced woman merely had to return to her village and her life would proceed in the same manner as before her marriage. This social apparatus dispensed with the need for a woman to seek support for herself from her husband or to seek access to family property after dissolution of marriage.

In the traditional economic structure, rules of property and maintenance could also be justified on the ground that women had little, if any at all, ability to work outside the home and earn income with which they could assist their husbands accumulate property during coverture. Consequently, the property acquired during coverture was inevitably considered to be solely the husbands. This was regardless of whose name the property might be vested. The right of a woman to property after divorce was considered by the High Court in Mwiya v. Mwiya²⁷. In this case the parties were married under Lozi customary law and they divorced

in a local court where the woman made a claim for maintenance by her husband and a claim for a share of the property. The evidence adduced suggested that the property to which the claim related was property acquired by the husband during the course of the marriage without any financial help from her. The Local Court, Magistrates Court and High Court held that there was no Lozi custom which compelled a man to share his property with the divorced wife.

The nature of property in the traditional economy perhaps also excused the adverse property rights after divorce. The property was simple and basic and included items such as poultry, hoes, axes, cooking utensils mainly made of clay and simple hut houses. Society was simpler and used low level technology.

2.2. MODERN SOCIETY

The Kinship system is no longer in a position to give adequate support to its members, that is, those displaced as a result of divorce. Development and industrialization have caused a breakdown in the traditional African society and the social order such as that of the joint family is in a rapid state of enfeeblement. Society is currently highly individualistic, competitive and acquisitive.²⁸ The case of Edna Chanda v. Mwenda²⁹ illustrates the changes in the responsibility of kin towards their divorced kinswomen. In that case, the parties were married under customary law (Bemba) and their marriage was dissolved by the local court. During the proceedings for divorce, the husband made a custody claim of the children on the ground that the wife had no stable home. The wife opposed the claim on the ground that according to Bemba customary law, the children belonged to the wife though the husband had access to them. The wife's father asked the court for an order for the husband to support the children because without it he would not voluntarily do so. Custody was granted to the wife but the husband was ordered to pay maintenance.

In the traditional society maintenance was the primary responsibility of the side having custody. If the case had been a product of customary law in the traditional apparatus,

custody and maintenance would have been the sole responsibility of the wife and her kin. However, in this case the court awarded the wife custody but extended the responsibility for maintenance to the husband. The request for such an order by the wife's kin, namely, her father, suggests some amount of reluctance or inability of the woman's kin to support her and her children after divorce.

The protection prevalent in traditional society of a woman divorcee by her kinship is evidently disappearing in modern conditions yet contemporary customary law, strictly speaking, continues to deny the existence of any rights to family property by a woman after dissolution of a marriage. Consequently, unless a woman is in receipt of an independent income and except in the event of early remarriage on her part, her lack of access to family property or maintenance by her husband after divorce exposes her to obvious hardships and possible destitution.

Though customary law pertaining to women's property rights after divorce remains obdurately unfavourable, different judges on some occasions divert from the law as it should be to accommodate the changing socio-economic conditions. This merely reflects the confusion in the application of customary law.

The following chapter will firstly, analyze the specific provisions in various statutes and relating to women's property rights after divorce and then secondly, the various customary laws with a view of pointing out the common factors in the customs.

END NOTES

1. M.Ndulo Law in Zambia (East African Publishing House Ltd Nairobi, 1984) p. 143
2. Ibid p. 143
3. ALLOT Essays in African Law (Butterworths, London, 1960) p.15
4. High Court Act, Chapter 50 of the laws of Zambia
5. The Marriage Act, Chapter 211 of the Laws of Zambia
6. D. Barker, Law (Esclays Ltd, Essex, 1992) p.262
7. P.M. Bromley, Bromley's Family Law (Butterworths, London, 1987)p.493
8. Ibid p. 494
9. Ibid p.495
10. Ibid p.496
11. Ibid p. 497
12. S.25 of The Matrimonial Causes Act, 1857
13. S.21 of The Matrimonial Causes Act 1857
14. S.2 and S.5 of the Married Women's Property Act, 1870
15. Ss I(a) and 2(i) of the Law Reform (Married Women and Tortfeasors) Act 1935
16. (1963) W.R.N.R 95
17. E.N. STANSFIELD, **STUDIES OF TRIBAL GROUPING IN NORTHERN RHODESIA**
(London, Oxford University Press, 1963) p. 54
18. A.L. Epstein, **The Administration of Justice and The Urban African: A Study of Urban Native Courts in Northern Rhodesia,**
(1953, Colonial Research Studies, New Jersey)
19. M. Ndulo, Op Cit p.47
20. Local Courts Act, Chapter 54, s.68 (subsidiary) Rule 4(a)(i)
21. Chapter 54 of the Laws of Zambia s.12(i)(a)

22. G. Hewitt, Studies of African Customary Law (Butterworths, London, 1960 p.55)

23. M. Ndulo, Op Cit p.151

24. N. Himonga, Family Property Disputes: The Predicament of Women and Children
in A Zambian Urban _____
_____ Community Ph.D
Thesis, The London School of
Economics and Political Science,
London University, 1985
(unpublished) p.20

P.H.D. G. Hewitt, Op Cit p.82

26. M. Ndulo, Widows Under Zambian Customary Law: The Response of the
Courts M.S. Unpublished p. 20-1

27. (1977) Z.L.R. 113

28. M. Ndulo, Op Cit p.22

29. LC 653/81 (unreported)_____

CHAPTER TWO

STATUTORY PROVISIONS AND VARYING CUSTOMARY LAWS PERTAINING TO WOMEN'S PROPERTY RIGHT AFTER DIVORCE

In order to cement the argument that women who marry and divorce under customary law, as compared to women married and divorced under statutory law, are prone to grave injustices and hardships when dealing with property rights after divorce, it is deemed imperative to dedicate a compendious chapter to specific provisions under statute and specific varying customary laws.

1.1. STATUTORY PROVISIONS

English statutory law has experienced pre-eminent developments in relation to women's property rights after divorce. As the progressional stages of statutory provisions have been alluded to in chapter one, we shall confine our discussion mainly to the provisions of the Matrimonial Causes Act, 1973, as amended by the matrimonial and Family Proceedings Act, 1984. The 1973 Act will suffice as it has replaced almost all the previous legislation on matrimonial causes. Specific reference to section 17 of the Married Women's Property Act of 1882 shall also be made.

By extending the equitable principle of the separate estate, the Married Women's Property Acts replaced the absolute incapacity of a married woman to hold property at common law by a rigid doctrine of separate property.¹ Having this effect, spouse's property could be divided into two types: that intended for common use and consumption in the matrimonial home, and that intended for personal use and enjoyment.² Often however, categorization of property is not openly contemplated within a happy union as there is really no need to risk having a property dispute whilst living amicably together. When a marriage breaks down however, two questions arise: in whom are the legal and equitable interests in

the property vested and what rights short of ownership may one spouse have in the property of the other?

It is imperative to note, for future comparison with customary law, that English law recognises that a spouse may have rights short of ownership in the property of the other.³

1.2. Section 17 of the Married Women's Property Act 1882

Having never discussed nor defined their respective property rights during the happy marriage, it becomes difficult to establish amicably who has what right in which property. One solution for ascertaining property rights is by proceedings under section 17 of the Married Women's Property Act, 1882.

The procedure under section 17 of the 1882 Act is available only to parties who are husband and wife or who are divorced but whose marriage had been dissolved within three years of the application under the section.⁴ Where there has been a divorce, it is desirable that property rights of the parties should be dealt with under the Matrimonial Causes Act 1973. This Act gives the court wide powers to adjust those rights⁵, rather than section 17 of the 1882 Act or under provisions of the Matrimonial Proceedings and Property Act 1970 which merely extends section 17 of the 1882 Act as these merely permit a declaration of the existing rights.

Section 17 of the 1882 Act provides that 'in any question between husband and wife as to the title to or possession of property' either spouse may apply for an order to the High Court or a county court, and the judge 'may make such order with respect to the property in dispute ... as he thinks fit'. The court may, in relation to section 17, direct an inquiry as to ownership of property and may order the return of any property wrongfully detained by the husband or wife. Since the court has the jurisdiction to determine questions of title and possessions, there must be in existence specific property with respect to which the

order might be made. If the property ceased to exist, there can be no such power.⁶ As this worked an obvious injustice if the other spouse had foreseeably disposed of the property, the Matrimonial Causes (Property and Maintenance) Act 1958, came in to remedy the loophole. This remedy gave the court power in such a case, either to order the defaulting spouse to pay the other the sum of money which represents the latter's interest in the property, or to make an order with respect to any other property which then represented the whole or part of the original.⁷

Regarding the jurisdiction of the court under section 17 of the 1882 Act, it must be heeded that it has no jurisdiction to vary existing titles and no wider power to transfer or create interests in property. Its discretion covers the enforcement of the proprietary rights of one spouse in any property against the other.⁸

Questions as to title of property between husband and wife under section 17 are not governed by the strict consideration as those commonly applied to the ascertainment of the respective rights of strangers. The actual contribution made by the respective spouses towards the purchase price or the form of the transaction, or that the property was purchased in the name of one or other spouse or both are not deciding factors. Furthermore, the circumstances of the breakdown and the conduct of the parties cannot affect title in the absence of an agreement between the spouses. These considerations are all irrelevant to the outcome of proceedings brought under section 17.⁹ If it is clear that the property, when it was acquired was intended to belong to one or the other spouse absolutely or in definite shares, then the court will give effect to that intention, and the title so ascertained cannot be altered by subsequent events otherwise by agreement.¹⁰

Problems may arise however, where the spouses' rights are not properly defined. In such a case, the court will have a wide discretion by ordering the interests to be divided in such proportions as it thinks fit.

One way in which statutory law seeks to ensure justice even under section 17, is by the use of the courts power to make different types of orders. In using these powers, the court may effectively control the way in which property is used without departing from the principle that it cannot alter title. The court may, for example, order a spouse to give up possession of a house or even forbid him or her from dispossessing the other spouse or to deal with the property in any way inconsistent with the other's rights. In Lee v. Lee,¹¹ a married couple lived together in a house owned by the husband. He deserted the wife and when he suffered financial difficulties he sought to sell the house. The wife applied under section 17 of the 1882 Act for an order restraining him from entering into any contract for the sale conveyancing of the property which might interfere with her enjoyment of it. The court duly restrained the husband from selling the house until provision of alternative accommodation was made.

The court may also, under section 17, order the property to be sold and direct how the proceeds of sale are to be divided or, if both spouses have interest, it may order one of them to transfer his or her share to the other on the latter's paying the value of the property transferred. In Bothe v. Amos,¹² for instance, the wife committed adultery and left the matrimonial home and abandoned the joint business venture entered into by her husband and herself. After the divorce, she made an application under section 17 for a share of the property and business as they were purchased in their joint names. The register held that on the facts the wife was entitled to one third of the premises and business which amounted to £2,500. He then ordered that sum to be paid by the husband to the wife. The wife appealed on the ground, inter alia, that she did not necessarily want her share in money. It was held that in dealing with an application in money terms the value of the parties' respective shares in any item of property and that since the court had the power to order a sale of property on application under section 17, it necessarily followed that the court had the power to make an order for the payment of a sum of money. This basically amounted to a sale of property by one spouse to the other, that the jurisdiction to order a sale of property was not restricted to a sale to third parties only.

As already intimated, section 17 of the 1882 Act is not the only provision pertaining to women's property rights after divorce. Section 17 seems restrictive as the fundamental function of this section is to pronounce an already existing rights. When a marriage has broken down, however, more extensive powers are needed to ensure, if that be possible, that no injustice is done. In an attempt to secure such extensive powers, a wider discretion was conferred upon the court mainly by section 24 of the Matrimonial Causes Act, 1973, which deals with the transfer and settlement of property and with variation of settlements. This turns our focus upon the Matrimonial Causes Act, 1973, an Act to consolidate certain enactments relating to matrimonial proceedings.

1.3 The Matrimonial Causes Act, 1973.

English statutory law which governs marriage under the marriage Act¹³ provides for property distribution in favour of the weaker spouse on divorce. In this respect, the courts are enjoined to ensure that the needs of the respective spouses are provided for from the available family resources after the dissolution of the marriage. The provisions in support of this contention are sections 24 and 25 of the Matrimonial Causes Act, 1973.

The 1973 Act gives the court power to grant property adjustment orders in connection with divorce proceedings.¹⁴ It is through these property adjustment orders that the distribution of property is accomplished. The court, on granting a decree of divorce, may make any one or more of the following orders: that a party to the marriage shall transfer to the other party such property as may so specified. The property so to be transferred being property which the party transferring is actually entitled to, either in possession or reversion; that a settlement of such property as may be so specified, be made for the benefit of the party who was not entitled. That is, property to which a party to the marriage is entitled, being made subject to a settlement order for the benefit of the other party; an order varying any

ante-nuptial or post-nuptial settlement so as to benefit the parties; and an order extinguishing or reducing the interest either of the parties to the marriage under any such settlement.¹⁵

Should the court make any of the above orders, then in making it, or at any time thereafter, the court may make a further order for the sale of such property, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.¹⁶

The court does not, nonetheless, have unfettered discretion in exercising its powers under provisions of the Act. The 1973 Act contains the matters to which the court is to have regard in exercising its powers for adjusting property under the foregoing provision. The court is to have particular regard to the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; the contributions which each spouse has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family; the conduct of each party; and the value, to each party to the marriage, of any benefit, for example a pension, which by reason of the dissolution of the marriage, that party will lose the chance of acquiring.¹⁷

From the foregoing provisions, it may be inferred that the judicial system attempts to place parties of a broken marriage at par with one another so as to avoid undue hardships. Though not expressly provided for in the amended Act of 1973, the court, nevertheless, appears to be required to exercise its powers so as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and if each party had property discharged his or her financial obligations and responsibilities towards the other.

In Wachtel v. Wachtel,¹⁸ a couple had been married for eighteen years and they had two children. During their marriage, they purchased the matrimonial home in the husband's name. The purchase price was £5000 which was paid by 100% mortgage, paid in instalments by the husband. The wife stayed at home looking after the children and helping the husband in his practice as a Dentist. She assisted by doing receptionist and clerical work. After the divorce, the wife left and the husband retained the house. The wife sought a property adjustment order under section 24 of the 1973 Act and the judge after making reference to the requirements of section 25 found that responsibility for the breakdown of the marriage rested equally on both spouses and that therefore the only capital asset, the matrimonial home should be equally divided; that the husband should consequently pay the wife a lump sum of £10,000 being half the price as the home was valued at £20,000. The court was directed in its holding by provisions of the 1973 Act pertaining to taking into consideration the contribution made by each party, which includes looking after the home or caring for the family. The rationale as states by Lord Denning was to the effect that:

'Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. She contributes in kind, her husband in money's worth. If the home has been acquired and maintained by the joint efforts then when to marriage breaks down, it should be regarded as joint property of both, no matter in whose name it stands.'

This case illustrates the point that statutory law seeks to protect not only the working wife but even the housewife. In fact, statutes do not specifically refer to the woman but to a spouse. Statutory law therefore seeks to protect the economically weaker spouse.

As section 17 of the Married Women's Property Act 1882 and sections 24 of the Matrimonial Causes Act, 1973, have both been alluded to, it is paramount that section 24(i) a from which the power to make the orders for the transfer and sale of property derives, be sharply distinguished from s.17 of the 1882 Act. The object of section 17 is to enable the court to determine summarily, either whilst the marriage still subsists or within three years

after it is dissolved or annulled, disputes between the spouses as to the title to, or right to possession of, individual items of property. Section 24 (i)(a) is designed to enable the court, where the marriage has irretrievably broken down, to adjust the property rights of the parties by ordering that property which unquestionably belongs to one of the spouses be transferred to the other for that others benefit. Such orders can be made in respect of any property to which either spouse is entitled, whether in possession or reversion, and whether the property was acquired before or after the celebration of the marriage.¹⁹

Until recently, it was generally assumed that if an order for the sale of property was required, it must be made under section 17 of the 1882 Act but the Matrimonial Homes and Property Act 1981 rectified this position by extending this right to the Matrimonial Causes Act, 1973.²⁰

The foregoing provisions and cases support the contentions that statutory law seeks to protect the weaker party of a broken marriage. It may be agreed that women, especially in Zambia, are the economically weaker of the two spouses. This reasoning leads to the conclusion that the provisions so alluded to provide favour to women in the distribution of resources on the dissolution of statutory marriage in Zambia.

2. CUSTOMARY LAW: TUMBUKA AND TONGA

Because of the prominent features of the Zambian customary law such as being unwritten and variable according to locality, it must be assayed from the perspective of distinct ethnic groups. For purposes of this paper, we shall examine the Tumbuka and Tonga customs relating to women's property rights after divorce.

In any endeavour to understand any custom pertaining to divorce, it is essential to begin by understanding how marriages are looked upon and what kinds of varying social structures exist.

A customary marriage may loosely be defined as a marriage between one man and one or more women and between the woman's and man's families.²¹ This definition emphasises the potentially polygamous character of customary marriages and the fact that the families of the parties to the marriage are as much parties to the marriage contract as the spouses themselves.

The involvement of the parties' families extends to the giving of the marriage payments and sometimes the paying of the same. It is pertinent to note that the families of the parties to the marriage are involved in matrimonial and property disputes and this shall be highlighted in the next chapter. The woman's parents may also be witnesses to proceedings for divorce in local courts and may be consulted as to whether or not the marriage should be dissolved.²²

Generally, the following principles are recognised by all tribes in Zambia as governing the essential requirements of a valid marriage under customary law.²³ Firstly, apart from the girl having reached puberty, there is no fixed age limit for either male or female to marry. Secondly women must be single whilst the man need not be. Thirdly, the parties must have consented to marry though there is no bar on family pressure being exerted. The consent of the woman's family is essential whilst consent of the man's family is not a necessity. Fourthly, marriage payments are an essential requirement of a valid marriage but differ in legal significance, purpose and variety from one tribe to another.

For some tribes the marriages payment, commonly called lobola, is of social significance only. Nearly all tribes however recognise these payments as having some significance to the legalization of the marriage and the establishment of uxorilocal and generational rights over women and children respectively.²⁴

It has been argued that marriage payments, including those which have legal significance are not essential for a valid marriage because such payments may be waived or postponed and yet the marriage concerned is considered to be valid.²⁵ Epstein states that what constituted a proper marriage is a union entered into with the consent of the woman's parents after appropriate marriage payments have been made. He insists that these requirements facilitate the proof of the existence of a marriage since marriage was, especially in the urban areas, in a state of flux.²⁶

In the case of Martha Chikulo v. Lwiindi²⁷ X sued her husband for divorce on the ground that he expelled her from the matrimonial home after he married another woman. X and her husband had been married for seven years under Tonga customary law. No payment had been made. Subsequently, the local court held that there was no marriage as marriage payments had not been made. Whether there were children or not was irrelevant and so was the length of time they had stayed together. The relationship which existed was said to be 'mapoto,' mere friendship, since there had been no dowry. The court refused to reconcile the parties who were not married. The effect of invalidating to marriage on account of non-payment of lobola was to deny the woman any right to property which might have existed.

In the case of Earing Nkhata v. Suzyo,²⁸ the parties had been married under Tumbuka customary law. They had no children, and they had been married for ten years. Lobola had been partly paid. On a hearing for divorce the court held that the non-payment or part payment of the marriage payment did not invalidate the marriage. It merely meant that the husband had forfeited his right to the children had there been any. The marriage which ensued from a relationship where marriage payments had not been paid is called 'Kusompola'. It is a valid marriage.

The above two cases illustrate the fact that the significance of marriage payments vary from one custom to the other. In the former case, the invalidating of a

marriage on account of non-payment of lobola automatically bars the woman from raising issues pertaining to her property rights.

Another common factor in all tribes is that a customary marriage may be dissolved either by divorce in a local court or divorce out of court in a family forum.²⁹ The choice belongs to the party initiating divorce proceedings. Most modern day divorces are heard by local courts because they show an ambit of flexibility. Divorce by private arrangement has the advantage of simplicity though the downside of this arrangement is that it often sacrifices the possibility of any arrangement being made vis-a-vis the security of women in relation to family property. Family forums are rigid in their application of customary property law which denies women of any property rights on divorce.³⁰

2.1 TRADITIONAL TUMBUKA CUSTOMARY LAW

The Tumbuka occupy part of the Eastern province of Zambia, particularly Lundazi. They are patrilineal in their social structure and this is perpetuated by the incidence of virilocal marriages. When a man pays part or all the lobola, the woman moves to his home or village. The woman becomes his wife and a member of his clan. All property, save that which she came with, becomes the husbands property to administer in the best possible way for the family.³¹ Often, the man takes more than one wife and it is seen as his duty to be able to manage all property so that the whole clan, his wives inclusive, share in its enjoyment. If a man in fact marries several women, each woman, upon moving on to his village, is entitled to her own home or hut (depending on his wealth), and each house is furnished by the joint efforts of husband and the wife who resides there. Some wives are more industrious than others and as such accumulate better property. The property; furniture, cooking utensils, clothing and any other personal property are nevertheless deemed to have been acquired by the husband no matter who actually bought it.³² This being the case, the husband retains all property upon the dissolution of the marriage. If the woman takes anything at all, it is not as of right but out of the kindness of heart on the part of the husband and, or his family.

In the case of **Christina Ndhlovu v. J. Nyirongo**³³, the parties had been married under custom for twelve years. During the course of the marriage the wife earned money by brewing a herbal beer. The husband was a subsistence farmer earning a low and inconsistent income. The matrimonial home was built and maintained by money from the beer sales. The couple also owned a gas stove and a two piece lounge set. These items were purchased by the couple though the wife's contribution was an estimated eighty per cent of the purchase price. The two equally agreed to divorce due to irreconcilable incompatibilities. At a family forum, it was decided that the wife was not entitled to any property as per traditional custom. The wife was not satisfied and took the action to a Lundazi local court seeking joint property distribution. Initially, the justice refused to hear the matter contending that the court was not an appeal court to overrule decisions of a family forum. After two or three family meetings, the families agreed to set aside their decision and begin the whole divorce proceedings afresh in the local court. The court consequently held that as the beer was brewed at the husbands village, it was a product of the husband's village. This being the case, it was the husband who facilitated the wife's business and that therefore all property bought from the proceeds of the sales were the husbands. The court also emphasised the fact that even if the wife had brewed the beer outside the husband's village, the custom was to the effect that all property, regardless of who acquired it, was the husband's. This pronouncement included all property whether intended for common use and consumption in the matrimonial home or that intended for personal use and enjoyment. This rule however is restricted to property acquired during and not before the course of the marriage.

Another case demonstrating the effects of divorce on women's property rights under traditional customary law is that of **EMILY MHITI V. JACKSON BANDA**.³⁴ In that case, the parties had been married, under Tumbuka custom, for sixteen years. During these years, the wife was a housewife earning no income at all. She spent her time maintaining the matrimonial home and caring for the family. She also avoided spending her house allowance on vegetables by having and maintaining a vegetable garden. The husband was the

breadwinner and all property was purchased by the husband for common use and consumption by the family. In the thirteenth year of marriage, the husband admittedly bought a mini tractor as a gift for the wife intended for her personal use and enjoyment, to use or sale as she desired. In their sixteenth year of marriage, the wife opted for divorce due to wife battery. Upon dissolution of the marriage, the wife sought to take the tractor with her but the court held that as a matter of custom, the husband was the sole owner and custodian of all property acquired during marriage. The justice stated that even a gift acquired during marriage automatically reverted to being the husbands if still existed at the time of dissolution. The rationale was stated to be that a gift given during marriage was in fact given with the view of life time commitment; that upon dissolution, a wife might remarry and enjoy property acquired from the efforts of her former husband with her new husband and such situations were not desirous at all and as such was to be avoided at all costs.

The Ndhlovu and Mhiti cases demonstrate that: firstly, traditional Tumbuka customary law does not consider a woman's income, or property acquired therefrom as her own, but as that of the husband's; secondly, that once the parties are married, the property acquired during that period, regardless of who purchased it, is not subject to separate ownership nor does it become joint property but becomes the husband's property to be used by the wife and family. This right is of use only and is temporary as it ceases to exist upon dissolution of marriage; thirdly, that the custom does not take into account the conduct of the parties which led to divorce when ascertaining property rights, nor does it take into account the contributions made by the wives be it in kind of moneys worth; fourthly, that even if the husband gives a gift to the wife during the subsistence of the marriage, the wife does not thereby acquire absolute property rights; and lastly, that whether a woman earns an income or not or whether she solely maintains the home and cares for the family, women married under traditional Tumbuka customary law have completely no rights in personal property after divorce.

Regarding real property, it must be borne in mind that under customary law, what a person owns is a right in or over a piece of land rather than the land itself.³⁵ As the Tumbuka are mainly virilocal in marriage, upon marrying a woman, that woman moves to the husband's village. During the marriage, if she has no field of her own, she is entitled to cultivate her husband's field or be given one by the husband. What she acquires is a right of usufruct, not a right to cultivate. The field or land remains the husband's for all intent and purposes.³⁶ The husband may still dictate what crops are to be grown and what use the land is to be put to. All rights acquired by a wife in such field or land are forfeited by the wife on the termination of marriage. She has no claim or right to continue cultivating the field and no right to live in the hut or house in which she had temporary rights.

TRADITIONAL TONGA CUSTOMARY LAW

The Tonga occupy a greater part of the Southern Province and, unlike the Tumbuka, are matrilineal in their social structure.³⁷ The Tonga, however, are also virilocal in marriage.³⁸ Because the Tonga are also virilocal, they apply the same law as Tumbuka when dealing with real property.

In relation to personal property, Tonga custom does not recognise a woman as capable of owning property whilst in a marriage. In the case of **Edina Chizuka v. Paul Chizuka**³⁹ the couple had been married for five years. Full marriage payment was made. The cause of divorce was the wife's adulterous behaviour. The local court held that in view of the fact that the wife was to blame for the divorce, she lost the lobola which had been paid by the husband's family. The wife's family was ordered to repay the marriage payment. It was further decided that regardless of fault all other property belonged to the husband.

In the case of **Habenzu v. Habenzu**⁴⁰, full marriage payment was made in connection to a marriage which lasted nine years. The cause of divorce was persistent wife adultery. The court held that the store and car which were in issue belonged to the husband.

even though they were both in the wife's name and even though the wife was the sole breadwinner. The court did however declare that the marriage payment was forfeited by the husband because the cause of break up was his.

As evidenced by the case of **Martha Chikulo**, the paying of the marriage payment is crucial for the validity of a Tonga marriage. If lobola is not paid, the marriage is invalidated and the issue of divorce or property rights does not arise. If lobola is paid, traditional Tonga custom denies women of any property rights after divorce. The only property which she may retain is the marriage payment only if her husbands conduct was the cause of divorce. This was illustrated by the **Habenzu** and **Chizuka** cases.

It is imperative to note that though both the Tumbuka and Tonga are mainly virilocal in marriage, both acknowledge and in certain instances practices uxorilocal marriages.⁴¹ In this instance, the man moves to the woman's village upon entering a union. In the case **Precious Zimba v. E. Nyirongo**,⁴² the couple were married under Tumbuka customary law. the marriage lasted for nine years and during this period the husband and wife resided at the wife's village. The husband was a farmer and earned a high income. The wife maintained the home and cared for the family. The husband built a house at the wife's village for their joint use as the matrimonial home. He also bought various household items such as furniture and a radio. Upon dissolution of the marriage, the court held that all tangible and moveable property belonged to the husband as per custom but since the house and farmland were part of the wife's village, she retained them.

Similarly, in the case of **CHIYOTA V. CHIYOTA**⁴³ the couple who had married under Tonga customary law sought to divorce. The husband moved to the wife's village and was given a field to cultivate. Both husband and wife through their joint efforts built a house which they furnished. Upon dissolution of marriage it was held that all property save realty belonged to the husband; that in an uxorilocal setting the husband merely has a

temporary right to use and enjoy the land and therefore forfeit all realty upon termination of marriage.

From these two cases it is evident that even in a uxori-local setting, a woman is denied all rights in personal property whereas the husband is denied all rights in realty. It is further evident that the court does not in either virilocal or uxori-local instances inquire into the contribution made by either spouse in acquiring real or personal property.

It is interesting to note that even though the Tumbuka and Tonga vary in social structure, that is the former is patrilineal whereas the latter is matrilineal and even though the two tribes give varying legal significance to the payment or non-payment of lobola, both customs are similar in their denial of women's property rights after divorce.

Whereas the courts under statutory law seek to place the parties in the financial position in which they had been if the marriage had not broken down, traditional customary law seems to seek to place the woman in particular, in the financial position in which she had been before the marriage ensued.

END NOTES

1. P.M. BROMLEY BROMLEY'S FAMILY LAW (Butterworths, London, 1987 p.502
2. Ibid
3. Ibid
4. Matrimonial Proceedings and Property Act 1970, s.39
5. s. 24
6. Tunstall v. Tunstal (1953) 2 ALL ER 310, CA
7. Matrimonial Causes (Property and Maintenance) Act 1958, s.7
8. Pettit v. Pettit (1970) AC 777
9. B. PASSINGHAM The law and Practice in Matrimonial causes
(Butterworths, London, 1969 p. 113
10. Ibid
1. (1952) 2 QB 489
2. (1975) 2 ALL ER 321, CA
3. M. Ndulo, Law In Zambia, (East African Publishing House, Kenya, 1984 p. 143)
4. s.24
5. Ibid
6. S.24 A
7. S.25
8. (1973) 1 ALL ER 829
9. B. PASSINGHAM AND HARMER, _____ The Law and Practice in Matrimonial causes, (Butterworths, London, 1979 p. 90)
10. Matrimonial Homes Act 1981, s7
11. C.N. WHITE, Principles of Customary and Civil Law, 1968 Cited in E. Colsons.
Marriage and the Family Among the Plateau Tonga of Northern Rhodesia.
12. Ibid

23. W.T.Mc Clain 'The Rights of Widows Under Customary Law' in Women's Rights in Zamia; Report of a consultation, Mindolo Ecumenical Foundations 1970 p.88
24. N.C. Himonga Family Property Disputes: The Predicament of Women and Children in a Zambian Urban Community Ph.D thesis, (unpublished), London University, 1985 p. 157
25. C.N. White, Op.cit pp 54 -5
26. A.L. Epstein, Politics in an African Community (Manchester, University of Manchester, 1958)
27. LC 1437/81 (unreported)
28. LC 1621/81 (unreported)
29. M. Ndulo Op cit p.151
30. K. Bealie, LAW AND CUSTOM IN COLONIAL AFRICA (Longman, London, 1966 p115)
31. Interview with H.M.G Lungu; Clan Elder on July 22 1995, Lundazi
32. Interview with Local Court Magistrate; Mr. Mkandawire, Resident Magistrate on 26th September 1995, Lusaka Boma.
33. LC 24 # 300/2/80 (unreported)
34. LC 243/2/80 (unreported)
35. M. GLUCKMAN 'African Land Tenure' Rhodes -Livingstone, Journal No. iii, June 1945 p.1-2
36. C.N. WHITE LAND TENURE report No. 3 on the Eastern province; 1959
37. E. COLSON MARRIAGE AND THE FAMILY AMONGST THE PLATEAU TONGA OF NORTHERN RHODESIA (Manchester, Manchester University Press, 1956 p. 23)
38. Ibid
39. LC 423/82 (unreported)
40. LC 303/79 (unreported)

41. E. COLSON **MARRIAGES AND FAMILY AMONGST THE TONGA OF
NYASALAND** (Manchester University Press, 1960 p. 202)
42. CASE # 2024/1/86
43. CASE # 2040/1/84 (unreported)

CHAPTER THREE

ATTITUDES OF THE PROPERTY DISPUTE PROCESSING MACHINERY TOWARDS THE APPLICATION OF CUSTOMARY LAW AFTER DIVORCE

In contrast with the application of traditional customary law which is rigid in its denial of women's property rights after divorce, contemporary application of customary law appears to be in a state of flux. This can be exhibited by a comparative analyses of how various dispute processing machinery have applied customary law relating to women's property rights after divorce. For purposes of this analysis, we shall evaluate the attitudes of three such disputes property machinery: Firstly, family forums, secondly, local courts; and lastly, Magistrates courts.

1.1. FAMILY FORUMS

Family forums are devoted to giving effect to traditional customary law by denying women all property rights after divorce. Women are seen as the subservient spouses incapable of acquiring property without the guidance and assistance of the husband.¹

In some forums, when a divorce hearing comes up, the matters in issue pertain only to custody of children and refunding of lobola and no mention is given to the distribution of property as it is taken to go without say that all property rights are vested in the husband; one could equate this practice to the practice of English courts in taking judicial notice of matters which are so notorious that formal evidence of their existence is unnecessary. The courts take cognisance of matters of common knowledge and everyday life. In a similar manner, family forums may be said to take judicial notice of the fact that women married under customary law forfeit all property rights on divorce.

In the aftermath of rigid application of traditional customary law, injustices and in many cases hardships ensue. It is an injustice because the law does not take into account the

financial contribution of the female spouse. A woman may expend all her efforts during coverture to earn an income in order to live comfortably and even luxuriously with her family. Upon the dissolution of marriage the court, under colour of customary law, strip her of all property, the product of her own hard work. Secondly, even if the woman did not contribute financially, a house wife often expends all her efforts during the subsistence of the marriage maintaining the home, cooking for her spouse and family and generally caring after her household. She too budgets in order to allow the family to maintain a healthy diet and yet save money for any property venture the couple may wish to undertake . The house wife therefore contributes just as much as the wife who goes out to work and even contributes as much to the family assets as the husband in some cases. She contributes in kind and it would be an affront to justice to continue insisting that she does not have any interest or right in any or all property acquired during coverture.

The obvious hardships that proceed from this unjustifiable denial of women's property rights after divorce include being homeless and starting all over again without a single item of property save perhaps clothing. Given the prevailing social and economic conditions, it would be virtually impossible to reacquire all the property she had during the subsistence of the marriage. Furthermore, the sudden change from riches to rags is not one in which the divorcee would be able to easily acclimatize to.

1.2. LOCAL COURTS

Having realized that the rigid application of traditional customary often leaves a divorced woman without property, and without a home and invariably a destitute, some local courts started making property orders in favour of women on the dissolution of a marriage.² These orders represent a very significant change to the traditional customary law on the subject under consideration; that is, the infiltration of statutory consideration into customary law.

The increased ability of some women to contribute either directly or indirectly to family property seems to be one of the significant factors in the courts response in favour of women in property disputes. Another noteworthy factor which facilitated the positive attitude appears to be the modern day urban fight for women's rights generally.

The courts have of late awarded a married woman who contributed towards the acquisition of property a share in that property. This applies to employed women who make direct contribution. For instance, in **LUCIANO LUNGU V. MAINESS TEMBO**³, the couple were married under Nsenga customary law for twelve years. During that period the couple, through joint efforts, purchased a house and put it in the husband's name. In the divorce hearing, a Lusaka Local Court held that the wife had a financial interest in the property and as such the husband was ordered to compensate his wife the sum of K84,000 for her interest in the house in question.

Similarly, in **Martha Muyombo v. Jack**,⁴ the wife who was an employed cook, adduced evidence to the effect that at the time she married her husband, he had no property. By the time divorce proceedings were commenced, their home had a fridge, carpets and a stove. In the judgement, the court declared that all property was acquired by both spouses equally and that, therefore, should be shared equally.

Notwithstanding the lack of financial contribution of a wife to the acquisition of property, the local courts may, when awarding a share of property to a married woman, take into account contributions which are indirect or non-financial.

Unlike in the **Luciano Lungu** and **Martha Muyombo** cases, the wife in **Zimba v. Zimba**⁵ was a full time house wife earning no income at all. In this case, the couple married in 1990 and remained so until 1994. At the time divorce proceedings were being commenced, the husband had bought a two bedroom house in Kalingalinga. On granting the divorce, the local court also ordered the husband to compensate his wife the sum of K2,000

for her interest in the house. The interest was stated to have been one which arose out of her maintaining the house and her contributions in looking after the husband.

The two former cases clearly illustrate that the courts orders recognize the financial contributions of the wife to the maintenance of the home and building of the house during marriage. These cases highlight the point that the wife's financial contributions are not a basis upon which the husband may be ordered to share family property with her upon the dissolution of the marriage. The latter case, however, highlights the point that the local courts do not always seem to restrict their property sharing orders to cases in which the wife made a direct financial contribution to the property; reference being made to the wife maintaining the house and looking after the husband.

In the case of **Joyce Phiri v. Chipata**⁶ the wife insisted on divorce while the husband wanted to reconcile. The couple owned three small houses all fully furnished. Because the husband wanted to reconcile the wife was denied compensation but the court ordered that they share all the property in equal proportions in spite of the fact that there had been no claim that the wife contributed to the acquisitions nor any claim for the share of the property by the wife. This case illustrates the fact that property orders in favour of women are also made by the local courts in some cases without any claim by the wife for the share of property.

In the case of **Lillian Matale**,⁷ the only asset in dispute was the matrimonial home. The court held that as the husband was in custody of the three children of the family, he retained the house in return for the payment of K120,000 compensation to the wife for her interest in the house. In those cases where in order for the husband to keep the house, he must pay a sum in return for it, it merely amounts to the sale of the wife's share in the house to the husband.

*In cases such as **Mutanda v. Phiri**,⁸ the house in question was held to be the*

joint property of the couple. The court ordered that the house be sold and the proceeds be shared equally.

The Lillian **Matale and Mutanda** cases demonstrate the apparent power of the courts not only to order property distributions but also to order the sale of property for the benefit of the spouses.

As intimated above, the application of contemporary customary law seems to be in a state of flux. The fact that local court justices seem to hold mixed views on the making of property orders is reflected by the differences in decisions.

At the same time that the **Luciano Lungu** case was being decided, the case of **River Banda**⁹ was also in court. In this latter case husband and wife had been married for five years under Soli customary law. Both parties worked and earned substantially the same income. Through their joint efforts they purchased a fridge, stove and television. On divorce, the court held that all property belonged to the husband as customary law demanded.

Similarly, in the case of **Habenga Jaru**¹⁰, the court held that all property acquired during the subsistence of a Tonga customary union belonged to the husband and husband alone no matter how the wife might have contributed.

The difference in holdings obviously connotes some confusions and uncertainty as to the nature of customary law in the light of changing social and economic conditions.

It is imperative to note, however, that the great majority of local courts do in fact order the share of family property between spouses after divorce whether or not there is evidence of financial contributions to the property on the part of the women. However, some justices are reluctant to make property orders in the absence of evidence of financial contributions on the part of the wife because property orders are still opposed by many as

being contrary to customary law. Another local court justice differed with his colleague and said that he found it justifiable to order parties to share matrimonial property in spite of the wife's lack of financial contributions because the wife in such cases had worked for the husband in so many other ways during the marriage.

It appears from the foregoing, that the local courts' attitude has been influenced by English legislation. Where it is clear that property belongs to one of the two spouses, the local courts have ordered that each spouse retain his or her property. This in essence is to effect of section 17 of the Married Women's Property Act, 1882. In ordering that the spouses retain what each spouse acquired for personal use, the local courts are in fact merely pronouncing on already existing rights.

Furthermore, cases such as Lillian Mutale and Mutunda v. Phiri, where the court ordered compensation by the husband to the wife for her interest in the matrimonial home and the sale of property for proceeds to be shared respectively, are decided along the lines of both the Married Women's Property Act of 1882 and the Matrimonial Causes Act 1973. These Acts give the courts jurisdiction to order the sale of property as already alluded to in chapter two.

The inclination towards statutory law by local courts is further illuminated by the fact that local courts are disregarding traditional customary law by making property orders in favour of women on the dissolution of marriage. Not only are they making orders where a wife has made financial contributions but also, as in Wachtel v. Wachtel¹¹ where she contributes in kind.

It is unfortunate that this attempt by the local courts to ameliorate the injustices of the effects of traditional customary law pertaining to women's property rights after divorce is surrounded by uncertainty and no authority. As such, the attempt is almost always undermined by the subordinate courts on appeal.

1.3. THE MAGISTRATES COURT

The Magistrate Courts seem to be in complete adherence with traditional customary law. Almost all cases which husbands bring in appeal to the Magistrate courts succeed.¹² The husband in **LUCIANO LUNGU V. MAINESS TEMBO** appealed to the Magistrate Court on the ground that the decisions of the local court to share the matrimonial home or pay his wife compensation for her interest in the house, was contrary to customary law. The appeal court subsequently reversed the decision of the local court holding that all property belonged to the husband.

Resident Magistrate in charge of the station at the Boma supported the quashing of property orders made by the local court because there was no legal basis for the orders in question.¹³ They all alleged to sympathise with the poor position of wives but stated that their duty was to give effect to the law and customary law did not recognise the right of women to property after divorce. Consequently, all local court orders which were heard on appeal were quashed by Magistrate courts.

It was contended that local courts make property orders in favour of wives purely on humanitarian ground and as such when the litigants, their main objection is that there is no legal basis under customary law upon which they were ordered to share matrimonial property after divorce hence they succeed in their appeals.

Occasionally, however, the Magistrates courts order property share when there is conclusive evidence that the wife contributed financially to its purchase. This in itself however is still in contravention of traditional customary law and defeats to whole argument of giving effect to the law.

In view of the Magistrate courts approach to property rights of women after

divorce, the rights of women after divorce in the local court depends on there being no appeal. Consequently the attempts of the local courts to improve the plight of divorced women in relation to property rights come to nothing in a good number of cases.

It is evident from the foregoing, that within the machinery of administering customary law, there is disorganization. Whereas family forums apply traditional customary law, the magistrate courts allege to adhere to customary law and yet hypocritically claim to sympathise with the poor positions of wives. Further, they sometimes disregard the very essence of the custom they claim to give effect to by occasionally ordering property shares when there is evidence that the wife contributed financially to its purchase. In the meantime, most local courts are inclined towards statutory legislation in an attempt to ameliorate the injustices and hardships which are likely to ensue from rigid application of customary law. Unfortunately, the justices who make orders in favour of women do so only in humanitarian ground and without legal basis. As there is no legal basis, not all local court justices make favourable property orders and their decisions can thus be said to be whimsical and hence different courts will give varying judgements. Consequently women in some cases seemed to go from one court to another in an apparent search of favourable decisions on the issues in question.

In **Muyunda v. Kaluba**,¹⁴ for instance, the wife deliberately did not make reference to any property when appearing in the local court where the divorce proceeding was being heard. After the divorce had been granted, she made a property claim in a different local court knowing that the justice in the latter court was in favour of sharing property.

The various courts and family forums clearly have different approaches to questions of family property in relation to women under customary law and whatever the reasons this is unfair to the litigants. It is tantamount to saying not everyone is equal before the law. For example, if two similar cases came up before justices of varying opinions, one woman will have a share in property and the other will have no right at all. The wife in the

former case will be placed in a position similar to the woman married under statutory law and the wife in the latter case will be denied all rights in family property and consequently will be subjected to the unfavourable effects of traditional customary law.

It is contended hereto, that the uncertainty and the non uniformity in the application of comtemporary customary law only supplements the already existing inequalities of women married under customary law as compared to their counterparts married under statutory law. The women married under statutory law have a certain and uniformly laid down procedure which one can specifically allude to as authority.

END NOTES

1. N.C. HIMONGA **FAMILY PROPERTY DISPUTE: THE PREDICAMENT
OF WOMEN AND CHILDREN IN A ZAMBIA URBAN
COMMUNITY** Ph.D thesis (unpublished) London University,
1985 p.
2. Ibid
3. LC 24 1398/94 (unreported)
4. LC 24 434/95 (unreported)
5. LC 1023/94 (unreported)
6. LC 24 1782/94 (unreported)
7. Case # 2/95; LC 21 (unreported)
8. LC 24 1432/1/95 (unreported)
9. LC 24 1395/94 (unreported)
10. CASE # 204/1/92 (unreported)
11. (1973) 1 ALL ER 829
12. Interview with Mr. Matesemwa; Executive Clerk at the Boma (Lusaka) on 29th
September 1995.
13. Interview with class two Magistrates; Mr. Siwo, Mr. Lungu and Mr. Chikwanda on
5th September 1995 Chilenje Local Courts
14. LC 737/94 (unreported)

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

The foregoing chapters have attempted to show fundamental differences not only between statutory laws and customary laws pertaining to women's property rights after divorce, but also the dissimilar application of customary law itself due to the changing social and economic conditions. These divergencies reflect the restricted rights of women to family property after a customary law divorce and consequent hardships, injustices and inequalities imposed upon them.

It has been observed that under traditional customary law, women have no rights after divorce although they may have contributed, either financially or in kind, the purchase of the property or the building or improvement of a house.

In contrast to the customary law position, statutory law demands that each spouse is to be taken as having contributed either financially or in kind, to the purchase of family property or the building or improvement of a house. Further to this presupposition, statutory law provides a uniform and codified procedure to ascertaining property disputes. The procedure goes to the extent of directing the court as to what matters it is to have regard to in deciding how to exercise its power to make property adjustment orders in connection with divorce proceedings and orders for sale of property for the benefit of the weaker spouse.

Amongst the considerations the court is to have regard to are those relating to the standard of living enjoyed by the family before the breakdown of the marriage and the contribution which each of the parties has made or is likely, in the foreseeable future, to make to the welfare of the family, including any contribution by looking after the home or caring for the family. These considerations have been reiterated as they are an important distinguishing factor from customary law which carries with it no express guidelines for determination

property rights. The deciding factor merely being the gender of the spouses.

The differences in the two laws were to such an extent that a woman married under customary law was subjected to hardships and injustices which a woman married under the Marriage Act could not equally complain of. As such, we saw the unilateral decision of the local courts to incline themselves towards considerations observed and dictated by statutory law. Some justices began taking into account financial and non-financial contribution of spouses and the conduct of the spouse in an attempt to ameliorate the position which was and is unjustifiably unfavourable to women married under custom.

It was further observed that the practices by some local court justices, alluded to above, was not and is not supported by law and thus is not the practice of all local court justices. It, therefore, is a practice which lacks uniformity as it has no legal backing.

As the local courts practice is merely de facto, their attempts at amelioration are invariably undermined by Magistrates Courts. The appeal courts frustrate local court decision simply by quashing such decisions in favour of women on account of failure of authority. This leads us to the initial contentions that the uncertainty and lack of definition of women's property rights after divorce, together with the practice of the indigenous customary law, inevitably means that the woman married and divorced under customary law is exposed to grave injustices and hardships as compared to the woman married and divorced under statutory law.

1.1. Recommendations for the Reform of the Law of Property After Divorce

It is axiomatic from the attitude of the various courts and family forums administering customary law, that there is need for reform in the area of women's property rights after divorce. Such reform is necessitated not only by the need to put women married under custom in a similar position as those married under the Marriage Act, but also to

exercise uniformity in the application and administering of customary law.

In this respect, it is suggested that the uncertainty, lack of uniformity and lack of authority prevalent in the application of contemporary customary law, be remedied by legislation.

Apart from legislation pertaining to specific items of property to the benefit of a widow, there has been no legislation in Zambia aimed at reforming the customary law governing distribution of property after the dissolution of marriage. This is so despite of the obvious need for such reform.

Legislation would provide authority for the decisions of the local courts, eradicate uncertainty and ensure uniformity. It is recommended that the legislation to be enacted take one of two forms: Firstly an integration of statutory and customary law so that only one single statute governs all property disputes arising from divorce, whether statutory or customary; secondly, maintenance of the duality by having two statutes governing disputes pertaining to property rights after divorce that is, one for statutory marriages and the other for customary marriages.

1.2. Integration of Statutory and Customary Laws

To opt for an integration of statutory and customary law in one codified statute invariably means compromising the very essence of customary law. This is so because the outcry of the woman married under customary law is to be at par with those married under statutory law. In order to achieve such equality, the same demands and considerations taken into account when determining property rights after divorce of a statutory marriage would need to be taken into account when ascertaining property rights on the dissolution of customary marriage. If the same considerations are to be taken into account there would be no need to distinguish between the two types of marriages. In essence, the spouses of a customary union would no longer be subjected to customary law pertaining to property rights.

Alternatively, it may be argued that individuals have a choice between customary marriage and statutory marriage. That one may deliberately choose to be subjected to customary law and hence to integrate and codify the laws into one statute which merely gives effect to English law would be tantamount to forcing people to give up their customs. To avoid such an argument, it is recommended that the legislation to be enacted should merely apply to customary law and should be aimed at avoiding the complete denial of women's rights after divorce.

1.3 SEPARATE LEGISLATION

Here, the duality of laws will be maintained although customary law will have to forfeit its rigidity in completely denying women's rights after divorce.

The enactments governing statutory law will remain as they are whereas customary law will be given effect in a unified codified legislation. The enactment should categorise property into two: That intended for common use and consumption in the matrimonial home, and that intended for personal use and enjoyment. Whether property was intended for common use and consumption or personal use, will be a question of fact to be determined by available evidence.

Once the court has decided that property was intended for common use and enjoyment, such property would be subject to traditional customary law, hence will belong to the male spouse. The rationale for allowing this property to be subject to customary law is two fold. Firstly, customary law envisages the husband as the custodian of property to administer for the benefit of the whole family. If property was acquired for the common use and enjoyment of the family at large, it only follows that such property be retained by the custodian. Secondly, the mere fact that legislation will authoritatively support a form of rigidity to the application of customary law vis-a-vis a category of property, will appease the

great majority who feel that we must hold on to custom and tradition. That those who wish to forfeit customary law in its entirety should marry under the Marriage Act.

If, however, property is found to have been acquired for the personal use of either spouse then regardless of whom acquired it, the court is to order such property as being that of the spouse for whose personal use and benefit it was intended.

This method not only ensures some form of amelioration to the hardships of rigid adherence to traditional customary law but also maintains the respect and continuity of customs by restricting women's property rights after divorce.

Furthermore, it provides a guideline on the application of an ever changing customary law to ensure certainty, uniformity and a basis for the authority of court decisions.

In the meantime, however, until legislative reforms materialize, much of the development of customary law to the benefit of women depends upon the courts.

In this respect, the courts must be mobilized and come to an agreement as to how best to approach the plight of the divorced woman under customary law. The courts should take a unified stance in the development of a customary which takes into account the interests of all parties and which is in pace with social and economic changes taking place in society; a dynamic and not static customary law. As Lord Denning said in his book *The changing law*,

'The law is often uncertain and it is continually being changed, as perhaps I should say developed, by the judges. In theory, the judges do not make law. They only expand it. But as no one knows what the law is until judges expand it, it follows that they make it'.

BIBLIOGRAPHY

BOOKS

- ALLOTT, A.N. **Essays in African Law,** Butterworths, London, 1960
- BARKER D. **Law** Esclays Ltd Essex, 1992
- BEALIE K. **Law and Custom in Colonial Africa** Longman, London, 1966
- BROMLEY P.M. **Bromley's Family Law** Butterworths, London, 1987
- COLSON E. **Marriage and The family Among Plateau of Northern Rhodesia,**
Manchester University Press,
Manchester, 1958
- DENNING A.T. **The Changing Law** Stevens and Sons, London, 1958
- EPSTEIN A.L. **Politics in an African Urban Community,** Manchester University
Press, manchester 1958
- Urbanization and Kinship: the Domestic Domain on the**
Copperbelt of Zambia, 1950- 1956 _
Academic Press, London 1981
- HEWITT C. **Studies in African Customary Law** Butterworths
London, 1960
- MEGARRY, R.G.
- AND WADE H.W. **The Law of Real Property** Stevens & Sons, London, 1966.
- NDULO M. **Law In Zambia** East African Publishing Hse, Nairobi, 1984
- PASSINGHAM B **Law and Practice in Matrimonial Causes** Butterworths, London,
1969
- PASSINGHAM B.
- AND HARMER C **Law and Practice in Matrimonial Causes,** Butterworths, London ,
1979
- STANSFIED E.N. **Studies of Tribal Grouping in Northern Rhodesia,** Oxford
University Press, London 1963

II ARTICLES

ALLOT, A.N. AUTHORITY of English Decisions in colonial courts' (1957), **Journal of African law**, vol. 1 No. 1, p. 23

ALLOT A.N.

AND EPSTEIN, A.L

AND GLUCKMAN, M Introduction, in M. Gluckman (ed), **Ideals and Procedures in African Customary Law**, 1969, oxford University Press, p.1

BARNES, J.A. 'Marriage in a Changing Society', **The Rhodes-Livingstone Papers**, No. 20 (1970), Manchester University Press, Manchester

CANTER, R. 'Family Dispute settlement and the Zambia Judiciary: Local-Level Legal Adaptation; in S. Roberts (ed), **Law and the family in Africa**, 1977, Mouton publishers, The Hague, The Netherlands p. 69.

EPSTEIN A.L. 'Juridical Techniques and the judicial process: A study in African Customary law; **The Rhodes-Livingstone Papers**, No. 23 1954, Manchester University Press, Manchester.

GLUCKMAN M. 'Kinship and Marriage among the Lozi, Northern Rhodesia and the Zulu of Natal', in A.R. Radcliffe-Brown and D. Forde (ed), **African Systems of Kinship and Marriage**, 1950, Oxford University Press, London, p.166

III REPORTS

A. Published

ALLOT A.N. 'The future of Law in Africa' **Record of Proceedings of the 'London Conference**, 28 Dece. 1959-8 Jan 1960. Butterworths, London, 1960.

LOCAL COURTS HANDBOOK, 3rd Edition, 1967, High Court, Lusaka

LOCAL COURTS HANDBOOK, 5th edition 1981, Lusaka Boma.