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Date

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Supervisor
MAINTENANCE OF DIVORCED WOMEN AT
CUSTOMARY LAW: A CRITICAL ANALYSIS.

An Obligatory Essay submitted to
the University of Zambia in partial
fulfilment of the award of the degree of
bachelor of laws (L.L.B).

by

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DEDICATION

To my mother and my late father who did not live to realise his dreams.
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CERTIFICATE</td>
<td>(i)</td>
</tr>
<tr>
<td>TITLE</td>
<td>(ii)</td>
</tr>
<tr>
<td>DEDICATION</td>
<td>(iii)</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>(iv)</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>1. THE LAW OF MAINTENANCE IN CUSTOMARY MARRIAGES PRIOR TO THE ENACTMENT OF THE LOCAL COURT (AMENDMENT) ACT</td>
<td>6</td>
</tr>
<tr>
<td>2. THE LAW OF MAINTENANCE IN CUSTOMARY MARRIAGES AS PROVIDED BY THE LOCAL COURTS (AMENDMENT) ACT</td>
<td>18</td>
</tr>
<tr>
<td>(i) Application of the New Law in Urban Local Courts</td>
<td>21</td>
</tr>
<tr>
<td>(ii) Application of the New Law in Rural Local Courts</td>
<td>22</td>
</tr>
<tr>
<td>(iii) Appeals to Subordinate Courts</td>
<td>25</td>
</tr>
<tr>
<td>3. MAINTENANCE IN STATUTORY MARRIAGES</td>
<td>27</td>
</tr>
<tr>
<td>4. A CRITICAL ANALYSIS OF THE NEW LAW</td>
<td>35</td>
</tr>
<tr>
<td>(a) Application of the New Law by Local Courts</td>
<td>40</td>
</tr>
<tr>
<td>(i) The Urban Local Courts</td>
<td>40</td>
</tr>
<tr>
<td>(ii) The Rural Local Courts</td>
<td>42</td>
</tr>
<tr>
<td>(b) Appeals to the Subordinate Courts</td>
<td>43</td>
</tr>
<tr>
<td>5. CONCLUSION</td>
<td>46</td>
</tr>
</tbody>
</table>
RECOMMENDATIONS .................................. 46
(a) Law Reform .......................... 46
(b) Legal Education/Training .......... 48

BIBLIOGRAPHY .......................... 51
INTRODUCTION

This study is concerned with maintenance of divorced women at customary law. However, this should not be taken to suggest that divorced men are not, in any way entitled to be maintained by their former wives. For instance, maintenance provided for by statute is drafted in such a way as to make no distinction between husband and wife. It provides that a court may make orders for payments of monthly sum for maintenance of a divorced spouse and not of a divorced woman. In other words, if the court finds, according to the facts of a particular case that the wife is in a stronger financial position than that of her husband, then the wife is ordered to maintain the divorced man.

However, under customary law, the position of maintenance is that it does not operate both ways. Maintenance here, is a sole responsibility of a man. Furthermore, in a typical traditional set up, it is mostly a man who is in a position to earn money. This
is so due to several factors that prevent a woman from so doing. Prominent amongst these are; illiteracy on the part of the woman. This prevents them from being employed in the formal sector. Secondly, tradition has set aside certain jobs solely for men. For instance, building houses, setting animal traps etc. Thus, in the event of a breakdown of marriage it is the woman, because of unfair distribution of jobs, who suffers.

The term maintenance in this study refers to that financial or material support given to a divorced spouse or children for their general welfare.

Customary law does not recognise maintenance of a divorced woman. This stems from the view that a man is only under a duty to maintain a wife whose services he enjoys. According to this view, since a divorced woman is not able to provide her husband with such services as cooking, washing etc then she is not entitled to be maintained.
This view did not pose any problem to a divorced woman in say, forty years ago. During this time livelihood depended on a subsistence economy. This was able to support very big families. In this community, a divorced woman was looked after by her people.

However, with the introduction of a money economy, this way of life collapsed. The big families broke up into smaller ones as this economy could not support them. The migration to urban centres also entailed the inevitable breakdown of this system. This new system could not support the divorced women.

It is at this point in time that a divorced woman started suffering. It is important to note however, that the law remained rigid even with this economic and social change.

Nevertheless, the Local Courts recognised the need and started to order husbands to pay their wives a lump sum of money as compensation for the loss of the marriage. The distinction between compensation and maintenance must be noted. Compensation was
not meant to take care as it was, the welfare of the divorced woman. It was a creation of the court in sympathy with a divorced woman and it had no legal backing. Thus such orders were quashed on appeal, by the subordinate courts.

Statutory law did not interfere with this set up until in 1991. The enactment of the Local Courts (Amendment) Act\(^1\) introduced maintenance in customary law marriages.

Since women who have lost their marriages through divorce have been subjected to a lot of hardships, because of the rigours of customary law, it is the aim of this study to find out whether the operation of this new law has provided any relief to such women.

Thus, chapter one will lay down the position of maintenance at customary law. In other words, this chapter will look at the issue of maintenance of divorced women before the statutory intervention.

Chapter two will try to look at the operation of the new law since its enactment and try to assess if

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1. No. 8 of 1991
there has been any change at all.

It is believed that in order to appreciate the whole idea behind the study there should be a comparative perspective of the subject matter. Therefore, chapter three will look at maintenance law in marriages contracted under the Marriage Act.²

After having done this then we can critically analyse the maintenance law in customary marriages. Thus, chapter four will use the information from the other chapters to analyse the maintenance law in customary marriages.

Chapter five will conclude the study and make recommendations for improvement.

2. CHAP 211 of the Laws of Zambia.
CHAPTER 1

THE LAW OF MAINTENANCE IN CUSTOMARY MARRIAGES PRIOR TO THE ENACTMENT OF THE LOCAL COURT (AMENDMENT) ACT.

Zambia has a dual system of laws. These are: statutory and customary laws. This state of affairs leads to two different types of marriages; statutory marriage which is marriage contracted under the Marriage Act\(^3\) and customary marriage being marriage contracted under customary law.

Unlike statutory, customary law is unwritten. Zambia has about 73 ethnic groups. These groups have got their own different customary laws regulating marriage. There is no prescribed unified customary law for the whole Zambia.

Most of the laws governing this type of marriage depend on whether a particular ethnic group is patrilineal or matrilineal. For instance, in a typical traditional marriage the home of the new couple will depend on this. If patrilineal like

\[^3\] Ibid.
the Ngoni of Eastern Province, the girl will have to go and stay with the boy in his village. The converse is the general position in a matrilineal set up.

However, for the purposes of this study, common features to all customary marriages have been observed. These are aspects relating to divorce and maintenance of divorced women.

The Local Courts have original jurisdiction in customary matrimonial causes. Customary law is applied in Zambian local courts by virtue of section 12 of the local courts Act\(^3\) which provides that:

Subject to the provision of this Act a local court shall administer -

(a) the African Customary Law applicable to any matter before it in so far as it is not contrary to natural justice or morality or incompatible with the provisions of any written law.

\(^3\) Cap 54 of the Laws of Zambia.
Another express provision as to the application of the law is that found in the subordinate courts Act. This section empowers the subordinate courts to apply any African Customary Law as long as such law conforms to Conditions laid down in the Local courts Act. These are that the law must not be repugnant to natural justice or at variance with any written law.

The two sections provide express application of customary law. However the High Court Act also talks about customary law. The section allows the High Court to use the knowledge of assessors in a matter concerning a customary dispute. Although the section does not expressly provide for the application of the law the meaning of the contents of the section is very clear and straightforward: that of recognition and application of customary law.

5. Section 34 chapter 50 of the Laws of Zambia.
Customary law does not recognise maintenance of divorced women. It is important however, to state here that the law does recognise maintenance of wives while the marriage subsists. Failure by a husband to maintain his wife entitles her to sue for divorce.

This study, however, is concerned with maintenance after divorce and not during the marriage. Although the local courts have original jurisdiction in customary marriage disputes, unsatisfied litigants have access to subordinate courts and eventually to the High Court through appeals.

The position of maintenance of divorced women at customary law is well established by the decision of the High Court in the leading case of Mwiya v. Mwiya.⁶ The brief facts of this case were that —

A Lozi couple was divorced by a Local Court. The appellant appealed to the Subordinate Court on the grounds *Inter alia* that property bought during the marriage was not shared between the parties. The court dismissed the appeal. She

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6. (1977) Z.R. 113
further appealed to High Court where she contended *inter alia* (a) that the property be shared.

(b) that under Lozi Customary Law a divorced wife is entitled to maintenance throughout her life.

The court with the help of assessors, who were unanimous on observing that there were no such Lozi customs dismissed the appeal. The wife in this case had made no financial contribution towards the buying of the household property. Thus, the holding in this case must not be confused with that in the case of Siwake v. Siwake. 7 In this case the court ordered that the couple must share household property which included three motor vehicles. Evidence was adduced to show that the wife contributed in the purchase of the property. In the Mwiya case, the court was ruling on the sharing of property where the wife did not financially contribute and on maintenance of a wife after divorce. In the Siwake case, the decision

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rests solely on the contribution of the wife towards the purchase of the property. Customary law was not invoked because of the contribution on the part of the wife. On this ground, the two cases are distinguished very clearly. It might be argued that it is not fair to generalise the holding in one case from one ethnic group to the rest of the ethnic groups in Zambia, but as it has been point out earlier, this is one aspect of customary law which is common to all groups in the country. The Mwiya case represents the general traditional customary law position in all tribes in Zambia as regards the none-existence of the right to maintenance after divorce.8

Perhaps this law was justified twenty years ago. The traditional society then was arranged in a different way from today. Society at this time practised a subsistence economy. The set up provided the needs of big families. A divorced woman was incorporated in her kinsmen extended families and was well looked after. However, with the coming of the money economy, this changed.

8. Ibid p. 253
With the coming of this economic and social change the local courts took it upon themselves to order the payment of compensation for the loss of marriage to divorced women. These orders had no legal backing thus, on appeal the orders were being quashed by the subordinate courts. In the case of Fulechi Hebert Maombe v. Mary Phiri Fulechi.\(^9\)

The local court ordered compensation to be paid to the divorced woman. The defendant appealed to the subordinate court. The court quashed the order explaining that there was no reason for ordering compensation.

In cases where a local court ordered the payment of compensation it is clear from this case that the divorced woman only benefited in so far as the case did not go to the subordinate court.

One other problem faced by divorced women at customary law, lies in the very nature of customary marriage. Customary marriage, can be dissolved either by a court of law or outside court. Where the former means of dissolution was used, then the divorcee was

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9. (1989) LCA 136 (unreported.)
likely to be paid compensation. Dissolution outside court involves the intervention of the concerned families which try to solve the dispute. In the event that reconciliation has failed, then the marriage is dissolved.

The formalities in this case can be as simple as writing of a divorcee letter by a husband to his wife as per Lozi customary law. Such cases rarely come before the courts and thus the divorced woman is subjected to the harsh rigours of customary law.

The only time a concerned party brings this case before a court of law is where property sharing or custody of children is at issue. In a typical traditional marriage such property may constitute grain and kitchen utensils. The wife is entitled to a share of the family grain because of her contribution in cultivating them. This, for instance is practiced amongst the Ngoni of Eastern Province. 10

Because of the informal nature of the dissolution of a customary marriage, the divorced woman who

10. This was learnt through interviewing the Ngoni elders on Ngoni customary law on the subject.
did not take the case before the court was deprived of the compensation ordered by the courts. The divorcee's position was still insecure even where the dissolution of the marriage was done by the court. There are some cases which show that the ordering of compensation was not automatic. In the case of *Alice Kambili v. George Malima*,¹⁰ the plaintiff was sent home (village) by the respondent and did not receive any financial support for four years. Divorce was granted but the court did not order any compensation.

None payment of maintenance after divorce under customary law has been justified in some cases. Thus traditionalists contend that maintenance is a married woman's right and that it can only be enjoyed in a marriage.¹¹ According to this school of thought, the husband, maintains his wife because he also expects services from her and that since a divorced woman is not in a position to render such services, then she is not entitled to maintenance.

¹⁰ (1991) LC/869 (unreported) decided by the Matero Local Court Grade A.
This attitude, as already pointed out could have been justified in those days when society practised a subsistence economy and the organisation of families (this includes extended families) was such that it catered for the needs of the divorced women. The modern families, however, have been trimmed because of the coming in of the money economy and the migration of people to urban areas. The traditional family today is unable to incorporate the divorced woman and this is especially so in urban areas.

The problem of a divorced woman under customary law in this new set up was further aggravated in cases where she had the custody of the children of the family. According to customary law a man in such a case is not compelled to maintain the children.

In the case of Edna Chanda v. Mwenda, father of the plaintiff requested the court to order the defendant to maintain the children of the family who were in the plaintiff's custody. The man said that without such an order the man could not be compelled to do so under customary law. Since some

12. Ibid Himonga p. 253
customary marriages get dissolved outside court then the divorced woman has got to look after the children of the family as there is no court order to compel the husband to maintain his children in such a case.

In cases where the court orders maintenance of children of the family it is either not enough or that the woman has got to push the man every time is due as revealed by research. 13

Thus, a divorced woman under customary law apart from struggling to look after herself in a changed society, in the case where she had custody of the children of the family (which happens in most cases14), she had to provide for the children as well.

In conclusion we can say that customary law did not and does not recognise maintenance of divorced women. However, it recognises maintenance during marriage. This is a married woman's right and failure by a husband to maintain his wife entitled the wife to sue for divorce. The view that a divorced

14. Loc. cit
woman is not entitled to maintenance could work favourably in a subsistence economy and in a well organised family unit, environment. However, with the money economy this view is considered as inhuman. This is especially so where a divorced woman also has custody of the children of the family.

It was the realisation of these problem which a divorced woman faced at customary law that prompted the enactment of the Local Courts (Amendment) Act to provide maintenance of a divorced spouse in customary marriages.
CHAPTER 2

THE LAW OF MAINTENANCE IN CUSTOMARY MARRIAGES AS PROVIDED BY THE LOCAL COURTS (AMENDMENT) ACT.

Customary law as it applied to maintenance in customary marriages had been left to operate without any intervention either statutory or by courts. This is unlike some aspects of the law where the courts came out and held that such branches of customary law were contrary to natural justice equity and good conscience. In the case of Kaniki v. Jairos, 15 a custom that required a surviving spouse to pay some money (akamutwe) to the deceased's family was held to be 'repugnant to natural justice equity and good conscience' by the High Court. This was a Lala customary law and the parties were in agreement as to the custom but what was at issue was the amount of money involved. The court passed such a judgment in accordance with section 12 of the Local Courts Act which allows the application of customary law in the Local Courts.

The section provides expressly that the law will only apply if it is not repugnant to natural

15. (1967) ZR 71
justice and not at variance with any written law. Further more, paragraph 16 of the Local Courts Hand-book states that any customary law which conflicts with principles of natural justice is contrary to natural justice. This means that anything that offends the sense of rightness or decency or is contrary to fundamental natural rights is to be regarded as repugnant.

In yet another case of *Nkomo v. Tshili*, 16 the High Court refused to grant custody of an eight year child as required by custom to the relatives of the child's father whom the child had never seen before. The court held that to do so would not be in the interest of the child and that it was contrary to natural justice.

Where maintenance of divorced women at customary law was concerned, however, courts came out in full support of the customary law. The courts agreed with this law and denied a divorced woman maintenance. 17

This was despite decisions such as the ones in the

16. (1973) ZLR 102
Kaniki and Nkomo cases. The law remained in operation even in the face of the social and economical changes pointed out in chapter one. In other words, the law remained static while society changed. This problem brought about the inevitable need for change.

Such a change came through the enactment of the Local Courts (Amendment) Act. Section seven of this Act brings in a new paragraph in section thirty-five of the principal Act. This paragraph now provides for maintenance to divorced spouses in customary marriages.

With the new paragraph, section thirty-five provides that:

The court may make the following orders:

(d) *Make an order for the payment of such sum for the maintenance of a divorced spouse as the court may consider just and reasonable having regard to the means and circumstances of the parties for a period not exceeding three years from the date of divorce or until remarriage which ever is earlier*.

The Act became law on the twenty-eighth of August 1991 but started operating on the sixth of September 1991. It is interesting to note however,
that in some local courts continued applying customary law or awarding compensation to divorced women. The trend in some cases continued up to the end of the year 1991. In the case of Elizabeth Ph Phiri v. Frank Banda, which was decided in November 1991, the plaintiff had been neglected by the defendant. The plaintiff claimed for divorce and it was granted. However, the court did not order maintenance. In another case Cathrine Sina v. Luka David Shyeemwa, also decided in November the court did not order maintenance or compensation.

**Application of the new law in Urban Local Courts.**

The available cases show that the courts started applying the new maintenance law seriously at the beginning of 1992.

In the case of Mada Jere v. Isaac Zulu, the defendant deserted his wife and two children. The

18. Lusaka (Matero Local Court Grade A (1991) IC/824 (unreported)
19. (1991) IC/832 (unreported)
20. One of the clerks admitted that they were reluctant to apply the law and that they were forced to start by the women's lobby.
wife sued for divorce. The court granted divorce and ordered the defendant to pay the plaintiff K1,000 monthly as maintenance for thirty-six months. In another case of Julian Tembo v. Aaron Lungu, the plaintiff sued for divorce because the defendant had no respect for his in-laws. Divorce was granted and the defendant was ordered to pay K2,000 as maintenance for thirty-six months.

However, in the case of Hilda Lubasi v. Ebby Katukula, the court did not order maintenance. The court did not give any reason for not doing so.

The application of the law in the urban local courts is not consistent as revealed by the Lubasi case.

(ii) Application of the new law in rural local courts.

The trend in rural local courts in relation to divorce cases before the coming in of the new provision on maintenance was the same as that obtaining in urban local courts. In other words,

23. (1992) L0/342 (unreported)
24. L0.C.A/32/92 (unreported)
they did not order maintenance but in some cases they did order compensation to be paid to divorced women.

After the amendment to the local courts Act, however, the courts continued with the old order. This is shown in some of the cases decided prior to the amendment. In the case of Felister Mbewe v. Simon Mutatuka,25 which was decided in July 1991, the court ordered the defendant to pay K2,000 as compensation to the plaintiff. In the case of Julian Munthumba v. Kenny Njamba,26 which was decided six months after the law of maintenance was passed, the court ordered compensation and not mainte-
nance.

It has been pointed out that a lot of women do not get the help of the courts in divorce cases because their marriages end out of court. However, there some cases where divorced women, whose marriages have ended out of court, have made the effort to bring their cases before the courts.

25. (1992) LC/174 (unreported)
26. (1992) LC/185 (unreported) the case came before Nkamesha Manyika Local Court Grad A in Lusaka rural.
This is done in protest against the rigours of customary law which does not offer them any relief. However, some case records show that these women were not awarded maintenance by the courts either. In the case of Ireen Kawala v. Newton Pendapa,27 the plaintiff had been divorced outside court and could not claim anything from her husband according to Soli customary law. She took the case before a court of law. The court did not order any maintenance. The court here clearly conspired with the customary law to defeat justice.

Apart from the inconsistencies in the application of the law and in most cases the complete disregard of the law, the position of a divorced woman is made even worse where she has the custody of the family (which is usually the case). The law does provide for maintenance of the children28 but the problem comes about because of the manner the local courts make such orders. In most cases the court orders the husband to be maintaining the children but does not stipulate the amount to be paid. The court also advises the wife to report to the court in

27. Section 7(e) of the Local Courts (Amendment) Act.
28. Ibid.
the event that the former husband does not comply with the order. The problem here is what constitutes maintenance of a child? In the course of this research it was revealed that to most men as long as they buy uniforms and exercise books for school going children then they have satisfied the order. In the case of non-school going children maintenance is in the form of a few clothes once in a while or a tablet of soap once in a while. From this it can be seen that the day to day requirements of a child is left in the hands of a divorced woman who is paid very little maintenance or none at all.

Appeal to subordinate courts

Dissatisfied litigants in the local courts can appeal to subordinate courts. Like the former, the latter are expressly empowered to apply customary law. At the time of this research, that is, July 1992, there only two appeal cases before the subordinate courts in Lusaka town. None of the cases had been decided by the courts. The first case was that of Hilda Lubasi v. Ebby Katukula. This case came before the Boma Subordinate courts in February but five months later it was still undecided. The second one came before the Chkwa Subordinate Courts but again was not

29. Ibid.
decided by the court because of non-appearance by the parties.

According to records, there hasn't been any appeal so far that has come before the High Court.

From what has been said so far we can conclude that for a long time the courts have been practising a conservative approach in as far as maintenance of divorced women at customary law is concerned. This is despite the active role that they have played in holding other branches of the law as repugnant to natural justice. In the case of maintenance however, the courts have worked had in hand with customary law. This has been so even in the face of change both economically and socially. The reluctance to apply the new law and in most cases a complete refusal is an illustration of this conservative approach. This leaves the divorced woman in customary law still far behind her counterpart in statutory marriages.
CHAPTER 3

MAINTENANCE IN STATUTORY MARRIAGES

The statutory marriage here in Zambia is contracted under the Marriage Act.\textsuperscript{30} Indegeneous Zambians were not allowed to marry under the Act prior to 1963. They could only marry under customary law but could register such marriage. However, this registration did not bestow on the parties any legal rights. In other words, the marriage still remained a customary one.

The Marriage Act is a modification of the English law to suit the local conditions. The Act lays down the necessary marriage procedures and provides the administrative machinery to administer marriage laws.

However, the Marriage Act does not deal with issues relating to divorce and maintenance of spouses under this type of marriage.

The law applicable in this area is English law. The law is found in the Matrimonial Causes Act, 1973. This English Act is applicable here by virtue of section 11 of the High Court Act.\textsuperscript{31} This section

\textsuperscript{30} CAP 211 of the Laws of Zambia.
\textsuperscript{31} CHAPTER 50 of the Law of Zambia.
provides that, "the jurisdiction of the court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of the court be exercised in substantial conformity with the law and practice for the time being in force in England." Matrimonial causes and matters envelop such things as maintenance, judicial separation, custody of children etc.

It is important to note that, unlike customary law marriage cases which are handled by Local Courts and the subordinate courts, statutory marriage is only administered by the High Court. Matrimonial causes arising out of the statutory law are an exclusive concern of the High Court sitting as a court of first instance.

The subordinate court is expressly precluded from entertaining any suit where the validity or dissolution of a statutory marriage is in question. However, they are empowered to make maintenance orders during the subsistence of the marriage. Maintenance arising out of divorce is a sole responsibility of

33. Ibid.
the High Court.

The law applied by the court in the distribution of property and financial provision on divorce is contained in sections 23, 24 and 25 of the Matrimonial Causes Act.

Under section 23 of the Act maintenance of both a spouse and children of the family is provided in form of periodical payments of a lump sum payment. The court may even order a party to make payment of lump sum to the other for him/her to meet expenses incurred in maintaining himself/herself or any child of the family before making application for the order of maintenance. 34

The orders which the court is empowered to make are not restricted to payments of money. The court can order the sale of property where a party has interests in, either in possession or reversion. 35 The proceeds from the sale are shared between interested parties.

Under section 25 of the Act the court is directed to have regard in exercising its powers

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34. Section 23(3) of the Matrimonial Causes Act, 1973.
35. Section 24(A) Ibid.
contained in the two sections, to the circumstance of the case including the following:

(a) income, earning capacity, property and other parties to the marriage has or is likely to have in the foreseeable future.

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.

(c) the standard of living enjoyed by the family before the breakdown of the marriage.

(d) the age of each party and the duration of marriage.

(e) any physical or mental disability of either of the parties to the marriage.

(f) the contribution made by each of the parties to the welfare of the family, including any contributions made by looking after the home or caring for the family.

(g) the value to either of the parties to the marriage of any benefit (eg pension) which by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring.
The section also requires the court 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 each had properly discharged his or her financial obligation and responsibility towards the other.

Paragraph (f) is particularly relevant and important in so far as we are dealing with the average Zambian woman. The women are less privileged economically. They don't have a regular income. Thus, they can not buy property or contribute to the purchase of property of the family so as to entitle them to a share at divorce.

The paragraph gives such women an opportunity to get a share by virtue of their services.

In the case of Wachtel v. Wachtel, Lord Denning had the following to say about such cases: "We may take it that parliament recognises 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. The one contributed in kind. The other

36. (1973) 1 All E.R. 829 at 838.
in money or money's worth. If the court comes to the conclusion that the home has been acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them no matter in whose name it stands. Just as the wife who makes substantial money contribution usually gets a share, so should the wife who looks after the home and cares for the family for twenty years or more."

In this case the wife had, for eighteen years contributed to the matrimonial home by looking after the home and helping her husband and had been an excellent mother. The court held that she was entitled to a share.

In an earlier case of Porter v. Porter, Sachs L.J. observed that "...the court must always take into account how long the marriage has lasted and to what extent the wife has rendered her domestic services to the husband."

The divorced woman's position is further strengthened by the fact that the children in her custody are also entitled to maintenance. The law

expressly provides that the court should not dissolve a marriage whose children's welfare has not been secured unless in special circumstances. 38

Although women married under the Act are well provided for by the law, research has shown however, that only a handful exercise this legal right.

The bulk of the cases show that women are more concerned with the maintenance of children than for themselves. One explanation of this attitude on the part of the women is that they have, in most cases, their own independent source of income. The other view is that some men still try to control their divorced wife's activities by virtue of the maintenance. They do this under the traditional belief that because divorced women are not entitled to maintenance then the maintenance still entitles them to have control over her. Thus, a divorced woman who would like to maintain her freedom desist from applying for maintenance.

However, this does not suggest the inadequacy of the law, or that there is a denial of justice by the courts. The courts, do in fact order maintenance

whenever it is applied for that is; if it is convinced that the applicant deserves to be maintained. This enquiry is necessary as it might turn out that the party applying for maintenance (whether woman or man) is actually the party who is supposed to maintain the other spouse. In other words, if an application satisfies this condition then maintenance in statutory marriages becomes a right unlike in customary marriage where even eligible candidates go without being maintained.
CHAPTER 4

A CRITICAL ANALYSIS OF THE NEW LAW

The mischief intended to be prevented is the guiding line to find out whether a particular piece of legislation is effective or not. The Court in the Wachtel Case pointed out per Curiam that in deciding cases the court can look at reports of a Commission although they are not binding on them they help to show the mischief that parliament intended to prevent. When looking at maintenance in Customary Marriages, literature is abound to show that divorced women are subjected to a lot of inhuman treatment because of lack of maintenance.

It is against such a background that the provision of maintenance in Customary Marriages in the Local Courts (Amendemnt) Act is going to be analysed. The primary objective is to find out whether with the introduction of such legislation, the divorced woman's position in Customary Marriages is any

39. Ibid.

better now than she was under Customary Law. We have seen in Chapter one that Customary Law does not recognise maintenance of a divorced woman. However, Local Courts took it upon themselves to order compensation to divorced women in a form of lump sum payment when the social and economic situations changed. This was contrary to Customary Law and the Subordinate Courts were justified to quash such orders or throw out appeals against non order of compensation. In the case of *Abina Phiri v Collins Banda*, the plaintiff appealed to the Subordinate Court because the Local Court did not order the defendant to pay her compensation. The court held that she was not entitled to it. The orders were the initiative of the Local Court but they lacked legal backing.

The introduction of maintenance by the Local Courts (Amendment) Act provided the much needed legal backing. However, this law has not been as effective as intended by the legislators as shown in Chapter two.

The first hurdle is the very nature of a Customary Marriage. As already pointed out in

Chapter one, a Customary Marriage can either be dissolved in Court or outside Court. In the latter Case, the divorced woman is subjected to Customary Law. In other words she does not get any maintenance at all according to the Law. In this case the woman is not protected by the Law. It appears that the legislators overlooked this fact in their noble work.

Further, the law lacks the much helpful guiding details found under the law applicable to statutory marriages. For instance, the statutory marriage law provides that the Court in awarding maintenance should take into account the living standard enjoyed by the family before the breakdown of the marriage. The maintenance law in Customary Marriage seems to ignore this important consideration. In the case of Cathrine Sina v Luka David Shyumwa, the husband was a prosperous businessman who owned a shop. At divorce, the Court ordered the defendant to pay a lump sum of K10,000 to the Plaintiff. In such cases, a woman who was leading a comfortable life during marriage turns into a destitute after divorce. Under the law applied to statutory marriage, the court is

42. Ibid.
empowered to make an order of payment of a lump sum to a party for him/herself to meet expenses incurred in maintaining him/herself or any child of the family before making an application for maintenance. This aspect was also overlooked in the Customary Marriage maintenance law. In the case of Fredah Nanyangwe v Whiteson Sinyiza, the defendant deserted the Plaintiff and went to live with another woman. The Plaintiff stayed without the husband's maintenance for a year. At divorce, the Court only ordered the defendant to pay a monthly payment of K600 for 10 months. The woman in this case was not only unjustly treated as to the duration of the payment which should be three years but the expenses she incurred in that one year was not considered in the order as it is not provided for by the law. An extreme case in this line is that of Alice Kambili v George Malima. In this case the Plaintiff was deserted and she stayed on her own for four years. At divorce the Court inexplicably did not order any payment of money of any kind.

The law is also silent on the sharing of property of the family. It only talks about the payment of money. It would seem that in the absence of

43. (1991) LC/776 (unreported)
44. Ibid.
an express provision to the contrary Customary Law is still governing this aspect. Under the Matrimonial Causes Act the Court is empowered to order the sale of property and share the proceeds in which either or both parties to the marriage has or have a beneficial interest in possession or reversion. Under Customary Law the wife has got no interest in his husband property unless she directly contributes in the purchase of such property. Siwakes Case is an illustration of this. However, under statutory marriages, a wife although she may not contribute directly to the purchase of such property, will be taken to have an interest in the property by virtue of her contribution made by working after the home or caring for the family. What Lord Denning said in the already cited Case of Wachtel v Wachtel is particularly true about a woman married under Customary Law. He said that in generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform, she is entitled in justice to

45. Ibid
46. Ibid
share its fruits.

However, neither Customary Law nor the new statutory provision takes into such considerations. Thus, as the position stands now a woman is not entitled to a share of the property of the family. This is so whether the Court orders maintenance or not. This leaves the divorced woman in the same position as she was before the Local Courts (Amendment) Act.

(a) The application of the new law by Local Courts.

The general trend as revealed by some case records is that these courts are very reluctant to apply the law. When they decided to order maintenance either the amount is very little or the period (3 years) stipulated by the law is completely ignored.

(i) The Urban Local Courts

When these courts are compared to the rural Local Courts they appear to be doing a bit better. According (ly) to some of the case records, the courts have ordered maintenance and have complied with the statutory requirement of three years. The courts were reluctant to apply the new law and started to apply early this year after they were told to do
so by the women's lobby. 47

However, the problem of divorced women is far from being comfortable even in those where the courts award maintenance. The average amount awarded is K1,000. This money according to the present economic ills cannot even buy a bay of meal meal.

The divorced woman is further disadvantaged in cases where she has the costody of a child or children of the family. This is so because although there is a law empowering the court to order maintenance of children of the family, the law was drafted in such a way that it suffices for the court to tell the father to maintain the children. 48 In other words, no amount of money is sitipulated as maintenance for the children. What normally happens in practice is that all that the father does (if he does it at all) is to buy a few clothes once in a while. 49 The day to day needs of the child is left to the mother. How

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47. A Court Clerk in one of the Urban Local Courts admitted that if it were not for the meeting with the Lobby Group the Position was going to be different.

48. S.35 (e) of the Local Courts (Amendment) Act

49. Section 41 of the Matrimonial Causes Act.
she does it is not concern of either the court or the father to the children. On this point the new law again does not help the woman. When you look at the law applying to statutory marriages, the Court is directed to abstain from dissolving the marriage if the welfare of the Children of the family has not been secured unless in special circumstances. This provision would do a lot of good to a divorced woman under Customary Law. Take the case of Mada Jere v Isaac Zulu,\(^{50}\) for example. The Plaintiff was deserted by the defendant and she had two children. The Court awarded her a monthly instalment of K1,000. The defendant was further ordered (no amount was stipulate to maintain the children.\(^{51}\) From this we can see that the new law has not helped to alleviate the burden on the divorced woman.

(ii) **The rural Local Courts**

From all the case observed in one rural Local Court, there was not single case in which

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50. Ibid.

51. A follow up on the case revealed that from the time the man was ordered to maintain the children he had only bought them School exercise books.
the court ordered maintenance. The court continues to order compensation. However, when the Local Court justice and clerk were asked to clarify the points they seemed to be convinced that they were acting according to the maintenance law. They did seem to notice the difference between the orders they were making before the new law and what is required by the maintenance law. What is again being overlooked is the requirement that the amount ordered should be a monthly payment stretching over a period of three years or up to the time of remarriage. The average amount ordered is K2,000 to be paid in a monthly installment of K500. This only goes up to months.

(b) Appeals to the Subordinate Courts.

Litigants, unsatisfied with the Local Courts ruling have got a right to appeal to the Subordinate Courts. At the time of the research, there were only two appeal cases from the Local Courts. One came before the Court at the Boma and the other one at the Chikwa Subordinate Courts.

The case which came before the courts at the Boma was still not decided by the court five months after the appeal. The Court Clerk admitted that generally there were some delays in disposing of the cases. This kind of attitude discourages the party appealing.
Justice delayed is justice denied. The one that came before the Chikwa Courts was also not decided by the Court due to non appearance by the parties.

At the time of this research there was no appeal to the High Court.

This brings to the conclusion that most of the cases end up in the Local Courts where the divorced woman's interest is not any better than that before the new Law.
CONCLUSION

The position of a divorced woman at Customary Law was that she was not entitled to maintenance. This was justified because the economic and social situations then guaranteed a divorced woman's well being. However, when this order gave way to a new system the woman started suffering. The Local Courts were quite sensitive and responded by ignoring the vigours of Customary Law and ordered compensation to be paid to divorced women in form of a lump sum. The subordinate courts on the other hand adhered to Customary Law and quashed such orders on appeal. This was justified because the ordering of compensation had no legal backing.

The much needed legal backing came through the enactment of the Local Courts (Amendment) Act. One would have thought that with the introduction of maintenance in Customary Marriage, the divorced woman's position was going to improve.

However, the divorced woman's comfort is far from being realised. The first problem blocking the realisation of this comfort is that the Local Courts are reluctant to implement the law. In cases where they order maintenance to be paid, it is either not enough or that the statutory period to be covered is
completely ignored. This picture is contrasted with that obtaining in statutory marriages. Unlike in statutory marriages the provision for maintenance in Customary Marriages does not give detailed considerations that should be taken into account when ordering maintenance. This results into a lot of injustice. Because of these problems the position of a divorced woman at Customary Law is not any better than that before the statutory intervention.

RECOMMENDATIONS

The fact that divorced women at Customary Law still face a multitude of problems, bears clear testimony of the flaws in the law and the gap between the law on paper and the law in action. These problems are attributed to the flaws in the law, administration of the law and lack of legal education and training programme.

The recommendations therefore, fall into two broad categories: law reform and legal education and training.

(a) **LAW REFORM**

This is the biggest problem impeding the progress
needed to improve a divorced woman's welfare.

The maintenance law applying to Customary Marriage will remain a dream as long as it stands unsupported by other progressive legal provisions. For instance, as long as a Customary Marriage can be contracted and dissolved outside a formal system like that of a statutory marriage, the law will have no effect at all. For example, in Zimbabwe a Customary Marriage is solemnised in a community courts (on the same level with our Local Courts) and can only be dissolved in court. This system can ensure that every couple is informed of their rights and make sure that every divorce case comes before a court of law. In this the operation of Customary Law on this aspect can be wiped out and to a greater extent ensure the ordering of maintenance.

A provision in the law laying down the surrounding circumstances to be taken into account by a court in ordering maintenance like in statutory marriages would be a great help.

The present law does not give such considerations as a result we find the courts treating the cases uninformally which should not be the case at all. For instance, a divorced woman lived in luxury should be treated differently from one who lived in poverty. The amounts of maintenance should be
different in the two cases. However, as the law does not give these guidelines, the courts tend to treat these cases equally.

The law on the maintenance of children in Customary Marriages should be strengthened. In statutory marriages the law provides that the courts should not dissolve a marriage if the welfare of the children has not been taken care of. We find this provision lacking in Customary Marriage maintenance law. Because of this we find a situation where the court dissolves a marriage without proper arrangements being made for the children welfare. In such cases, the divorced woman, who usually has the custody of the children, is subjected to a lot of hardships.

There should be a law empowering the Local Courts to make orders of monthly payments as maintenance of children. This will help to stop the making of a general meaningless order.

(b) Legal Education/Training

The Local Court justice do not undergo any formal training. The only qualifications that is required for one to become a justice is the knowledge of the English Language. The candidate should be able
to read and write. It is also an important requirement that the candidate should have a good knowledge of a Customary Law operating in the area where he is to work. The observation made through this study is that this criterion of picking the Local Court justices is outdated.

The justices are required to interpret statutes and then deliver sound judgment based on this interpretation. It was discovered in the course of this study that they are ill equipped to do this. For instance in one case, a Local Court even went to an extent of 'dissolving' a marriage contracted under the Act. The presiding justice could not know that the court had no jurisdiction to dissolve the marriage. What is more puzzling is that the case record showed that there was enough evidence to show that the marriage was one under the Act. This is clear testimony that some of the justice do not understand the most fundamental principles of law.

52. Nkomesha Manyika Local Court Grade A- Lusaka Rural. By the time the authorities learnt of the mistake, there was nothing that could be done. The couple believed themselves divorced.
In the same court the justice did not seem to understand the difference between compensation and maintenance. According to them the maintenance provision is just a continuation of the past namely; the making of compensation orders. The revolutionary impact that this statutory provision has on Customary Law has not been appreciated.

Finally, there must be a serious mass education campaign. More than three quarters of the population does not know about the change in the law as a result they do not exercise their rights provided therein. Thus, it is believed that even where you have a perfect law and the court officers highly qualified to carry out their duties, the good intentions will still not be achieved if the population that law soughts to serve is ignorant about its existence. Mass education is a necessary tool to make people abandon Customary Law on the aspect of maintenance and accept the new law as the only justified position. It must not be forgotten that maintenance is a conflict between statutory law on one hand and Customary on the other.


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