Divorce in matrilineal Customary Law marriage in Malawi: A comparative analysis with the patrilineal Customary Law marriage in South Africa

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Declaration

I, Lea Mwambene, hereby declare that the work on which this research paper is based is my original work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted in support of an application for another degree or qualification of this or any other institution of learning.

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Chapter 1

Introduction

This research aims to undertake an investigation into the question of whether after divorce, in the matrilineal customary law marriage in Malawi, women’s rights are severely violated. It will show causes of divorce, how proceedings are done, how issues of property are handled, how the issue of custody of children and maintenance are also handled. All this will be weighed against the constitutional provisions and international law.

This will be done by way of comparison with divorce in patrilineal customary marriage in South Africa. Since the main focus of the study is the matrilineal customary marriage in Malawi, the South African position will not be as detailed. The ultimate purpose of this research is to seek effective ways of reducing a misconception that all customary laws are gender biased toward men. It seeks to enhance an understanding of how issues of marriage and divorce are governed in various societies.

Whereas it is debated that customary norms enforce gender discrimination and are therefore amongst the offenders against human rights,1 this study argues that a blanket rule that all customary rules are discriminatory toward women and therefore in conflict with human rights seem not to be true. At the end of the day, it becomes an issue about the proper understanding of a particular culture and how repressive norms in that culture could be eliminated.

So far, few scholars have studied the marriage aspect of customary law in Malawi.2 It should also be noted that most scholars who have written on customary marriages in Malawi are non-legal researchers. As such, there is very little analysis of the law and case materials.3 Therefore, this research will also endeavour to produce authoritative

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2Most notable works are: Chigawa M., 1987 and Ibik J.O., 1970.
3For example, Chigawa is the only legal scholar I encountered who has written on the subject; Mtika and Doctor are demographers, Ibik is a sociologist.
legal materials on the matrilineal customary law of Malawi.

After the attainment of republican status, Malawi had two court systems that shared jurisdiction over certain matters. These two systems were the Western structured and the Traditional Courts. All customary cases were handled by traditional courts, the National Traditional Appeals Court (N.T.A.C.) being the highest court of appeal of this system. For this reason, most of the cases referred to in this research paper were decided by the N.T.A.C. After 1994, all courts and their judicial powers are redefined in the Constitution of the Republic of Malawi, 1994. The Western modern and the traditional system merged into a single system. In essence, section 103(3) of the 1994 constitution, which provides for merging of the two systems, abolishes the Traditional Court system. The original jurisdiction over customary law cases is now vested in the magistrate courts (M.C.) and the High Courts, the Supreme Court of Appeal (S.C.A.) being the highest court, where appeals are finally channelled. As such, most of my case authorities that are used are those of subordinate courts, where the research was conducted.

This research paper is divided into seven chapters. The second chapter describes the geography of areas where matrilineal customary law applies in Malawi (Appendix). I further give an account of the social organisation of one of the tribes that is matrilineal. The third chapter presents the theoretical framework and study design of the research. The fourth chapter presents a broader view of a matrilineal customary marriage. The aim of chapter four is to enhance an understanding of how, after divorce, issues of property, custody of children and maintenance are handled. The fifth chapter presents a detailed discussion of the aspect of divorce. It starts by looking at grounds for divorce under a matrilineal customary system in Malawi. It then looks at who can initiate a divorce. It finally looks at the procedure for divorce. The sixth chapter looks at how issues of maintenance, child custody and property distribution are handled in a matrilineal customary marriage after divorce. In other words, this chapter looks at the effects of divorce.

The research paper concludes by examining the rights of women and men after divorce in a matrilineal customary system. I argue that it is wrong to say that all customary norms discriminate against women and are therefore offenders of human rights.

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4Malawi became a Republic on 6th July 1966.
6Mutharika P., 2000, 950.
7Cases are, therefore, not of recent nature. However, they are important because they show how the matrilineal customary law was being administered by courts of law.
8That is, when Malawi became a multi-party country.
9Map of the Central and Southern regions of Malawi where matrilineal customary marriages are practised.
Chapter 2

Theoretical framework and study design

2.1 Methodology

The overall objective of the study is to investigate whether, after divorce in a matrilineal customary marriage in Malawi, women’s rights are severely violated as compared to the patrilineal customary marriage in South Africa.\footnote{South Africa has been chosen because patrilineal marriages have been well researched and documented in the country.} The work reflected in the following chapters is based on a variety of research methodologies. First, desk top audits of existing materials on customary law and human rights are taken, including internet-based publications and conference reports. The desk top audit also focus beyond the borders of Malawi and South Africa. This is intended to ascertain the existing body of knowledge regarding matrilineal customary law marriages. Particular emphasis is placed on an examination of case law on divorce in customary matrilineal marriages in some selected Malawi magistrate courts. Customary marriages in Malawi are under the original jurisdiction of magistrates, some of whom were once traditional judges in the now-abolished traditional courts. Since 1994, traditional courts are not officially operational\footnote{Unofficially, traditional courts are still operational. Litigants do take their cases to these courts.} because they were integrated into the judiciary as Magistrate courts. However, though parliament has not so far done its task, section 110(3) of the Constitution\footnote{The Constitution of the Republic of Malawi, 1994 hereinafter called the Constitution.} provides that:

parliament may make provision for traditional or local courts presided over by lay persons or chiefs: provided that the jurisdiction of such courts
shall be limited exclusively to civil cases at customary law...  

I also look at the domestic law that provides for the equal rights of partners during and after marriage. In this regard, I firstly look at the Constitution since it is the supreme law of Malawi; all other laws are to be measured against it.

The Constitution upholds the principle of non-discrimination. It also provides the recognition of cultural rights. Section 24(2) of the Constitution seems to provide an internal limitation that “legislation shall be passed to eliminate customs and practices that discriminate against women”. The inclusion of the right to culture is, in my opinion, a commitment by Malawi to the preservation of African culture. As long as a particular cultural practice can be justified that it is not discriminatory on the basis of gender, African people, who choose to live by their cultural beliefs, are entitled to do so. For example, many Africans contract monogamous marriages governed by the Common Law and not Customary Law.

In addition to the above, section 24(1)(b) of the Constitution provides that women, on the dissolution of marriage, have the right:

(i) to a fair disposition of property that is held jointly with a husband; and

(ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

From the above Constitutional provision, it is clear that the Constitution requires that upon dissolution of marriage, property jointly held by spouses to a marriage should be equitably distributed between them. Thus, it could be argued that section 24(1)(b) equally applies to marriages contracted under Customary Law. Another constitutional provision, that will be important in this discussion, is section 22(5) with regard to marriages by repute or by permanent cohabitation. As it will be shown later, under the matrilineal marriage laws, a marriage is not recognised if there was no ankhoswe.

\[4\] Mutharika P., 1996, 215 has also taken note of this constitutional provision.

\[5\] See section 5 of the Constitution.

\[6\] See section 20 of the Constitution.

\[7\] See section 26 of the Constitution.

\[8\] This argument comes in because not all Africans want to live in accordance with their traditional cultures.


\[10\] According to section 22(5) of the Constitution, customary marriages are also recognised.

\[11\] My emphasis

\[12\] Marriage guardians from both the woman and the man’s side whose consents validate the matrilineal marriage.
I also look at the statutory law governing the matrilineal customary marriages in Malawi. Finally, international best practice and theoretical materials are not ignored in this research as the practice of customary norms continues to be influenced by international law. International law has played a great role in providing a yardstick against which legislation in domestic laws can be assessed. For instance, the Constitution provides in section 11(2)(c) that:

In interpreting the provisions of this Constitution a court of law shall where applicable, have regard to current norms of Public International Law...

The above provision, in my opinion, envisages that international treaty law is an important source of authority for the interpretation of those rights relevant to women that have been included in the Constitution. Not only would the Convention on the Elimination of all forms of Discrimination against Women (C.E.D.A.W.) be of relevance in this regard, but the other non-binding instruments pertaining to the welfare of women may also carry weight.

It could be argued, though, that in terms of international law, treaties to which Malawi is a party should be accorded more weight than non-binding laws, because upon signature, the obligation is incurred to “refrain from acts which would defeat the object and purpose of the treaty”.

In particular, in view of the fact that this research paper is concerned with women’s rights upon divorce, it is worth noting that C.E.D.A.W., and other international instruments relevant to marriage and divorce would be of much relevance. Therefore, women’s rights in terms of international law is an important resource for judicial interpretation and legal development in this discussion.

Secondly, I undertook a field trip to various magistrate courts of Malawi. The magistrate courts visited include the Blantyre district magistrate court, Zomba district magistrate court and the Mulunguzi magistrate court. These courts are located within the geographical areas where matrilineal systems are practised. During the research, I also interviewed some women and men who were awaiting divorce trial proceedings.

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13 Ratified by Malawi in 1987.
15 These interviewees were found in the respective courts that I was visiting. Some of them had their cases already determined by the court.
Chapter 3

The land and the people

3.1 Introduction

Malawi is a small landlocked country south of equator.\(^1\) It shares borders with Mozambique to the east, south and south west, Zambia to the west and Tanzania to the north. The country is divided into 3 administrative regions, \textit{viz} namely: North, Centre and South. These are further subdivided into a total of 27 administrative districts. The population is close to 10 million.\(^2\) Fifty-two percent of the population are women.\(^3\) The majority of these women live within the matrilineal family systems.\(^4\)

The country is not homogeneous. There are several tribes. In the northern region there are, among others, Ngonis and Tumbukas.\(^5\) The Mang’anja, Yaos and Chewas are the largest groups in the southern and central regions.\(^6\)

Generally, Malawi can be divided into two customary marriage law systems: matrilineal and patrilineal systems.\(^7\) The matrilineal system prevails in twenty districts of the central and southern regions, \textit{viz} viz Dedza, Dowa, Kasungu, Lilongwe, Mchinji\(^8\), Nkhotakota, Ntheu, Ntchisi, Salima, Blantyre, Chikwawa, Chiradzulu, Machinga, Mangochi, Mulanje, Mwanza, Thyolo, Zomba, Balaka and Phalombe. The patrilineal system prevails in the whole of the five districts that are in the northern region and

\(^{1}\)Mutharika P., 2000, 949. \\
\(^{2}\)Green C. and Baden S., 1994, 2; Mutharika (n.1), 949. \\
\(^{3}\)W.L.S.A., 2000, ix. \\
\(^{4}\)Miller D., 1996. \\
\(^{5}\)Green and Baden (n.2), 2. \\
\(^{6}\)Miller (n.4). \\
\(^{7}\)Chigawa M., 1987, 3. \\
\(^{8}\)Mtika M.M. and Doctor H.V., 2000, 26 research shows that this district is in transition to patrilineal system.
Nsanje, the only patrilineal district in the southern region.\textsuperscript{9} Since most districts are predominantly matrilineal, Malawi would be said to be a predominantly matrilineal society.

Since the main focus of this study is on the matrilineal system, in the next section I discuss the social organisation of the Chewas, the main matrilineal tribe. There are minor differences with other tribes that are also matrilineal but, essentially, they share common features in terms of conducting their marriages.

### 3.2 Social organisation

#### 3.2.1 Composition of a village

In each district, there are villages. The village is mainly composed of groups of *mafuko*\textsuperscript{10}, *akamwini*\textsuperscript{11}, *akamwana*\textsuperscript{12} and other people who are not related to the rest of the villagers by blood or marriage. For example, there may be strangers who occupy land in the village with the consent of the village headman and live as co-villagers.\textsuperscript{13}

#### 3.2.2 Social groups

The following main groups are found within the village. Firstly, there is *fuko*. This consists of all blood relations who trace descent through a female line to a first or common ancestress.\textsuperscript{14} Blood relations include adulterine children and children of unmarried women.\textsuperscript{15}

However, a child may belong to the father’s *fuko* where *lobolo* was paid. *Lobolo* is normally a substantial marriage payment as an essential requirement of a virilocal marriage.\textsuperscript{16} It should be noted that virilocal marriages, with liability to pay *lobolo*, are likely to occur in districts where matrilineal tribes have integrated with the traditionally patrilineal Ngoni.\textsuperscript{17} However, in a matrilineal system there is no requirement of *lobolo*. In fact, it is discouraged.

\textsuperscript{9}W.L.S.A. (n.3), ix.
\textsuperscript{10}Matrilineal relatives.
\textsuperscript{11}Sons-in-law.
\textsuperscript{12}Daughters-in-law.
\textsuperscript{13}Ibik J.O., 1970, 180.
\textsuperscript{14}Ibik, (n.13), 180.
\textsuperscript{15}Ibik, (n.13), 180.
\textsuperscript{16}Meaning matrimonial residence being at the husband’s village.
\textsuperscript{17}For example, in Kasungu district, amongst some Chewas and in some parts of Mchinji.
Each *fuko* is subject to the control of a *kholo*. The functions and obligations of a *kholo* are: to settle internal disputes; to exercise general care and attention over all the members of the *fuko*; to sue for compensation for wrongs done to any member of the *fuko* by an outsider; and to obtain land for use of members of the *fuko*, and to exercise general control over such land.

Secondly, there is *mbumba*. This is composed of all members of the matrilineage with the exception of the *kholo*. Each *mbumba* is subject to the control of its oldest male member, called *nkhoswe wamkulu*. Usually, the *nkhoswe* is the wife’s brother. The functions and obligations of the *nkhoswe wamkulu* are similar to those of *kholo* as stated above, although the former has to consult the *kholo* in important matters like marriage and divorce.

Thirdly, there is *banja*. This social group is the basic family unit and is composed of a man and his family, together with their children, if any. The group is subject to the authority and control of the husband. As head of the family, the husband is responsible for providing food and shelter for members. If a man has more than one wife, then he, together with each of his wives and their respective children, constitute a separate household.

Similar to what happens in a patrilineal polygynous marriage, each household occupies a separate house and cultivates separate plots of land. The various households of a polygynist, in a matrilineal polygynous marriage, are ranked in order of seniority by reference to the time when the respective marriages were contracted.

Even though the husband controls his family, the general welfare of the *banja* is in the hands of the *nkhoswe*; the eldest *nkhoswe* takes the leadership role. Because of this, some scholars have argued that matriliney is a patriarchal system which traces lineage through the female kin and enforces land and labour rights and obligations on that basis. In the absence of the wife’s brothers, an elder sister or some other

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18 *Kholo* is the oldest living ancestress of matrilineal relatives. On her death, her name and position in the social structure of the matrilineage are inherited by her eldest granddaughter.

19 *Ibik* (n.13), 181.

20 *Mtika and Doctor* (n.8), 5.

21 *Ibik* (n.13), 181.

22 *Ibik* (n.13), 181.


24 *Ibik* (n.13), 181.

25 Wife’s brothers who are guardians of the marriage.

26 Note that, just like in the patrilineal systems, men also take a leadership role in the matrilineal systems.

senior relative from the maternal line acts as the *nkhoswe* over their *mbumba*.\(^{28}\) It should be noted that in matrilineal customary law, a female has a chance\(^{29}\) of being a *nkhoswe*\(^{30}\) whilst as in the patrilineal customary law, as will be shown later in the discussion, it is always the males who take the leadership roles.

The responsibility of the *nkhoswe* include: arranging marriages; ensuring that the *mbumba* have access to adequate land and other resources; and overseeing succession and inheritance rights. He is also responsible for the general welfare of his sister and her children.\(^{31}\) Fathers/husbands play a minimal role in these responsibilities. They are sidelined in all decision making, including control of what they produce from the gardens. These are gardens that were allotted to them by their wife’s *nkhoswe*. As a man, a husband’s status is achieved through his *mbumba*.\(^{32}\)

### 3.3 Summary

So far, I have discussed the social organisation among the matrilineal systems and shown how that system attaches considerable importance to women as the reproducers of the lineage.\(^{33}\) Concurring with Phiri’s view, “mother-right” ensures for women the right, even in marriage, to remain united with their own kin, and to control offspring of the marriage. It also offers them the right to protection by her *nkhoswe* and the right to inherit land from her mother.\(^{34}\) Upon marriage, the practice of *chikamwini*\(^{35}\) seems to put husbands at a disadvantage; their rights are compromised in their immediate family.\(^{36}\)

On the other hand, the brothers and maternal uncles of the wife are regarded as the heads of family. Village leaders are generally chosen from amongst them.\(^{37}\) Similar to what happens in patrilineal system, we see that in matrilineal societies, men are also leaders.

\(^{28}\)Mtika and Doctor (n.8), 5.
\(^{29}\)Because normally they are not preferred to be guardians.
\(^{30}\)Mtika and Doctor (n.8), 5; W.L.S.A. (n.3), 28.
\(^{31}\)Phiri K, “Some changes in the matrilineal family system among the Chewa of Malawi since the nineteenth century” as cited by Mtika and Doctor (n.8), 6.
\(^{32}\)Ibid.
\(^{33}\)Ibid.
\(^{34}\)Phiri “Some changes in the matrilineal family system among the Chewa of Malawi since the nineteenth century,” as cited by Miller D., 1996 has also noted this.
\(^{36}\)Where a Chewa man moves to his wife’s village.
\(^{37}\)My opinion.
Chapter 4

The marriage system

4.1 Introduction

This chapter discusses the way in which, traditionally, marriages are contracted in terms of matrilineal system in Malawi. I also make a direct comparison with the way traditional marriages in patrilineal South Africa are contracted. In discussing the patrilineal system, I focus more on the differences between the two systems.

4.1.1 Essentials for a valid marriage

Essentials for a valid matrilineal customary marriage are, firstly, that a man and a woman must have the personal capacity to marry each other in accordance with the customary law.\(^1\) There is, however, no precise age as to when one attains adulthood and marry. The same position applies in patrilineal marriages of South Africa.\(^2\) In both systems, the graduation to adulthood is, in most cases, attained when one has completed an initiation ceremony,\(^3\) that is not specifically connected to age.\(^4\)

On the other hand, both the CRC and the African Charter on the Rights of the Child (the Charter) define a child to be a person who is below the age of 18 years. The age limit is only for the purposes of enjoying rights enshrined in the CRC and the

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\(^1\)Generally, customary law, among others, require that the intending spouses must be of marriageable age and that they should be in a good state of mind.

\(^2\)This view has also been expressed by Bennett T.W., 2004, 304.

\(^3\)See http://archives.obs-us.com/obs/english/books/Mandela/pp25.html (accessed on 5/19/2004) where Mandela has amply explained this in his autobiography, “Long walk to freedom”.

Charter. As argued by Bennett, neither the two instruments oblige states to enact laws specifying an age of majority. However, it could be argued that countries that are Party to these international instruments would be expected to comply with the CRC and the Charter’s age limit and therefore enact laws to reflect this. This line of thinking is also seen in the recommendation by the Committee on the Rights of the Child on the report submitted by Malawi in 2002. Malawi, as a Party to the CRC, has defined a child to be a person who is under 16 years.

Secondly, consent or approval of his/her marriage guardian is essential for the validity of a person’s marriage. The role of marriage guardians in validating the marriage in the matrilineal customary law was emphasized in the case of Manchichi v. Manuel, in which the court said that:

We know that marriage is a social agreement between two persons, but in order that such marriage may acquire legal recognition under traditional customary law, the agreement must be sanctioned by the establishment of chinkhoswe. And as it has been said in a number of cases, this court does not recognise any union or cohabitation as constituting a valid marriage in the absence of chinkhoswe.

Other cases that have also dealt with the issue are: Namero v Namero; Makoko v Josaya; Nachengwa v Jumbe.

However, with the recognition of marriage by repute and cohabitation in the constitution the above position as was expressed by the N.T.A.C. seems to be changing.

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5See articles 1 and 2 of the CRC and the Charter respectively.
6Bennett T.W., (n.4), 304-305.
7Bennett T.W., (n.4), 305.
8That is for all laws whether customary or statutory.
9The basis of this argument being that State Parties to these Conventions will be expected to implement the rights as contained therein.
10See http://www1.umn.edu/humanrts/crc/malawi2002.html, (accessed on 5/13/2004) where the Committee recommended that State Parties take the necessary legislative measures to establish a clear definition of “child” in accordance with article 1 of the CRC and other related principles and provisions of the Convention.
11Section 23(5) of the Constitution.
13Civil Appeal Case No. 1 of 1979, N.T.A.C. (Unreported) as cited by Chigawa (n.4), 35.
14Meaning the ceremony whereby the two marriage guardians (from the man’s and woman’s sides respectively) formally meet and exchange their consent to the marriage in question.
15As quoted by Chigawa (n.4), 35.
16Civil Appeal Case No.70 of 1980, N.T.A.C. (Unreported).
17Civil Appeal case No. 80 of 1979, N.T.A.C. (Unreported).
18Civil Appeal case No. 106 of 1979, N.T.A.C. (Unreported).
19Section 22(5) of the Constitution.
For example, in *Doreen Chikayera v Manuel Mteteka*, the parties in this case had cohabited for two years. There was also evidence that the man had built a house at the wife’s village. But, the ankhoswe from both sides had not met. It would have been that there was no valid marriage between the parties. So, in a suit by the wife with regard to child maintenance after the same union was dissolved, the husband raised the defense of not having been legally married according to the matrilineal customary law. He was not responsible for maintenance. The court, using section 22(5) of the Constitution, ruled that marriage existed and disregarded the requirement of ankhoswe.

As a contrast to the matrilineal marriage, the major essential for the validity of a marriage, in the patrilineal system, is the payment of lobolo by the bridegroom’s father or by the bridegroom, as the case maybe, to the bride’s guardian. It is said that without lobolo, there can be no customary law marriage.

Another point of contrast which subtly comes with the lobolo custom is the girl’s right to choose who to marry as guaranteed by the international instruments. In the matrilineal system of marriage, the ankhoswe’s consent is not dependent on how many head of cattle one is going to bring. As such, the chances that the girl’s right to choose who to marry may be violated is, in my opinion, slim. On the other hand, in the patrilineal system, because of the lobolo, it appears that the girl’s guardian plays a major role on who is going to marry her. The number of head of cattle seem to be a determinant factor of who the guardian will give consent to. This, in my opinion, tampers with the girl’s right to choose. On the other hand, we see that in the same system, there is no evidence to suggest that the boy’s right to choose is affected by lobolo.

As earlier noted, freedom to marry is an accepted rule of international law. Therefore, countries that are Party to these Conventions should ensure that all laws, including customary marriage laws, comply with the international standards.

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20Civil Cause No. 70 of 2004, M. C. (Unreported).
21Constitution of Malawi.
22Bride wealth.
24Bekker (n.23), 107.
25See article 16(2) of Universal Declaration on Human Rights; article 23(3) of the Covenant on Civil and Political Rights; article 16(1)(a) and (b) of the Convention on all forms of Discrimination Against Women; article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.
27Bennett (Ibid) has also mentioned this factor.
28Which includes the freedom to choose whom to marry.
29Bennett (n.26), 116 has also noted this.
Thirdly, in some matrilineal tribes, if a girl or boy was not initiated and had also not been circumcised, she or he lacked capacity to marry. Nowadays, this requirement is being disregarded.

Fourthly, marriage comes into existence when the parties become entitled to cohabit. Cohabitation itself is not essential to the formation of a valid marriage, but the acquisition of the right to cohabit is essential. On the other hand, in the patrilineal system, proof of cohabitation plus the receipt by the woman’s guardian of a substantial number of cattle, raise a presumption that the latter has given his consent to cohabitation.

The last element relates to marriage payments that are made. A chicken is an essential payment for the validity of a marriage. It is normally required in the case of an ordinary marriage and the marriage of a pregnant woman. It is returnable in whole or part, if the marriage is terminated by divorce caused by the wife’s matrimonial offence.

On the other hand, as earlier noted, in the patrilineal marriage, there is payment of lobolo. The difference that we see between the two systems is that the payment of a chicken, though an essential element for the validity of marriage, does not however validate the marriage under the matrilineal system. The same would not be said of the lobolo that is paid in the patrilineal system.

Apart from the essential requirements for a valid marriage, there are some formalities that need to be observed but are not essential in the validation of a matrilineal marriage. These include the assent of parents and elders of the mafuko. In case of a polygynous marriage, consent of the senior wife may be required. In some cases, failure to obtain the wife’s consent to marry a subsequent wife has been a ground for divorce because it was regarded as amounting to cruelty.

30i.e. Yaos who are mostly found in the districts of Mangochi and Zomba. They were also essential elements amongst the muslims.
31Ibik (n.12), 182.
32Emphasis added.
33Bekker (n.23), 116.
34This chicken should not be understood as lobolo because in some cases it is not given yet the marriage is valid. As earlier noted, the most important element for validation of marriage in the matrilineal system is the consent of the marriage guardians.
35Ibik (n.12), 190.
36Ibik (n.12), 189ff.
37Ibik (n.12), 183.
38See for instance: Poya v Poya, Civil Appeal Case no. 38 of 1979 N.T.A.C. (Unreported) and Wasili v Wasili, Civil Appeal case No. 86 of 1979, N.T.A.C. (Unreported).
4.1.2 Standard procedure

The standard procedure for negotiating a marriage under the matrilineal customary law is as follows. A boy and a girl agree to marry.\(^39\) Then, they exchange gifts known as *chikole*.\(^40\) After the *chikole*, they both exchange information regarding the identity of their parents and their maternal uncles. The next step is for the boy to inform his *mwini mbumba* who eventually seeks the opinion of his *nkhoswe wamkulu*. Having obtained the approval of his *nkhoswe wamkulu*, the boy’s *mwini mbumba* institutes formal negotiations with the girl’s *mwini mbumba*. A further meeting is arranged for a later date to enable the girl’s *mwini mbumba* to consult his family elders, and to make private inquiries about the boy’s character and family background.

At the next meeting, if the boy’s proposal is accepted, a convenient date is fixed for the conclusion of the marriage negotiations, namely, the cohabitation between the spouses. Meanwhile, the boy will be encouraged to visit the girl’s home, and will be shown a piece of land on which he is expected to build the matrimonial home. This ends the formal negotiations for the proposed marriage.\(^41\) In some areas,\(^42\) if the marriage proposal has been accepted, a chicken by the boy’s *mwini mbumba* is offered to the girl’s *mwini mbumba*.\(^43\) The marriage may be regarded as concluded when the girl is handed over by her marriage guardian to the boy, and the parties begin to cohabit.\(^44\)

On the other hand, in patrilineal marriages, when the choice of a future wife has been made, his father or he himself will, through the marriage intermediary, propose marriage to her father.\(^45\) Similar to what happens in matrilineal marriages, in patrilineal marriages we also see that “marriage guardians” are involved. However, the difference between the two systems is that in the matrilineal customary marriages, the marriage guardians are in most cases\(^46\) *ankhoswe*, who are, as explained earlier, maternal uncles. On the other hand, in the patrilineal system, marriage guardians come from the male elders of the man’s village.

Unlike in the matrilineal system where the consent of marriage guardians to cohabit

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\(^{39}\) Chigawa (n.4), 4.

\(^{40}\) This is a gift from a boy to a girl in form of clothing, household effects or money given at a time of proposing marriage. The gift may be returnable upon termination of betrothal. However, it is not essential for the validity of a marriage.

\(^{41}\) Ibik (n.12), 184.

\(^{42}\) Notably, Mulanje, Mchinji and Kasungu.

\(^{43}\) Ibik (n.12), 184.

\(^{44}\) Ibik (n.12), 188.

\(^{45}\) Bekker (n.23), 97.

\(^{46}\) This is because if there is no *ankhoswe*, marriage guardians are appointed from amongst the village male elders.
entitles the parties to do so, in the patrilineal system, if the suit is acceptable to the girl’s guardian, and the required number of cattle are paid up, the patrilineal customary marriage is concluded and the parties may cohabit.47

4.2 Rights and obligations arising from marriage

4.2.1 Matrimonial home and land

When a valid matrilineal customary marriage has been contracted, the husband is expected to go and live with his wife at his wife’s village. This is called chikamwini.48 It is a common feature of matrilineal groups in Malawi. Its original intent seems to have been a way of introducing a dependent male labourer into the wife’s family unit.49

In the matrilineal system of marriage, residence for the married spouses is matriloc-
al.50 The husband is shown a piece of land on which to build the matrimonial home.51 They also allocate a piece of land to the newly wed couple to be used for cultivation of crops essential for the subsistence of their family.52 All the rights in respect of such land, are exercisable only with the consent of the wife’s kholo.53 Similarly, land allocated to a wife in her husband’s village is subject to the control and interest of the husband’s kholo.54

However, residence elsewhere chitengwa55 may be permitted at a later stage if the parties are agreeable and the arrangement has the consent of the wife’s guardian.56

Similarly, in the patrilineal system, a husband is obliged to provide his wife with a house.57 However, the difference between the two systems is that in the patrilineal system, the matrimonial house is located in the husbands village. Upon marriage,
the wife moves from the village of her guardian to that of her husband.\textsuperscript{58} Again, just like in the matrilineal system, where the rights of the land allotted to the newly wed couple are exercisable only with the consent of the wife’s \textit{kholo},\textsuperscript{59} in the patrilineal system, land is also a joint communal possession. Hence, though the family head is the legal owner of the estate, his ownership is burdened with what has been called personal rights of various types of which maintenance and habitation are two of the main ones.\textsuperscript{60} The wife is allocated a piece of land to be used for the cultivation of crops. All the rights in respect of such land are exercisable only with the consent of the husband’s patrilineage. It has also been said that women subject to customary law may not own land.\textsuperscript{61} This, in my opinion, demonstrates their powerlessness in regard to the land they cultivate.

4.2.2 Type of marriage

Matrilineal customary law marriages are potentially polygynous.\textsuperscript{62} The husband is allowed to marry more than one wife.\textsuperscript{63} On the other hand, a married woman is barred from contracting further marriages for as long as she remains legally married.\textsuperscript{64} Concurring with Kamchedzera,\textsuperscript{65} customary law favours the husband with regard to sexuality. Women, on the other hand, are not allowed the same opportunities as men. Just like in matrilineal marriages, patrilineal marriages are also potentially polygynous.\textsuperscript{66} The husband is allowed to marry more than one wife, but not the wife. Arguably, in both systems, there is a \textit{prima facie} case of unfair discrimination because women are treated differently from men. However, one can hardly suggest that the inequality would be addressed if women were given the same opportunity to accumulate men as spouses.\textsuperscript{67} Concurring with Goody, the notion of one woman acting as a wife to more than one man would indeed suggest greater oppression, not liberation.\textsuperscript{68}

\textsuperscript{58}Bekker (n.23), 140.
\textsuperscript{59}Which means that neither the wife nor the husband has the right to own land as it is understood in the Common law system.
\textsuperscript{60}Bekker (n.23), 126.
\textsuperscript{63}Ibik (n.12), 191.
\textsuperscript{64}See \textit{Msowoya v Milanzi}, Civil Appeal case No. 99 of 1979, N.T.A.C. (Unreported).
\textsuperscript{65}Kamchedzera (n.62), 374
\textsuperscript{66}Bekker (n.23), 126.
\textsuperscript{67}Kaganas F. and Murray C., 1991, 126.
\textsuperscript{68}Goody, \textit{The Oriental, the Ancient and the Primitive: Systems of marriage and the family in the pre-industrial societies of Eurasia}, as cited by Kaganas and Murray, (n.67), 126.
On the other hand, international conventions and the constitutions of South Africa and Malawi contain the norm of non-discrimination. It is therefore expected that women and men will be treated equally in all issues including marriage.

4.2.3 Property rights

After the inception of a valid matrilineal customary law marriage, household property, acquired by the spouses, constitutes matrimonial property. This, of course, excludes personal belongings which are exclusively for the spouse in possession of them. Any other chattel, personal or real, is the property of the couple and is subject to the joint control of both spouses. The only qualification to this basic rule is that where it is shown that a particular chattel, personal or real, was acquired by the individual effort of one spouse only, that spouse has ultimate control over the chattel in question.

To the preceding, there is one exception. The matrimonial home built by the husband at the wife’s village belongs to her as of right. The rule stems from the fact that matrimonial residence for the married couple in this system is uxorilocal. Here we see an instance where the customary rule works to benefit women at the expense of men.

Save as stated herein, matrimonial property will be distributed equitably between the parties upon dissolution of marriage. For example, in Georgina Mazunyane v Rodney Chalera after the marriage was dissolved, the court ordered that property be distributed equally between the parties. This, in my opinion, is an influence of the international and constitutional requirements that state that upon dissolution of marriage, there should be an equitable distribution of property.

Unlike in the matrilineal system where a wife has more control over property rights, in the patrilineal system of marriage, the husband has more control over the matrimonial property than the wife except for odd items of personal property. In fact, the control and ownership of all property vests in him as a family head. Wives do not even have

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69 For example, CEDAW.
70 See section 8(2) of the 1996 Constitution.
71 See section 20 of the Constitution.
72 Ibik (n.12), 192.
73 Chigawa (n.4), 20.
74 See Poya v Poya Civil Appeal No. 38 of 1979, N.T.A.C. (Unreported).
75 This means that residence is at the wife’s village.
76 Civil Cause No. 75 of 2004, Mulunguzi Magistrate Court (Unreported).
77 Bennett (n.26), 122; Bennett A sourcebook of African customary law for Southern Africa, as cited by Bronstein (n.61), 390.
78 Bekker (n.23), 126.
the right to control their own earnings.\textsuperscript{79} This would obviously lead us to expect that wives, upon dissolution of marriage, do not get anything. It is further said that upon the death of a husband, this control is with his eldest son of his first wife. A wife has little, if any, say in the administration of the property, as she is, herself, regarded as an “asset”.\textsuperscript{80}

\section*{4.2.4 Affiliation and custody of children}

Under the matrilineal customary law, children born out of the marriage are affiliated to the clan of the female spouse.\textsuperscript{81} This is probably the most important feature of the matrilineal customary marriage.\textsuperscript{82} This custom, in my opinion, has undoubtably considerable influence on the way in which the general principles of child’s well-being are applied in specific cases.

Contrary to the matrilineal system where the children of a family are affiliated to the mother, in the patrilineal system, provided bridewealth obligations have been complied with, the husband and his family have full parental rights to any children born to a wife during marriage.\textsuperscript{83} This position is also similar to many societies that are patrilineal.\textsuperscript{84} The right of a father to custody of his children is absolute. This right cannot be taken away from him merely because the child might do better if left in the care of another of his relative.\textsuperscript{85} As already stated above, the right stems from fulfilling his obligation under the lobolo agreement.\textsuperscript{86} This, then, entitles the father and his family to have rights to any children born to his wife during marriage.\textsuperscript{87} In contrast to the matrilineal system, we see that in the patrilineal system mothers have no rights to their children.\textsuperscript{88} However, just as in the matrilineal system, customary law takes priority over the best interest of the child.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{79}Bennett \textit{A sourcebook of African customary law for Southern Africa}, as cited by Bronstein (n.61), 390.
\item \textsuperscript{80}Bekker (n.23), 126.
\item \textsuperscript{81}Chakhumbira \textit{v} Chakhumbira Civil Appeal case No. 39 of 1979, N.T.A.C. (Unreported)
\item \textsuperscript{82}Chigawa (n.4), 10.
\item \textsuperscript{83}Mokoena \textit{v} Mofokeng, as cited by Bennett T.W., 1995, 104.
\item \textsuperscript{84}Notably, Malawi in the northern region of the country; Zimbabwe; Ghana and Nigeria.
\item \textsuperscript{85}Bekker (n.23), 227.
\item \textsuperscript{86}Kameca \textit{v} Nkhota, \textit{Journal of African Law}, 1968, 190.
\item \textsuperscript{87}Bennett (n.26), 104.
\item \textsuperscript{88}The view that under the patrilineal system mothers have no right to their own children was also expressed in Project 90, Report by the South African Law Commission on Customary Marriages, 1998, 137.
\item \textsuperscript{89}Burman, 1991, 41.
\end{itemize}
Chapter 5

Divorce

5.1 Introduction

Marriage in the matrilineal customary law system may be terminated either by a divorce decree pronounced by a court of competent jurisdiction\(^1\) or by death of either spouse or both.\(^2\) In the case of death, the demise of a spouse itself does not terminate the marriage bond.\(^3\) The marriage will subsist until formally terminated at the hair-shaving ceremony followed by *msudzulo*\(^4\) that will officially terminate it between the deceased spouse and the surviving spouse.\(^5\) On the other hand, termination by divorce is not complicated under the matrilineal customary law. This will be shown later when grounds for divorce are discussed. The spouse who is seeking a decree of divorce need only show that marital love between the spouses is not prevailing and that there is no hope of the spouses reconciling again.\(^6\)

On the other hand, in the patrilineal system, it must be remembered that a customary marriage depends on the *lobolo* contract. This contract, as already alluded to, is between the husband and the wife’s guardian. Consequently, no dissolution of marriage can be effected unless both parties are involved in the necessary proceedings.

\(^{1}\) Magistrate courts in Malawi have, under the Courts (Amendment) Act 2000, original jurisdiction to dissolve marriages contracted under customary law.


\(^{3}\) Ibik J.O., 1970, 198.

\(^{4}\) Meaning the actual divorce.

\(^{5}\) Chigawa (n.2), 9.

\(^{6}\) *Rose Maliko v Preston Kunje* Civil Cause No. 110 of 2003, Zomba Magistrate Court (Unreported); *Ntheuda v Mabvira* Civil Appeal No.41 of 1981, N.T.A.C. (Unreported), as cited by Chigawa, 1987, 43, the court dissolved the marriage where no proper reasons were given by the husband. It was sufficient reason for the party intending to divorce to show that the marriage has broken down irretrievably; love had deteriorated.
or formalities.\textsuperscript{7}

However, just like in the matrilineal system, marriage under the patrilineal system of South Africa can be dissolved by death of a spouse or by divorce.\textsuperscript{8} Where the dissolution of marriage is by death of one spouse, the rules seem to be different from the matrilineal system. If it is death of a wife, the demise itself terminates the customary marriage, but does not necessarily terminate the existence of the house created by her customary marriage.\textsuperscript{9} If it is death of a husband, death itself does not dissolve a customary marriage. His widow continues to be a wife at his family home.\textsuperscript{10}

5.1.1 Who can initiate divorce

Article 16(1)(c) of C.E.D.A.W. states that women should have the same rights as men on dissolution of marriage. Therefore, it is expected that in all matters relating to divorce women should have the same rights as men.

As earlier stated, in matrilineal societies, residence is with the wife’s family. During the research, some women stated that it is, therefore, easy to chase husbands out of their villages after being frustrated with them. They simply tell them to pack and go. Obviously, this leads to the conclusion that in matrilineal customary marriages, women would initiate more divorce proceedings than men. In fact, it has been noted by some researchers that, comparatively, there are more divorce in the matrilineal system than they are in the patrilineal system.\textsuperscript{11}

Similarly, since residence in the patrilineal system is at the husband’s family home, it has been noted by other scholars that husbands sometimes dissolve their customary marriage by simply ejecting the wife from his family home or abandoning her.\textsuperscript{12} Obviously, this leads us to the expectation that in the patrilineal systems, men initiate more divorce proceedings than wives. In fact, some scholars have noted that it is far more difficult for women than men to obtain divorce in the patrilineal system.\textsuperscript{13} On the other hand, in the matrilineal customary marriage, either spouse may seek divorce from the other. No outside person can initiate divorce proceedings unless he has the consent or approval of either spouse.\textsuperscript{14}

\textsuperscript{7}Bekker J.C., 1989, 172.
\textsuperscript{8}ibid.
\textsuperscript{9}Bekker (n.7), 175.
\textsuperscript{10}Bekker (n.7), 172.
\textsuperscript{11}Reniers G., 2003, 183.
\textsuperscript{12}Bekker (n.7), 180.
\textsuperscript{13}Kaganas F. and Murray C., 1991, 129.
\textsuperscript{14}Ibik (n.3), 197.
As earlier noted, the consent of marriage guardians is important for the validity of the marriage; it is obviously expected that the same consent would be important when one of the spouses would be seeking divorce. However, we see that it is actually the spouse’s consent which matters in initiating a divorce proceeding. As it will be shown later, this approach offers more advantages to women than in the patrilineal where the wife’s guardian plays a major role in divorce.

Unlike in the matrilineal customary marriage, where both spouses have capacity to initiate divorce proceedings, under the patrilineal customary marriage, a wife has no right to dissolve her customary marriage without referring the matter to her guardian.\textsuperscript{15} A wife is, in most cases, entirely dependent upon him to take the necessary steps to effect dissolution.\textsuperscript{16} On the other hand, a husband is permitted to dissolve his customary marriage extra-judicial by unilateral act at his pleasure and for no reason other than his desire to terminate it,\textsuperscript{17} without him being required to get the permission of his guardian. We see an instance where men and women are accorded different opportunities.

5.1.2 Grounds for divorce

Under matrilineal customary law, there are several matrimonial offences upon which one party seeking divorce can use to support one’s application. However, as earlier stated, divorce is possible without one party petitioning on the grounds of the other’s matrimonial offence.\textsuperscript{18} The court may grant divorce where one party repudiates the marriage or where the parties mutually desire to terminate the marriage.\textsuperscript{19} The following are most notable grounds for divorce: First, there is adultery. In matrilineal customary marriages a single act of adultery by a wife is a cause for divorce.\textsuperscript{20} In patrilineal customary marriages a single act of adultery, by the wife, would not be sufficient cause for divorce. In fact, adultery does not in itself constitute a good cause. If a husband dissolves the customary marriage for this reason only, he

\begin{itemize}
  \item \textsuperscript{15}Bekker (n.7), 187.
  \item \textsuperscript{16}Bekker (n.7), 187.
  \item \textsuperscript{17}Bekker (n.7), 177.
  \item \textsuperscript{18}For example, in most cases the cause of divorce was not known and yet the parties were willing to divorce.
  \item \textsuperscript{19}For example, in the cases of \textit{Agnes Kapande v Master Lozani} Civil Cause No. 137 of 2004, Mulunguzi magistrate court (Unreported); \textit{Annie Ndekha v Augustine Chitika} Civil Cause No.69 of 2004 Mulunguzi magistrate court (Unreported).
  \item \textsuperscript{20}Ibik (n.3), 197.
\end{itemize}
will forfeit lobolo.\textsuperscript{21}

Again in matrilineal marriages it is interesting to note that adultery may be inferred from a man having become unduly familiar with a married woman even if there is no additional evidence from which adultery may be inferred. Such a man may be ordered to pay damages to the husband.\textsuperscript{22} On the other hand, in the patrilineal system, it has been held that the alleged adultery must be satisfactorily proved by evidence for it to be a sufficient ground for divorce.\textsuperscript{23}

Secondly, failure by the husband to provide a house for the wife may be a ground for divorce under the matrilineal system.\textsuperscript{24} On the other hand, since in the patrilineal customary marriage there is no requirement of building a house, this, in my opinion, would not be a ground for divorce brought by a woman.

Thirdly, in matrilineal marriages, if a wife disobeys her husband, he is entitled to divorce her.\textsuperscript{25} On the other hand, disobedience to her husband, unless it amounts to repudiation,\textsuperscript{26} does not constitute a good cause for divorce in the patrilineal customary marriage.\textsuperscript{27}

Fourthly, in matrilineal customary marriage law, desertion of one spouse by the other for an unreasonable period of time constitutes sufficient cause for divorce.\textsuperscript{28} What constitutes unreasonable time is a question of fact in each case, but usually varies between one and two years in the man’s absence and one to three months in the case of a wife.\textsuperscript{29} It should be noted that in terms of determining such unreasonable time, women are treated differently from men. On the other hand, in patrilineal marriages, desertion by the wife is not repudiation, unless she makes it palpably clear, when her husband requires her guardian to return her, that she intends never going back to him.\textsuperscript{30}

Failure to maintain a wife and children is sufficient for divorce only if the husband has the means to maintain, and persists in his failure for a period of time in the matrilineal marriages.\textsuperscript{31}

\textsuperscript{21}See the cases of Conana v Dungulu 1 NAC 135; Roji v Jongola 1 NAC 199; Jakalase v Nobongo 1 NAC 203 as cited by Bekker (n.7), 177.

\textsuperscript{22}For example, in Mwale v Kaliu 1 African Law Report, Malawi Series, 213 adultery was inferred from the undue familiarity of the defendant.

\textsuperscript{23}Coka v Kumalo 1946 NAC (T & N) 106 as cited by Bekker, (n.7), 204.

\textsuperscript{24}Mwanza v Shaba Civil Appeal case No. 82 of 1974, N.T.A.C. (Unreported).

\textsuperscript{25}Kamuendo v Kamuendo Civil Appeal case No. 154 of 1978, N.T.A.C. (Unreported).

\textsuperscript{26}See Mokhatso v Chochane 1947 NAC (C & O) 15 as cited by Bekker (n.7), 179.

\textsuperscript{27}Bekker (n.7), 179.

\textsuperscript{28}Menasi v Balakasi Civil Appeal case No. 98 of 1979, N.T.A.C. (Unreported).

\textsuperscript{29}Ibid (n.3), 198.

\textsuperscript{30}See Gedle v Mankibhala 3 NAC 176 as cited by Bekker (n.7), 178.

\textsuperscript{31}Chakhumbira v Chakhumbira Civil Appeal case No 39 of 1979, N.T.A.C. (Unreported).
In addition to the above, it has also been held that persistent cruelty is a sufficient cause for divorce in the matrilineal system.\textsuperscript{32} Similarly, in the patrilineal system, cruelty at the hands of a husband is sufficient ground of divorce.\textsuperscript{33}

5.1.3 Procedure for divorce

\textit{Chitekwe v Navicha}\textsuperscript{34} seems to suggest that a customary marriage could only be dissolved by a court. However, the information obtained from interviews seems to suggest that matrilineal marriages could easily be terminated by either the marriage guardians or the local chiefs. But, where it would appear that there are ill feelings between the parties and that the divorce is contested by one party, then the court is the proper forum to decide.\textsuperscript{35}

Under the matrilineal customary marriage system, the procedure for divorce is that the aggrieved spouse complains to his or her marriage guardian, who in turn consults the other marriage guardian. The marriage guardians try to reconcile the parties. If this attempt fails, a further attempt at reconciliation takes place before the village headman. If either party is adamant in the desire for a divorce, the headman refers them to court. The court to which the dispute is referred again tries to reconcile the spouses. If no amicable settlement is met, divorce will be granted by the court. Where divorce is granted, the court may award compensation to the successful spouse as an additional remedy.\textsuperscript{36} An order for the division of matrimonial property may also be made by the court.\textsuperscript{37}

Unlike in the matrilineal customary marriage where the procedure is open to all the parties to the marriage, in patrilineal marriages, customary procedures for obtaining divorce place the wife at a disadvantage. Because she lacks \textit{locus standi injudicio}, a woman must first obtain her guardian’s assistance to prosecute the action.\textsuperscript{38} As noted by Bennett, if the guardian cannot or will not return bridewealth, there is every chance that he will refuse to assist her.\textsuperscript{39}

\textsuperscript{32}Mwaibambe v Shonga Civil Appeal case No 104 of 1979, N.T.A.C. (Unreported; Muanza v BotaCivil Appeal case No 156 of 1979, N.T.A.C. (Unreported).
\textsuperscript{33}Bekker (n.7), 205.
\textsuperscript{34}Civil Appeal case No 14 of 1965, N.T.A.C. (Unreported)
\textsuperscript{35}Ibik (n.3), 198 has also mentioned this.
\textsuperscript{36}For example, in the cases of Dorothy Joswa v Preston Joswa (ibid); Rose Maliko v Preston Kunje (ibid); Eunice Stampa v Maxwell Banda Civil Cause No.137 of 2004, Mulunguzi Magistrate Court (Unreported), compensation was ordered as an additional remedy to the successful litigant.
\textsuperscript{37}ibid.
\textsuperscript{38}Bennett T.W., 1995, 124.
\textsuperscript{39}Bennett (n.37), 124.
Chapter 6

Effects of divorce

6.1 Introduction

The effects of termination of a matrilineal customary marriage are manifold.¹ For purposes of this discussion, they are grouped into three. I first discuss the status of children. I then discuss maintenance, before I finally look at matrimonial property.

6.2 Status of children

6.2.1 Introduction

This section considers the law and practice governing the status of children in matrilineal customary law marriages after divorce. The changing legal status of children may only be properly understood if examined within the context of wider relations which are also in flux. I have already examined aspects of this process in the preceding chapters. Chapter four showed how the role of ankhoswe over the children has diminished. It raised issues concerning the decline of ankhoswe’s influence over his sister’s children.

Drawing mainly from court decisions, an attempt is made here to show new rules governing the status of children and their relations with parents as they are continually being created and redefined, partly in anticipation and partly in response to social change.

This section is divided into two subsections. I look at the matrilineal customary law governing the affiliation of children. I then discuss judicial modification of the

¹Chigawa M., 1987, 10.
matrilineal customary law relating to children.

6.2.2 Affiliation and custody of children

The interviewees frequently said that children of tender age should remain with the mother. Other children should live with whichever parent is best capable of raising them and providing education and moral and social guidance. It was also generally accepted that a parent’s responsibility does not end with the award of custody to the other parent, but that there remains a duty to provide both material and moral support.

As earlier stated, in matrilineal customary law, children born out of the marriage are attached to the clan of the female spouse. This custom has, undoubtedly, considerable influence on the way in which the general principles of the child’s well-being are applied in specific cases. For instance, in a custody dispute, if both parents of an older child owned equally adequate homes, the tendency would be to follow tradition and therefore favour the mother’s home. In my opinion, such tendencies should not constitute rules. Each case should still be judged on its own merit. They might, however, prove to be decisive if all other considerations were more or less equal.

On the other hand, in patrilineal marriages, as earlier stated, provided bridewealth obligations have been complied with, children born of a married woman are affiliated to the father. The issue of custody of the children upon the dissolution of marriage is also dependent on whether lobolo was paid or not. As Bennett puts it, this meant that children could not be transferred from the family responsible for raising them to some other person against payment of a consideration. The implication is that even if the child’s best interest would better be achieved if custody is granted to the mother, custody of the child has to be granted to the father because of lobolo.

At international level, both the CRC and the Charter dictate that the principle of the best interest of the child must guide whoever is in the decision making process concerning the custody of children. It is, therefore, expected that in considering the issue of custody of children after divorce, due regard must be made toward this principle. A dispute over the children’s custody would be resolved not by reference to a particular system of customary law, but by applying the principle of the best

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3 Mokoena v Mofokeng as cited by Bennett T.W., 1995, 104.
4 Bennett T.W., 1999, argues that rights are depended on the payment of bridewealth. Rights stand depending on whether bridewealth was fully paid or not.
5 Bennett, 1991, 24.
6 Articles 3 and 4 of the CRC and the Charter respectively.
Because of this line of thinking, custody of the child can be granted to anybody regardless of what a particular customary rule dictates.

6.2.3 Judicial modifications of matrilineal customary law relating to children

As earlier stated, the matrilineal customary marriage laws traditionally recognised all children born to a married woman as belonging to that wife and were accordingly affiliated to her descent line. Various personal laws concerning the affiliation of children and determination of custodial rights over them, were administered by the Traditional Courts under the general jurisdiction granted to them by the Traditional Courts Act.

Throughout the period when the traditional courts were determining custodial rights, courts upheld the matrilineal principle that all children born to married woman belonged to her. For instance, in *Mkandawire v Mkandawire*, the marriage between the parties was contracted in accordance with the matrilineal system of the central region. The wife was granted a decree of divorce because her husband had treated her with cruelty. The husband claimed that the issue of their marriage should be affiliated to his clan. The N.T.A.C. dismissed his claim on the basis that under matrilineal customary law custody of children is always granted to the mother.

Of course, in some instances, it would appear that the courts were respecting the wishes of the parents. For example, a husband, in matrilineal marriages, could be awarded custody of their children if the wife consents and it is in the best interests of the children of the marriage. There was also a tendency to favour the mother in the case of very young children.

Similarly, in patrilineal marriages, the customary rule that children belong to the father seem to play a major role in the court’s decision. Because of the significance of bridewealth, it has been said that courts work on an assumption that fathers will retain their children on divorce.

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7 Poulter, 1988, 214.
9 Chapter 3:03 of Laws of Malawi.
10 Civil Appeal Case No. 35 of 1985 as cited by Chigawa (n.1), 10.
11 *Mkandawire v Mkandawire* (ibid).  
15 Bennett (n.6), 24.
On the other hand, international instruments, as earlier stated, consider that the best interest of the child should be of paramount consideration. Since Malawi is a Party to these instruments, it appears that courts these days are directly affected by international standards when the issue of custody of children is being decided. When faced with custody issues, courts rarely makes reference to cultural values. For example, in *Cathy Assani v Andrew John*, the court ordered that custody of children should be granted to the party who was in the position to properly look after them.

Of course, as noted by Bennett, the influence of cultural beliefs that the best interest of the child will, in most cases, influence the courts to grant custody of the child to fathers, cannot be ruled out. Similarly the same could be said for the matrilineal societies.

### 6.3 Matrimonial property

#### 6.3.1 Introduction

In the southern region of Malawi, there is a narrative that a man is supposed to “leave with his blanket”, meaning that he is not only expected to leave after divorce, but that he cannot claim any material goods from the household - except for his blanket. This logic would obviously lead us to expect that women take all the matrimonial property after divorce in the matrilineal systems of Malawi. It also leads us to expect that women’s right to property is not violated. Of course, on the other hand, we see the inequality on the basis of gender between men and women. Men’s right to property, in my opinion, seem to be violated upon the dissolution of marriage.

Contrary to the above position, in the patrilineal customary marriage of South Africa, men seem to be at an advantage over women. The rule that wives have no proprietary capacity, obviously lead us to expect that they lose all their property when the marriage ends.

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16 Articles 3 and 4 of the CRC and the Charter respectively.
17 Civil cause No.21 of 2003, Magistrate court (Unreported).
18 See also the case of *Doreen Chikayera v Manuel Mteteka* (ibid) where similar sentiments were also expressed.
19 Bennett (n.6), 24.
21 See section 28(2) of the Constitution which prohibits arbitrary deprivation of one’s property.
22 Bennett T.W., 1995, 123.
On the other hand, section 28(2) of the Constitution and article 17(2) of the Universal Declaration on Human Rights provide that:

No person shall be arbitrarily deprived of his own property.

It is therefore expected that, upon dissolution of marriage, each spouse will not be deprived of his or her property due to cultural practices. Having said that, I now discuss the distribution of property rights after divorce.

6.3.2 Matrimonial home and land

As earlier stated, with matrilineal descent systems, matrilocal residence after marriage is often the prescription.\textsuperscript{23} After the dissolution of their marriage, it is obviously expected that the male spouse leave the uxorilocal matrilineal home, after which the house belongs to the woman as of right.\textsuperscript{24} He is only entitled to remove all doors, windows, and other valuable fixtures not affecting the main structure. This right to remove fixtures is only implicit where the husband provided them.\textsuperscript{25} Here we see that a husband is deprived of the house that he himself built. In my opinion, this is contrary to the constitutional and international standards that require that no one shall be deprived of his property. One would obviously think that the most equitable solution upon dissolution of marriage is probably to sell it and share the proceeds.

Similarly, in the patrilineal system, a wife who had moved to the husband’s home is expected to return to her guardian’s family home after the dissolution of marriage. However, unlike in the matrilineal system where a husband is obliged to provide a house to the wife even after the decree absolute has been granted,\textsuperscript{26} in the patrilineal marriage, after the dissolution of marriage, the wife is not entitled to be provided with accommodation by her erstwhile husband.\textsuperscript{27} Here too, a divorced wife suffers the same fate that befalls a husband in the matrilineal system.

In the matrilineal system, rights over land allocated to one spouse by the family of the other by virtue of the marriage cease upon divorce.\textsuperscript{28} The land upon which the spouses used to cultivate will remain the property of the female spouse when the male spouse leave the village since he had no right of his own to such land.\textsuperscript{29} Under

\textsuperscript{23}Chigawa (n.1), 6.
\textsuperscript{24}Chigawa (n.1), 20.
\textsuperscript{25}Ibik J.O., 1970, 200.
\textsuperscript{26}Dorothy Joswa v Preston Joswa (ibid).
\textsuperscript{27}Malaza v Mndaweni 1974 BAC (C) 45 as cited by Bekker J.C., (ibid), 199.
\textsuperscript{28}Ibik (n.28), 200.
\textsuperscript{29}Chigawa (n.1), 21.
the matrilineal system, just like in the patrilineal system, land does not belong to an individual. It belongs to the family of a wife or husband respectively. As such, if the marriage is dissolved, it makes sense that the land should go back to the owner, the family. In my opinion, such acts would not be deprivation of one’s property because, in the first place, the land given is not owned by either the wife or husband. Therefore, arguably, customary laws are not in conflict with international standards.

6.3.3 Traditional movable household property and personal belongings

Under matrilineal customary law, each spouse is entitled, on divorce, to retain all personal belongings, including livestock and gifts of a traditional kind received from the other spouse. The traditional household property is divisible between the spouses, the lesser share going to that spouse adjudged responsible for the divorce. However, it has been noted by others, that among the districts that are matrilineal, there are local variations with regard to how this property is handled after divorce. In some areas the traditional property is equally divided between the spouses irrespective of who is at fault.

However, there has been some judicial modifications in that these days courts do order that the property be distributed equally between the husband and wife. This is in conformity with the constitutional and international standards.

6.3.4 Marriage payments

As previously discussed, in matrilineal marriages, there are some marriage payments that are made. Upon dissolution of such a marriage, this is what happens: Firstly, chikole is not returnable upon divorce. Secondly, a chicken is returnable only if the divorce is caused by the matrimonial offence of a wife. If returnable, the amount to be returned is determined having regard to all the relevant circumstances.

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30Ibik (n.28), 200.
32For example, in the districts of Dedza, Kasungu and Lilongwe.
33For example, in the cases of Georgina Mazinyane v Rodney Chalera Civil Cause No.75 of 2004, Mulunguzi Magistrate court (Unreported); Annie Ndekha v Augustine Chitika Civil Cause No. 69 of 2004, Mulunguzi Magistrate court (Unreported) the court ordered that all matrimonial property be distributed equally between the spouses.
34See chapter four where these payments are discussed
35Ibik (n.28), 201.
36Ibik (n.28), 201.
Similarly, in patrilineal marriages, the *lobolo* is returnable upon the dissolution of marriage. The number returnable is also dependent on who is at fault. In addition, the number is also dependent on the duration of the marriage and the number of children born out of the relationship. However, most interestingly, if the *lobolo* is not paid back by the wife’s guardian, children born to the wife by another man belongs to the divorced man. This is so because, without returning it, the marriage still subsists.\(^{37}\)

### 6.4 Maintenance

The constitutional position with regard to maintenance is that on the dissolution of marriage, women have the right to a fair maintenance, taking into consideration all the circumstances, in particular, the means of the former husband and the needs of any children.\(^{38}\) It is, therefore, expected that upon dissolution of a marriage, provision for women maintenance will be made.

Under the matrilineal system, there was no provision that a husband had a duty to maintain his wife after divorce. However, this position seems to have changed. Courts are being influenced by the constitutional and international standards that dictate that on the dissolution of marriage, women have a right to maintenance. For instance, in the case of *Mwandida Saiti v Charles Pemba*\(^{39}\) the court ordered that the husband should be maintaining the wife after divorce by paying a monthly reasonable amount of money to her until she herself finds a job.

Similarly, in the patrilineal system, there is no duty placed on the husband to maintain his wife once marriage ends. In theory, the divorcée is absorbed back into her own family.


\(^{38}\)Section 24(1)(b)(ii) of the constitution.

\(^{39}\)Civil Cause No. 28 of 2004, Zomba district magistrate court (Unreported).
Chapter 7

Conclusions

7.1 Overview

The research has shown that matrilineal customary marriage laws are not as discriminatory towards women as in patrilineal customary marriages. Rather than looking at all customary laws as being discriminatory toward women, our study has shown that some customary laws are more advantageous to women. It is believed that if customary norms are understood and practised to meet their intended purpose, it can enhance rather than diminish human rights ideals in family law.¹

7.2 Divorce and its effects

7.2.1 Children

To conclude, I will first look at what I have called child-focused vs family-focused. As has been shown in the discussion, the emphasis at international level with regard to children’s welfare after divorce is child-centred whilst both matrilineal and patrilineal customary laws are based on the cultural values that essentially are rights of the family unit. Attitudes, therefore, in issues of custody after divorce are different. Much as it is appreciated that the family ensures stability and provides emotional and economic support and hence the argument for protecting the rights of the group as a whole, the conflicting interests (i.e. in patrilineal systems, fathers and their lineage, on the one hand,² and mothers and their children on the other; and in the matrilineal systems, mothers and their lineage, on the one hand, and fathers and their children on the

¹Nhlapo R.T., 1991, 141.
²Nhlapo (n.1), 143 has also mentioned this fact.
other) posed by the systems should not be underrated. Therefore, there is a need to strengthen the positive practices that guarantee children enjoying their rights under customary laws. On the other hand, in matters of child custody, the justification for preferring men over women, in patrilineal customary marriages and women over men in the matrilineal societies cannot hold water, taking into account the fact that both men and women are getting empowered economically and can better look after their children.

7.2.2 Maintenance

With regard to maintenance, I conclude by looking at the non individual nature of both the matrilineal and the patrilineal customary marriages of Malawi and South Africa, respectively. This notion embodies the idea of marriage as an alliance between two kinship groups for purposes of realizing goals beyond the immediate interests of a particular husband or wife.³

In the matrilineal system, it has been shown that the original intent of chikamwini was to provide cheap labour to the wife’s family and not only to the wife. As such, where a husband wished to do chitengwa, the nkhoswe had to be satisfied that not only would his sister’s child be well taken care of by the husband, but that there was also an assurance that the husband will be able to take care of his wife’s family at home. Therefore, when such a marriage is dissolved, it is obviously expected that the cheap labourer would stop providing his services. On the other hand, in the patrilineal system, wives and children were an economic asset of the family, and rules that developed around them were part of a group’s survival strategy.⁴ Arguably, it is expected that after divorce, since the wife will not be performing her duties for the group’s survival, a husband is not expected to maintain her.

However, as has been shown in the discussion, the emphasis at constitutional and international level with regard to wife maintenance after divorce is wife centered whilst both the matrilineal and the patrilineal customary laws are based on cultural values that essentially are rights of the family unit. Attitudes, therefore, in issues of maintenance after divorce are different. Much as it is appreciated that the family ensures stability and provides emotional and economic support and, hence, the argument for protecting the rights of the group as a whole, the conflicting interests (i.e., protection of family rights against wife’s right to maintenance) posed by the systems should not be underrated. Therefore, there is need to strengthen the positive practices that

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⁴Nhlapo (n.1), 137.
guarantee women enjoying their rights under customary laws. On the other hand, in matters of maintenance after divorce, the justification for preferring group rights over women’s rights, cannot hold water. They pose as blocks to women’s enjoyment of the right to maintenance.

7.2.3 Rights of spouses

On the rights of spouses after divorce, I conclude by looking at what I have called women’s rights vs men’s rights. As has been stated, the emphasis at both international and constitutional level is that men and women of full age enjoy equal rights as to marriage, during marriage and at its dissolution whilst both matrilineal and patrilineal customary laws are based on cultural values that essentially benefit one spouse only.

For example, under patrilineal customary laws, women are generally regarded as being inferior to men. They are seen as objects of production and reproduction. In contrast, men under the matrilineal system are seen as objects of production and reproduction. Women have a certain edge of power over males in reproductive issues.

In addition to the above, in the patrilineal system, a wife’s acquisition becomes her husband’s property. Consequently, upon dissolution of marriage or death of the husband, a wife stand to lose everything she contributed to the family estate. On the other hand, in the matrilineal system, we see that upon dissolution of marriage the man stand to lose everything he contributed to the family.

Attitudes to issues of property rights, child custody, and maintenance after divorce, are different. Much as it is appreciated that the matrilineal system, in some ways, is not as discriminatory as the patrilineal system toward women, the discriminatory laws against men should not be condoned. There is a need, therefore, to strengthen the positive practices that guarantee women enjoying their rights under customary laws. On the other hand, in matters of property distribution, the justification for preferring men over women, in patrilineal marriages, and women over men, in matrilineal societies, cannot hold water, taking into account the fact that both men and women are getting empowered economically and can acquire property.

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5Article 16(1) of the Universal Declaration on Human Rights.
7Mwale P.N., 2002, 22.
8Bennett T.W., 1995, 126.
Bibliography

Books


Articles


**Reports**

Chigawa M., Customary law and social development: *de jure* marriages vis-a-vis *de facto* marriages at customary law in Malawi, Chancellor College, Malawi, 1987.


Reniers G., Divorce and remarriage in rural Malawi, Demographic Research Special Collection 1 Article 6 published on 19th September, 2003 at www.demographic-research.org.

**International Declarations and Conventions**


The United Nations Declaration on the Elimination of Discrimination against Women, 1967

The Covenant on Civil and Political Rights, 1966.


The Universal Declaration on Human Rights, 1948.

**Internet Sources**

http://www.umanitoba.ca/faculties/arts/anthropology/tutor/marriage/defining.html

http://www.ucl.ac.uk/heeg/matriliny.htm

http://coci.itb.ac.id/sumbar-culture.htm

http://www3.sympatico.ca/ian.ritchie/AFRWOMEN.html


Constitutions


Cases

Malawian cases

Agnes Kapande v Master Lozani Civil Cause No. 137 of 2004, Mulunguzi Magistrate Court (Unreported).

Annie Ndekha v Augustine Chitika Civil Cause No. 69 of 2004, Mulunguzi Magistrate Court (Unreported).

Cathy Assani v Andrew John Civil cause No.21 of 2003, Zomba Magistrate Court (Unreported).


Chitekwe v Navicha Civil Appeal case No 14 of 1965, N.T.A.C. (Unreported)

Doreen Chikayera v Manuel Mteteka Civil Cause No. 70 of 2004, Mulunguzi Magistrate Court (Unreported).

Dorothy Joswa v. Preston Joswa Civil Cause No. 113 of 2003, Zomba district Magistrate Court case (Unreported).

Eunice Stampa v Maxwell Banda, Civil Cause No.137 of 2004, Mulunguzi Magistrate court (Unreported).

Georgina Mazunyane v Rodney Chalera, Civil Cause No. 75 of 2004, Mulunguzi magistrate court (Unreported).


Kandoje v Mtengerenji, I African Law Reports, Malawi, 558.

Makoko v Josaya Civil Appeal case No. 80 of 1979, N.T.A.C. (Unreported).


Menasi v Balakasi Civil Appeal case No. 98 of 1979, N.T.A.C. (Unreported).

Mkandawire v Mkandawire Civil Appeal Case No. 35 of 1985, N.T.A.C. (Unreported).


Mwaibambe v Shonga Civil Appeal case No 104 of 1979, N.T.A.C. (Unreported).

Mwale v Kaliu 1 African Law Reports, Malawi Series, 213.

Mwanza v Bota Civil Appeal case No 156 of 1979, N.T.A.C. (Unreported).

Mwanza v Shaba Civil Appeal case No. 82 of 1974, N.T.A.C. (Unreported).


Namero v Namero Civil Appeal Case No.70 of 1980, N.T.A.C. (Unreported).


Poya v Poya Civil Appeal Case no. 38 of 1979 N.T.A.C. (Unreported).

Rose Maliko v Preston Kunje Civil Cause No. 110 of 2003, Zomba Magistrate Court (Unreported).

Wasili v Wasili Civil Appeal case No. 86 of 1979, N.T.A.C. (Unreported).

South African cases

Conana v Dungulu 1 NAC 135.

Malaza v Mndaweni 1974 BAC (C) 45.

Matsupelele v Nombakuse 1937 NAC (C&O) 163.

Roji v Jongola 1 NAC 199.
Jakalase v Nobongo 1 NAC 203.

Mokhatso v Chochane 1947 NAC (C & O) 15.

Gedle v Mankihlana 3 NAC 176.