

APPROACHES TO GENDER EQUALITY UNDER CUSTOMARY LAW BY FRANCES MWANGALA ZALOUMIS

For a long time now and since the UN Decade for Women 1976 – 1985 women the world over and in particular in Africa have become more and more aware of their situation. At conferences, seminars and workshops women issues have been discussed and these have been defined as arising purely from their sex stereotyped sub-ordinate social and economic roles. This paper attempts to discuss the legal status and the situation of women under Customary Law as it relates to inheritance, the right to own property, marriage and divorce.

From the outset it is important to attempt to understand the term Customary Law. Professor A.N. Allot a recognised authority in the field of African Law defined Customary Law as follows:-

“It is unwritten and the rules can be traced to the people and have been handed down to succeeding generations. The law consists of different bodies of rules that may be invoked in different contexts. These rules are based on conceptions of morality and depend for their effectiveness on the approval and consent of the people. The law has evolved in response to the pressures put upon the people by their environment. It reflects their way of life and their adjustment to life in the particular society and environment”.

Professor M. Guckman in his introduction in his extensive work on the subject in Ideas and Procedures in African Customary Law, defines Customary Law as the unwritten African traditional law which consists of variety of different types of principles, norms and rules, some of them state wide and general principles of morality and public policy to constitute an apparently enduring ideological framework for justice.

Neville Rubin and Eugene Cotran in their introduction to their work, Reading in Africa discusses the problem of determining the precise point at which custom ends and law begins. They view Customary Law as “continuum which begins with the observable phenomenon of human society to establish for itself ordered patterns of conduct and ends with the pragmatist lawyer’s view that law in any society is what the Courts will enforce. Therefore the term Customary Law will be used here to refer only to those rules that are enforced by the recognised courts of law in traditional or modern set up. The Customary Law should be distinguished from the term custom because it is used to designate rules of conduct which are not enforceable within the judicial system but are strictly observed by the community”.

In this regard there has been an attempt at the reformation of laws to remove their overtly discriminatory provisions and in some cases nature but it has not lessened discriminatory practices. It has merely shifted the responsibility for discrimination from the law to administrative practices. Discriminatory Customary practices are not disallowed by law. This emphasises the point that

customs often have greater force and effect than those rules which are formally recognised by the courts. Even in instances where new legislation has been enacted to attempt to reform a custom which had the status of Customary Law, the custom may still be quietly observed by the community.

INHERITANCE – SITUATION OF WOMEN AND CHILDREN IN ZAMBIA

Traditionally, mechanism of looking after the property rights of minor children of a deceased man was entrusted in the heir of the deceased estate. He inherited both a large share of property and the social responsibility of the deceased. Among the Ngoni tribe the rule attached to intestate inheritance is, property passes to the heir including deceased obligations to his family and dependants. It is the duty of the heir to maintain the deceased's dependants and all those the deceased stood in loco parentis.

If the heir does not discharge his duties accordingly under Customary Law or where there is abuse on the heirs part in the discharge of his obligations his relatives can enforce his obligations by making a fresh application for the administration of the estate to the local court to have someone else appointed administrator. A case in point is that of "Estate of John Jere", unreported, Chipata local court 'A' Grade case no. 423 of 1982. The mother of the deceased invoked the Statutory Provisions of Section 36 of the Local Courts Act 54 by seeking that the deceased son be removed from his position of appointed administrator for utterly neglecting the deceased's dependants by mismanaging the estate.

From this case it can be argued that although a particular child may have a right to inherit from the father's estate, this right may be revoked if he does not honour his customary collateral duty of maintaining the rest of the dependants. In the case of the "Estate of John Jere", the son was accordingly removed by revocation of his order of appointment, but another male relation was appointed. In the administration of estates in the Ngoni system evidenced by several case law administered in the local courts the administrator of estates or the heirs to the estate, in most cases are male. The Ngoni tribe is patrilineal on the male lineage.

Under the Tonga tribe Customary Law of Zambia once an heir has been appointed he inherits the entire estate which he is obliged to distribute to those entitled. In the case of Lwando Mainza vs Kanene Hatwaana, Monze local court 'B' Grade case no. 64 of 1975 unreported. It was said that children do not fall within the description of relatives entitled to inherit. They have nevertheless a recognised and enforceable share in the estate. Although the Tongas are matrilineal the heirs are in most cases male.

IMPACT OF SOCIO –ECONOMIC DEVELOPMENT ON CUSTOMARY LAW OF INHERITANCE

It is said that the role of the individual in a given society depends upon his place in it. How the person fits into that place is largely conditioned by the nature of the particular society. (Rubin N. and Cotran E. Reading in African Law, London Frank Cass and Company Limited 1970 P2). It is also contended that it is important to determine the exact position of the individual in the social structure as this is the only way that we can assess the extent of the individual rights and duties. The range of social activities in which the person may or must participate and his/her opportunities for personal differentiation within the community.

The emphasis in traditional African society was on family and larger kin groups. This is reflected in the traditional legal systems. For instance children and women occupied a very inferior position in traditional society especially with regard to property. They were regarded as having no capacity to acquire or own property. A reflection of traditional societies in Zambia indicate that after a fathers death or husbands death such property would be entrusted to one of the male relatives of the deceased who was thereby obliged to look after the social welfare of the deceased dependants.

It can be argued that this state of affairs might have been justified with regard to the social and economic conditions prevailing at that time, as society was based on extended family ties and the bonds were strong.

Urbanisation and industrialisation has disrupted the traditional social economic structure to such an extent that women are now the heads of the households either directly or indirectly. This situation has had an effect on the Customary Law of the societies. With the emergence of the cash economy individualism has been pronounced and people no longer feel bound by the kinship patterns. This new development has thus led to the breakdown of traditional values relating to land, care of the deceased man's children which has manifested itself in what has become popularly known as "property grabbing". This arises as a result of the deceased relative's interest in the deceased's property and they do not fulfil their Customary Law duty and responsibility of looking after the orphans. In this day and age it is difficult to see how another person can take full social and economic responsibility to take care of another family given the poor economic scenario prevailing in most African countries.

Therefore the property must be left to the widow and her children. The law should be amended in such a way that it gives the co-administration to the widow as well to ensure that the estate is distributed accordingly and that one does not see a situation where relatives who played no part in the creation of family wealth in the lifetime of the deceased rush for the spoils to the total exclusion of the widow and dependants.

There are several cases in point and these are being heard on a daily basis in the local courts. One such case is that of Adinar Mkumba vs Tembo. The deceased husband a Nsenga by tribe (Matrilineal) was survived by Adinar and seven minor children. The defendant was the deceased brother who was appointed administrator of the estate. Adinar sued the administrator for not

supporting her financially and the children. The deceased was a businessman and was operating a fleet of mini buses. After his death the young brother was appointed to 'cleanse' her or 'purify' her and consequently took all the property including buses, from which income was generated to support the family. The defendant after acquiring the wealth abandoned the widow and the children and other dependants. She was now caring for them without any income from the buses. The administrator of the estate (defendant) ordered her to vacate the matrimonial house and she refused. She was now claiming a share of the income from the operation of the buses to enable her support her children and other dependants. The case illustrates that in most instances the persons who are heirs by virtue of inheritance and succession are men and in most cases are only interested in property grabbing and there are no punitive measures taken by the community to stop the scourge.

There are many similar cases not reported either because the widow is intimidated by the relatives of the deceased and fears to be bewitched or they do not possess sufficient funds to pay for legal representation. Law is a mirror of society's values. It reflects the various customs, norms, cultures and interests of particular people at a given time. Society's socio – economic structure has greatly changed and consequently has declared Customary Law relating to the distribution of deceased estate redundant and inequitable and also repugnant to fair distribution of the wealth to the rightful people.

There have been some notable change. The courts including the local courts will not tolerate a denial of the children and widows entitlement but as earlier stated there are more casualties of the system than those who seek refuge under the law. How adaptable it is to new conditions and demands in the various areas of legal relationship and to what extent adaptation as it occurs is framed in terms of old or newly devised principles.

CUSTOMARY MARRIAGES AND DAMAGES FOR ADULTERY

Actions for damages for adultery does not seem to be the subject of detailed investigation. Adultery is sexual intercourse between a spouse and a man or woman who is not her husband or wife. It is a firmly established cause. In Customary Law it is within the rights of a husband to sue a person with whom a wife is alleged to have committed adultery. It is lawful for the local courts in such actions to order the person with whom the wife is proved to have committed adultery to pay damages. However its important not to put too much reliance on historical source because this in certain circumstances leads to ignoring the dynamic qualities of Customary Law and its capacity for adapting to changing circumstances, the change may result from population movements to a new environment or in much of Africa from the startling effects of European domination. Customary Law has the capacity for adaptation. Laws primary function is to seek to do justice and when principles of law no longer serve justice then they should be discarded. If the Customary Law does not change then it is assumed that the society is static.

Zambia has two types of marriage one contracted under Customary Law and the other under English Law. For the purposes of the discussion we shall concentrate on Customary Law marriage. Marriage contracted under Customary Law are administered by the local courts. Most Africans contract marriage under the Customary Law and educated Africans have increasingly contracted marriages under the English Statutory Law and the reasons for this tendency by educated Africans is the security on the part of women which is greatly influenced by the liberation of the African woman from her rather subordinate traditional rule. But coming to subject under discussion it is necessary to include a consideration of basic rights and obligations which any marriage confers upon the contracting parties. These are uxorial rights which are held in a woman as a wife. They rights to her domestic and sexual services genetricial rights are held in a woman as a mother. They are rights over her reproductive powers and determine whether the children are to be members of the fathers or mothers descent group. The action in adultery is mainly based on uxorial rights. The cause of the action arises where a marriage is proved. In Sinkala vs Njovu case no. 1927 – 1998 Lusaka local court. The Plaintiff claimed damages from the Defendant for having committed adultery with his wife whilst the Plaintiff was in jail proved that they were not married as no dowry was paid. Court dismissed the claim.

POSSIBLE REFORM

1. Should a wife have a right of action analogous to that of her husband
2. Lack of knowledge to a womans marital status should defeat the claim
3. Under Customary Law a husband is liable in damages to a woman's male guardian for her seduction or adultery but his wife has no corresponding remedy. The wife should also have the same remedy.

It might be argued that to grant her the right would defeat or violate the principle of polygamous marriage but the present tendency of law is to treat spouses as far as possible equal footing. Therefore the discrimination should be discouraged.

LAND OWNERSHIP UNDER CUSTOMARY LAW

Access to land for women under Customary Law is dependant on the traditional rights women have in the particular African Society. The most common system in most African traditions is in which women do not own land but have usufruct rights to the land. Although this is a generalisation but true for the majority of the Sub-Saharan Africa in particular ethnic group with patrilineal systems. There are exceptions in matrilineal societies and bilateral societies in Zambia such as the Lozi tribe. In the Lozi traditional custom a woman is entitled to land rights but when she gets married and moves to her husband's village the land right is transferred to another person in the same family. The right to land will be restored upon her return to the village either upon dissolution of marriage or when widowed.

Although under traditional land tenure system African men do not own land as the ownership is vested in the chief or headman, there is a permanency in enforcement of these rights which is not the case with women. Men can decide how the land will be used i.e. distribute it to their children or wives or even allow someone to use it for financial or material gain. The position with a married woman is that she is given a piece of land by her husband and her rights and access to the land will only exist as long as the marriage is subsisting. Single, divorced or widowed women access to land is dependable on the availability of the land to the clan. When it is available the woman's access to land will be in most cases through the brother or son or her father if he is alive. When a man dies his children may inherit his property but his wife is never entitled to a portion of the inheritance including land.

The local courts in Zambia have not helped the situation. Even if a woman contributes economically to the purchase of property it becomes the individual property of the husband. There are numerous cases that are adjudicated in the local courts. As a way of illustration a recent case is that of Edna Mwachisanga vs Zimba. 1999 Lusaka local court. The Plaintiff claimed that the small holding the family owns and investment on it was purchased and developed through resources from both of them. Edna was a typist in one of the Government Ministries. Her husband was a clerk in a forwarding and clearing company. She claimed that she had contributed to the purchase of the 10 acre plot and at weekends helped in the construction of their family house. The court held that Edna be compensated for her contribution in the purchase of property and whatever she spent on the construction of the house. It is interesting to note that the compensation is without interest. The couple had been married for 15 years and purchased the property 5 years later. The court was more interested in the compensation rather than the ownership in the property.

The land tenure system under Customary Law in Zambia and most of the Sub Saharan Africa places women in an inferior status to that of men. The inferior status is as a result of the discriminatory Customary Laws of inheritance and property rights. The distinction between Civil Law and Customary Law has allowed and turned a blind eye to the discrimination the women suffer. Although most constitutions do not discriminate against women, it does not disallow discrimination under Customary Law as long as it is not repugnant to 'natural justice' or written law.