

UNIVERSITY OF ZIMBABWE



BEYOND THE RHETORIC: A CRITICAL ANALYSIS OF THE WOMEN'S
ACCESS TO JUSTICE IN MALAWI IN RELATION TO THE RIGHT TO
EQUITABLE DISTRIBUTION OF MATRIMONIAL PROPERTY UPON
THE DISSOLUTION OF MARRIAGE

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ABSTRACT

This dissertation, written by a judicial officer from Malawi, examines the women's right to access justice in matters concerning distribution of matrimonial property after a judicial dissolution of a marriage. The study was provoked by many complaints and misgivings by women over decisions by courts concerning distribution of property after divorce.

The study adopted women's law approach to investigate the women's lived realities with the legal system in accessing justice in matters of distribution of matrimonial property. The investigation was through case studies, interviews and focus group discussions which enabled the researcher to uncover legal and customary dynamics that influence court's decisions and women's approach to the courts. The study unearths that most women hardly know their rights to a fair share of matrimonial property upon divorce. It was discovered that women have problems to come to terms with claims of their rights in the courts. Apart from that, even where women have been awarded a share in property there were several impediments by the judicial system that hamper women's enjoyment of the judgments by the court. The study found that problems that render women unable to access the legal remedies range from insufficient mechanisms of enforcement of the judgment, anti-women cultural perspectives and indifferences, and evasiveness of the men who might still be in the custody of the property.

The study unearths observable traditional patriarchal tendencies of regarding some property as belonging to men at the expense of women's rights and expectation. Therefore, much as the law provides for the rights of women to fair share in property and access to justice, some enforcement actualities obviously make women not to attain these rights in reality. There is a missing link in civic education thereby making Malawi failing to meet its international human rights obligations on the rights of women to access justice and equitable distribution of the property.

To remedy all this, the study suggests that there is need to address the mind-set of the society by incorporating gender-friendly judicial and legal processes, including provision of legal aid to women, and invoking civic education to all on the issues of rights of women, general human rights and non-discrimination. The dissertation also suggests that there should be deliberate steps to enable women access justice without many hurdles.

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To you all I say thank you and may God the Almighty bless you all.

DEDICATION

I dedicate this work to my wife Esther and sons Dalitso and Dalitsani

DECLARATION

I, JACK NRIVA, declare that this is my own work and has not been presented for any study programme in any University or College. The ideas and views, except where indicated and acknowledged, are mine.

6 April, 2016

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter of Human and People's Rights
BLLR	Butterworth's Labour Law Report
CA	Civil Appeal
CC	Civil Cause
MSCA	Malawi Supreme Court of Appeal
CEDAW against Women	Convention on the Elimination of All Forms of Discrimination against Women
CRM	Chief Resident Magistrate
FGM	First Grade Magistrate
HC	High Court
IAWJ	International Association of Women Judges
MC	Matrimonial Cause
MDFRA	Marriage Divorce and Family Relations Act
MHRC	Malawi Human Rights Commission
MLC	Malawi Law Commission
MLR	Malawi Law Report
NGO(s)	Non-Governmental Organisation(s)
NSAs	Non-State Actors
PR	Principal Registry
PRM	Principal Resident Magistrate
SADC	Southern African Development Community

SEARCWL	Southern and Eastern African Regional Centre Women's Law
SGM	Second Grade Magistrate
SRM	Senior Resident Magistrate
WLSA	Women and Law in Southern Africa Research Trust
WOJAM	Women Judges Association of Malawi

LIST OF LEGAL AND INTERNATIONAL INSTRUMENTS

International and Regional Human Rights Instruments

Convention for Elimination of all Forms of Discrimination against Women

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Southern Africa Development Community (SADC) Protocol on Gender and Development

Domestic Laws

Courts Act, Cap 3:01 Laws of Malawi

Deceased Estates (Wills, Inheritance and Protection) Act No 14 of 2011

Gender Equality Act

Marriage, Divorce and Family Relations Act, Act No 4 of 2015

The Constitution of the Republic of Malawi

LIST OF CASES

Anna Kagwira v Henderson Kagwira Civil Appeal No. 24 of 2012 High Court (HC),
Principal Registry (PR)

Bannatyne v Bannatyne 2001 2 BLLR 111 (South Africa)

Chibweya v Chibweya 10 Malawi Law Report (MLR) 279

Chimtedza v Chimtedza (2009) Matrimonial Cause (MC) No 97 (PR)

Emma Kishindo v Paul Kishindo Civil Cause (CC) No. 392 of 2013

EN v TN Matrimonial Appeal No. 4 of 2012

Esnart Green v Wyson Green Civil Matter Number 77 of 2012 (SRM, Blantyre)

Jacqueline Chapamba v Gershom Chapamba MC No 17 of 2015 HC, Lilongwe
District Registry

Jane Nkulichi v Harry Nkulichi CC No. 1062 of 2007

Kayambo v Kayambo 12 MLR 40

Kayira v Kayira HC Civil Appeal No. 44 of 2008,

Lorraine Khamisa v Shabir Khamisa MC No 9 of 2009

Marylyn Munthali v Francis Munthali CC No. 2 of 2011 (Mzuzu)

Monica Zolo v Quaniso Kumwenda Civil Appeal No 44 of 2008

Mtegha v Mtegha HC Civil Appeal No. 44 of 2008

Nseula v Attorney General and Malawi Congress Party [1999] MLR 313

Nyangulu v Nyangulu 10 MLR 433

Paul v Paul CC No. 55 of 2015 SRM

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EXECUTIVE SUMMARY

This dissertation is about issues of equality and non-discrimination concerning women's right to equal share of property upon dissolution of marriage as well as their ability to access justice in such matters. The main objective of the study was to examine the experiences and perspectives of women in their encounter with justice system as well as the acts, attitudes, perspectives and practices of the courts in cases concerning distribution of matrimonial property after divorce and women's access to justice in such matters.

The study used desk research and interviews with women accessing justice and other persons involved in the administration of justice, mostly magistrates. The findings of the study are that the courts apply the concept of fairness in distribution of matrimonial property especially under section 24 of the Constitution. Under the provision, women are entitled to equal treatment before the law and, upon dissolution of a marriage to fair share of the property jointly held in the family. The Marriage Divorce and Family Relations Act (MDFRA) beefs up the Constitution by providing for the factors that the court ought to consider when distributing the matrimonial property.

With precedent from the Malawi Supreme Court of Appeal as well the High Court, the principle of fair distribution of matrimonial property seems to be well-rooted in the decisions of the courts. However, there seem to be divergent views as to what fairness entails in some cases and also concerning the concept of joint ownership in other instances. The study found that women hardly claim property in the courts but the courts still make it a point that women should have a share in the property once a marriage has been dissolved. The right is seemingly automatic as the Constitution and the MDFRA provide. Because the women do not claim the property, sometimes women do not know what property the family had for them to share. In some cases men conceal property either before or during the hearing of the matter. Coupled with traditional attributes of ownership of property under custom, the women's right to equitable share of property is negatively affected.

Most women seem to have scanty knowledge about the right to fair distribution of matrimonial property. Equally, some men failed to appreciate the rationale behind this right and regarded this law with circumspection. The study found that the State and non-State actors are not disseminating information to women, and the public at large, about the right to fair share of property upon divorce.

The study therefore finds that there are issues that need to be addressed as issues concerning equality and discrimination against women under the Convention on Elimination of All forms of Discrimination against Women (CEDAW) and The Protocol to the African Charter on Human and Peoples' Rights (ACHPR) as well as Southern SADC Gender protocol. The rights are available internationally and domestically for women but the women are not benefitting from the rights.

The study further found that women have practical, social, economic and legal impediments to access justice in the matters before the court. These include

- Failure to commence legal proceedings in courts. Women go to the court not knowing how to initiate the proceedings
- Failure to articulate issues in court
- Financial constraints in accessing the courts
- Resistance by their former husbands to have them have access to property duly awarded by the court
- Indifferent response from the members of staff of the court when women want to enforce judgments
- Lack of legal representation
- Lack of knowledge on the courts

The study therefore makes recommendations to make realistic the women's access to justice and fair share to property upon divorce. Some of the recommendations are:

1. There is need to ensure for civic education and public awareness on gender relations, women's rights, equality, non-discrimination and gender/sex stereotypes within the society.

2. There ought to be quality system of access to justice: a system of justice which ensures that the problems that women face are eradicated, and that women get remedies with efficiency.
3. There is need for orientation of magistrates on international obligation and issues of gendered approach to access to justice.
4. The court processes ought to be streamlined to ensure that the access to justice is easy for women.
5. There is need to promulgate easy-to-follow procedural rules for family-related issues from commencement, conduct and enforcement.
6. There is need to improve the mechanisms for the enforcement of the decisions where the need arises
7. Court staff responsible for the court processes and enforcement ought to be provided with orientation on customer relations and gender issues.
8. The general public should be given general information on the availability of the court to provide effective remedies for human right violations.
9. The State and Non-State Actors (NSAs) should make available the information on access to justice and the rights of women through accessible mediums such as television, radios, adult literacy as well as other information communication technology modes such as short message services on mobile phones.
10. There is need to device means for the availability of legal aid to women who seek justice in courts.
11. NSAs such as human rights defenders and non-governmental organisations (NGOs) can also assist by providing legal service to women in issues concerning women's rights.

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CHAPTER ONE

1.0 INTRODUCTORY REMARKS

1.1 Introduction and Background to the Study

Issues of equality and non-discrimination feature highly in the Constitution of Malawi (the Constitution) and the legislation that has been passed in the country subsequent to the Constitution. Further to that Malawi is a party to several international instruments addressing issues of discrimination against women. Thereby, Malawi undertakes to ensure that there are laws, practices and policies that enhance equality and non-discrimination of women.

This study seeks to analyse the issue of non-discrimination and equality of women by examining the law on post-divorce distribution of matrimonial property. International law, constitutional law as well a specific piece of legislation require that upon dissolution of a marriage, women should be entitled to fair disposition of the property held by the family. The study investigates the realisation of this right as well as the practical access to the right. Thus the study also tackles the aspect of access to justice in relation to the women's right to equitable distribution of the matrimonial property.

This study arose out of curiosity from my reminiscence of an ever-increasing number of complaints and concerns by women against decisions by magistrates in many matters concerning matrimonial disputes such as maintenance of children or the women themselves and also distribution of matrimonial property. When I was working as a Principal Resident Magistrate (PRM), I used to encounter several complaints by women on, among other issues, disposal of matrimonial property. The complaints ranged from dissatisfaction with the decisions of the courts, in some cases, and to non-consideration of such issues, in other cases.

When I was undertaking the studies in women law¹ especially international human rights for women, methodologies and theories and perspectives in women law², my mind became pre-occupied with such questions as whether the courts and the justice system could be treating women differently from men based on gender or sex considerations.

The question exercised my mind so much so that I decided to undertake a deep analysis as to the courts' decisions and practices in relation to cases brought up by or concerning women in relation to family matters. Particularly, I decided to critically interrogate the issue of division of matrimonial property upon divorce. I chose this topic as it was seemingly on the most contentious if not emotional issues during the dissolution of marriage and also due to power relations in marriage between men and women in relation to property which in most cases tilt more towards men.

1.2 The Problem in Issue

Ideally, during the dissolution of a marriage, the court has to distribute the property between the parties. The court has to distribute the property fairly taking into several factors concerning the property with special focus, in most cases, on women who in the cultural context are vulnerable in the terms of ownership and acquisition of property. Due to the cultural dimensions women also face problems to access justice in matters concerning property after the dissolution of marriage. Thereby, there is a gap in that the law, including international human rights standards, provides for women's right to property and access to justice whilst as a matter of fact, women have problems in accessing the courts and thereby the rights to fair distribution of property is negatively affected.

¹ Masters in Women's Law, SEARCWL, University of Zimbabwe.

² Among other subjects, Methods and Methodologies and Theories and Perspectives in Women's Law were the core courses. The two courses are 'designed to actively and beneficially transform students' approaches to women's issues and women's engagement with law and human rights', Stewart, 2011: 29

1.3 Location of the Study

The study was conducted at Blantyre Magistrates' Court, Limbe-Dalton Magistrates' Court and Midima Magistrate's Court within Blantyre District, in the Southern Region of Malawi. I also managed to get some insight from Mulanje Magistrates' Court also in the same region. The region practices the matrilineal system of marriage where a family is traditionally located at the wife's home. However, since Blantyre is an urban area, there are also cases of marriages celebrated under patrilineal system. Nevertheless, the respondents concerned with the court issues concerning distribution of matrimonial property (the court users) all belonged to the marriages that were matrilineal in nature.

1.4 Objectives

My objective in conducting this research was to examine the experiences and perspectives of women in their encounter with justice system as well as the acts, attitudes, perspectives and practices of the courts in cases concerning distribution of matrimonial property after divorce and women's access to justice in the issues.

Specifically, the study sought to

- examine whether women are treated differently from men in accessing justice in matters of distribution of matrimonial property due to cultural and societal perceptions
- examine whether the Marriage, Divorce and Family Relations Act (MDFRA) brings in a new dimensions to the issue of disposal of matrimonial property subsequent to dissolution of marriage.
- examine whether women are not able to effectively and properly pursue their property rights in the courts after the dissolution of marriage because they are not aware of their rights in the court of law.
- examine whether the State and non-state actors (NSAs) are not effectively disseminating to women information their rights property and access to justice.
- examine whether there is need to devise mechanisms that enable effective dissemination of women's rights to equitable share of property and access to justice.

-examine the extent to which women are aware of their rights to property, access to justice and equality before the law and

1.5 Assumptions Informing the Research

In carrying out the research my overarching assumption was that women face discriminatory practices in issues of distribution of matrimonial property upon the dissolution of marriages. Therefore, the study sought to look into instances in which women face discrimination in cases of distribution of matrimonial property. To this end I developed the following as the sub assumptions to the overarching assumption:

1.4.1 That women are treated differently from men in accessing justice in issues of distribution of matrimonial property due to cultural and societal perceptions against women.

1.4.2 That the MDFRA brings in a new dimension to the issue of disposal of matrimonial property subsequent to dissolution of marriage

1.4.3 That women are not able to effectively and properly pursue their property rights in the courts after the dissolution of marriage because they are not aware of their rights in the court of law.

1.4.4 The State and NSAs are not effectively disseminating to women information their rights property and access to justice.

1.4.5 That there is need to devise mechanisms that enable effective dissemination of women's rights to equitable share of property and access to justice.

1.5 Research Questions

From the overarching assumption, the main research question was whether women face discrimination when it comes to sharing of property upon dissolution of marriages?

The following research questions follow from this major question, and formed the backbone of the research:

1.5.1 Are women treated differently from men in accessing justice issues of distribution of property? Are there cultural and traditional factors and practices that disfavour women in issues of distribution of matrimonial property?

1.5.2 Does the MDFRA bring a new dimension to the disposal of matrimonial property?

1.5.3 Are women able to effectively and properly pursue property rights in the courts of law? Are women aware of their rights to property and access to justice?

1.5.4 Are the state and NSAs actors effectively disseminating the information of women's rights to property?

1.5.5 Is there a need to come up with mechanisms of information dissemination?

1.6 Conceptual and Theoretical Framework

1.6.1 Conceptual Framework

It is apt to put in context some of the terms that have been used in this write-up. I will explain the following terms: matrimonial property, equitable distribution of property and access to justice.

1.6.1.1 Matrimonial Property

The MDFRA defines matrimonial property to include: (a) the matrimonial home or homes; household property in the matrimonial home or homes; (c) any other property whether movable or immovable acquired during the subsistence of a marriage which by express or implied agreement between the spouses or by their conduct. It also includes property that is used, treated or otherwise regarded as matrimonial property. The law also elucidates non-monetary contribution to include non-financial contribution made by a spouse for the maintenance, welfare or advancement of the family and includes domestic work and management of the home, child-care, companionship and the endurance of the marriage.

The Constitution requires the property to be jointly held. Joint holding of the property has received a wider and generous interpretation by the courts, in some cases, to include property that a husband might hold exclusively.³

1.6.1.2 Equitable Distribution of Matrimonial Property

Section 24 (1)(b) of the Constitution recognises women's right to full and equal protection by the law and, among other rights, that on the dissolution of a marriage, they ought to be entitled to a fair disposition of property jointly held with the husband. On the other hand, section 74 of MDFRA provides that upon the dissolution of a marriage, the court has to equitably divide and re-allocate property.

The Constitution tackles the issue of matrimonial property from the general angle of women's rights and equal protection while the MDFRA looks at the instances that the courts ought to take into account in considering the division and reallocation of property. 'Disposal of the property', 'distribution of matrimonial property', and 'division and reallocation of property' are used interchangeably and achieve the same result. Likewise 'fair' and 'equitable' are also used interchangeably.

Mwaungulu J in *Stewart Kamphoni v Violet Kamphoni* MC No. 7 of 2012 discusses what amounts to fair disposition of property by saying that fairness is the hallmark and that fairness is wider than equality:

...achieving equality between the spouses would result in unfairness to a wife. For example, if the wife has custody of infant children, equal allocation of matrimonial property will not be fair.

1.6.1.3 Access to Justice

Access to justice has been defined to mean more than mere physical and geographical access to courts and tribunals. It also includes the fairness and the responsiveness of the system to such issues as class and gender of the litigants. In a study in 2000 by Schärf and others, the access to justice in Malawi was affected by such factors as poor enforcement of judgments, resource constraints in the judiciary, poor understanding of

³*Lorraine Khamisa v Shabir Khamisa* MC No 9 of 2009; *Stewart Kamphoni v Violet Kamphoni* MC no 7 of 2012; *Marylyn Munthali v Francis Munthali* CC No. 2 of 2011 (Mzuzu)
Kayira v Kayira Civil Appeal No 44 of 2008
Monica Zolo v Quaniso Kumwenda CA No 44 of 2008

the Constitution by the subordinate court and other case handling institutions, lack of support services to the judiciary as well as lack of legal awareness to the public (Schärf 2002, 18).

The Committee on the Elimination of Discrimination against Women has suggested that access to justice must entail justiciability, availability, accessibility, good quality, provision of remedies and the accountability of justice systems. The Committee further observed that the access to justice may be hampered by discriminatory laws, procedures and practices as well as stereotyping and gender bias in the justice system (Committee on the Elimination of Discrimination against Women, 2015). Therefore, access to justice entails more than the availability of the institutions of justice. It also entails the activities that are available to enable the persons seeking justice to practically access the justice including good quality and availability of effective remedies.

1.6.2 Theoretical Framework

The right to equitable distribution of property and right to access justice can be placed within the feminist critique of human rights. Feminists argue that there are several factors that lead to differentiation of men and women issues where the enjoyment of human rights is concerned. Feminists argue that the root cause of this all is the dichotomisation of the work (sexual division of labour) done by men and women in the family and in the wider economy. Much as the feminine chores are characterised as private and home-based, masculine activities are regarded as public and of economic significance. All this leads to the undervaluation of work performed by women which (work) is associated repetitive and underestimated activities such as child care, cleaning and cooking (Reynolds, 1991; Clark , 2007). The sexual division of labour is assumed, consciously or unconsciously, in many family law rules and

norms and is reflected in such conception as that the man is the head of the household⁴ and that mothers should perform functions in relation to caring and nurturing.⁵

Clark and Goldblatt (2007:203) argue that judges and spouses have these stereotypical notions of masculinity and femininity which make them determine the roles which men and women are supposed to fulfil as husbands and wives and as parents. This can also lead to issues of division of property where one is deemed to be an owner and the other is a mere beneficiary. Heaton argues that the stereotype emanates from attitudinal approach that does not recognise women's altruistic behaviour in the private sphere which is seen as a mere support system that enables the optimal functioning of the public sphere (Heaton, 2005). The family is contextualised in the private domain with which law has no business to interfere. Boshoff, for example, also posits that the family is seen as private affair of which the law has no business to interfere (Boshoff, 2001). That type of thought can also lead to negative ramifications of women in their quest to attain justice in that family affairs because such affairs are taken out of the context of the public domain.

Thus, the background of the study is based on the feminist thoughts in relation to human rights as to the roles of men and women in the family and the consequences of that in cases where the property of the family is to be distributed subsequent to dissolution of the marriage.

The subject matter of distribution of matrimonial property in relation to women revolves around the substantive issues of right to property and equality as well as the procedural aspect on access to justice.

In its report, the Malawi Law Commission (MLC) noted that there was a gap between the right to fair disposition of matrimonial property subsequent to divorce in that there was no enabling statute as to how to implement the right (MLC, 2006, 82). The Commission noted that the Constitution was of little assistance in ensuring fair

⁴ A common saying in cultural set-up: Men are regarded as having control over their families i.e. wives and children.

⁵ Issues of work and women have occupied women's socio-legal struggle for equality and non-discrimination especially under Marxist feminism (Fergusson and Hennessy 2010:1)

distribution of the property and that some decisions tended to do injustice to women. Ascertainment of ownership was not straightforward and some principles tended to be patriarchal (MLC, 2006: 84). Obviously, patriarchal tendencies tend to dominate over women rendering them vulnerable.

Chikopa has suggested that women are vulnerable in issues concerning the institution of marriage and, among other areas, distribution of matrimonial property. For that reason, he argues that the courts have to protect the rights of women in issues of distribution of matrimonial property (Chikopa, 2015). At the same time some studies have suggested that women get hurdles to access justice. In 2000, WLSA Malawi published a study which found that the system that women find themselves in search of justice is a maze; it is time-consuming and frustrating. The guarantee to find justice is low and the women get too little justice and too late (WLSA Malawi , 2000). Likewise, a 2006 study by AfriMAP (AfriMAP Open Society Foundation, 2006) found that much as the majority of Malawians were aware of their rights and the institutions to assist them, many people were not able to enforce their rights because they could not access the formal justice delivery system. That study observed that poor people, especially women, were disproportionately impeded by various physical, financial and linguistic barriers (AfriMAP Open Society Foundation, 2006:19).⁶

1.7 Summary of Chapters

This Chapter has outlined the background, objectives, research assumptions as well as the research questions forming the background of this research. The next Chapter deals with the research methods and the methodologies that the study employed in order to accomplish the research objectives, assumptions and the questions. Chapter Three will deal with the legal framework concerning the study. Chapters Four and Five outline the findings of the study on the women's experiences with the justice system in realisation of the matters of matrimonial property distribution and the right to equitable distribution of matrimonial property, how the courts deal with the right and the extent to which women are aware of the right. The final chapter will draw

⁶Schärf *et al* reached the same conclusions in a 2002 study about access justice in Malawi (Schärf *et al* 2002).

general conclusions and make recommendations in relation to the issues covered in the study.

CHAPTER TWO

THE RESEARCH PROCESS

2.1 Introduction

This chapter is concerned with the research methods that I used in pursuing this research and also the methodological framework informing the methods that I employed. I will start with the methodology I applied to illustrate the theories that informed the methods that I employed.

2.2 Methodological Framework

The study employed qualitative research methods that were informed by the desire aimed at interrogating the human rights concerned, *i.e.* the right to equitable share of property upon divorce and the right to access justice, and the extent to which the courts and the personnel at the courts, through their acts and decisions, enable the women realise the rights in issue. Further the study interrogated the challenges, if any, and impediments that women encounter in accessing the rights and the extent to which customary norms and practices assist or impede women in attaining the rights. Thus, specifically in this research, I employed human rights, women's law, gender and sex analysis, actors and structures as well as legal pluralism approaches.

2.2.1 Women's law approach

The women's law approach has a woman as a starting point of analysing a socio-legal issue. This approach looks at women's lived realities based on sexuality, birth, care and domestic work, among others, as a starting point for the analysis of the position of women in society (Bentzon, 1998). Okin observes that theories and issues surrounding human rights have been constructed under a male model and when women's real-life experiences are taken into account, the theories, compilations and prioritisations change significantly (Okin, 1998).

The approach women's law critically engages the differentiation between men and women within a given legal system. Alternatively, it looks at the equalisation of men

and women under the law and examines whether such equalisation achieves equality or perpetrates further differentiation between men and women. As Dahl argues:

As long as we live in a society where men and women have different paths in life, different living conditions, with different needs and opportunities, legal rules will necessarily affect men and women differently. ...

It is this complex interplay between law and life that researchers in women's law seek to chart and understand, with the special goal of contributing to the work for real equality and liberation. (Dahl, 1987: 12)

The approach of women's law, therefore, assists to appreciate women's encounter with discriminatory norms within a seemingly or a *de jure* egalitarian legal system. The approach explores women's lived realities and detects the shortfalls of the legal system in relation to women.

As Farha suggests, women's inequality can only be detected, understood and addressed if the details of women's particular experiences are exposed, analysed and assessed (Farha, 2008: 568). I, therefore, used the women's law approach, having women as the centre of the study to unveil women's issues in relation to distribution of matrimonial property and accessing the courts to get in touch with justice. During the study, I interrogated women's knowledge of the rights under discussion taking into account that the women were of different classes: urban and rural, also of different economic activities as well as educational backgrounds. Nevertheless much as there were differences based on the social differences, as the study shows some of the problems are faced by women generally as a group.

2.2.2 Sex and Gender Analysis

Much as the research focussed on women's rights, it was significant to approach the issue from the gender relations angle. Thus I had to employ sex and gender analysis approach. This approach analyses how societal attitudes differentiate men and women not only based on biology, but also what the societies consider masculine and feminine roles in the society. This approach helped me to interrogate the gendered approaches and roles in relations to women's access to justice as well as the appreciation of the women's rights to fair distribution of matrimonial property upon divorce. At the back of my mind in conducting the research was the cultural and

societal attitudes towards women's roles, contribution and access to property. The questions that came to mind were the gender roles of women in homes and public sphere and how such roles are seen as being contributory in accumulation of matrimonial property in a family. From the judicial point, I wanted to find out how the courts approach women's contribution and entitlement to property. Further to that, I wanted to interrogate how such approaches affect the women's general access to justice in such matters.

Sex and gender analysis is a very important tool in appreciating and addressing discrimination based on sex. Therefore, I wanted to find out whether women were treated differently from men and how such treatment could be said to be perpetuating discrimination against women.

2.2.3 Human Rights Approach

The concept of Human rights is a universally celebrated value. Human rights approach is rooted in the states' commitment to uphold internationally recognised and acknowledged rights for all individuals without discrimination. Once the state has made a commitment to recognise particular rights, it (the state) must take measures aimed at ensuring that the rights are actualised (Connors, 2000). This research examines the substantive right to a fair distribution or equitable share to matrimonial property in relation to women once family relations can no longer subsist. It also examines the actual access to the justice system and attainability of remedies from the justice system. All these are issues in human rights recognised internationally and regionally. They are also rights that women rights instruments emphasise in relation to women. At the centre of the whole agenda is to ensure that women do not suffer discrimination from men on the basis of their sex or gender. By its international obligation and the spirit of the Constitution⁷ Malawi has a responsibility to ensure that women attain human rights in the same way as men. In this study, the exploration is the extent to which the available mechanisms enhance or diminish the realisation of these rights by women. In approaching the study from this angle, the question is

⁷ Sections 13, 20 and 24 of the Constitution about equality and non-discrimination as well section 11 which compel the courts to have regard to current norms of public international law when interpreting the laws.

whether the state is meeting its obligations in accomplishing its duty in realising the rights intended to be protected. Conversely, the question is whether women are enjoying their rights that the international instruments as well the constitution and statutory law confers on them. Therefore, at the core of the study was the investigation into the issue of human rights especially on the assumption that in as far these rights are concerned, women are treated differently from men. The two rights are important because they have a bearing on how Malawi is fairing on realising the right of women to non-discrimination and equality before the law.

2.2.4 Influence of Actors and Structures Approach

This approach engages from a gender perspective the interrelationship between the law and other normative structures and persons enforcing the law (Bentzon, 1998:100). The law is looked at from the perspective of other structures, norms and actors to uncover the expectations, as well as practical social, political and economic realities and impediments in realisation of rights and justice. The approach assumes that the interplay between the law and the real life of issues concerning women is influenced by several other societal and extra-legal factors apart from the law itself. The factors affect the thinking of personnel behind the dispensation of justice as well as the support structures for the dispensation of justice. This study reveals the complications that women encounter for them to access legal redress from the courts. Some of the encumbrances are visibly affected by the negative perception against women seeking redress from the court on family matters. Some people might look at the women's attempts with negative gender stereotypes or cultural conceptions. One of the assumptions in the research was that women face different treatment from men in accessing justice in matters of distribution of matrimonial property. Therefore, the study interrogated whether some of the decisions by the court might be influenced by cultural norms preferences and prejudices.

2.2.5 Legal Pluralism Approach

Legal pluralism is a way of looking at a problem from a legal, as well as other normative standards and angles to understand the interplay between the law and the other norms. Law definitely formally regulates peoples' way of life, but that does

seclude other norms and 'laws' from regulating peoples' affairs in the same way as the law does. Legal pluralism is inevitable in the African setting due to the coexistence of received law, customary law and religious laws (Banda, 2005:13).

Malawi follows a plural legal system ranging from international law, statutory, common and constitutional law alongside customary laws and religious prescriptions. Therefore, in a given scenario, the approach to the law is multifaceted and informal law would inevitably have an influence on the formal laws sometimes complementarily and in some cases, confrontationally. .

The Legal pluralism approach therefore analyses the impact of law as officially recognised on a particular issue alongside with other social and cultural norms such as cultural practices and customary law.

Legal pluralism can be viewed as a combination of legal, social and cultural norms, values and institutions which provide individuals and groups...with a variety of options and choices as to how [to] achieve their aims and goals (Bentzon, 1998:101)

Legal pluralism also forms the agenda of relooking the customs and practices that have a negative impact on attaining equality especially for women. This can lead to the Member States to international human rights obligations to take measures of transformative cultural change of aspects that engender discrimination (Musembi, 2013). In my research, I looked at customary law practices as a legal norm and how they negatively affect the human rights norms in relation to treatment before the law, women's knowledge and ability to pursue the human rights in issue. The question was the extent to which, under custom, women have access to the legal remedies on the one hand, and to property, on the other. How does that affect women's rights within the formal legal system?

2.3 Research/ Data Collection Methods

With that methodological background, in carrying out the research I carried out several strategies including desk research, perusal of court records as well as online searches, interviews as well as group focus discussion. I carried out the desk research as well as the perusal of the court records for purposes of examining the court

decisions in matters of divorce concerning the distribution of matrimonial property. Some of the court records prompted me to have in-depth interviews with the magistrates or the litigants as the case could be.

The interviews that I had can be categorised as key informant interviews as well as general interviews. I had four key informant interviews. The key informants included the Chief Resident Magistrate (CRM) for the Southern Region of Malawi, a Supreme Court Judge, and a village head who was in company of his *nduna* ('minister'). As to the in-depth interviews, I interviewed twenty-three respondents who included magistrates and other persons who included litigants involved in distribution of matrimonial property upon divorce. Others were officials from organisations involved in the issues under discussion in one way or the other.

The tables below show the number of respondents involved in interviews that I carried out in this research.

Table 1: Key Informant Interviews

Locality	Informants		Total	Description
	Female	Male		
CRM's Court	0	1	1	CRM
Malawi Supreme Court of Appeal (MSCA)	0	1	1	Justice of Appeal
Blantyre Rural	0	2	2	Village headman and an Assistant
Total Key Informants	0	4	4	

Table 2: In-depth/General Interviews

Location	Total	Females	Males	Description
Blantyre CRM's Court	8	4	4	Four Senior Resident Magistrates (SRM) 2 Male (M); 2 Female (F) ; One First Grade Magistrate (FGM), (F) and three litigants (F)
Midima Magistrates Court	2	0	2	One SRM (M) and Second Grade Magistrate (SGM)
Limbe Magistrate's Court	7	5	2	One (SRM) (M), FGM(M), One SGM(F) and four complainants
Mulanje Magistrate's Court	1	1	0	FGM
Thyolo National Initiative for Civic Education District Office	1	0	1	Deputy Civic Education Officer
Zomba ⁸	1	0	1	National Coordinator, Women Judges' Association of Malawi (WOJAM)
Bangula Trading Centre	2	1	1	A couple
Total	23	10	13	

Apart from that I had three focus-group discussions in order to engage the respondents on the issues to do with women's right to fair distribution of property. The discussions

⁸ At a hotel during a WOJAM training workshop

were held in Blantyre CBD where six men participated and in Kanjedza Township, in Limbe Blantyre where five men also attended. The other group discussion involved six women and took place at a village within Blantyre district.

Table 3: Focus Group Discussion

Location	Female	Male	Description
Blantyre CBD	0	6	Men working in different occupations
Blantyre Rural	6	0	Women, all not working
Kanjedza Limbe	0	6	Businessmen as well working men
Totals	6	11	

Table 4: Summary of Methods

MODE	Participants		Total
	Female	Male	
Key informants	0	4	4
In-depth/ other interviews	10	13	23
FOCUS GROUP DISCUSSION	6	11	17
	16	28	44

2.4 Limitations of the Study

The study was concentrated in Blantyre City. Therefore, the study was deprived of a comparative analysis of processes in the courts in the rural settings although I was able to interview a magistrate from a district court as well as a civic educator from a district. Apart from that, due to some problems, I failed to have interviews with some potential key informants such as the country director of Women and Law in Southern Africa Research Trust, Malawi Chapter (WLSA Malawi). I believe that the director of WLSA Malawi was a very significant interviewee as WLSA Malawi is the biggest NGO that deals with issues of women in Malawi in terms of research, policy and advocacy. Apart, from that there were some other intended interviewees that I failed to trace. However, I was convinced that I was able to get the relevant information

from the other persons whom I interviewed. The most significant inquiry I wanted from WLSA Malawi was about women's representation in the courts and also information dissemination on women's rights. This evidence was available from the other quarters I interviewed.

2.5 Evaluation of the Methods

Be that as it may, I found that the methods I used were quite informative. From the key informants, I was able to follow up some case files and find appropriate persons to interview. The case files also proved to be an enormously important tool in observing the issues arising in the courts. I had, therefore, to relate the data from the court records with the persons involved. The interviews with the judicial officer provided deeper understanding of the aspects of administration of justice than the court records. Therefore, the triangulation of data proved very informative.

The focus group discussions showed the collective thinking of the persons involved. Therefore, the research methods provided a deeper insight into issues of women's access to justice in issues of division of matrimonial property as well as the perspective of men in the said issues.

2.6 Conclusion

In conclusion, this study qualitatively used a woman as a starting point and employed the human rights approach, sex and gender analysis, women's law approach as well as the structures and actors approach. Legal pluralism was also employed- to look at how other norms other than the formal law affect women's issues in relation to property upon the marriage dissolution. As for the actual methods the study moved from perusal of court records, library research, key informant interviews, in-depth interviews as well focus group discussions.

The next Chapter looks into the international human rights and the domestic legal framework informing this study.

CHAPTER THREE

3.0 INTERNATIONAL AND NATIONAL HUMAN RIGHTS AND LEGAL FRAMEWORK

Women's rights focus mainly on the human rights principle of non-discrimination because, despite various human rights instruments, extensive discrimination against women continues to exist. The Convention on the Elimination of all Forms of Discrimination against Women, to which Malawi is a signatory, clearly makes non-discrimination an underlying principle. Malawi must undertake appropriate measures in developing and following policies and legislation that eliminate discrimination against women. -Malawi Law Commission, Report of the Law Commission on the Review of Laws on Marriage and Divorce, 2006

3.1 Introduction

Women have rights to equality with men in all spheres of life as propounded by international human rights instruments and the Constitution. In the case of dissolution of marriage, women are entitled to equitable distribution of matrimonial property they held together with their spouses during the subsistence of the marriage. Women are also entitled to access justice on the equal footing with men and that practices and problems that hinder women's access to justice have to be discouraged by the State through legislation and administrative policy measures. This Chapter discusses the human rights and legal frameworks informing the women's rights to equitable distribution of matrimonial property as well as the practical access to that right. I will start by discussing the international human rights framework and then discuss the rights within the international framework then under the constitutional and legal landscape in Malawi.

3.2 International and Regional Human Rights for Women

For the purposes of this study, I will dwell much on Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Protocol to the African Charter for Human and Peoples' Rights (ACHPR) on the Rights of Women in Africa (Maputo Protocol) and the Southern African Development Commission (SADC) Protocol on Gender and Development. I do so because CEDAW is the most relevant instrument worldwide on the rights and freedoms of women. CEDAW spells out

specific goals and measures that are to be taken by the state parties to create equal rights for women. On the other hand, the Maputo Protocol addresses the implementation in Africa of international human rights of women (Viljoen 2009:16). It is an instrument that makes African governments more compelled to ensure attainability of women rights and it makes the States accountable for failure to take steps to arrest violations of women's rights (Njoroge 2005). The SADC Protocol, further, introduces a new approach to implementation of gender equality goals and objectives by binding the Member States to speed up the process of ensuring the availability of legal tools and policies for ensuring the realisation of equality and non-discrimination between men and women (Munalula 2011).

3.3.1 The Right to Access Justice and Equality before the Law

The CEDAW provides for a duty on the States Parties to embody in their Constitutions and legislations, the principles of equality between men and women and non-discrimination of women. The Protocol to ACHPR provides for the duty on the State to incorporate principles of equality in their national laws.⁹ Article 15 of the CEDAW also provides for the right of women to equality before the law which right is also provided for in Article 8 of the Protocol to ACHPR on Women's Rights. Under that provision, the States have to take measures to ensure women's effective access to judicial and legal services, sensitisation of women's rights and reform of discriminatory laws and effective gender equality rights enforcement by the enforcement agencies.

3.3.2 The Right to Fair Distribution of Property upon Dissolution of a Marriage

Article 7(d) of the Protocol to the ACHPR requires the States Parties to enact appropriate legislation to ensure that women and men have the right to equitable distribution of property upon dissolution of a marriage. Article 16(1) (h) of CEDAW

⁹ Article 2

accords both men and women the same rights in relation to acquisition, administration and disposition of property.

3.4 Malawian Constitutional Order and Legislation

3.4.1 Right to Access Justice

The Malawian constitutional and statutory legal order also provides for the right to access justice for all. Apart from statutes that provide for access to justice for all,¹⁰ the right to access justice, from any court or tribunal, is guaranteed in the Constitution with the attendant entitlement to effective remedies for the violations of the rights under the Constitution and any other law.

3.4.2 Right to Equality

One common theme in the Constitution of Malawi is the right to equality and non-discrimination of all persons. The state has a duty under section 13 to actively promote the welfare of people by adopting and implementing policies aimed at achieving gender equality for men with women through implementation of policies that address social issues such as economic exploitation and rights to property.

Section 20 of the Constitution prohibits discrimination in any form and also imposes on the State a duty to pass legislation that addresses inequalities and to pass legislation with the aim of eliminating customs and practices that discriminate against women especially in relation to deprivation of property.¹¹

3.4.3 Women's Right to Fair Distribution of Property upon Divorce

Specifically for women, section 24 of the Constitution guarantees the right to full and equal protection by the law (a right of women to non-discrimination); and a right to a fair disposition of property that is held jointly with the husband, upon dissolution of the marriage.

¹⁰E.g., the Courts Act (Cap 3:01)

¹¹ Section 30(3) of the Constitution imposes the duty on the State to pursue measures aimed at introducing reforms aimed at eradicating social injustices and inequalities. Gender Equality Act also makes measures to incorporate the concept of equality between men and women.

The MDFRA, similarly, provides in section 74 for the equitable division and reallocation of property upon the dissolution of a marriage. One of the findings of the MLC in coming up with MDFRA was that there was need to promulgate a law to provide for the dynamics of distribution of matrimonial property subsequent to a divorce. The Commission noted that the Constitution did not provide for the how the fairness was to be achieved and the courts relied much on common law (MLC, 2006, 82). It was open to the courts to decide what was fair when distributing the property. In some cases, as this study found,¹² the courts could also be driven by customary law norms and prejudices. The MDFRA, therefore, came up with parameters of the circumstances that the courts should take into account when distributing the property. These include

- (a) The income of each spouse;
- (b) The assets of each spouse;
- (c) The financial needs of each spouse;
- (d) The obligations of each spouse;
- (e) The standard of living of the family during the subsistence of the marriage;
- (f) The age and health of each spouse; or
- (g) The direct and indirect contributions made by either spouse, including through the performance of domestic duties.

The MDFRA, therefore, expands the horizon for the courts to consider when distributing matrimonial property.

3.5 Conclusion

The international obligations and the legal system in Malawi is not short of commitments and provisions for the women's right to equitable distribution of property, right to equality as well as the associated right access justice thereon. From CEDAW, to regional Protocols down to the Constitution and statutory law, the rights for women to fair distribution of matrimonial property as well as equality before the law are guaranteed. The question is how Malawi, as a party to these instruments, and a

¹² See Chapter Five

nation with laws that recognises such rights, ensures the realisation of the rights. The next two chapters analyse the realities on the ground of women's experiences with the justice system.

First, the discussion dwells on the issue of the right to access justice and, thereafter, the issue of fair distribution of the matrimonial property.

CHAPTER FOUR

4.0 WOMEN AND ACCESS TO JUSTICE IN ISSUES OF PROPERTY DISTRIBUTION UPON DIVORCE

Honestly, most women are not able to follow procedures very well. In most cases they come to the court after issues have gone to ankhoswe..... [marriage advocates] or even the victim support unit [of the Malawi Police Service]. Sometimes when they come to take summons they come from village headmen or churches. Sometimes they don't know what they want. - A Second Grade Magistrate, Midima Magistrate's Court (25 November, 2015)

4.1 Introduction

This Chapter analyses how women's real life aspects concerning access to justice in issues of distribution of matrimonial property. As illustrated before, access to justice is a wide term and entails economic, cultural, legal and physical aspects of availability of legal services to the people who require the services. Access to justice covers all the aspects of court users' encounter with the system and structures before, during and after the court sessions.

4.2 Women's Encounter with the Justice System

From the judicial officers I interviewed, I observed that some women go to the court not knowing exactly what they want the court to do for them. A magistrate told me of his experiences from the days when he was a court clerk. He said most women could not make a tangible claim and that in some cases, they (the clerks) could summon the women and their husbands to round-table discussion where the issues could be discussed. In some cases the issues could be resolved. If not resolved, the women could make such claims as '*kundisiya ukwati*' i.e. 'deserting me'. It had, according to the former clerk, to take a magistrate to help the women make out a clear case of that assertion. Thus according to the respondent's view, such women did not appreciate that they could approach the court and seek divorce. The respondent stated that, as a magistrate, he still observes the problem of women coming to the court without proper pleadings.

In one case that I came across, a woman went to complain to her village headman that her husband had deserted her. Efforts by the village dispute-settling structures to summon the man to a hearing did not materialise. The woman also tried to approach her church for assistance. The village head referred the woman to a magistrate's court 'for assistance'.

At the court, her claim was for the court to persuade the husband to go back to her. The court tried to conduct some mediation between the parties. At the court, the man attended the session but it was clear that he no longer wanted to go back to his wife. The court advised the woman that the court could not compel the husband into the marriage and that the only option she had was to seek divorce. The woman took some time to file for the divorce. When she finally sought the divorce, the husband did not even go to the court to defend the claim against him. The magistrate dissolved the marriage. Asked if she had any other claims against the husband, the woman said she left it all to the court to assist her (*Paul v Paul* CC Number 55 of 2015, Blantyre SRM).

When I interviewed the woman, it seemed that she was not sure of the claim to make before the court and in actual sense, she did not make any tangible claim.

The woman was at a loss as to how she had to approach the court and what she had to claim from the court. It is not uncommon for women go into court without proper claims and pleadings, leaving it all to the court to assist them to make out their claims. It remains doubtful if such persons know their rights and remedies they can get from the courts. It is suspicious if person can pursue her rights if she does not know her rights on how to approach the courts. Of course, the magistrates said that the scenario was not different from that of men but that men were in most cases able to present their cases and conduct cross-examination properly as compared to women.¹³ From some of the respondents the failure by women to pursue their claims is rooted in culture. One SRM argued that under culture women are supposed not to speak in

¹³Interview with an SRM at Blantyre on 18 November, 2015 and also an FGM on 19 November, 2015

public and for that reason, they fail to express themselves in the court setting. The magistrate working at Mulanje Court observed that:

In a rural setting when you ask women what they want from the court they say ‘*Mutandithandize ndi inuyo.*’ [You are the one to assist me]. Perhaps, they have fear of being seen as being materialistic.¹⁴

He said that cultural notions that some property is masculine and some feminine and also that men are heads of the families make women to have problems to claim property.

The concept that man is the head of the family is problematic as it makes people feel that property only belongs to the husband. Culture makes women not to cling to property. Further to that, some property is seen to exclusively belong to men. As an example bicycles are seen to belong to men as compared to kitchen utensils which are seen to belong to women.

Inasmuch as the magistrate attributed this aspect to rural women, the failure to make out the claims is not confined to the courts in the districts. The magistrates in urban courts also had the same observations that women do not make clear complaints for the courts to determine. The magistrates also observed that even women in the urban areas leave it to the courts to work out the claims for them. Another magistrate suggested that the women make vague claims because historically, in the traditional courts no party wanted to be seen as being responsible for the breakdown of the marriage because causing a marriage to break had negative consequences in relation to maintenance and compensation. However, it appeared that in most cases, the women were going to the court to seek reconciliation and reunion with their husbands and that divorce could not necessarily be what they were looking for in the court. The question would be what reconciliation would one seek when the man in question deserted them and failed to attend other dispute resolution forums? One FGM also blamed the issue on culture whereby women are oriented to persevere within the marriage.

One woman I interviewed told me that she went to the court to seek reconciliation, not divorce, but the man was uncooperative rendering the reconciliation untenable and she ended up getting divorce:

¹⁴ 17 November 2015

I came to complain that my husband had moved out of home. He left me saying I was sickly. Yet he was the one who made me sick. I came for conciliation. The court said it does not dissolve marriages but that the man was not cooperative and I could be in trouble if I continued in the marriage.¹⁵

An SRM at Blantyre Court observed that many claims by women were not straightforward; they were not indicating what they were exactly seeking from the court.

When we are hearing these matrimonial causes most cases are 'andithamangitsa' ['I have been chased'] or 'andithawa or ndathawidwa', ['he has deserted me' or 'I have been deserted']. In most cases they will not say they want divorce. Only in few extreme cases of enough is enough they might come and seek divorce. But in most cases they claim that the husband has deserted them or that he is not giving assistance. I take time before I grant divorce. I call *anankhoswe* [marriage advocates] to seek to reconcile the parties. Only when conciliation fails do we proceed to dissolve the marriage on the basis that the courts cannot force parties to be living together.¹⁶

From the observation of one magistrate, the failure to make out clear claims was attributable the fact that the women are not aware of how to claim and claim their rights in the court.

Women may know their rights to property but they do not know how to go about [making the claims]. They don't know how to do it.¹⁷

Most of the women whom I interviewed who underwent trial did not know how to proceed to get the summons and how to make the claims. In some cases even writing the statements of claim was a difficult thing for them. Clerks could assist them to draw up the claims. But still in the court, the women leave themselves at the mercy of the court to guide them on how to go about their claim how to give evidence and how to cross-examine their husbands in the court. One SRM at Blantyre had reservation whether by assisting the women the courts were doing justice in the adversarial legal system where the magistrate is supposed to an unbiased arbiter.

Some say *mundithandize*. [Assist me]. But by assisting them you may not be doing justice. Sometimes they get angry and say 'angotenga zonse' [Let him just take all the property].¹⁸

¹⁵ Blantyre 19 November 2016

¹⁶ Blantyre, 17 November, 2015

¹⁷ Blantyre, 19 November, 2015

¹⁸ 18 November, 2015

Likewise, an SGM at Midima wondered whether it was the role of the court to assist litigants in making out their claims.

They make such claims as *andisudzule* [he should release me] you ask them do you want divorce? They answer '*mutikhazike pansi mutithandize*' [call us to a roundtable and help us/ mediate over the issue].

The court is in quagmire. My understanding is that that is not the role of the court. The court should be the last resort with clear need of mentioning what the court should do for a litigant. In most cases women don't know what they want. Sometimes they are sent back to organize themselves. In some cases, they come back to the court and say '*takambirana*' [we have discussed]. The marriage can continue and the issues get resolved by the parties themselves.¹⁹

Most respondents observed that during the proceedings, women do not know how to present their cases. Some women were said to be very emotional whilst others could even abandon their own matters in the court. One SRM said:

Many women are emotional. They fail to understand what is involved in cross-examination. Mostly men are in the wrong but they cleverly conduct cross-examination which is, sometimes, so vigorous that the women get disoriented. The Court is supposed to moderate the process. The Court has to come in and intervene. So procedure and evidence are troublesome to women. Sometimes they do not know what to provide in evidence-in-chief.²⁰

It is the case that most women find problems to present their claims or to initiate the proceedings. They also have problems to pursue their cases in the court in sense of presentation of a case, adducing evidence and cross-examination of the other party.

The SRM went on to say that:

On procedure both women and men do not appreciate how to conduct the procedure in the court. I tell the [litigants] about the procedure. I tell them how to narrate their story, how to ask question and how to sum up their case. I tell them briefly, even the educated [ones]. Sometimes women get emotional and fail to pursue their matters. Some even intend to abandon their matters. I have to comfort them. I tell them

'Masukani mayi'. 'Kuno ndi ku khoti'. 'Osanyanyala nkhani yanu'.

[*'Feel free madam'. 'This is a court [to assist you].'*] *'Do not abandon your issue.'*²¹

¹⁹ 25 November, 2015

²⁰ SRM, Blantyre 18 November, 2015

²¹ As above

It is observable that most cases in the magistrate's courts are without legal representation. Women in such matters, therefore, lack the ability to pursue the legal matters such as pleadings, evidence and procedure. Ordinarily a litigant, in the adversarial system has to know what he or she is claiming, what evidence they should lead and how to lead it. Without legal representation many women have problems to pursue their cases: lawyers play a significant role in litigation and in some cases they assist in using the court's time economically.

The HC observed in *EN v TN*, Matrimonial Appeal No. 4 of 2012, that although under matters of customary marriage the rules of procedure may be slightly relaxed, a claimant still bears the burden to present before the court all the evidence available to support her claims.

The court observed that:

The findings of this appeal case indicate that there were some weaknesses in prosecuting the appellant's case both in the subordinate court and on appeal, as relevant evidence that might have supported the well prepared submissions of the appellant was not made available to the court.²²

The Court made observation that human rights defenders take up matters when they have gone on appeal but neglect to take the matters when they are initiated in magistrates' courts. The court observed the court users are put at a disadvantage when they are not legally represented.

By the way of advice and in order for human rights defenders to make their litigation work meaningful and achieve the desired results, it may be strategically helpful to handle a case through the entire court process. That is, the legal representation should begin in the lower court, where human rights defenders can effectively assist clients by ensuring that relevant evidence is admitted then [pursue] the matter up to appeal level, rather than merely focusing on [preparing] submissions in support of an appeal case.²³

The importance of legal representation is, therefore, self-evident. With failure to appreciate how to approach the courts on issues concerning them, the women's right to access justice and equality before the law, as specifically provided for them under the law, is compromised. Access to justice should mean that women know where to go

²² Page 14

²³ Page 15

and what to do to access justice without any inhibition to the steps along the way (Stefiszyn 2009: 50). One of the duties recognised in the ACHPR Protocol and the SADC Gender and Development Protocol is that States should provide legal aid for women in issues concerning rights to non-discrimination and equality before the law. However, it appeared that human resource constraints in the Ministry of Justice were such that they could not sufficiently provide the service to women. Other organisations such as WLSA Malawi and MHRC were providing free service to some women but it was infrequent and almost only in the HC and in cases that were prominent or had attracted wide publicity²⁴.

A judge of MSCA suggested that there should be legal representation in family matters because a lot of rights are in issue in such matters:

The problem I see is that our legal system has not developed. We are responsible as practitioners for all this malaise. In principle, every marriage that ends must have a lawyer but the Legal Aid is not a pregnant system because there are difficult issues.

When distributing property there are serious issues of people and rights for example rights of children and other related social status for example employment. It would be difficult for a villager to go for all these issues and most of the issues also go to lay magistrates. I would say that automatic legal aid must be ordered in each matrimonial cause. Legal aid can be in every district. Every district should have two legal aid advocates and resident magistrates. This can impact family law.²⁵

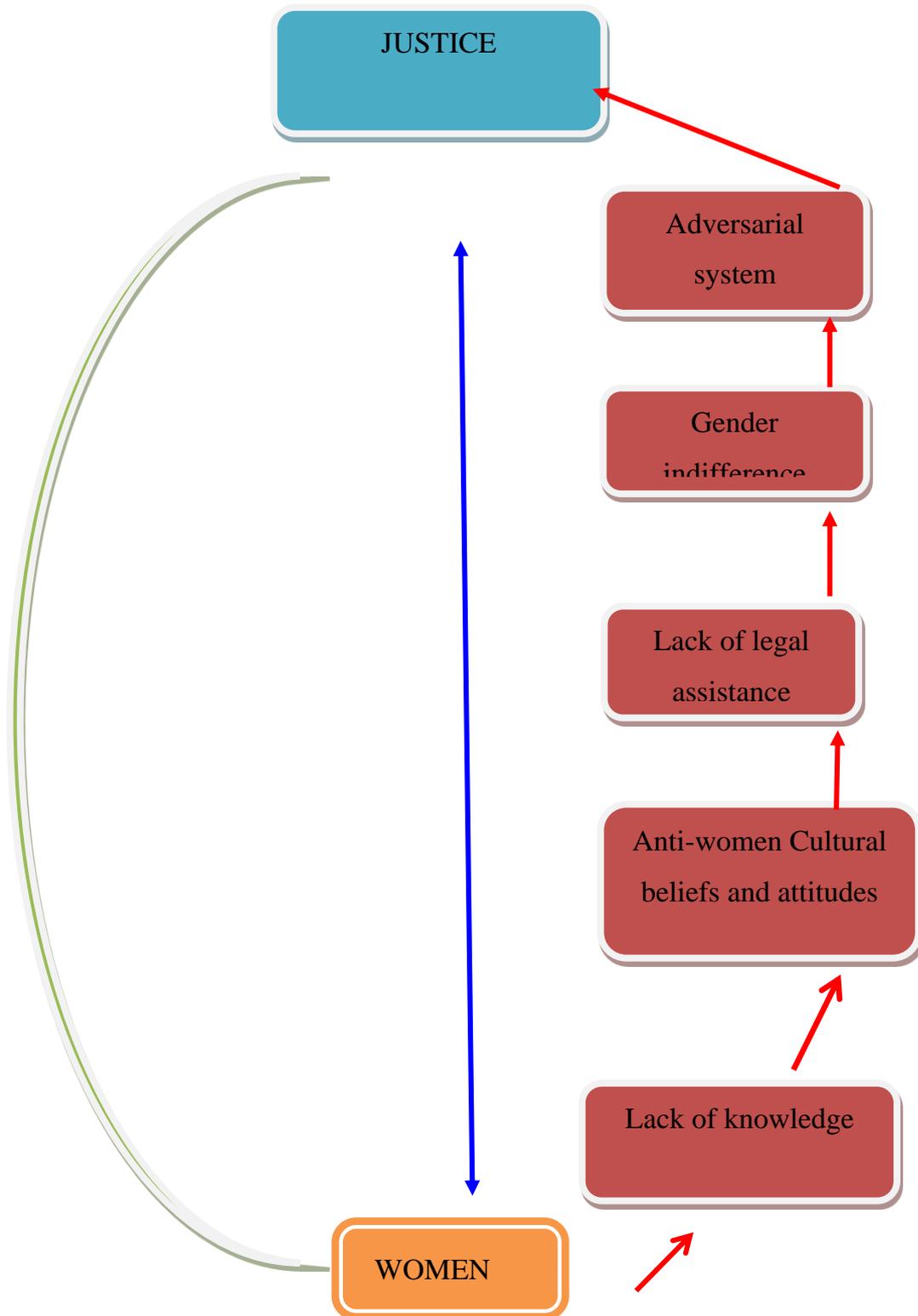
4.3 Women's Problems in Enforcement of Court Orders for Distribution of Matrimonial Property

There are many impediments that women face to access justice as the following figure illustrates:

²⁴ In *EN v TN*, Matrimonial Appeal No. 4 of 2012 the appellant woman was represented in the HC by MHRC. The HC observed that it would have been proper if the representation would have been at all the levels of the trial.

²⁵ Interview at Blantyre: 18 November, 2015

Figure 1: Women and Access to Justice in Cases Concerning Matrimonial Property



4.3.1 Adversarial Legal System

The study shows that women find difficulties than men to pursue their matters in the courts. The issue is said to be rooted in the culture and custom whereby women are not supposed to talk in public. Coupled with the customary norms that women are regarded not to own property, the whole system works to the detriment of women. The legal system has to critically analyse the customary issues that work to the disadvantage of women and consider how to best deal with women in the courts. That may even involve treating women differently.

4.3.2 Gender indifference (Anti-women cultural beliefs and attitudes)

The study found that in some instances there was failure to give special attention to women's needs. Some of the problems women encounter can be said to be rooted in historical and cultural subordination of women. Some personnel responsible for enforcement of judgments do not appreciate the importance of assisting women to get justice done. As a result, women have problems to effectively enforce judgments that have been entered in their favour. In its 2015 General Recommendations, the Committee on Elimination of Discrimination against Women observed that there are many obstacles and restrictions that women meet in accessing justice and that the obstacles occur in

a structural context of discrimination and inequality , due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. (Committee on Elimination of Discrimination against Women, 2015:1).

Critically, some of the impediments that women meet might be rooted in cultural aspects of gender inequality and stereotyping. Some ineffective remedies can only be directed to women or to some group of women based on the very cultural attributes of stereotyping (Committee on Elimination of Discrimination against Women, 2015:4). As a South African Constitutional Court observed in *Bannatyne v Bannatyne* 2003 2 BLLR 111, there are links between inadequate enforcement of maintenance orders and gender inequality.

This area of enforcement of judgments is one other area where women's access to justice is problematic.

As the PRM of Blantyre observed,

I have observed that in most cases there is a problem with enforcement. In some cases, men do all they can to ensure that the women they are contesting with do not get any remedy from the court.²⁶

He gave an example of one such instance:

There is one case, for example, whereby the matter was being heard by Midima Magistrate but the man stated that he was not comfortable with the court to continue hearing the matter. The matter was eventually heard by the CRM and after he delivered the judgment *inter alia* awarding a house to the woman. The man appealed against the decision to the High Court. Before the High Court made a decision the man sold the house to a third party. The High Court, on appeal, ordered in favour of the woman. The matter was sent back to this court for enforcement. We ordered the purchaser to surrender the keys of house to the court.²⁷

This illustration shows that the man might not have taken the court business seriously and that the decisions of the courts could be rendered unworkable. Another case, though not necessarily from Blantyre illustrates the frustration women encounter in relation to the fruits of litigation from the courts. In *Jacqueline Chapamba v Gershom Chapamba* MC No. 17 of 2015 (Lilongwe District Registry), the woman prosecuted her divorce case before a magistrate who referred the matter to the HC for distribution of the matrimonial property. The HC ordered the division of the property. At the woman's request, the HC ordered that the members of the court should oversee the distribution of the property with the help of the police should need be.²⁸ However, on several occasions when the woman intended to have enforcement of the judgment, the members of staff demanded payment of allowances to them. Whenever they went to

²⁶ 9 November, 2015

²⁷ PRM, Blantyre, 9 November, 2015

²⁸ The court said

I further order that since the petitioner has expressed fear on how she would access the properties if shared to her, the petitioner [should] be assisted by the court staff from the High Court in liaison with the Mponela Magistrate Court. The court staff should have to seek the help of the [Officer-in-Charge] of Mponela Police Station in the event that the respondent is not co-operative.

the location where the property for distribution was situated, there was no person available at the matrimonial home. Therefore, the judgment could not be enforced. The police, whom the court ordered to assist, were never available for assistance. The woman told me that she feared that the police could not assist her because the respondent in the matter was also a police officer.

The woman was of the view that her former husband was frustrating the course of justice and she suspected that there were some corrupt practices involved. During the first time I talked to the woman, she said she was not amused with the judgment on the ground that much of the property was donated to her by her parents. She was of the view that the man did not have to benefit much. However, in the latter interviews her concern was merely that she wanted to have the judgment enforced.²⁹

On advice from the Senior Deputy Registrar of the High Court, I advised her to contact the most senior clerk at the HC Registry. Upon visiting the court, she told me that no one assisted her and that no one was willing to assist her. Seemingly frustrated, she said she was thinking of giving up the issue all together.

I went to the Court to seek assistance but no-one seems to be interested to assist me. I feel I should leave the issue and go on with my life. But it pains me because the property totally belonged to me and I was assisted by my parents to acquire it.³⁰

The woman's complaints were that: the former husband was clinging to the property despite the court judgment, the police were not of any assistance, the court officials were not assisting and that when they wanted to assist they were asking for payment of allowances and that whenever they went to enforce the judgment, their tasks were less satisfactory.

The acts of the staff members of the judiciary seem not to be proper. On the face of it, there was lack of professionalism on the part of their part. Further to that asking for payment from a court user for allowances is not proper. It has a semblance of a corrupt practice and unfair practice. In any event if an employee of the judiciary has done some work of which there ought to be payment of allowances, the allowances

²⁹ The interviews were carried out between September and October, 2015

³⁰ Interview 25 November, 2015

are supposed to be footed by the judiciary and not the court user. Further to that, if the observation by the woman is anything to go by, the acts of the judiciary staff paint a bad picture on the administration of justice. Further the fact that the police were also not assisting raises questions as to what extent the state organs assist women in matters that are usually regarded as private and also how seriously the government agencies take issues to do with women.

On one occasion when I had to meet one FGM at Blantyre for an interview, she was having a conference with parties that were divorced in 2013.³¹ The court of the SRM ordered that the man should construct a house for the woman. More than two years down the line, the man was yet to fulfil the judgment of the court to construct the house. In my discussion with the magistrate, she stated that there were many such cases where enforcement of judgments was a real problem. She further observed that the staff members of the court were not well-versed with assisting litigants to enforce their judgments. She stated that in some cases, like in that particular matter, the clerks do not bring to the attention of the magistrates that the judgments have not been enforced. She said where a claimant is represented by a lawyer, such cases are easily enforced by using the usual means of execution of judgments but for the most of litigants, they had no clue of how to make sure that their judgments are enforced. Some go to police or village headpersons who cannot assist them, according to her.³²

Schärf *et al* observe that under the Constitutional order, as opposed to the traditional courts regime, the enforcement of judgments was not much effective. The study found out that the support staff members were lacking the facilities and financial resources to enable them effectively carry out their duties. They had to travel long distances without being given accommodation and subsistence allowances. (Schärf *et al* 2002; 22). The authors argue that the

courts in the new constitutional dispensation had become virtually powerless in that they were reluctant to imprison people for failure to satisfy a civil obligation (save in contempt cases). They claimed that the new constitution took away the most effective tool of enforcement of

³¹*Esnart Green v Wyson Green* Civil matter number 77 of 2012 (SRM, Blantyre)

³² 19 November, 2015

judgments, namely prison, in debt cases without providing for a better alternative. (Schärf *et al*, 2002; 22).

In an interview, the complainant in the matter complained that she had been coming to the court but the staff hardly assisted her. She said she was forced to pay again court fees to initiate the enforcement process and that she had financial problems to travel from the village where she was now based.

The court ordered in 2013 that he should construct a house for me. I've been going round and round without getting assistance. She was ordered to pay K30, 000³³ and he paid. He was also ordered to construct a house but he did not and he says he will not construct the house. He is challenging he says he has money and that money answers any questions. So I just came to the court for assistance. From last year up to now, I have been coming to court to remind about the court's judgment. I ended up issuing new summons and I had to pay K2, 200.³⁴³⁵

Much as the sum might appear not much, to her it was an amount of money she was struggling to raise. She had to raise the money anyway to ensure that she could 'see' justice at the end of the day. Thus, women also suffer financial constraints to have their matters enforced and yet the enforcement was not forthcoming.³⁶

In line with what my study was concerned with, I probed from her whether she had any problems with how the court handled her as compared to the former husband. She said she had no problem with the way the court treated her:

There was no problem in court. We were both treated equally and I don't think I was, or he was, treated differently. It is he who wants me not to benefit from the judgment of the court.³⁷

I probed from her whether she claimed property from the court. She said she only claimed a house.

We had no property. We only had a radio which he sold and dining set *ya mlaza* [dining set made up of palm material]. I did not claim property

³³ About \$38

³⁴ About \$2.8

³⁵ Blantyre 19 November, 2015

³⁶ The complainant in *Jacqueline Chapamba v Gershom Chapamba* also made a complaint that she was concerned that her money was being spent without her seeing the benefit of enforcement of the judgment.

³⁷ As above

because there was nothing worth claiming. I demanded a house because I knew it was my right to be given a house by the husband.

The woman categorically expressed her difficulties in going to the court to have the judgment realised:

I am an orphan and I depended on him. It is difficult for me to come to the court from my village. Money is a problem. I live in Chiradzulu in Chief Nkalo's area. When we were married we are living in Mbayani and it was easier for me to come to the court.³⁸

Therefore, the study revealed that women face several encumbrances to access justice and have their cases heard and enforced due to several factors. Much as there are physical structures *i.e.* the courts for women to access justice, there are impediments that make the reality of accessing justice very confounding. The challenges that the women meet make the access to justice and the equality before the law to be illusory. According to Stefiszen, for any law to have an impact, women must access to, and have equal treatment in courts and tribunals (Stefiszen, 2009: 50). Having access to justice, and having equality before law goes far beyond the mere presences of the courts (Yegge, 2001:4). The courts must take into account the women's peculiarity and vulnerability and assist women to overcome their impediments to the substantive access to justice. It is a question of not only providing the justice but also ensuring the people who seek justice must get it on time. Women must also be accorded knowledge, by the State and NSAs, on a wider platform, about their rights to equality and how to access justice in the courts (Bond, 2014).

4.7 Conclusion

Many women who seek judicial services in matters relating to family relations face problems to access justice. The problems arise out of lack of knowledge on how to access the courts. Additionally, the support structures from the courts are far from being satisfactory. The findings showed that it was not easy for many women to adequately make their claims. The courts mostly enlighten women on what to claim and how to make the claims. Nonetheless, when the courts have made orders, women still find impediments to realistically benefit from the court's decisions. Thus the

³⁸ As above

women's right to access justice is met with various structural and social impediments. As the issues in discussion mostly affect women, the issue of access to justice ought to be regarded as a gender issue.

CHAPTER FIVE

5.0 WOMEN AND THE RIGHT TO EQUITABLE DISTRIBUTION OF MATRIMONIAL PROPERTY

5.1 Introduction

The Constitution as well as the MDFRA recognise the right to equitable distribution of matrimonial property upon the breakdown of a marriage.

The right is also reflected in the Maputo Protocol- the ACHPR Protocol on the Rights of Women in Africa³⁹. The right is one such important right in realising women's right to property and also to equality with men. Otherwise but for this right, entitlement to property would be an illusion for many women especially those in rural areas who are said to mainly occupy the unpaid informal and precarious type of work (NSO, 2014) and whom culture has placed on the role of home-care. This Chapter looks at the findings of the research on the knowledge by women of the right to fair distribution of matrimonial property and how the courts deal with the right. On the issue of knowledge by women, the Chapter will also discuss the role of the Government agencies and NSAs in ensuring that the women have access to information on the right.

5.2 The Approach by the Courts in Malawi on the Right to Equitable Distribution of Matrimonial Property

The study sought to investigate the degree to which the courts in Malawi apply the right and the extent to which women invoke the right to equitable distribution of matrimonial property. The study by Schärf *et al* found that the magistrates were not quite aware of, and were not applying, the constitutional rights in their decisions (Schärf, 2002). However, from my observations of the decisions by the courts and from the magistrates I interviewed, I found out that the courts are conversant with, and apply the concept of fairness in distribution of matrimonial property based on section 24 of the Constitution. In the most judgments I came across and also from the responses from the magistrates, the magistrates made reference to the provision as the

³⁹ Article 7 (d)

point of reference in matters of distribution of the property. Only in one case did I find the magistrate making reference to the MDFRA. However, in that scenario, the reference was merely to the fact that the court had to fairly dispose of the property once it has annulled a marriage.

It appeared to me that the use of the constitutional principle has emanated from the development of the law from the HC and the MSCA after the introduction of the 1995 Republican Constitution. There have been several decisions from the HC and the MSCA on the right to fair distribution of matrimonial property which have been of guidance to the courts in dealing with the issues. Whereas in the past the courts looked at joint-ownership and financial contribution,⁴⁰ the contemporary decisions of the courts are based on the constitutional principles of fairness and equality⁴¹. During the study, I also observed that the Women Judges Association of Malawi (WOJAM) had embarked on training workshops for magistrates on women's rights in the Constitution, as well as the application of international law such as CEDAW, Maputo Protocol and the SADC Gender Protocol. According to the training manual of the programme, one of the areas of study are MDFRA generally and the distribution of matrimonial property, specifically (International Association of Women Judges and WOJAM, 2015:6, 11, 31). The development of the law and the trainings seem to have an impact on the courts' approach to fairness in the issue of distribution of property.

According to Chikopa, experience had it that property was habitually registered in husbands' names and the literal interpretation of joint-holding of property worked to exclude women from equitable disposition of property. Therefore, the courts had to undertake, a generous interpretation of section 24(2) of the Constitution (Chikopa, 2015:13). It was observable that fairness was the underlying principle for the magistrates in distributing the property.

⁴⁰*Kayambo v Kayambo* 12 MLR 40; *Nyangulu v Nyangulu* 10 MLR 433 and *Chibweya v Chibweya* 10 MLR 279

⁴¹*Stewart Kamphoni v Violet Kamphoni* MC no 7 of 2012, *Anna Kagwira v Henderson Kagwira* CA No. 24 of 2012, *Emma Kishindo v Paul Kishindo* CC No. 392 of 2013, *Kayira v Kayira* HC CA No. 44 of 2008, *Zola v Kumwenda* HC CA No. 21 of 2008, *Mtegha v Mtegha* HC CA No. 44 of 2008

One SRM commented on section 24 of the Constitution as the starting point in considering issues of post-divorce redistribution of matrimonial property as follows:

The starting point is sections 24 of the Constitution. We look at case by case and analyse the cases according to the facts. We do not look at acquisition but the holding of the property. Most property is held together. We also look at contribution such as the level of contribution but the most important thing is that most of the property is held together.⁴²

One other magistrate stated that she approached fairness from the angle of lifestyle that the parties had been leading and responsibilities arising out of the family and the subsequent divorce such as taking care of the children born out the marriage. She uses that criterion to decide what property to allocate to each of spouses.

You look at the person who would best be served by that property. For example, young children are usually in the custody of their mother. The woman would need to maintain the life style that she led during the marriage so as to take care of the children.

She further said:

It can be seen that the man may be able to buy new materials but the woman may not be able to buy property again. Priority is given to the one who will take care of the children.

She added:

You can also consider the fact that the children are young. For example, if there is a car that takes children to school, and you take away the car, the children's life will be affected. Therefore, even if the car belonged to the man, you give the car to the woman in the case where the woman is with the custody of children.⁴³

Much as so far the MDFRA is rarely applied, section 74 of the Act is wider than the Constitution and leaves it to the court to consider a broader range of factors, including financial needs and obligations of the parties, for it to arrive at an equitable distribution of the property. Nonetheless, most magistrates were of the view that the Act only emphasises the principles that they already follow in exercising discretion in distributing matrimonial property.

⁴² Interview at Blantyre on 17 November, 2015

⁴³ SRM, Blantyre, 19 November, 2015

In discussing MDFRA, some magistrates expressed dissatisfaction with the inclusion of a matrimonial home as matrimonial property (worth distributing) especially where the home was located at one of the spouse's home. An SRM at Blantyre put the issue this way:

Up until the MDFRA, the procedure was different between magistrates and the High Court. Now we have one blanket law. For example, under the customary law, a man has to construct a house for a wife. There is one case where a man constructed two houses at his home. The woman claimed one. I explained the law and the consequences such as her relationship with the in-laws and what would happen if she remarried. Even under *chikamwini*, (matrilineal system) if one constructs three houses, how can you distribute the property?⁴⁴

It seems that the issue has exercised some of the judicial minds although not necessarily under the MDFRA. The CRM had such a scenario:

Like in [one matter] because the land was on the husband's parents' land, we could not have ordered the woman to take possession of the house. Ordinarily, normally at custom the husband is supposed to build a wife a house, but then in that case that is why I ordered that she should have taken a share in the house. That is why I ordered that the house should be the same in size and quantity.⁴⁵

In its review of the laws, the MLC considered that matrimonial home situated on a customary land should not be subject to distribution. In the report the Commission took the view that:

The Commission recognized that in cases of customary land, a fair distribution might not always be possible as the rights to such land are usufruct only and ownership of property on such land as well as the land itself cannot be alienated or transferred to a former spouse as the land is intended for the use of a particular clan. The Commission therefore recommends that in cases of divorce the interest in customary land must be transferred to the children of the marriage. (MLC, 2012:85)

However, the recommendation is not reflected in the MDFRA. It would have been better had the recommendation found its way into the MDFRA because as the SRM observed looking at the definition of matrimonial property, a matrimonial home is subject to distribution regardless of where it is located. That is likely to pose some practical difficulties as suggested by the SRM above.

⁴⁴ Blantyre, 19 November, 2015

⁴⁵ Interview with CRM, Blantyre, 9 November, 2015

It is also evident that in considering the matters, the magistrates have regard to the non-monetary contribution made by the other spouse where necessary. As one magistrate stated, holding the property together, meant more than the financial and material contribution to the property. In all the decisions I had access to, the non-monetary contribution was mainly on part of the wife. A magistrate pointed out that

We look at whatever contribution made by the spouses towards the accumulation of property. We also look at the effort such as domestic work. There is no benchmark as how to do it. That is why there is disparity between magistrates and judges.⁴⁶

Another magistrate echoed the sentiments in a different way by illustrating that the contribution can be by the way of household chores and the expectation that the property would be for the whole family:

At custom, when a person is building a house, it is intended for both the man and the woman. She may have been contributing in the sense that she had hope that the property would be for the family. The contribution might be through cooking, washing and other household chores.⁴⁷

The contribution can likewise be deduced from the mere fact that the parties have lived together long enough even-though the woman may not have been engaged in an economically viable activity:

We look at decided cases. We look at how each party contributed. Looking at customary basis, most of the property might have acquired by the man. Historically, men have been the bread-winners for their households. It is only now that women are working. In the past, most women were not involved in conventionally productive work except household chores.

.... We look at the number of years the parties have been together. It would not be fair for a lady to get nothing when she has been married for quite a long time. We look at how much the man has contributed. You look at fairness.

Some parties may live together for twenty to thirty years and the woman has nowhere to go. We say matrimonial property should be shared. Sometimes the property is shared equally. Sometimes a man builds a house in town and is ordered to build one for the woman in her village.⁴⁸

⁴⁶ SRM, Blantyre, 18 November, 2015

⁴⁷ SRM, Blantyre, 17 November, 2015

⁴⁸ SRM, Blantyre, 17 November, 2015

In another interview one other magistrate stated that he bases his judgment on intention of the parties, equity and vulnerability. He was quick to point out, however, that intention was not quite persuasive. He emphasised that equity and vulnerability were quite paramount. He said that vulnerability mostly affected women as compared to men:

We look at three factors. [Intention of the parties, equity and vulnerability]. Sometimes we forgo intention because a woman may not be working and the man is working and is the sole breadwinner. I exercise equity and look at the woman's contribution in terms of cooking, washing and so on. Vulnerability is especially on women although in some cases it may concern a man for example where a man is not working.⁴⁹

Indeed, looking at most of the decisions of the courts, the courts totally ignored the intention of the parties in acquiring the property and ruled in favour of the fact that the parties were living together. The court could infer contribution from the mere fact of living together and therefore that the contribution could take several forms.

The bottom line is that the courts have developed jurisprudence on how to achieve fairness in the distribution of matrimonial assets. A Supreme Court Judge also hinted that common law aspects of distribution of property are no longer applicable and that the courts follow the principle of fairness. He said the history of matrimonial causes, in most cases discriminated against women, for example under the Divorce Act⁵⁰, a woman was not entitled to property if she had contributed to the breakdown of the marriage.

[Common law] has been thrown away and the statutes prefer 'fairness'. I agree with the decisions that approach the matter from the angle of fairness despite the fact that fairness does not necessarily mean equality. Fairness is dominant in customary laws. Even the Constitution talks about fairness.⁵¹

5.3 Women Treated Differently in Matters of Distribution of Matrimonial Property?

From the observations from the respondents, court records as well as the judgments I read, the courts attempt to apply principle of fairness in distribution of matrimonial

⁴⁹ SRM, Blantyre, 18 November, 2015

⁵⁰ The MDFRA repeals the Divorce Act and the other Acts related with marriage.

⁵¹ Interview with MSCA Justice, 18 November, 2015

property taking into account the prevalent peculiar vulnerability of women in the marriage relations. The magistrates consider the circumstances of each case for them to make a decision. One magistrate suggested that MDFRA requires that the courts should regard the vulnerability of women. He said

MDFRA [enjoins] the court to look into the vulnerability of women and children and ensure that women are supported and that they should not suffer in the end. If a woman has been divorced and has no property she might end up having a change in behaviour that may lead to abuse. Having property can prevent such cases of being abused again. That can also lead to prevention of illicit relationships that women may enter into in order to sustain life.⁵²

Nevertheless, some few decisions seemed to incline much more on awarding more valuable property to men and distributing to women household items such as kitchen utensils. Some authors have made an observation that courts' decisions in family matters could be influenced by traditional mindset. Eaton (1986) observed that a family which is implicit in the courtroom discourse is one which is supported by tradition, policy and legislation in a way which has implications for the marginalisation of women both within and beyond the family (Eaton, 1986: 89).

A magistrate suggested that cultural background influences the decisions that the Courts make, giving items of higher value to men and giving household materials mainly kitchen utensils to women:

Because of our background, we use customary trends. We look at the use of items. Kitchen utensils are given to women and the bigger items are given to man. Commonly-used property is shared in equal shares but much more property is given to the one who is to have the custody of children. The starting point is who was using what. I don't think it is fair because a woman is only given utensils.⁵³

The magistrate attributed this to the cultural set up in which men are providers whilst most women do not work and depend on their husbands for financial survival. It was truly observable that some decisions were trendy in awarding kitchen utensils to women.

⁵² SRM, Midima magistrates Court, 25 November, 2015

⁵³ SRM at Blantyre on 19 November, 2011

In its discussion of Article 16 of CEDAW in 1994, CEDAW Committee observed that the family relations, distribution of work and responsibilities and gender stereotypes can cause bias in distribution of property between spouses (CEDAW Committee, 1994; Ikadal 2013: 273). One magistrate, however, was against the idea of giving kitchen utensils to women only. His argument was that men too would need the kitchen utensils. He said:

In most cases courts order kitchen utensils to go to the woman forgetting that the man needs to eat too.⁵⁴

The magistrate took the view that such approaches arise from social division of the roles of men and women within the family: that a husband is a financial provider while the woman's role are to take care of the house through washing, cleaning and cooking. Another magistrate had the same view arguing that the society has in most cases regarded a man as a head or the owner of a family and the wife has a lesser influence in the family. In such a scenario, prominent property is most invariably regarded as belonging to the man.

So the concept that man is the head of family is problematic as it makes people feel that property only belongs to the husband. Culture makes women not to cling to property. Further to that, some property is seen to exclusively belong to men. As an example bicycles are seen to belong to men as compared to kitchen utensils which are seen to belong to women.⁵⁵

This was also echoed by a woman magistrate who observed that:

... Many men still have the mentality that a woman can only get kitchen utensils forgetting that working up tonight is also contributory. Some men also think if the woman is in the wrong she should not to get any property.⁵⁶

From the responses of the magistrates, it is quite apparent that in some matters women are treated differently from men in matters concerning distribution of matrimonial property. Women are awarded property that is traditionally regarded as feminine, such as kitchen utensils, while men are awarded property that is of high value such as vehicles and real estates. To that extent, women are treated differently in a discriminatory manner.

⁵⁴ FGM, Limbe Dalton Court, 8 December, 2015

⁵⁵ FGM, Mulanje Magistrates' Court

⁵⁶ FGM, Blantyre, 19 November, 2015

5.3 Concealing of Matrimonial Property

One problem that is rampant in matters of distribution of property is that some men conceal property not only during the trial but in some cases, some men accumulate property without the knowledge of their wives as observed by some magistrates. This is especially the case with motor vehicles and real estates. In some cases the courts had to make orders to the Directorate of Road Traffic or the Department of Lands to make revelation as to the ownership of property. One magistrate at Blantyre said

Sometimes women don't know their husband's property. Culture plays a role whereby property is deemed to belong to the men. The other problem could be illiteracy as some women do not even know the concept of ownership of a motor vehicle.⁵⁷

The bottom-line then is that some women are kept in the dark as to what property their husbands might be accumulating in the course of the marriage. In some cases though, women could have some idea as to the property, but the men could, in the court, allege that the property belonged to a third party. A woman at Limbe-Dalton Court expressed her experience thus:

The court was alright. The staff assisted me to get to the court and I am satisfied that I was able to get justice. The court also assisted me to be relieved from the marriage. I did not claim property. But when the issue arose, my husband was concealing some property. I mentioned all the property including plots, a private school and minibuses. I believe the court will assist me fully.

I am just awaiting judgment. My life has now changed. I am remaining with a child. The child is sickly and I cannot afford decent food as I am only doing *mandazi* [fritters] business. Life has become very tough. I expressed all these issues to the Court.⁵⁸

A magistrate at Limbe Dalton suggested that in such scenarios the court has to exercise discretion because 'failure to exercise discretion would invariably lead to disadvantaging women, whom the customs already disadvantage. The courts should be the place where women should get justice.' She gave an example where a man intended to dispose of a house while the matter was ongoing in the court. When the woman brought the issue to the attention of the court,

⁵⁷ FGM, Blantyre, 19 November, 2015

⁵⁸ 18 December, 2015

... I had to use Prevention of Domestic Violence Act and I issued a Protection Order. The order is still in force. The man would have disposed of the house and render all the court process meaningless. The courts therefore have to be vigilant otherwise vulnerable people might feel to have been duped by the justice system.

I look at the circumstances of each case and make an appropriate order. That is discretion, isn't it? We look at issue and see how to assist the parties especially women who are in most cases vulnerable.⁵⁹

In another case, the magistrate made an order to have records of ownership of some vehicles which the woman claimed belonged to the family while the man said they did not belong to him alone but to a business partnership with a friend. When the records showed that the vehicles belonged to the man exclusively, and there was no evidence of the alleged partnership, the court regarded the vehicles as matrimonial property. The court regarded the husband as an untrustworthy witness, and did not believe him in relation to the other property which the wife said was theirs. The table below shows the divergent claims that the parties told the court they possessed:

⁵⁹ SGM, Limbe Dalton, 18 December, 2015

Table 5: Presentation of Evidence of Matrimonial Property before A Court at Limbe⁶⁰

MATRIMONIAL PROPERTY ACCORDING TO WIFE	MATRIMONIAL PROPERTY ACCORDING TO THE HUSBAND
<ul style="list-style-type: none"> • Kitchen utensils • Furniture • Matrimonial home • A plot in Bangwe township with three houses • Private school in Bangwe • Mini-buses (four) • Toyota Carina 	<ul style="list-style-type: none"> • Kitchen utensils • Furniture • Matrimonial home • Toyota Carina

In summary, coupled with the general hiccups women find in pursuing their claims, women can also be disadvantaged in the matters concerning property due to concealment of property by their spouses.

5.4 Women’s Knowledge of the Right to Equitable Share of Matrimonial Property

My findings were that most women do not have knowledge concerning the right to claim property on divorce. As the study found out, only in very few cases were women able to claim a share from their matrimonial assets.

Of the three women I interviewed at Blantyre Magistrates’ Court, one woman was aware of the right because she said she was advised by her lawyer. That woman was

⁶⁰ Limbe-Dalton Court before the SGM. Accessed 18 December, 2015

able, through the lawyer representing her, to claim property concurrently with the claim for divorce and maintenance of children. The woman told me that prior to engaging her lawyer, she did not know much about the right and how to claim it. The woman and her husband resolved the issue of divorce and matrimonial property through a consent judgment.

The other woman stated that she knew she had a right to claim property but that there was nothing worth claiming.

The third woman I met at Blantyre Court said that she was not aware that she had a right to claim property. She also said that it was unfortunate that she went to the court without legal representation⁶¹ and she said she believed that had she been legally represented, her representative would have been making some of the claims on her behalf. Thus, the status of women's knowledge of the right to equitable distribution of matrimonial property can be said to be unsatisfactory.

As for the women I had a focus group discussion with in Blantyre rural, they were not aware about the right to matrimonial property and how to go about it. Most of the property at their disposal was agriculture-based such as livestock and farm produce which were mostly regarded as belonging to the homes which were situated at the women's home place. Upon divorce, the property would thus, customarily, remain at the women's home although in some cases men could take away the livestock.

Comparatively, the men I had focus group discussion with in Blantyre were appreciative of the fact that women had to have equitable share to matrimonial property. One man said:

Men will have a duty to provide for their families. That duty ought to go on even beyond the subsistence of the marriage. But due to practical problems that might arise due to divorce, the parties will have to share the property even amicably without the involvement of the court. It is important, for example, to register some of important property such as landed property in the names of wives and children so as to take into account the inevitable eventualities such as death.⁶²

⁶¹ She could not afford a private lawyer and she failed to secure legal aid

⁶² Focus Group Discussion 26 November, 2015

However, one can discern that the assertion is coated within the notion that men have to provide for their family. Thus the mentality was obviously arising from patriarchal notions of men's superiority over women in the family. The same mentality of patriarchy was also the case with the focus group discussion I had at Kanjedza where some men did not appreciate the law on MDFRA on equitable distribution of property upon divorce. One man said the law is contrary to African norms, that it was unrealistic and was only meant to please gender activists. One man wondered why the law talks of distribution of property yet in most cases the men were responsible for accumulation of the property. He contended that it should be up to men, and not the courts or anybody, to consider whether or not to give their wives property. Another man suggested that the law would trigger instability in the families in that it will lead to women to seek dissolution of marriages since the law is encouraging women to get property from failed marriages.

The thinking of some of the men on the issue of distribution of property proves that the issues of gender roles and stereotypes against women have to be imparted on the populace and that the failure to appreciate the need for fairness represents a deeper social and cultural mentality of men's subjugation over women (Engels, 1972), a clear case of patriarchy.

As Tong describes it, patriarchy is 'a set of social relations between men which have a material basis, and which, though hierarchical, establish or create independence and solidarity among men that enable them to dominate women' (Tong 1989: 180). Hartman (1976) describes patriarchy as being in the material realm through control of property which is achieved through laws and customs affecting women's life and through day to day activities through which men reinforce inequalities. The men's approach to women's rights to equitable share of property can be said to be influenced by the gender relations and societal perceptions of the roles and relations between men and women in the private and public spheres (Engels, 1972; Eaton, 1986).

5.5 Civic Education by the State and NSAs

Noting that there was insufficient knowledge of the women's right to fair distribution of matrimonial property, I also interrogated whether the State and NSAs are

disseminating information on the right to the masses especially women. As already stated, the State has a role to engender information on the issues against discrimination and against women as well as their rights under the international law. From my findings, it is quite apparent that there is no civic education either by the Government or the NGOs.

My interaction with the women whom I interviewed revealed that none of them had had an encounter with information dissemination on the issue. The respondent responsible for civic education in one of the districts⁶³ told me that though he was new in district, he was not aware about any civic education on distribution of matrimonial property. He said he was aware nevertheless that there is civic education on the women's right to inherit deceased estate and also to own property on their own, but not on the right to fair distribution of matrimonial property upon divorce. He said that even where he was working before, he was not disseminating information on distribution of matrimonial property upon dissolution of marriage.

The inquiry I undertook with the Ministry of Gender, Children Disability and Social Welfare was not coming out clear as to whether the Ministry had a stratagem for conducting civic education on issues to do with women and law let alone MDFRA or disposition of matrimonial property upon divorce.

Equally, from the Ministry of Information and Civic Education, which is the Government's official ministry responsible for civic education, it was not clear that there are any civic education strategies on the women's right to equitable distribution of property or any information of women's rights. The Ministry's website showed that they had a Department of Information and Civic Education:

The Department of Information and Civic Education is mandated to collect, analyse, compile and disseminate public information to stimulate interest for popular participation in the country's social and economic growth and development. (Malawi, Ministry of Information and Civic Education)

In one radio interview, the Minister of Gender observed that women were supposed to be educated on issues of like the MDFRA and the Gender Equality Act (Malawi

⁶³ Thyolo District Deputy Civic Education Officer for National Initiative for Civic Education

Broadcasting Corporation, 5 February, 2016). The Minister was quoted after she took some time of her political rally to enlighten women on issues of gender equality, deceased estates and MDFRA. It was noteworthy that the Minister dwelt much on women's right to property especially under the Deceased Estates (Wills, Inheritance and Protection) Act, 2011. She lamented that women suffer deprivation of the right to property on the pretext that they do not economically contribute to the property.

The Minister suggested that politicians should take advantage of political rallies to disseminate the information on women's issues since women form the greater proportion of the people who attend political rallies.

From the observations, it is quite apparent that civic education on the issue of distribution of matrimonial property is quite at large. One magistrate observed that the need for civic education is inevitable and that wherever necessary civic education must be conducted.

She gave an example that she observed that many women are not aware of their rights when she and a HC judge conducted an awareness campaign at a women's group at a church to which they belonged. She said:

We are very far away. There is need for civic education. We went as Women's Guild, at our church (St Columbus CCAP) with Judge Kamanga to train women on the law on Wills, Inheritance and Deceased Estate. We took a long time to explain the issues. People, even the professionals, asked questions showing that many are unaware of the issues surrounding the law and human rights.⁶⁴

The magistrate therefore formed the opinion that many people lack information on the issues to do with the law. She formed the opinion that there is need to invoke civic education from various angles.

There is need for civic education wherever people gather for example in churches, during delivery of judgments and during WOJAM meetings.⁶⁵

The Deputy District Civic Education Officer for Thyolo National Initiative for Civic Education pointed out that

⁶⁴ FGM, Blantyre 19 November 2015

⁶⁵ FGM, Blantyre 19 November 2015

It seems the area of property distribution upon divorce is overlooked perhaps due to sensitivity of the matter, but it is an area that we ought to really look into.⁶⁶

5.6 Need for Civic Education?

One of the observable trends in relation to matrimonial property, is that women from the rural societies do not make claims for matrimonial property and also that they are unaware of the right to make such claims in courts of law. It is also noticeable that there is need for civic education in matters concerning women and property rights. As for the urban women, it is also discernible that the levels are low of knowledge of the right to property and in some cases the knowledge is not perfect. As an example one woman at Blantyre Magistrate's Court told me that she was of the view that she had to get all the property that her marriage had at the dissolution of her marriage.

5.7 Issues and Rights Concerned

Much as the courts make decisions that enhance the women's right to fair disposition of property, women are secluded from the knowledge of the right. Undoubtedly, the right to information is compromised. The right to information is very significant for women to know and realise their rights and in so doing the state can achieve non-discrimination goals. CEDAW obliges states parties to ensure that women have access to education and information about their rights and the remedies available for the infringement of the rights.⁶⁷ The Protocol to ACHPR enjoins the States Parties to commit themselves to use public education and information strategies with the aim of achieving elimination of cultural and traditional practices that are based on the superiority or inferiority of the sexes. (Article 2(2)). The findings of this research show that the women hardly have information on the rights that they would have fair share of property at the dissolution of marriage.

Additionally, the approach of the courts as to what fairness entails is not uniform. The decisions of the courts are not consistent in some regard. There are instances where some courts always use a fifty-fifty criteria based on 'equality is equity principle'. Such courts deal with property by merely dividing it into two equal shares. One other

⁶⁶ Thyolo, 16 February, 2015

⁶⁷ Articles 2(c), 3, 5(a) and 15

magistrate told me that she uses ‘one-third: two thirds’ formula under which a contributor to the property gets two-thirds of the property. Approaching in that manner is contrary to the Constitution and the MDFRA in which the emphasis is on fairness⁶⁸. Such an approach outright ignores the aspects of fairness and does not take into account the realities that divorce might bring especially on women who have no tangible means of subsistence.

Apart from the concept of fairness and equality, the decisions from the HC seem to have some fundamental discrepancies. For example, ‘joint-holding’ of property is not without controversy. In *Jane Nkulichi v Harry Nkulichi* CC No. 1062 of 2007 (HC, PR) as well as in *Anna Kagwira v Henderson Kagwira* CA No. 24 of 2012, the courts held the view that, by categorising jointly-held property, the Constitution intended to entail that there is some property that would not be jointly held as matrimonial property. In *Marylyn Munthali v Francis Munthali*, CC No. 2 of 2011 (Mzuzu), the HC held that property owned by one party in the marriage, to the exclusion of the other, can be shared by the court as matrimonial property. In *Lorraine Khamisa v Shabir Khamisa*, MC No 9 of 2009, the court said that a court can still deem that a wife has a beneficial interest in property registered in the husband’s name. The same approaches are followed in *Kayira v Kayira*, HC CA No. 44 of 2008, *Zola v Kumwenda* HC CA No. 21 of 2008 and *Mtegha v Mtegha* HC CA No. 44 of 2008. These approaches are said to be based on the principle of constitutional interpretation which requires constitutional principles to be interpreted in a wider and generous fashion as opposed to legalistic and pedantic approach⁶⁹.

In *Stewart Kamphoni v Violet Kamphoni* MC 4 of 2012 (HC, PR) the court stated that property need not be jointly held for it to be distributed:

In principle, the spouse’s contribution should not be the reigning principle. Rather a spouse’s contribution should, together with everything else, go to fairness. There are bound to be situations where to exclude or include a spouse’s contribution may be fair or unfair. In all respects, on all general

⁶⁸ Several decisions of the HC have held that fairness does not necessarily mean equality: *Stewart Kamphoni v Violet Kamphoni*, *Kagwira v Kagwira* though there are also decisions by the HC that have proceeded on the principle of equality in the share for example *Chimtedza v Chimtedza* (2009) Matrimonial Cause No 97 (PR)

⁶⁹ Chikopa 2015: 15 quoting *Nseula v Attorney General and Malawi Congress Party*[1999] MLR 313 (MSCA)

law, statutes, Common law, international law and customary law, fairness is the hallmark of disposal of matrimonial property.

The HC in *Anna Kagwira v Henderson Kagwira*, though, seems to disagree with the decision *Stewart Kamphoni v Violet Kamphoni*. The court stated that the Constitution recognises that spouses can acquire or hold property singly to the exclusion of the other spouse and that neither section 28 nor section 24 of the Constitution makes it automatic that the property belonging to the other spouse is to be regarded as jointly held.

The MDFRA enjoins the courts to have regard to such issues as assets of each spouse and the income of each spouse as well as financial needs of each spouse. In its report in support of the law, the MLC seems to alienate the assets of each spouse yet in the Act it is a factor to be considered. From the plain reading of the Act, even the property, which is excluded from the family, can be subjected to distribution. Beyond that, the law also requires consideration to be had to the financial needs of each spouse the obligations of each spouse, the prior standard of living of the family, healthy needs and the age and health of each spouse as well as the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

Perhaps the provisions intended to widen the horizon of the factors that the court has to take into account.

The MLC, in its report, stated that

The Commission found that husbands were more likely to register property bought by them individually in their own names or in the names of children of the marriage. It is also highly unlikely that the wife being the weaker spouse will ask, during the subsistence of the marriage, for a share in each and every asset that is acquired as such kind of behaviour leads to distrust. There is therefore very little property in a marriage that a couple can call jointly owned and therefore the constitutional provision does nothing to improve the plight of women who are disadvantaged by not being accorded the right to a fair distribution since only property that is jointly owned can be the subject of a fair distribution MLC, 2006:84.

The Commission considered that the Constitution could not have intended to make the provision to the detriment of women and therefore considered that the MDFRA should

expand the constitutional provision on the fairness of distribution of matrimonial property.

The Commission recommends that a provision must be incorporated into the proposed new law which equitably distributes matrimonial property based upon such factors as need, custody of children, earning capacity and other extensive guidelines to guard against abuse of discretion by the courts. This approach will prevent weaker family members, invariably women, from suffering loss.

Thus the commission also considered the reality that most women “remain largely relegated to the home in performance of domestic chores” and that

It is very rare for men (who in most cases possess the purchasing power) to either declare an intention that the property shall be owned jointly or to register property in the joint names of the spouses. The Commission found that husbands were more likely to register property bought by them individually in their own names or in the names of children of the marriage. It is also highly unlikely that the wife being the weaker spouse will ask, during the subsistence of the marriage, for a share in each and every asset that is acquired as such kind of behaviour leads to distrust. There is therefore very little property in a marriage that a couple can call jointly owned and therefore the constitutional provision does nothing to improve the plight of women who are disadvantaged by not being accorded the right to a fair distribution since only property that is jointly owned can be the subject of a fair distribution.

The Commission recommended that a provision must be incorporated into the MDFRA to equitably distribute matrimonial property based upon such factors as need, custody of children, earning capacity and other responsibilities of the spouses after divorce. The commission suggested that the distribution of the property had not to be based on ownership or title as was the case under the Constitution presently the case.

The coming into force of the MDFRA was meant to widen the scope of latitude for the courts to employ in considering the issues of distribution of matrimonial property. The Act, however, falls short of being open on the realities of inequality against women in issues of the property. It is quite apparent that the provision does not actually reflect what the Commission intended. I argue that had the provision be more open, it would have gone a long way in qualifying as a piece of legislation that tackles inequality and discrimination against women. It would also have removed any doubts to what property ought to be distributed.

5.8 Conclusion

This Chapter has looked at the how the courts approach the right to fair distribution of property. The courts apply the principle of fairness. The coming onto the scene of the MDFRA has brought in a new landscape as to the issue of distribution of matrimonial property. However, in some cases, cultural factors concerning property ownership in a family seem to have affected some courts' thinking in distributing the property. The right to property from a marriage after its dissolution, however, seems not to be well comprehended by the society to the extent that many women hardly make claims on that aspect in the courts. It is quite ostensible that there is lack of civic education on the right. The governmental and non-governmental agencies seem to be lagging behind in so far as the dissemination of this right is concerned.

CHAPTER SIX

CONCLUSIONS: BEYOND THE RHETORIC-WHAT SHOULD BE DONE

6.1 Introduction

This study has outlined problems that women encounter in relation to the right to fair distribution of matrimonial property upon the dissolution of marriage. Some of the problems relate to the right itself while the other issue relates to how women access the courts to claim or to get the right. This Chapter draws the general conclusions of the study and offers some recommendations to the problems found in the study.

6.2 Beyond the Rhetoric: The General Conclusions

6.2.1 Different Treatment towards Men and Women

Within the location where I conducted the study, it seemed to me that the courts relentlessly assist women to make their claims. The courts also persistently make it point that where it is appropriate to do so, women should benefit from the right to equitable share in matrimonial property. The right to equitable share to matrimonial property is perpetually available from the courts upon dissolution of a marriage. From my finding, the right is well institutionalised and almost a rhetoric. However, there are some inconsistencies as to how the right is applied and how the court has to treat some property, such as matrimonial home at a spouse's customary home, and property exclusively held by one spouse. Further, as the study has shown, the considerations of the court as to what is fair may also be clouded in some cultural and gender-based stereotypes

Additionally, women face many hurdles to access the courts in the matters of distribution of matrimonial property. All these entail that women suffer discrimination in issues access to justice and distribution of matrimonial property.

6.2.2. The MDFRA's New Dimension to Matrimonial Property

The coming into force of the MDFRA brings in minimum issues which the courts have to consider in the distribution of matrimonial property. The Act expands the

concept of matrimonial property and the contribution to the property. It also puts down the factors that the courts should take into account when distributing the matrimonial property. However, MDFRA seems not to be quite definitive on some of the aspects that were not settled by the courts before the new law was passed.

6.2.3. Women not able to effectively pursue property rights in the courts

Women face many impediments to access the courts in issues concerning matrimonial property. The access to justice for women is not straight-forward as the actual access to the courts is obstructed by several factors including gender-oriented factors. Factors that affect women most include lack of knowledge on how to commence the proceedings, how to conduct the proceedings and how to access the remedies from the courts enforced. Women also face problems to adduce evidence as some property is concealed from them.

6.2.4. State and NSAs not Disseminating Information on Women's Rights

The study also found that there is a lacuna in as far dissemination of information to women and the public at large concerning women's rights. Thus women and the public do not get information to do with women's rights generally. Specifically, women are not aware of, because they are not informed about, the rights to access justice and the equitable distribution of property.

6.3 What Needs to be Done?

To tackle the issues there is need to consider several factors. There is need to seek transformation and solutions from several social and legal angles. Some of the following recommendations may go a long way in addressing the issues.

6.4 General Recommendations

6.4.1 Fairness in Distribution of Matrimonial Property

The law on fairness of distribution of matrimonial property would continue being problematic unless the law itself addresses some issues raised in this study. This is especially on the position of men and women in relation to property in society and within the family. The law has to address comprehensively the property that ought to be shared at the dissolution of the marriage and also the issue of disclosure of the

property as those issues prove to disadvantage women in the courts. It is worth noting that much as the MLC intended that disclosure of property should to be part of the law (MLC, 2006: 85), the MDFRA does not provide for any such requirements.

There is therefore need to expound the jurisprudence behind distribution of matrimonial property in the light of issues concerning equality and non-discrimination of women. Issues of property acquisition and ownership are gendered and dealing with such issues need gendered and a human-right based approaches that deal with cultural gender stereotypes as well as economic and cultural realities of women's equality with men.

6.4.2 Need to Put in Place Deliberate Steps to Enable Women Effectively Pursue Their Rights

6.4.2.1 Provision of Quality Justice to Women

To have a feasible system of access to justice for women, there ought to be a quality and gender-sensitive system of administration of justice. A quality system of administration of justice is one which ensures that women attain justice with fewer hurdles. There should be a system where women are able to approach the courts and get remedies efficiently and without many constraints. As the Committee on Discrimination against Women put it, quality justice system is a system that adheres to international standards of quality justice system including 'sustainable gender sensitive dispute resolution mechanism' (Committee of Discrimination against Women, 2015: 6). International standards for quality access to justice include the access to quality justice before, during and after the matter has been determined.

6.4.2.2. Orientation of Magistrates on International Obligations and Women's Rights Issues

In that event the orientation of magistrates of international obligation and issues of gendered approach to access to justice would go a long way in instilling in the magistrates the understanding of the dynamics of access to justice. Thus the Government has to look at ways in which to best carry education in gender justice to

magistrates. Issues of gender equality should form the core of magistrates training as well as continued education for all judicial officers. Gender sensitivity would also assist judicial officers to take into account women's disadvantaged positions in society. As Nyirenda suggests administration of justice requires more than just having reference to the facts in relation to the law.

Judges must understand all facts and also the attendant circumstances of the parties appearing before them. They must have the faculty and skill of immediately assessing the ability and capacity of those appearing before them, and must be ready to control the proceedings accordingly. It is the singular duty of the court to ensure equality as different sectors of our society try to fathom the thicket of intricate procedures and evidential burdens. (Nyirenda, 2015:4)

Such orientation would ensure that there is a systematic mechanism for institutionalised assistance by the courts of litigants especially those in vulnerable situations, generally and specifically⁷⁰. The court processes ought to be streamlined to ensure that the access to justice is easy for women. The judiciary can promulgate easy-to-follow and all-encompassing procedural rules for family related issues from commencement, conduct and enforcement of claims. The court should also have mechanisms to enforce the decisions where the need arises. Access to justice in matrimonial causes should be regarded as a gender issue and a matter of equality and non-discrimination against women. For that reason, there is need to have laws and procedural rules that do not disadvantage women.

6.4.2.3. Gender Training for Lawyers and Judiciary Staff

Not only is it appropriate to have the training on gender for the magistrates, it is also appropriate to extend such training to legal practitioners and the court staff who enable the court to carry out its business including enforcement of judgments. There is need to ensure that there are effective enforcement mechanisms for issues concerning distribution of matrimonial property and other family matters. Because the issues concern women mostly, they are gender issues (*Bannatyne v Bannatyne* 2003 2 BLLR 111). The likelihood of bias, from the personnel behind the court processes and enforcement, against women is high and it ought to be addressed through deliberate

⁷⁰ This is the approach being advocated by Chikopa and Nyirenda, (Chikopa, 2015, and Nyirenda, 2015).

policies and training in gender issues aimed at doing away with the gender stereotypes. There would therefore be need for targeted training on human rights, equality and gender sensitivity to the people who deal with the court processes and the enforcement of court judgments on family matters. That has to extend to lawyers and the judiciary support staff for them to be conversant with the peculiar impact of gender-stereotypes on the day-to-day effect of the law on the lives of women. In so doing, the concerned actors would feel the significance of attending to the needs of women in appropriate ways.

6.4.2.4 General Information on Access to Justice and Women's Rights for the General Public

Apart from targeting the personnel responsible for court processes, there is also need to provide general information for the general public for the appreciation of the availability of the court to assist people who seek redress. There is need for the Government to make available information on access to justice through accessible mediums such as television, radios, adult literacy as well as other information communication technology modes such as short message services on mobile phones.

6.4.2.5 Legal Representation for Women in Courts

The Government should also have plans of ensuring that legal aid is available to women who seek justice in courts. As suggested earlier, issues of family law in courts involve a lot of issues of human rights. It is therefore appropriate that women prosecuting such issues should be fully represented in the courts. The Minister of Gender and Community Services told a radio that her ministry has hired services of a lawyer to assist in women's issues. However, one lawyer is not enough. In the long term, there would even be need to have more lawyers at a district level to assist women to access justice through representation in the courts. NSAs such as human rights defenders and NGOs can also assist by providing legal service to women not only in HC or matters that have raised much public profile. The services ought to be strategically available across the country. This can be attained by the use of paralegals and local based committees. The ministry can also consider other innovative means

like having one-stop centres where women's issues can be handled under one roof by legal professionals and social welfare practitioners.

6.4.2.6 Monitoring and Evaluation of the Gender Aspect of Access to Justice

There would also be need to put in place mechanisms for monitoring and evaluation of the judicial system and the decisions on the gender aspect to the access to justice. This would also ensure that there is accountability from the concerned institutions on the issues concerning women's general rights to equality and specifically rights associated with access to justice. Without accountability by the justice institutions, problems associated with access to justice for women might end up being recurrent (Goetz, 2015: 77-78) thereby failing to meet the international obligations to eradicate systematic discrimination against women. Accountability would assist to have the problems that women encounter to be dealt with systematically when they appear and avoid the reoccurrence of the problems. In that event, the right to access justice would be guaranteed both as a legal requirement and also as a reality to women.

As AfriMAP Open Society Foundation suggested, for the right to access justice and effective remedies to have practical meaning, actors in the justice delivery system must develop a plan aimed at removing obstacles that impede the formal access to justice especially the poor and other socially marginalised groups (AfriMAP Open Society Foundation 2006:20). Therefore there is need to develop ways and means of taking into account the problems of women in accessing justice with the aim of making the access to justice less problematic and more meaningful.

6.4.3 Need for Civic Education

There is need to ensure that there is civic education and public awareness on gender relations in the family between men and women. Such education and public awareness has to tackle issues of women's rights, equality, non-discrimination and gender/sex stereotypes within the society. The issues to be included in the education plan should include women's right to property generally and the right to fairness in the sharing of the matrimonial property. The civic education can take place through bill-boards,

radios, televisions, mobile phones and other related means. The information should also be available in libraries, information centres and clubs and societies. Ministries of Information and Civic Education as well as Gender and Community Services should take steps that internalise and maximise the need to dispatch the information on gender and non-discrimination to the masses.

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