

CUSTOMARY FAMILY LAW IN MALAWI:

Adherence to Tradition and Adaptability to Change

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Introduction

Customary law has existed in Malawi since time immemorial. From the introduction of British colonial rule up to the present day it has been administered side by side with the statutory laws and the received English common law. The first formal recognition of customary law appeared in Article 20 of the British Central Africa Order in Council 1902, which stipulated that in all cases to which Africans were parties every court was to be "guided by native law in so far as it is applicable and is not repugnant to justice and morality, or inconsistent with any Order in Council or Ordinance". The establishment of Native Courts in 1933 took this recognition a step further by giving customary law a separate forum in which it could be expounded, applied and developed as an independent system of law. Whereas the High Court and its subordinate courts could apply customary law only tangentially, Native Courts were empowered to apply it as the primary law unless it were shown to be repugnant to justice and morality or contrary to the written law. This was the position even on appeal from Native Courts to the High Court, which in such cases was expected to apply the relevant customary law and to take judicial notice of it.¹

However, customary law was still viewed as a foreign system of law in contrast to the general system of law administered in the High Court and its subordinate courts. The impact of customary law on the Malawian *corpus juris* was virtually nil. This was mainly due to the

1. See *Chitema v Lupanda*, 1961 - 63, *ALR Mal.* 162 at 165-6.

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fact that although at the lowest level Native Courts were staffed by approved native chiefs, appeals lay ultimately to the High Court, which was staffed by expatriate judges whose knowledge of customary law was scant but who were nonetheless in a position to control its development. Moreover, the structure of the appellate courts was so elaborate that for a case to reach the High Court it had to be heard by no less than three intermediate appellate courts. Consequently, very few cases filtered up through the system, and even fewer found their way into the Law Reports.

Thus customary law came to be increasingly associated with Native Courts - or Traditional Courts, as Native Courts were later re-named.² This association is, if anything, more marked today than it was in the past, since the High Court and the Traditional Court systems no longer mix. Since 1970 they have operated on parallel lines, each with its own structure of appeals running from the lowest to the highest of the two systems. Although the High Court and its subordinate courts are empowered by s.64 of the Courts Act³ to take account of customary law if it is material to the proceedings, any rule of customary law must be treated "as a question of fact for purposes of proof". In other words, its validity must first be proved, if necessary by the testimony of experts, before it is formally admitted and applied. In contrast, Traditional Courts are required to take judicial notice of customary law and to administer it accordingly. Thus if customary law is to develop and make any significant contribution to Malawian jurisprudence, this must come about almost entirely through the endeavours of Traditional Courts.

Nowhere is this more likely to occur than in the area of family law, which is where the rules of customary law are most commonly applied. This is due to the fact that the majority of people in Malawi, especially in rural areas, conduct their family affairs in accordance with the customary laws of their particular localities. Disputes relating to marriage, divorce, illegitimate pregnancy, custody of children and the distribution of property on the dissolution of marriage are thus - to the extent that litigation in formal courts is concerned - almost entirely the preserve of Traditional Courts. However, in deciding disputes which depend on customary law for their resolution, Traditional Courts have adopted a variety of approaches which cannot be easily systematised. Perhaps with changing conditions of society in view, Traditional Courts have in

2. Local Courts (Amendment) Act 1969.

3. Cap. 3:02 of the Laws of Malawi.

some instances applied or attempted to apply common law principles and have reasoned on the analogy of common law parallels. In other instances, Traditional Courts - in particular the National Traditional Appeal Court, which is the highest court in the Traditional Court system - have rigidly adhered to what they have regarded as strict undiluted customary law principles. Some of their decisions have incorporated propositions that not only appear sweeping and arbitrary but also raise questions about the accuracy of the rules cited, and also, more vitally, about the way in which the courts view their role in the preservation and development of customary law in the face of rapid and widespread social change.

Let us look at some groups of family law cases involving similar subject matter and attempt to deduce some common principles from them.

Prerequisites for valid customary law marriages

It is generally accepted that there are two predominant systems under which a valid customary law marriage may be contracted in Malawi. One of these is commonly known as the *chikamwini* system, under which the essential requirement is the presence and consent of the *ankhoswe* (marriage guardians or advocates). This system is followed throughout the Central Region and most of the Southern Region, where the people are largely matrilineal and practise uxorilocal residence. The other system is commonly known as the *lobola* system, which requires not only the presence and consent of the *ankhoswe* but the payment of *lobola* (bridewealth) by the bridegroom to the family of the bride. This system is followed throughout the Northern Region and in the two southernmost districts of Chikwawa and Nsanje, where the people are largely patrilineal and practise virilocal residence.

There have been a number of cases in which the National Traditional Appeal Court has reiterated, almost with crusading zeal, that no union of whatever duration between a man and a woman can be regarded as a valid marriage in the eyes of customary law unless the parties have complied with the strict requirements of the system prevailing in their area. In the case of *W.N. Manchichi v Fanny Manuel*,⁴ the parties had lived as husband and wife for six years

4. National Traditional Appeal Court Civil Appeal Case no. 1 of 1979, unreported.

before their union broke down. The wife brought complaint in the Tambala Traditional Court alleging that the husband had deserted her and had wilfully neglected to maintain her. The trial court found the charges proved, and ordered the husband to pay K150 to the wife as compensation and costs of the proceedings. On appeal, the National Traditional Appeal Court revoked the order for compensation and costs, on the ground that since the union of the parties had not been regularised by the presence and consent of their *ankhoswe* it could not be considered a valid marriage under customary law. Therefore, the court ruled, the parties could have no legal rights or obligations arising out of what was an invalid union. The court made a similar ruling in the case of *Khembo v Khembo*,⁵ which concerned a couple who had lived together for nine years and had had three children in the course of their union. The Blantyre Traditional Court ordered the husband to pay K12 per month for the maintenance of the children, but refused to order damages or compensation to be paid to the wife for cruelty and unlawful removal of property. The National Traditional Appeal Court upheld the decision of the lower court, again on the grounds that the couple's union had not been sanctioned by their *ankhoswe* and was therefore not a valid marriage according to customary law.

This principle was carried to an extreme in the case of *Martin Yohane v Kepson Ntondo*.⁶ The appellant was betrothed to the respondent's daughter, a very young girl who had not yet reached the age of puberty. The respondent came from Chikwawa district, where the payment of *lobola* is a prerequisite of a valid customary law marriage. However, in view of the immature age of the respondent's daughter, it was agreed between the appellant and the respondent that the appellant would not pay *lobola* until the girl had borne the appellant three children. The appellant was only required to pay a betrothal gift - consisting of "a box of matches, some tobacco, two bottles of *kachasu*⁷ and K20 cash" - after which he took the girl with him to his home, where he cohabited with her for eleven years. During this period four children were born to the couple, and on the birth of each child the appellant sent word to the respondent notifying him of the birth. After the birth of the third child, the appellant sent his *ankhoswe* to the respondent to find out how much

5. National Traditional Appeal Court Civil Appeal Case no. 16 of 1979, unreported.

6. National Traditional Appeal Court Civil Appeal Case no. 34 of 1979, unreported.

7. *Kachasu*: a potent, unrefined local liquor.

lobola he would be required to pay for his wife. The respondent demanded K30. When the appellant failed to pay this amount, the respondent sent for his daughter and gave her in marriage to another man, "stating that since the appellant had failed to pay *lobola*, his continued cohabitation with her was unlawful". The appellant sued the respondent for damages, claiming that he was lawfully married to the respondent's daughter because he had paid the betrothal gift.

The court of first instance dismissed his claim, holding that according to the customary law prevailing in Chikwawa district the appellant had never been married to the respondent's daughter. However, the court ordered that the appellant should be paid K12 as compensation because he had paid the betrothal gift. The respondent also told the appellant that he could take the children with him provided he paid the respondent K66. The appellant appealed against the court's decision. Both the Chikwawa District Traditional Appeal Court and the National Traditional Appeal Court dismissed his appeal, the latter court holding that

in those areas where the payment of *lobola* is a pre-requisite for contracting a valid marriage, there can be no marriage until *lobola*, or part thereof, has been paid, and this court, or any other Traditional Court, for that matter, does not, and will not recognise a union, with cohabitation of any duration whatsoever, as amounting to a valid marriage in the absence of *lobola*.

The National Traditional Appeal Court also set aside the order requiring the respondent to pay K12 to the appellant.

One wonders whether the notion of public policy plays any part in the court's thinking in such cases. It is surely doubtful whether the public interest is well served by declaring marriages null and void which have lasted for many years and in which several children have been born. The decision in the case of *Yohane v Ntondo* is particularly regrettable in as much as the dissolution of the union, which on the face of it appears to have been a happy one, was at the instance of the father of the wife, whose sole interest in the matter was to obtain his *lobola* and not to promote the happiness and stability of his daughter's marriage. It is submitted that this is a classic case where the conduct of the respondent was, and ought to have been declared, repugnant to justice and morality by any standard. This is shown, first, by his having given in marriage to the appellant a daughter who was of a very immature age and who had no say in the matter; and secondly, by his unilaterally, and ap-

parently without the consent of his daughter, having given her in marriage to a second man, thereby bringing the first union to an end without even informing the appellant of his intentions.

The increasing incidence of *de facto* marriages in urban areas suggests that society is changing its attitude in favour of accommodating these unions. Therefore, if customary law is to reflect the changing practice of society, it ought to shift its position accordingly to keep abreast of this trend. Indeed, it is questionable whether the National Traditional Appeal Court is correctly stating the customary law in the cases cited, or whether it is in fact formulating a rule dictated by the traditionalist moral attitudes of the judges concerned. It should be noted that the National Traditional Appeal Court has not always been consistent in this area. In the case of *Thomsen v Demba*,⁸ the court held that since the parties had lived together for ten years and had had five children, their union constituted a valid marriage. This was despite the fact that their union had not been sanctioned by their *ankhoswe*, and despite the fact that the District Traditional Appeal Court had held that they were not married. The National Traditional Appeal Court awarded substantial compensation on the grounds that the appellant had "cruelly divorced his wife". Traditional Courts would be well advised, it is submitted, to follow the example set in *Thomsen v Demba*, and to adopt a sufficiently flexible attitude to enable them to hold irregular unions which have lasted for a long period to be valid marriages. This should be particularly the case when there are children involved who would be adversely affected if the marriage were declared null and void.

Such adverse effects were evident in the case of *Mrs. Ethel Namero v Green Namero et al.*,⁹ which concerned the distribution of property of a party to a *de facto* marriage who had died intestate. A dispute arose between the wife and her late husband's relatives over the apportionment of the deceased's estate, and the wife took the matter to the Blantyre Traditional Court. The court ruled that since the union of the deceased and his wife had not been regularised by the presence and consent of their *ankhoswe* and hence was not a valid customary law marriage, the wife was not entitled to a widow's

8. National Traditional Appeal Court Civil Appeal Case no. 87 of 1972, unreported. For a general discussion of this case and others see L.J. Chimango, 'Women without 'Ankhoswe' in Malawi,' *African Law Studies* 15: 54-61 (1977).

9. National Traditional Appeal Court Civil Appeal Case no. 78 of 1980, unreported.

share of the deceased's property. On appeal, the National Traditional Appeal Court upheld the trial court's ruling. However, the appellant did not go away entirely empty-handed; under the Wills and Inheritance Act,¹⁰ she qualified as a dependant of the deceased and was therefore entitled to receive a certain share of his estate in order to alleviate any hardship that she might have suffered as a result of being deprived of the status of a wife. But what she received as a dependant was considerably less than what she would have received if her union with the deceased had been recognised as a valid marriage by the court. Indeed, had the Act not made specific provision for dependants, customary law as applied by Traditional Courts would have allocated her nothing, since her status under this law was that of a concubine with no matrimonial rights whatever. Thus the court's decision protected the appellant only partially, and in effect the four children of the ten-year union of the appellant and the deceased were likewise deprived.

The approach of the National Traditional Appeal Court in *Namero v Namero* might be contrasted with that of the High Court in *Magombo v Nelson*.¹¹ In this case a sister of the deceased brought an action in a local court against her late brother's wife for possession of the deceased's house and for custody of his two adult children. The deceased and his wife had lived together for seventeen years until his death, but they had not been legally married in accordance with customary law or any other law, although there was evidence that at some point they had been given a document by a court which they had understood to give legal sanction to their union. Both the deceased and his wife had been married before and had had children by their previous marriages. The wife had brought up all these children together in the deceased's house until they had grown up and established homes of their own. After the death of her husband the wife remained in his house, where she continued looking after several of their grandchildren. In the trial court the deceased's sister lost her claim, and the Blantyre Local Appeal Court upheld the trial court's decision.

In the High Court the appellant argued that since her brother and the respondent had never been married but had merely lived together, she herself, as a sister of the deceased, had a right to his house and

10. Cap. 10:02 of the Laws of Malawi.

11. 1964-66 *ALR Mal.* 134. See also *R v Damaseki*, 1961-63 *ALR Mal.* 69, where the High Court recognised the validity of the union without *ankhoswe* and provided proprietary relief to the 'owner'.

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a duty to accept responsibility for his children. However, the High Court noted that during the time when the deceased and the respondent had lived together the appellant had been living a long distance away, and there was no evidence to suggest that she had had any close relations with her brother or his family before his death. The court added:

All the assessors draw attention to the very long period during which the respondent and the deceased lived happily together as man and wife, and say that they must be regarded as man and wife. The first assessor asks: "If she were asked to leave the house, where would she live now?" The second assessor says: "They were together when they acquired this house, and all their thoughts were one. It is improper for someone to come from another place and take this house. The respondent should continue to live in the house, with her children and the deceased's children." The third assessor says: "The wife was good enough to bring up deceased's children. She would be treated kindly and left to live in her husband's house together with the children."

Southworth Ag. C.J., sitting with the three assessors, readily agreed with their opinions and dismissed the appeal.

What is encouraging about this case is that the two lower courts, the three assessors in the High Court, and the Acting Chief Justice were all agreed that the respondent should be treated as a wife notwithstanding the technical invalidity of her marriage. The High Court, and most probably the two lower courts also, were much influenced by the length of time and the responsible manner in which the couple had lived together and by the kindly attitude of the respondent. In the view of the High Court, all these factors had combined to erase the stigma of concubinage with which the couple's union would otherwise have been branded by their failure to have obtained the consent of their *ankhoswe*. In addition, the court clearly felt that since the appellant had been a virtual stranger to the deceased and his family in all respects save that of blood relationship, to have granted her possession of her late brother's house and custody of his children would have been a flagrant abuse of the judicial process and almost certainly a flouting of the deceased's own wishes. Thus the court refused to be tied down by the strict rules of customary law, approached the case in a humane and common-sense manner, and thereby arrived at what was obviously the most equitable outcome. It is submitted that this approach should be highly commended to Traditional Courts.

However, High Court decisions and opinions of assessors have not always been consistent in this regard. There have been instances when the High Court has failed to appreciate social realities and to protect the security and dignity of women who are parties to such irregular unions. In the case of *Christina Mhango v Ali*,¹² the parties had lived together for six years and had had four children in that period. In 1970, when the husband drove the wife away, the wife applied to the Blantyre Traditional Court alleging that she was not receiving any support from her husband. The Blantyre Traditional Court and the Blantyre Traditional Court of Appeal proceeded to try the case as though a valid marriage at customary law existed. On further appeal by the husband to the High Court against an order to pay £30 as compensation, Chatsika J. was of the view that both the lower courts had erred in law. He held that they should first have inquired whether a valid marriage existed, and only after satisfying themselves of this fact should they have proceeded to dissolve the union or award compensation to the aggrieved party. The learned judge and the assessors were all agreed that since the couple's union had not been sanctioned by their *ankhoswe*, the couple were not in fact married according to customary law. The order of £30 compensation against the husband was consequently set aside.

However, instead of leaving matters there, as Traditional Courts would almost certainly have done, the learned judge added, "It is a doctrine of Equity that we must look on that as done which must have been done." Taking into account the fact that during their six years together the parties must have treated each other as husband and wife, that the woman must have been regarded as married and thus could not have been proposed to in marriage by anyone else, and that she performed for the man all the services expected of a wife including bringing up his four children, the learned judge ordered that she should be paid £15 by the man as compensation "to enable her to start a new life". According to the learned judge, "the Courts would have failed to protect the community were they to deny consideration to a situation such as the present one". But one wonders precisely how the community was protected by quashing an order of £30 and substituting for it one of £15, which was a negligible sum even by the standards of the time.

It is submitted that the High Court lost an excellent chance to emphasise the superiority of equitable principles (to which the learned

12. High Court Civil Appeal (T.C.) No.15 of 1970, unreported.

judge was appealing) over the rigid principles of law. Since it was the initial wish of the parties that they should be treated as a married couple, and since they conducted themselves as such to the outside world for a period of six years, the court should in fact have regarded them as married. The husband should have been estopped from denying the existence of a marriage which he had induced his wife and the outside world to believe existed.¹³

Traditional conciliatory procedures in matrimonial disputes

As we have seen in a number of the above cases, the National Traditional Appeal Court tends to attribute considerable importance to the role of the *ankhoswe* as validators of customary law marriages. If anything, the court attributes even greater importance to their role as mediators in matrimonial disputes. Just as Traditional Courts generally encourage parties to resort in the first instance to traditional conciliatory measures in other types of dispute, so they encourage married couples to refer their disputes to their *ankhoswe* before having recourse to a court of law. Indeed, the National Traditional Appeal Court has effectively penalised spouses who have failed to follow this procedure.

Thus in the case of *G.T. Wandawanda v Mary F. Bowa*,¹⁴ where the parties had been validly married for eighteen years and the husband petitioned for divorce on the grounds of his wife's adultery, the National Traditional Appeal Court in allowing the husband's appeal commended the fact that "when misunderstandings arose the appellant did not just rush to court. He tried several other tribunals to bring [the couple] into harmony again, such as referring their dispute to their *ankhoswe* and subsequently to the church elders". On the other

13. It is interesting to note that in *Brown Elliassi v Beatrice Magaisa*, High Court Civil Appeal (T.C.) No.7 of 1970, unreported, the same learned judge, Chatsika J., disagreed with the opinion of two of three assessors, who had invited him to find that a marriage existed notwithstanding the absence of *ankhoswe*. Here again both the Blantyre Urban Traditional Court and the Blantyre Traditional Appeal Court had found that a marriage existed and granted compensation to the innocent party.

14. National Traditional Appeal Court Civil Appeal case No. 86 of 1980, unreported.

hand, in the case of *Enelesi Kamwendo v Thomas Kamwendo*,¹⁵ the National Traditional Appeal Court ruled in favour of the wife because of the manner in which her husband had handled his differences with her. In this case the parties had been validly married for twenty-four years, and the husband left the matrimonial home because "the appellant had become very disobedient". He told the court that in spite of his remonstrations against his wife, she had continued to brew beer and distil *kachasu* at their home for sale. He also alleged that she had had love affairs with some of her customers. However, the wife insisted that the husband had deserted her and was neglecting to maintain her. The court held that if what the husband alleged was true, then he should have referred the matter to the *ankhoswe* or some other near relatives for their advice. His failure to do so showed that when he left the matrimonial home he was in fact guilty of desertion. So too in *Lashid Labana v Kamisu Mkwanda*,¹⁶ where a wife left the respondent, her husband, and joined or married the appellant on the grounds that the respondent drank excessively, the National Traditional Appeal Court held that at customary law the drunkenness of a spouse was not in itself a sufficient excuse for running away from matrimony. If one spouse drank excessively the matter should, as a rule, be taken first to the *ankhoswe*, who would reprimand and warn the offending spouse.

The role of the *ankhoswe* in matrimonial affairs is considered so important that it is obliquely recognised by statute. Under r.39 (1) and (2) of the Traditional Courts (Procedure) Rules,¹⁷ it is provided that a Traditional Court may issue a Certificate of Divorce only if it is satisfied "that the marriage in question has been effectively dissolved in accordance with the customary law applicable". The rules make it clear that the court's Certificate of Divorce is only declaratory of an existing fact, that is, the fact of a dissolved marriage. Although the rules do not specifically say so, it is in fact well understood that in order to dissolve a marriage under customary law the consent of the *ankhoswe* must be obtained. If the *ankhoswe* have not yet dissolved the marriage, they will be called as witnesses in court and asked to state who, in their view, has caused the

15. National Traditional Appeal Court Civil Appeal case No. 154 of 1978, unreported.

16. National Traditional Appeal Court Civil Appeal Case No. 56 of 1981, unreported.

17. Traditional Courts Act (Cap. 3:03 of the Laws of Malawi).

breakdown of the marriage and is therefore at fault. In such cases their evidence will invariably be treated with great respect.

Maintenance of children on dissolution of marriage

One of the areas in which the National Traditional Appeal Court has consistently adhered to the strict rules of customary law is that of responsibility for the maintenance of children on the dissolution of their parents' marriage. In such cases the court has refused to accept allegations that an established custom has changed with the passage of time in the absence of conclusive proof to that effect. In the case of *Mailosi Yilo Pangaunye v Evelesi Bonongwe*,¹⁸ both the husband and the wife came from districts where the *chikamwini* system obtains, under which children are always attached to their mother's clan. But the parties opted for the *lobola* system, under which children are attached to their father's clan on the dissolution of their parents' marriage. At the time of the marriage the wife already had an illegitimate child by another man, but the husband agreed to treat the child as part of the family. When the marriage was dissolved, legal custody of the children was awarded to the husband, apparently in accordance with the dictates of the *lobola* system, but the youngest child was left in the care of its mother until such time as it would be of sufficient age to be taken by its father. In due course the father demanded the child's return. The Bangula Traditional Court ordered the child to be given to its father, but it also ordered the father to pay K40 to his former wife as compensation for having maintained the child. The father appealed against this decision, contending that according to the customs of the district in which the couple resided, a father was permitted to take his children without paying any compensation to the mother. He further argued that he was under no obligation to compensate his former wife because he had kept her illegitimate child free of charge during the subsistence of their marriage.

The National Traditional Appeal Court ruled in favour of the former wife. The court held that although the rules relating to the custody of children could vary from one patrilineal district to another, it was the custom in all patrilineal districts for a very young child to remain with its mother until such time as it was able to leave her. It was also the custom in all patrilineal districts for a father to be

18. National Traditional Appeal Court Civil Appeal Case No. 15 of 1980, unreported.

given the duty of maintaining any child of whom he was awarded legal custody; and if another party maintained that child on his behalf, he would be under a legal obligation to compensate that party. These customs, the court said, were "as old as the *lobola* system itself". The court was extremely reluctant, and it is submitted rightly so, to recognise the existence of an alleged new custom exempting a former husband in a *lobola* marriage from compensating his former wife who kept his child until it grew up. Moreover, the court added, "the appellant was not exonerated from his duty to maintain this particular child simply because he had maintained another child. The arrangement to maintain the respondent's illegitimate child ... was not made on the understanding that should the marriage collapse the appellant would be exempted from his customary obligation towards his last child."

On the other hand, customary law stipulates that where *lobola* is not paid in a union in which it ought to have been paid, no valid marriage exists, and any children born to that union belong to the woman's clan. The natural father cannot then be legally compelled to maintain them under customary law. In such a situation, the only possible remedy available to the mother is to bring a petition under the Affiliation Act¹⁹ for an order against the natural father to maintain the children. Similarly, customary law places no legal obligation on a father to maintain his children if he marries under the *chikamwini* system. Thus in *Lidia Mkanthama v B. Mkanthama*,²⁰ the National Traditional Appeal Court held that since according to Chewa matrilineal custom a child belongs to its mother's clan, "the husband therefore strictly speaking at customary law is not duty bound to maintain the child". Although he has a moral duty to provide for it, the court will be reluctant to order him to do so.

It can be argued that the decision in *Mkanthama v Mkanthama* shows some lack of imagination on the part of the court. Since the modern tendency of most men marrying under the *chikamwini* system is to provide for their children in spite of the strict position under customary law, the court appears to be out of touch with actual practice. It is submitted that Traditional Courts should take greater account of changing attitudes and customs in this regard, and that

19. Cap. 26:02 of the Laws of Malawi. see *Mary Njanje v Wallace Mhango*, National Traditional Appeal Court Civil Appeal case No. 58 of 1981, unreported.

20. National Traditional Appeal Court Civil Appeal Case No. 93 of 1980, unreported.

the rules of customary law should be altered to place a legal duty on a father to maintain his children.

Right of wives to opt out of polygamous marriages

One of the fundamental rules of Malawian customary law is that a husband is entitled to marry more than one wife. However, Traditional Courts have shown a certain ambiguity on the question of whether he must obtain the consent of his first wife before exercising his right to marry subsequent wives. In the case of *Poya v Poya*,²¹ a dispute arose between a husband and wife over the wife's alleged neglect of her duties. After several unsuccessful meetings with the *ankhoswe* to try to resolve the dispute the wife left the matrimonial home and went to live with a relative. During this separation the husband married another woman without the consent of his first wife or her *ankhoswe*. The first wife thereupon sued for divorce. The Zomba Traditional Court dissolved her marriage, but omitted to make an order requiring her husband to build a house for her and the children of the marriage in accordance with the *chikamwini* customary law prevailing in their area. She appealed against this decision. The National Traditional Appeal Court ruled in her favour, maintaining that her husband's failure to consult her and her *ankhoswe* before marrying a second wife had contravened customary law and had constituted cruelty to her.

The National Traditional Appeal Court took the same line in the case of *Mpaweni Wasili v Mrs. Mary Wasili*²². Because the wife objected to her husband's marrying a second wife, and even fought with some of her husband's lovers, the Blantyre Traditional Court dissolved their marriage. In fact the respondent was already married to another man by the time the appeal was heard, so in upholding the lower court's ruling the National Traditional Appeal Court was only recognising a *de facto* situation and setting its legal seal on it. But the principle it laid down is of general application, namely, that a wife may opt out of a polygamous arrangement by divorce. In the words of the court: "According to our traditions, if the appellant married polygamously against the wish of his first wife that was

21. National Traditional Appeal Court Civil Appeal Case No. 38 of 1979, unreported.

22. National Traditional Appeal Court Civil Appeal Case No. 86 of 1979, unreported.

cruelty to her ... because in the *chikamwini* system of marriage, a wife cannot be dragged into a polygamous marriage against her will."

It is questionable whether, in these two cases, the National Traditional Appeal Court was stating the customary law correctly. It is of course usual for husbands who wish to marry more than one wife to consult their senior wives before doing so. But it can be argued that this consultation is carried out as a matter of practice and not as a matter of law, the non-observance of which entitles the aggrieved wife to seek legal relief. Also, to say that it is cruelty for a husband to marry a second wife against his first wife's wishes is a somewhat strained application of the concept of cruelty as it has existed under customary law. It appears that the court's decisions in these two cases were not so much a strict interpretation of the existing law as a reflection of changing attitudes towards the position of women in the family and in society as a whole. If so, it is submitted that this development is to be welcomed as a step in the right direction.

Unfortunately, the judgments of the National Traditional Appeal Court in *Poya v Poya* and *Wasili v Wasili* received a qualified setback in the later case of *Rosina Chimtengo v Simioni Wilson*.²³ In this case the parties, a husband and his second wife, lived together for nine years in what was generally regarded as a valid customary law marriage. When the husband left the matrimonial home, the wife petitioned the Blantyre Traditional Court for his return. The court dismissed her petition on the grounds that since her husband did not obtain the consent of his first wife and her *ankhoswe* when he contracted his second marriage, the supposed second marriage was null and void. On appeal, the National Traditional Appeal Court disagreed with the Blantyre Traditional Court, maintaining that in such cases the first wife's consent was "just a formality". The court said:

It is therefore felt to be unreasonable that a marriage properly arranged between marriage advocates of the husband and of the wife should be held invalid simply because the consent of the first wife was not obtained or [because] the marriage advocates of the first wife were not informed. As we have often stated in this court, there are certain requirements at customary law which must be met in order for a marriage to be valid: there must be marriage advocates and in other parts of this country

23. National Traditional Appeal Court Civil Appeal Case No. 114 of 1979, unreported.

lobola must be paid. In this particular case the marriage advocates of the appellant and the respondent endorsed this marriage, and therefore this marriage was valid at customary law.

Those who would like to see a greater degree of equity between husband and wife will lament this decision as retrogressive. It is surely disturbing if a wife's wishes may be effectively overridden on a matter so crucial as this. But perhaps this decision shows that Traditional Courts are not yet ready to make radical changes in an area embodying such fundamental traditional concepts as a husband's right to marry polygamously as and when he chooses.

As matters now stand, then, the case of *Chimtengo v Wilson* lays down the principle that under customary law a husband can contract a second marriage without, or even against, his first wife's wishes without incurring the sanction of having the second marriage declared invalid by reason only of the fact. The aggrieved first wife, however, has the option of divorce in accordance with the principle laid down in *Poya v Poya* and *Wasili v Wasili*. In the High Court system, another possible remedy for an unconsulted senior wife was offered by Cram J. in the case *Kandaje v Mtengerenji*.²⁴ During the ceremony of marriage performed under the African Marriage (Christian Rites) Registration Act²⁵ the husband had promised not to take another wife, but he later reneged on that promise, and the learned judge said that the wife might sue the husband in equity though not in law since he was entitled to take an additional wife under customary law.

Right of pregnant women to sue for damages

Another area in which Traditional Courts have shown a willingness to modify the strict rules of customary law in response to changing conditions is that of a woman's capacity to sue for damages in cases of illegitimate pregnancy. It has long been a well-established rule of Malawian customary law that when a woman is made illegitimately pregnant, the proper party to sue for damages for her pregnancy is her father or some other guardian but not the woman herself.²⁶ She

24. 1964 - 66 *ALR Mal.* 558 at 565 and 567.

25. Cap. 25:02 of the Laws of Malawi, under which any minister of any denomination may celebrate a marriage between two Africans belonging to that denomination.

26. See e.g. *Chitema v Lupanda*, 1961 - 63 *ALR Mal.* 162 at 169.

has no status in the matter herself, as the injury is held to be not against herself but against her guardians and her family in general. If a married woman becomes pregnant in an illicit relationship, it is held that the proper person to sue for damages against her and the adulterer is her husband (or his representatives), as it is he who suffers the injury of insult and embarrassment. The action is in the nature of a proprietary right in the father of a daughter or the husband of a wife as the case may be.

In a recent case before the National Traditional Appeal Court, this rule was qualified in such a way as to enable the woman herself to sue in certain situations. The case in question was that of *Charles Nkhoma v Dorothy Thokozani*,²⁷ in which the father of an illegitimate child appealed against a decision of the Blantyre Traditional Court ordering him to pay K150 in damages to the mother. One of the grounds raised by the appellant was whether the respondent was a competent party to sue in view of the fact that under customary law such an act was a wrong against her father or some other person *in loco parentis*. The National Traditional Appeal Court, however, held that in circumstances where it would be difficult or impossible for a father or guardian to sue - for instance, where the woman concerned lived hundreds of miles away from her family - the woman herself should be granted the *locus standi*.

It must be noted that the court's emphasis was on the hardship that the strict application of the customary law rule would bring in particular cases, and that its decision cannot thereby be taken as a wholesale repudiation of the fundamental traditional concept of the proprietary rights over women of fathers, husbands and guardians. Nevertheless, it may be that *Nkhoma v Thokozani* is the thin end of a wedge that might one day be driven through the rule so as to enable any pregnant woman to sue for damages in her own right.

Conclusion

This paper has attempted to outline some of the ways in which customary family law is currently interpreted, expounded, and administered in the Traditional Courts of Malawi, particularly the National Traditional Appeal Court. Our study has mainly focused upon cases decided by the National Traditional Appeal Court because

27. National Traditional Appeal Court Civil Appeal Case No. 61 of 1981, unreported.

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the decisions of that court are the most readily available. It may be, therefore, that the law as applied elsewhere in the Traditional Courts system is not adequately represented by the cases discussed here. However, the National Traditional Appeal Court is the highest court within the hierarchy of Traditional Courts. What it lays down as law is supposed to be accepted as law by courts inferior to itself.

This raises some obvious difficulties. As we have seen, the decisions of the National Traditional Appeal Court are by no means always consistent. This is partly due to the fact that whereas in some areas the rules of customary law are well established and can be ascertained in advance of litigation, in other areas the rules are fluid and very much uncertain in content. Thus the interpretation of the law may be largely determined in particular cases by the liberal or conservative attitudes of the judges of the court. Although customary law is a living and dynamic system of law which is capable of adapting itself to the changing conditions of its environment, it can often be used, and indeed often is used, not to promote such adaptation to change but to retard it.

However, the unpredictability of customary law need not be an entirely negative feature in the context of family law. On the contrary, it can give the law vitality and the potential for growth. It can afford the courts the flexibility which they would otherwise lack if they were constrained by the obligation to abide by fixed and immutable rules of law. The area of family law is one which, perhaps more than any other, reflects the immense complexity of human nature. It could therefore be argued that it is desirable for the courts to have as much latitude as possible within which to resolve the varied issues brought before them in order to do justice in each case.