

THE RIGHT TO EQUALITY IN MALAWI: RECENT DEVELOPMENTS IN FAMILY LAW¹

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Introduction

Goal 16 of the new Sustainable Development Goals aims to promote just, peaceful and inclusive societies.³ Key targets under this Goal include:

- Promoting the rule of law at the national and international levels and ensuring equal access to justice for all;⁴
- Developing effective, accountable and transparent institutions;⁵
- Ensuring responsive, participatory, representative and inclusive decision-making;⁶
- Ensuring public access to information and protecting fundamental freedoms;⁷ and
- Promoting and enforcing non-discriminatory laws and policies.⁸

This paper seeks to reflect on recent legal and case law developments on the right to equality in Malawi as it relates to family law.⁹ In this respect, the paper looks specifically at the extent to which a domestic law for implementation of non-discrimination, the Marriage, Divorce and Family Relations Act, achieves its purpose of ensuring equal access to justice for all.

Marriage, Divorce and Family Relations Act

The Marriage, Divorce and Family Relations Act¹⁰ is the product of a special Law Commission that was constituted to undertake a review of the laws on marriage and divorce (the “Commission”). On 26 June 2006, the Commission published its Report on the Review of Laws on Marriage and Divorce.

The Commission emphasised the following three main principles in order to achieve a general, gender-based law reform that incorporates the welfare, interests, dignity and participation of women and men. These principles are:

- Non-discrimination in the enjoyment of human rights;
- Equal participation of both men and women; and
- Affirmative action to achieve gender equality and combat discrimination.¹¹

1 This is an adaptation of a paper presented at a Seminar on the Role of the Courts to Protect the Rights of Vulnerable Groups, held at Mount Soche Hotel in Blantyre on 20 March 2015.

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3 A/RES/70/1 (21 October 2015).

4 *Id* target 16.3.

5 *Id* target 16.6.

6 *Id* target 16.7.

7 *Id* target 16.10.

8 *Id* target 16.b.

9 This paper follows on a previous paper entitled “An analysis of Malawi’s Constitution and Case Law on the Right to Equality” *Using the Courts to Protect Vulnerable People* SALC (2014) 112 available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/12.pdf> (last accessed: 21 November 2016).

10 Gazetted in April 2015.

11 “Report on the Review of Laws on Marriage and Divorce” Special Law Commission (26 June 2006) 18-19 available at <http://>

The provisions of the Act should be examined to determine if they meet the dictates of the right to equality. Admittedly, to examine all sections of the Act is beyond the scope of the present paper. Accordingly, I will examine only one topic to illustrate my point.

Nullity of marriage

Nullity of marriage was covered in the now repealed Divorce Act.¹² The Act outlined the procedure to petition for the nullity of marriage,¹³ the grounds for a decree of nullity,¹⁴ the procedure to place children of annulled marriages,¹⁵ and the grounds for a decree of presumption of death and dissolution of marriage.¹⁶

The findings and recommendations of the Commission on nullity of marriage focused on the petitions for nullity of marriage and considerations for the children of annulled marriage.¹⁷ With respect to petitions for nullity of marriage, the Commission recommended “the incorporation of the substance of section 11 of the Divorce Act in the proposed new law and the introduction of a new provision to reflect the reasoning and recommendations in the foregoing.”¹⁸ As regards children of annulled marriage, the Commission recommended deletion of section 13 of the Divorce Act for being redundant.¹⁹ There is nothing in the Report to show that the Commission considered the grounds for a decree of nullity at all.

Section 12(1)(a) of the repealed Divorce Act provides that a marriage may be declared null and void if the respondent was permanently impotent at the time of the marriage. This provision was incorporated into the Marriage, Divorce and Family Relations Act as section 77(1)(a).

- “(1) The following are grounds on which a decree of nullity of marriage may be made-
- (a) that the respondent was permanently impotent at the time of the marriage;
 - (b) that the parties are within the prohibited degrees of kindred or affinity;
 - (c) that either party was of unsound mind at the time of the marriage;
 - (d) that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force;
 - (e) that the consent of either party to the marriage was obtained by force, duress or fraud;
 - (f) that the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage;
 - (g) that the respondent was at the time of the marriage suffering from a sexually transmitted infection; or
 - (h) that the respondent was at the time of the marriage -
 - pregnant by some person other than the petitioner; or
 - responsible for the pregnancy of some person other than the petitioner.”

www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf (last accessed: 21 November 2016).

12 Previously Cap. 25:04 of the Laws of Malawi.

13 *Id* section 11.

14 *Id* section 12.

15 *Id* section 13.

16 *Id* section 14.

17 “Report on the Review of Laws on Marriage and Divorce” Special Law Commission (26 June 2006) chapters 7.5.2.8 and 7.5.2.9.

18 *Id* 81.

19 *Id*.

Section 77 of the Act seems to follow the general legal position that only spouses should be parties to a petition for nullity of marriage; if the parties to a marriage are content, it would be almost intolerable to allow a third person to insist on an inquiry. It is also clear that the grounds in paragraphs (b), (c), (d) and (e) of section 77(1) of the Act apply with equal force to either spouse. On the other hand, this is not the case with grounds in paragraphs (a), (f), (g) and (h) of section 77(1) of the Act. The grounds in the second group are targeted at the respondent only, irrespective of whether the respondent is the husband or the wife.²⁰

This raises the question whether or not the second group of grounds is in line with the right to equality. For example, on a petition presented by a husband (petitioner) for nullity of a marriage on the ground that the wife (respondent) was permanently impotent at the time of the marriage, the court can only announce a decree *nisi* declaring the marriage to be null and void if it finds that the case for the petitioner has been proved.²¹ However, suppose that the respondent proves the petitioner is the spouse who is permanently impotent, rather than themselves. This strange situation is evident in some antiquated English case law.²² In these cases, the court ruled it had no legal basis to annul the marriages.

In an oft-quoted case of *Pettit v Pettit*,²³ a marriage which took place in 1939 had not been consummated owing to the impotence of the husband, who made regular but unsuccessful attempts at intercourse with the wife until 1954. The parties continued to live together, however, and the wife never reproached the husband. In 1945 she gave birth to a child which had been conceived by *fecundation ab extra* (pregnancy that occurs in the absence of penetration). In 1957 the husband fell in love with another woman, and notwithstanding the wife's efforts to persuade him to remain with her and the daughter, he left his wife in 1959. Having discovered for the first time a year later that as a matter of law he could petition for a decree of nullity on the ground of his own impotence, he presented such a petition in 1960. The Court of Appeal held that in a petition for a decree of nullity by an impotent spouse, the whole of the circumstances, including the respondent's attitude and reaction to the position created by the impotence, must be looked at in order to determine whether it was just or unjust that the impotent spouse should obtain a decree. Because of the wife's behavior and in particular her forbearance, the Court ruled it would be unjust to accede to the petition and that it should be refused. It is important to note that none of the judges in this case was of the view of completely ruling out a petition by a spouse for a decree of nullity of marriage on the ground of his or her impotence.

In short, in so far as section 77(1)(a) of the Act does not allow an impotent spouse to bring a petition grounded on his or her own impotence, the clause is strictly speaking not based on the principles enunciated in *Pettit v Pettit*.

It is submitted that where a petition for nullity is founded on a petitioner's impotence, the overriding test ought to be whether or not in all the circumstances of the particular case it would be unfair and inequitable to grant the relief. Obviously, the circumstances will vary infinitely. In this regard,

20 *Id.*

21 *Id.* section 2.

22 See *Norton v Seton* (1819) 3 Phillimore 147 "no man shall take advantage of his own wrong".

23 (1962) 3 All E.R. 37.

I would fully adopt the instructive passage in the speech of the Earl of Selborne, L.C., in *G v M*:²⁴

“there may be conduct on the party seeking this remedy which ought to estop that person from having it; as, for instance, any act which has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages of and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation has ever existed ... that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind, many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred.”²⁵

It is submitted that a petition for nullity of marriage by an impotent spouse on the grounds of his or her impotence ought to be allowed in principle. If any authority is needed, I place reliance on the words of Normand J who in *F v F*²⁶ said this:

“In principle any person who has a title and interest in the subject matter of an action is a competent pursuer, and it is a general rule of our law that title rests upon interest. There are exceptions to this general rule, but I know of none which bears relevantly on the present question. Taking the general rule as a useful test, it can hardly be questioned that the impotent spouse has an equal interest with the potent spouse in a question which vitally affects his or her *status*. The bond of a marriage which cannot be consummated, it may be added, can be as irksome and humiliating to the impotent as to the other spouse. If, therefore, the impotent spouse is to be denied the remedy, it is necessary to enquire what is supposed ground for this denial. Lord Fraser speaks of the potent spouse as the party aggrieved. But, with respect, both alike are aggrieved; and to treat the potent spouse as alone aggrieved is to imply that the impotent spouse is in some sense a defaulter, as though he or she had failed to implement a contract and was debarred from founding on his or her default. The condition of impotency which is a ground of nullity is not voluntary; and the voluntary refusal to have intercourse, though it may be dealt with as desertion, is not a ground for an action of nullity. Where the incapacity results from a physical or temperamental condition, for which sufferer is not responsible, he cannot be debarred from the remedy on the ground that he has defaulted in his obligations. There may, of course, be circumstances which will bar the potent spouse. If, for example, he or she entered into marriage knowing the defect, the other spouse would indeed be entitled to complain, and to plead the *suppressio veri* in bar of the action. But the report in the present case does not mention any facts suggestive of a plea of personal bar, and it is not necessary to consider further what circumstances would properly give rise to it.”²⁷

Further, it is significant to note that other jurisdictions have moved on and embraced petitions by an impotent spouse.

24 (1885) 10 App. Cas. 171.

25 *Id* 186.

26 (1945) S.C. 202.

27 *Id* 202 (underlined emphasis added).

In the United Kingdom, as far back as in 1948, an impotent man or woman was allowed under case law to petition for annulment of the marriage on the ground of his or her own impotence unless he or she was aware of the impotence at the time of marriage or unless it is unjust in all the circumstances.²⁸ Further, the ground of “a respondent being permanently impotent at the time of marriage” no longer appears in the statute law pertaining to nullity of marriage.

The term “permanently impotent” first appeared on our statute book in 1905 at the time of enactment of the repealed Divorce Act. The question remains whether the phrase “permanently impotent”, as used in 2015 in section 77(1)(a) of the Act, has the same meaning it had in 1905. Over the last century, there have been considerable advances in medical science regarding treatment of impotency. These advancements materially change which men or women can be characterised as “permanently impotent”. What was once considered an “incurabl[e]” impotency can no longer be characterised as such.²⁹ This archaic characterisation should be updated to modern understandings of medicine and society.

The repealed Divorce Act was modelled on nullity provisions in the UK Matrimonial Causes Act, 1857.³⁰ In the intervening period, the UK has reformed its law pertaining to nullity of marriages on several occasions through its enactment of the Matrimonial Causes Act, 1937, the Matrimonial Causes Act, 1950, the Nullity of Marriage Act, 1971 and the Matrimonial Causes Act, 1973. Applying section 77(1)(a) of the Marriage, Divorce and Family Relations Act is an unnecessary burden that the legislator of Malawi has left to the judiciary. It should be revised to comport with modern understandings of medicine and society.

Distribution of marital property

*Kagwira v Kagwira*³¹

The appellant and the respondent married in December 1990 and lived together as wife and husband until 25 October 2012. On this date, a Second Grade Magistrate sitting at Midima ruled on a petition by the wife (appellant), and dissolved the marriage.

Following the dissolution of the marriage, the lower court distributed the matrimonial property. The appellant was allocated a house, a television set, a sofa set, ten iron sheets, two beds, two mattresses, a bicycle and kitchen utensils. The respondent was allocated a house, a deep freezer, a sewing machine, a book shelf, a bed, a mattress and a pot. The lower court also ordered the respondent to “build a house for the wife at her home with burnt bricks and roofed with iron sheets”.³²

The appellant was unhappy with the lower court’s decision regarding distribution of property and she contested that the lower court “erred in law by unfairly distributing the matrimonial property

28 See *Harthan v Harthan* (1948) 2 All ER 639 at 644, CA and *Pettit v Pettit* (1962) 3 All E.R. 376.

29 See *Cowen v Cowen* (1946) Probate 36.

30 20 & 21 Vict, c. 85.

31 HC/PR Appeal Case No. 24 of 2012 (unreported).

32 *Id.*

(including the matrimonial house) which is contrary to section 24(1)(b) of the Constitution”.³³

The case was appealed to the High Court for argument and counsel for both the appellant and the respondent had substantial and well thought out submissions. The Court considered sections 13, 20, 24 and 28 of the Constitution and reviewed a number of cases on the full import of section 24(1)(b) of the Constitution.³⁴

Section 24(1) of the Constitution provides that:

- “(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right:
- a) to be accorded the same rights as men in civil law, including equal capacity:
 - i) enter into contracts;
 - ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
 - iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
 - iv) to acquire and retain citizenship and nationality.
 - b) on the dissolution of marriage, howsoever entered into:
 - i) to a fair disposition of property that is held jointly with a husband; and
 - ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.”

Following these examinations, the Court made the following conclusions:

- a) Men and women are allowed “to acquire and maintain rights in property, independently or in association with others, regardless of their marital status”;
- b) The Constitution recognises that a spouse can, during the subsistence of a marriage, acquire, own or hold property, either singly or collectively, to the exclusion of the other spouse;
- c) Neither section 24 nor section 28 of the Constitution makes it automatic that, upon, during or after marriage, property belonging to either spouse be regarded as jointly held property;
- d) Each spouse owns property he or she acquired before marriage, unless on marriage he or she demonstrates a desire to convert it into joint property or gives it as a gift to the other spouse;
- e) For property acquired during marriage, it is not automatic that all such property is jointly held, evidence is needed to show that the property is jointly held;
- f) An inference that property is jointly held by spouses is not to be made from a mere fact of marriage, and a spouse claiming a share in an object of property that is alleged to be jointly held bears the burden of proof;
- g) “Fairness” is not “equality” and “equality” is not “fairness”, that is, fair disposition of property does not necessarily entail equal disposition of property and equal disposition of property does not necessarily mean fair disposition of property;
- h) Section 24(1)(b) of the Constitution requires “fairness”, and not necessarily “equality”, in disposition of property that is jointly held by the spouses and consequently, foreign case law

³³ *Id.*

³⁴ *Mkulichi v Mkulichi* HC/PR Civil Cause No 1062 of 2007 (unreported); *Munthali v Munthali* Mzuzu District Registry, Civil Cause No. 2 of 2011 (unreported); *Khamisa v Khamisa*, HC/PR Matrimonial Cause No. 9 of 2007 (unreported); *Kamphoni v Kamphoni*, HC/PR Matrimonial Cause No. 7 of 2012 (unreported); and *Kishido v Kishido*, HC/PR Civil Cause No. 397 of 2013 (unreported).

and provisions under international law that seek to achieve “equality” are neither relevant nor applicable and cannot limit section 24(1)(b)(ii) of the Constitution that requires “fairness”; and i) The maxim “equality is equity” ought to be applied in disposing property that is jointly held by spouses only in circumstances where there is a way of discovering the parties’ intentions and no fair way of distinguishing between their respective contributions.³⁵

Jurisdiction of magistrate’s courts

*Nduya v Nduya*³⁶

Having dissolved a marriage celebrated under the maternal system of marriage, the First Grade Magistrate sitting at Chikhwawa took the view that they could not distribute the matrimonial property because the value thereof exceeded the maximum monetary jurisdiction of the lower court under section 39(1) of the Courts Act, that is, MWK1,500,000.³⁷ It accordingly referred the case to the High Court for the distribution of the matrimonial property.

The High Court held, among other matters, that once it is established that a magistrate’s court has jurisdiction to dissolve a marriage, it has jurisdiction to make ancillary orders attending the primary jurisdiction such as distribution of matrimonial property irrespective of the fact that the value thereof exceeds the monetary jurisdiction of the magistrate’s court.

The Court referred to the case of *Kalumpha v Kalumpha*³⁸ where Mwaungulu J held:

“On dissolution of marriage, orders as to custody of children and matrimonial property are ancillary and do not go to jurisdiction. A court that has primary jurisdiction to dissolve a marriage must have jurisdiction to make ancillary orders unless, of course, a statute removes or limits in some way that court’s jurisdiction.

There is no statute, however, that limits the magistrate court’s jurisdiction to make ancillary orders generally or ancillary orders as to matrimonial property or custody of children for marriage.”

It is hoped that this decision will help to promote quick resolution of cases relating to distribution of matrimonial property and ensure affordability of civil justice.

*Malola v Malola*³⁹

The High Court in this case considered the effect of the Marriage, Divorce and Family Relations Act on the jurisdiction of lower courts to deal with a marriage by repute.

Section 13 of the Act provides that “a marriage by repute or permanent cohabitation shall only be recognised under this Act upon a finding of a court of competent jurisdiction”. The High Court held that, taking into account the provisions of the Marriage, Divorce and Family Relations Act⁴⁰

35 *Kagwira v Kagwira* HC/PR Appeal Case No. 24 of 2012 (unreported), 14-15.

36 Miscellaneous Matrimonial Cause No. 24 of 2015 (unreported).

37 MWK1,500,000 is equivalent to approximately \$2079 on 17 November 2016.

38 HC/PR Civil Appeal No. 1 of 2010, 6 (unreported).

39 Civil Appeal Case No. 48 of 2016.

40 Section 2 of this Act specifically defines a “court” as “the High Court or other court having jurisdiction as specified under this Act and, in relation to any claim within its jurisdiction, includes a traditional or local court”.

and the Courts Act,⁴¹ “the lower court appears not to generally have the jurisdiction to determine divorce cases where the parties were married by repute or permanent co-habitation”.⁴² The Court emphasised that “the only time magistrate courts will have jurisdiction over marriages by repute or permanent co-habitation is when the customary law of the area recognizes such marriages”.⁴³ The Court noted that its conclusion was based on the unfortunate *lacunae* in the Marriage, Divorce and Family Relations Act and that accordingly “great hardship will be caused to people from all far away corners of this country whenever they want to settle their affairs upon break-down of their marriages by repute or permanent co-habitation”.⁴⁴

These cases raise fundamental questions about how we ensure access to justice in family law matters.

Conclusion

Law reform is an incremental process and, as we strive towards achieving the Sustainable Development Goals, we should assess whether improvements in legislation can improve access to justice and better achieve equality. This is the case even with recently enacted pieces of legislation such as the Marriage, Divorce and Family Relations Act.

41 Section 39(2) of the Courts Act provides that “no subordinate court shall have jurisdiction to deal with, try or determine any civil matter – (e) except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of any marriage celebrated under the Marriage Act or any other law, other than customary law is in question”.

42 *Malola v Malola* Civil Appeal Case No. 48 of 2016, 3.

43 *Id* 4.

44 *Id* 4-5.