

Commercialisation of Divorce in Zimbabwe: The Case of Maintenance Laws and Legislation

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Abstract

Maintenance laws have been enacted in Zimbabwe since 1971. There is no doubt that the laws have played a significant role in promoting social justice between married couples when they decide that they can no longer stay together as husband and wife. However, this paper argues that in the current tough economic conditions in Zimbabwe, the Maintenance Act [Chapter 5:09] has been abused by some fortune seekers or those wanting to seek vengeance. Using the experiences of men in the current economic hardships in Zimbabwe the paper explores cases of gender inequality being perpetuated by the gaps in the maintenance legislation.

Keywords: Maintenance Act, gender, marriage, divorce, men, women, equality.

1. Orientation

Marriage has never been a relationship based solely on love and companionship. Rather it has always primarily been an economic institution where husbands and wives contribute to the marital union by earning wages, sharing resources, and making joint decisions regarding careers, purchases, and investments (MacCoy, 2005). Thus, some consider marriage an economic partnership as some depend on marriage for sustenance and survival. Although the term partnership suggests equality between husbands and wives, the term is misleading because partners to a marriage are typically not economically equal. A happy marriage may mask this inequality, but it becomes openly evident upon divorce (MacCoy, 2005) especially when the aggrieved party asks for maintenance. Maintenance also referred to as Alimony is money paid by one ex-spouse to another for the upkeep of the children the couple had in their marriage and also the upkeep of the filing spouse.

According to Murray (2000) spousal support, also known as maintenance is designed to balance the effects of divorce by examining the earning capacity and future needs of each spouse and by providing financial support to the spouse who is more economically dependent. Much controversy surrounds the maintenance laws in different countries, as they have been a source of much inconsistency among trial courts, unhappiness and conflict among litigants and critics. Collins (2001) highlights that most family law attorneys agree that spousal support presents the largest impediment to settling divorces, and support cases are among the most appealed. As the law is a legislative measure dealing with the people it has social implications that ultimately draw the attention of social science researchers. Social science researchers in the United States have revealed that the ways in which divorced couples share their experience of the maintenance system seem to be from completely different worlds alluding to the gendered nature of society (McMullen, 2011). Much attention has been put on women as international conventions and protocols have been drafted and implemented in state countries to protect them. The maintenance laws in state countries have proved the implementation of the international conventions and protocols as they have also acted to serve and protect the rights of women.

However, these laws coming from a top down approach have had an impact on the social order where men have been on the disadvantaged side as in some cases women take advantage of the law to manipulate men. Khunou (2006) highlights that a number of theorists on the state have illustrated that the state favours the interests of women and undermines those of men. This implies that women are given the upper hand by the law that it is up to them to make men suffer through the law. Reynolds (2000) on the other hand argues that, the state nowadays determines where and how families constitute themselves, through legislation. The intervention of the state and its control of the family households have led to the redefinition of what fatherhood and motherhood means in families and broader communities.

Zimbabwe has obligations under the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) to eliminate discrimination against women in all matters relating to marriage and family relations. It also has the duty to modify social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

However, Zimbabwe has a pluralistic marriage system and it is one of the countries where choices of the type of marriage are wide and varying. One may choose to co-habit (*kuchaya mapoto*), to get married in an unregistered customary law union, to be in a registered customary marriage, or to be in a registered civil marriage. These different types of marriage are a consequence of Zimbabwe's dual legal system which allows customary law to exist simultaneously with general law. Nonetheless, when it comes to divorce and maintenance issues, the general law is put into effect without consideration of the fact that persons were married under the customary law.

Dube (2013) highlights that maintenance laws have been enacted in Zimbabwe since 1971 and the lobbying by women's groups has seen marriage laws being reformed. This has seen amendments to the marriage laws and the amendment of the Maintenance Act [Chapter 5:09] in 2005 which has been much dreaded by most males in Zimbabwe as it has been viewed to be in favour of women.

According to the *Newsday* (2014) from the introduction of the multicurrency system to the present economic crisis, there has been an alarming increase in divorce cases where people, usually women are now getting married in order to be divorced so as to claim maintenance and a share in the distribution of property. Many women are now entering into marriages especially with the elite, the wealthy for prosperity and not true love. They now enter into these marriages for no only publicity but making money for themselves. Hence when such marriages fail; they quickly run for maintenance so that they become even more prosperous. The *Herald* (2015) has even reported that according to the Harare Civil Court statistics at least 72% of men who have been faking out huge amounts of money have been exonerated from paternity by DNA tests. This proves that some women have even claimed maintenance funds from men who are not even the fathers of their children. Thus these women have taken advantage of the law to make men look after some other men's children.

Moreover, most of these divorced women have often claimed outrageous amounts in maintenance, some of which do not even tally with the men's earnings. Magistrates have often told the women not to use the courts to settle scores, but to ask for "reasonable" amounts within the reach of the men to ensure that children accessed what they deserved. The men paying maintenance fees having married again usually face problems in providing for their new families as their maintenance obligations tend to gobble much of their incomes. This implies that the men and his new family are left to face challenges as his income is not enough to provide for his family. Moreover the men's children in his new family are thus deprived of some of the things the maintained child gets. This implies a gap in the law. Thus the study seeks to explore the cases of gender inequality being perpetuated by the gaps in the Zimbabwean maintenance legislation.

Recently there has been a series of suicide cases recorded around the country where men have felt short changed by the law and opted to end their lives since they cannot pay the required maintenance monies. Some women have tended to demand very high amounts of money for maintenance which they have often used for other things other than the welfare of the children upon whose basis the courts would have granted their demand for huge amounts of money in maintenance. In most cases it is very evident that these women will not be in need of the money for the children's upkeep, but rather for their own extras. Men who are usually married again tend to face challenges as their incomes are too little to cover the maintenance obligation and the needs in the new families.

2. Statement of the Problem

Recent reports showed that many men could be supporting other people's children amid reports that about 70% of maintenance cases referred for DNA paternity tests in Harare last year tested negative. The reports said the tests proved that nearly three-quarters of men who challenged paternity of the children they were maintaining won their cases. According to court records at least 50 men appear at the Harare Civil Court for maintenance hearings daily and an estimated 14 000 maintenance files were opened in 2012 up from 3 040 in 2011, 2 174 in 2010 and a paltry 427 in 2008. Courts still order men to maintain their estranged wives even where there are no children born of the marriage or even where the children are now beyond the prescribed age group for receiving maintenance even if the man himself also has no source of income. This state of affairs has necessitated this study to identify gaps in the Maintenance Act so as to come up with some suggestions for improvement for the benefit of social justice.

3. Theoretical Framework

This paper is guided by the social exchange theory which emphasises that people calculate benefits and costs before they enter into relationships (Wood, 1995). Marriage as an institution has been largely influenced by money where some people have been drawn to marry other people because of the fact that they are rich regardless of their characteristics, age or facial looks. The influence of wealth in marriage institutions can be traced to different epochs in Zimbabwean history. First is the time when families started regarding the girlchild as a means to escape poverty by marrying her to a rich family. Second is the colonial era in Zimbabwe when *roora* (bridewealth) became commercialised. In the Shona culture, there is an old adage which explicitly states that "*Mukwasha muwonde haaperi kudyiwa*" (the son-in-law is a fig tree that shall never cease to be consumed). From the modern world perspective, this implies that wealth and money are fundamental factors required from the men by the female and even her relatives before and during the course of marriage. In the modern calculative environment, this has led to marriages of convenience where the marriages are not based on love but rather on wealth and money.

4. Maintenance Law

MacCoy (2005) highlights that the system of maintenance or alimony is rooted in the early English model of alimony which stemmed from the laws of coverture. Under the doctrine of coverture, in a married couple the husband gained control of all property his wife owned and the wife also transferred to her husband her ability to hold real property and keep any earnings (Murray, 2000). In return, the husband incurred a legal duty and a moral obligation to protect and financially support his wife. This legal duty arose from the marital relationship itself and was imposed regardless of the wife's premarital wealth (Murray, 2000). This meant that the husband was required to provide his wife with material support and all other "necessaries" of life, such as food, clothing, and shelter. In return, the wife would provide her husband with a duty of service, such as housework, childcare, and companionship.

In Southern African countries, due to the varied experiences of colonisation, there are at least two laws in operation. Armstrong (1992) shows that in most Southern African countries, there are two sources of law which determine legal obligations and rights in family law matters. These are the general law and customary law. The general law can either be based on Roman-Dutch law or on English common law. Customary law is based on each ethnic group; and is therefore influenced by customs. Armstrong (1992:32) shows that customary law at all levels is characterized by diversity and ambiguity. In addition customary law is changing rapidly as social conditions change.

5. Why Maintenance?

During divorce cases Giddens (1992) writes that both men and women seem to be angry about something, though angry at different things. He affirms that "men's anger is against women's self-assertion in the home, the workplace and elsewhere while women are angry at men in turn because of the subtle ways in which men deny them material privileges claimed for them" (Giddens, 1992:122). This highlights men and women's priorities in marriages where it can be observed that women are more interested in the material things. However Giddens (1992) clarifies that the economic and social constraints which keep women as caregivers should not be undermined since these constraints play a major role in the women's inability to have the same economic and social stability that men have from achieving equality in the private or public worlds. Such a revelation explains why it is mostly women who file for support from men.

Khunou (2006) in her findings concluded that women claim maintenance fees to make their former husbands "pay" as they felt that the men had wasted their time and used them when no one else was interested in taking care of them. This meant that women saw the maintenance law as a means to pay back time wasted with the former husbands. Khunou (2006) further states that as much as claiming maintenance was an issue of the responsibility of both parents to their child evidence showed that the issue may be coupled with questions of unfulfilled promises, anger and vengeance seeking. This implies that women may use their children's right to maintenance and the father's responsibility to maintain them to their own advantage. Khunou (2006) highlights that women may use the law to assert themselves and make their former husbands see another version of them, that is of people who could inflict frustration, humiliation and pain. However it should be noted that although the maintenance weapon against injustices in relationships has been seen in a negative light, for many women who find themselves in the same situation it is a reality.

6. The Maintenance Order on Men and Women

Khunou (2006) reports that when the fatherhood experience is established through the use of force it becomes unpleasant and complicated as it may have repercussions on the relationship between the father and the child. The relationship becomes difficult to maintain when the interactions are to be facilitated by people who are not in a good relationship, that is the father and the mother. Khunou (2006) also reports that when the police and courts become involved, the relationship is seen as problematic, and at this point even the fathers' family gets involved. Usually the feelings of resentment come from the father's family. This reveals that the maintenance system favours women and is biased against men.

Khunou (2006) highlights that the argument by most men that maintenance and family law in general favours women and works against men, takes place in relation to the idea of gender equality, which has been defined to mean 50/50, meaning that women and men must share financial responsibility equally. This has been understood and argued by some men emphasising that since women have equal rights to men, they should go through the same hardships that men go through, like taking over sole responsibility for the maintenance of children (Khunou, 2006). Such a statement testifies to a widely held perception by men.

Moreover, highlighting the experiences of men in the maintenance system, Khunou (2006) reports that individual men deal with the system in such a way that their identities and histories are carved on the system where most of the fathers assert the importance of understanding the system when going in to negotiate maintenance as they point out that a man needs to offer less than what the woman demands because what women demand is always unreasonable. Such a revelation can be considered relevant in the Zimbabwean context where

stories of women demanding huge amounts of money in maintenance cases have made headlines.

Moreover, Khunou (2006) reports that the experience of paying maintenance for a majority of fathers made them realise that they were not an integral part of their children's lives as they missed being a father in the everyday sense, such as making decisions about school activities and getting to know the child's world, including their child's friends, tastes, joys and disappointments. This can be explained by the reason that after most divorce cases mothers tend to be disinterested in letting their children see their fathers as they are jealous of the child developing a closer relationship with the father. Thus, maintenance paying fathers may lack the opportunity to make an impact on the kinds of people their children would become. Some fathers are not against paying maintenance, but against not having control over how the maintenance benefited their children (Khunou, 2006). She further asserts that contribution to raising the children should not be measured only in financial terms, but should include the father's involvement in the decision-making process of matters that concern the life of the child.

Armstrong (1992) reports that the maintenance system in Southern Africa is viewed as a violation of the local cultures and as perpetuating divorce cases since women know that they will automatically be maintained by men. Such a view can be observed in most men who had customary marriages and are unhappy with how their maintenance cases are handled by the courts. This is especially because the courts give mothers access to maintenance for the children they care for without giving them more responsibilities with regard to the fathers and the maintenance of their marriages and crumbled relationships (Khunou, 2006). Armstrong (1992:145) concludes in her study of maintenance that men are not opposed to the obligation to maintain their children, but to the enforcement of that obligation through the formal courts, involving women acquiring control over the man's money and the court imposing duties without corresponding rights over the children and the woman. Such a statement brings out the contradictions involved in maintenance cases involving people who have been married under the customary laws as the formal maintenance courts disregards all other obligations made in the customary marriages.

Studies portray that maintenance officers and the procedures are at best unhelpful and a serious challenge to the effective implementation of the Maintenance Act (Bell, 2003; Mills, 2003; Moyo, 2003). Such a portrayal can be attributed to the biases and misconceptions held by most maintenance officers, as they assume that women are always right and men are irresponsible. Thus they should be forced to be responsible. Moreover corruption among the maintenance officers also stands as a factor challenging the effective and proper implementation of the Maintenance Act [Chapter 5:09].

7. Conclusion

Arguments for gender studies that focus only on women's experiences include the fact that, to a large extent, women have been left out of history, which is undoubtedly; true (Amadiume, 1987; Farrell, 1993; Connell, 1995). This argument can be considered as having led to the assumption that the patriarchal system which is characteristic of national governments in general, works and benefits all men in the same ways. Such an assumption which is one-sided led to a lack of men's studies and how changes in women's positions impact on society in general, thus doing an injustice to the task of addressing past inequalities (Khunou, 2006). This has also limited our understanding and interrogation of gender relations in society.

This paper gave a review of the literature that has revealed the experiences and perceptions of men in the maintenance system. The literature validated the Amadiume (1987) suggestion in her account of Igbo women and their power in society that misconceptions have dictated that men are immune to emotional strain and led to the assumption that only women can be harmed. Farrell, (2001) asserts that there should be studies on challenges faced by fathers in maintenance cases.

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