

MAINTENANCE DISPUTE SETTLEMENT INSTITUTIONS
IN PAPUA NEW GUINEA (1)

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I. INTRODUCTION

Many societies recognize obligations of maintenance and support between husbands and wives, and between parents and children. Papua New Guinea is no exception in this respect.

Law has often been used to regulate this very important matter. In Papua New Guinea examples of such laws date back to the 1920s.(2) The context in which those laws operated has of course changed. Since then there have been enormous changes in the people's social, economic and political life. Urbanization is now a major problem in Papua New Guinea and there is great disparity between the urban and rural sectors of the economy.

The introduced economic system has made money a very important matter in the lives of many Papua New Guineans and for many in the urban context money has become the only means of survival. This has had an adverse effect on marriages. Marriages nowadays are less stable than they used to be and many of them disintegrate altogether.

Many women and children derive their main security for continued support from the obligations of the husband and father arising from marriage. The absence in Papua New Guinea of a state-run social security system like that in England or Australia makes it especially important to determine who should bear the responsibility of maintaining family members when a marriage breaks down.

Claims involving maintenance and support in Papua New Guinea may variously be brought in a Village Court, Local Court, District Court or in the National Court. The limits and conditions of the respective jurisdictions of the courts will be considered below.

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1. This article is based on Chapter 4 of my thesis entitled "Economic Aspects of Marriage Breakdown and the Law in Papua New Guinea" Submitted to the Law Faculty, Warwick University, 1984.
 2. **Native Regulation 1939 (Papua), Reg.77; Native Administration Registrations 1924 (New Guinea), Reg.77.**

In the dispute settlement process, however, it is important to note that courts are not the only places in which solutions are obtained. This also applies to maintenance disputes. There are other formal and informal institutions to which disputants may have recourse. These include customary processes, state backed welfare agencies and churches. The extent to which a particular process of settlement is used depends on the context in which the dispute arises. Factors such as the parties' economic position, accessibility to dispute settlement institutions like courts or welfare officers, and whether the dispute arises in the rural or the urban context often come into play.

The purpose of this paper therefore is to look at the various laws dealing with the question of maintenance and the courts exercising power under them. In addition, it will look at the various other institutions involved in the maintenance dispute settlement processes and the factors that affect the choice of forum.

II AN OVERVIEW OF LEGISLATION REGULATING MAINTENANCE.

There are basically only two laws which directly deal with the question of maintenance as between spouses on the breakdown of marriage. They are the **Deserted Wives and Children Act**, Chapter 277, and the **Matrimonial Causes Act**, Chapter 282. The former deals with maintenance before divorce and the latter after divorce has taken place.

The **Deserted Wives and Children Act** applies to statutory marriages (i.e. those contracted in accordance with Part V of the **Marriage Act**), as well as those contracted in accordance with customary law (**Darusilla Kuang v Eliab Tovival** [1969-70] P.N.G.L.R. 24). Originally the Act had no application to natives (Section 30). This discriminatory provision was repealed in 1961 (Section 5, **Deserted Wives and Children Act**, 1961). Jurisdiction to hear maintenance claims under that Act lies with the District Courts (3) and the Local Courts (Section 18(1), **Local Courts Act**, 1963) except that the latter only have jurisdiction over customary marriages. Section 18(1) of the **Local Courts Act**, 1963 provides:

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3. The definition of "Court" under Section 4 of that Act means the District Court.

"The jurisdiction conferred by the Deserted Wives and Children Act, ... may be exercised by a Local Court in the case of a marriage by native custom ..."

The implication therefore is that they cannot exercise jurisdiction over maintenance claims brought by women who are parties to a subsisting statutory marriage. In practice, however, Local Courts do exercise jurisdiction over women married by statute as well. Clearly, however, any such orders if challenged would be held invalid as beyond the power of the Local Court.

The **Matrimonial Causes Act**, on the other hand, applies only to parties married otherwise than by custom. Under Section 4 the provisions of that Act have no application to customary marriages. They only apply to statutory marriages and claims can only be brought in the National Court (Section (1)) and even then only in conjunction with divorce or nullity proceedings (Section (1)(c); **Silvia Spichiger v Fritz Spichiger** (M.P. 28 of 1977)).

The **Deserted Wives and Children Act** provides a means whereby a wife who has been left by her husband without making adequate provision for her maintenance and who cannot support herself and the children (if any) can complain in any of the magistrates' courts for an order compelling the husband to contribute towards their support. The kind of support these courts can order is, however, limited to the making of financial orders only. This means that the court cannot order the defendant husband for example to settle any of his property in lieu of maintenance. The courts do, however, have power to authorize some person or body to seize and sell any of the defendant's goods to obtain the moneys necessary to meet his obligations under an order for maintenance against him (Section 6(1)).

An important aspect of these two laws is their inextricable relationship with the money economy. That is, the powers of the courts exercising jurisdiction under these laws to order maintenance depend on the financial positions of the parties involved in the case. Thus, the **Matrimonial Causes Act** confers on the National Court powers to make monetary awards, whether periodic or lump sum payments (Section 76(1)(b)). It also has powers to order the settlement of property which either party owns (Section 75). Similarly jurisdiction under the **Deserted Wives and Children Act** is designed to provide financial relief only. Section 3(1)(a)(iii) of that Act only allows Local and District Courts to "order the defendant to pay, for the use of the wife, such allowance as it considers reasonable" in the circumstances. Neither of these two Acts makes provision for a magistrate to order payment in kind.

Essentially, this means that maintenance remedies provided by these two laws are generally limited to those engaged in some form of wage labour. People who fall into this category include public servants and private employees who may happen to be working in the larger centres like Port Moresby and Lae or in the

smaller rural based centres. It follows therefore that unemployed residents in these centres and those in the rural economy generally are virtually outside the scope of these laws.

Moreover, maintenance remedies that are provided are limited to the nuclear family unit. They emphasize the economic relationship between the husband, wife and children to the exclusion of the extended family. Rights and obligations relating to maintenance and matrimonial property are treated as individual rights within the context of the nuclear family and there is no concept of group rights and obligations based on the wider extended family. Thus, the Matrimonial Causes Act speaks of "the maintenance of a party to a marriage or of children of the marriage" by having regard to the "means, earning capacity and conduct of the parties to the marriage" (Section 73(1) and (2)).

The Deserted Wives and Children Act, in addition to being nuclear family oriented, is also based on the assumption that the husband is the breadwinner of the family and the wife is economically dependent on him. This, in part, accounts for the fact that there is no corresponding obligation, under existing law let alone the Deserted Wives and Children Act, on the wife to support her husband. Such ideas are of course not in harmony with customary rules regarding marriage, divorce, and support obligations during marriage.

Neither the Deserted Wives and Children Act, nor the Matrimonial Causes Act, provides for the application of customary law. This of course does not necessarily prevent the courts from applying any relevant customary law on the matter in question in accordance with the Customs (Recognition) Act, Chapter 19 and Schedule 2.1 of the Constitution. In the rural areas where customary law is still the dominant source of law it would seem that the court will be much more receptive to customary notions of support and maintenance. Village Courts already have the power under the Village Courts Act, Chapter 44, to enforce customary obligations which may include obligations of support.

III THE DISPUTE SETTLEMENT PROCESS

The extent to which women utilize the laws we have already mentioned is not altogether clear. This is mainly due to the fact that not every dispute that is related to marriage breakdown is taken to the official court system. This is because of the various legal, social and economic factors extant in Papua New Guinea. Indeed, in a plural legal system like that of Papua New Guinea, it is just one of several institutions for the settlement of disputes, let alone maintenance disputes. Abel (1980: 813) has noted that

"The redirection of attention away from courts has certain merits. It reminds us that the state has no monopoly over legal functions. It is not only societies with a relatively underdeveloped state apparatus (generally found in the third world) that tolerate the coexistence of competing jurisdictions; the latter are also found within the most bureaucratic and centralized of states: economic institutions, (corporations, trade associations), religious and ethnic groups, organized sports, universities, etc. Furthermore, in all societies, formal legal institutions handle a numerically insignificant proportion of the total population of disputes, instances of normative violation or sanction, and formulations or changes of rules."

In the case of Papua New Guinea, informal institutions include customary resolution by using, for example, the extended family system; mediation; Village Courts; churches; welfare agencies; reconciliation; and the courts.

However, I must point out at the outset that as a result of the plurality of laws that exist in Papua New Guinea the "settlement" of a dispute in a particular forum does not necessarily mean the end of that dispute. The process of dispute settlement in Papua New Guinea is quite complex since an "order" of a court, for example, which "settles" the dispute in question does not always prevent the disputants or either of them from resorting to other institutions for a "final" solution.

Many supposedly "settled" disputes often get transferred by the parties to other dispute settlement institutions until a final solution has been reached. For example, "settlement" in accordance with customary law does not always prevent a party from instituting proceedings in an official court or seeking help in one of several welfare offices run by the State. On the other hand, a court order awarding maintenance, for example, does not necessarily end the dispute since questions of return or otherwise of a bride-price, custody and so on may be settled in accordance with relevant customary rules. But many of the disputes that do not get settled in unofficial institutions or the government-run welfare agencies end up in court although some of them as a result of various intervening factors and processes do not reach the court rooms.

The diagrams below show the general patterns of these two processes; first, that of transferring disputes from one institution to another and secondly, the various stages at which a dispute can be dropped before it reaches the court. Often, of course, a dispute can be referred by officials of one institution to another.

DIAGRAM 1

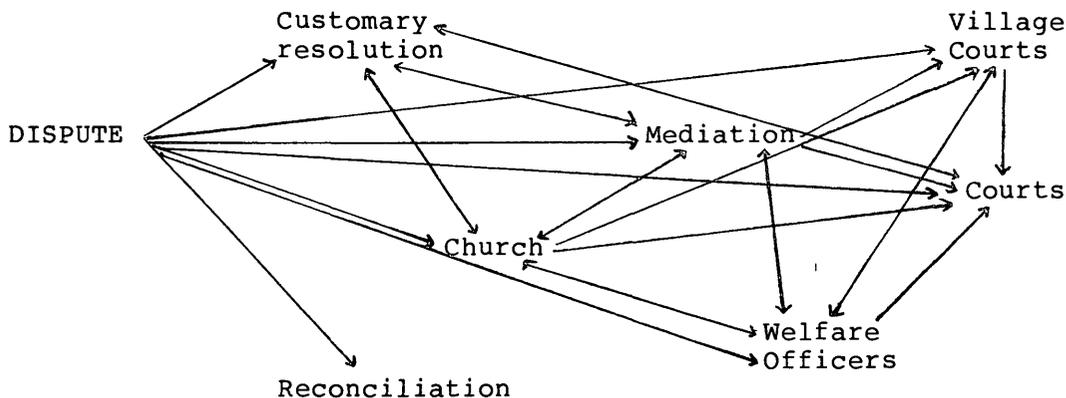
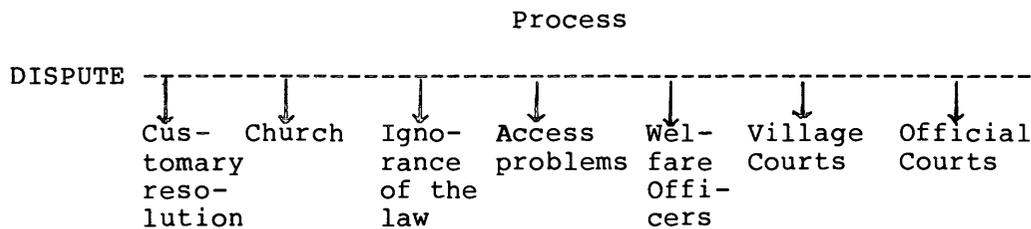


DIAGRAM 2



The stages, as shown in diagram 2, at which a dispute may 'die' do not represent any order. That depends on the facts of the case and the various social and economic factors surrounding the disputants. The diagram simply indicates at what stage a dispute may die and as such the stages do not necessarily represent any final stage at which a dispute ceases. As shown in diagram 1, a dispute can still be transferred from one stage to another.

IV MAINTENANCE IN THE RURAL AREAS

Generally, under customary law, short of a duty to provide the means of subsistence, a husband has no 'duty' as such to support his wife during marriage. During periods of temporary separation this duty is suspended and may end altogether if the marriage is dissolved. On the breakdown of marriage her kin will perform the function of providing these means until she gets reconciled with her husband or remarries if her marriage has been dissolved.

Today, although kinship continues to act as a social security mechanism for many rural and urban Papua New Guineans, it cannot be expected to provide this security in all cases. As a result of the various social and economic changes associated with capitalist production being experienced by Papua New Guinea, traditional support from kin may no longer be sufficient and in some cases inappropriate, particularly because of new material requirements like clothing, shop foods and education.

If kinship support is not forthcoming a woman (who more often than not is the complainant) can have recourse to the courts to assert her rights. However, the extent to which women in the rural areas would have such recourse is less compared to the situation in the urban areas. Even though both Local and District Courts have power to deal with the question of maintenance most cases would go before the Local Court since it is closer to the people than the District Courts. Other disputes would be taken to state-backed dispute settlement institutions like the Village Courts and Welfare Officers who may either mediate or, as they sometimes do, arbitrate a settlement or advise and assist women to institute court proceedings against their husbands.

1. **Village Courts.** Under the Village Courts Act, Chapter 44, unless otherwise excluded, Village Courts have jurisdiction over all disputes arising within the area over which they have jurisdiction (Section 15(1) (a)). In exercising this jurisdiction their primary function is to "ensure peace and harmony through mediation and consensus" (Section 19) by applying any relevant customary law in accordance with the Customs Recognition Act, Chapter 19, (Section 29(1)). This jurisdiction has been exercised by magistrates to hear family related disputes such as forced marriages, bride-price, polygamy, adultery, desertion, domestic violence and to a lesser degree maintenance (Mitchell, 1982).

The application of customary law in Village Courts over maintenance disputes does not favour deserted women even if they need the support of their husbands. Nevertheless, as things change in Papua New Guinea, custom being a fluid system of law, customary rules regarding support obligations will inevitably change. As a result, customary rules may develop

under which an obligation on the part of the husband is recognized for the support of his wife and children on the breakdown of marriage. In the North Solomons, for example, Mitchell (1982: 13) found that

"[I]t was felt that an obligation for a husband to support his nuclear family exists and should be enforced by the Village Courts. Clearly one can see that in the North Solomons many changes are taking place in the social structure of traditional societies and Western practices such as maintenance payments are becoming more prevalent. It is likely that customs will change as requirements of the society change."

This change will however be gradual because many societies are still dominated by customary law. While magistrates may be sympathetic some will give effect to these changes in their decisions while others will reject them on the ground that maintenance is a concept that is foreign to Papua New Guinea societies. Some courts have even sought to justify their position by simply saying that they have no jurisdiction to hear maintenance claims (Mitchell 1982: 12).

In some cases magistrates may be quite indifferent and unsympathetic to the problems faced by women on the breakdown of marriage. In Mendi, for example, a woman had gone to the Court for a divorce on the ground that her husband who was a labourer earning between K30-K40 per fortnight was not supporting her and their three children. In rejecting her request the court retorted:

"You are talking about being maintained with money but you must remember we never had money in the past. I do not think we should bring this thing about money as a ground for divorce. Rather, not making any gardens, or such things denying basic rights to life according to custom. Money is a new thing. We are not money dependent completely. There should be other grounds for divorce."

At times, however, magistrates may hear maintenance claims and order the husband either to look after his wife or pay compensation to her family if she returns to them (Mitchell 1982: 12). In others they would refer women to Welfare Officers who would either mediate or help and advise them to proceed against their husbands in the Local or District Court.

2. **Local Courts.** Having regard to the close proximity of Local Courts to the people, most maintenance disputes are heard by those Courts. If a wife has been deserted by her husband she can institute proceedings against him in a Local Court under Section 18(1) of the Local Courts Act, 1963. This section provides:

"The jurisdiction conferred by the Deserted Wives and Children Act ... may be exercised by a Local Court in the case of a marriage by native custom ...".

Strictly the Court only has jurisdiction over parties who have married by custom. In practice, it seems that magistrates may sometimes wrongly assume to exercise jurisdiction over statutory marriages as well.

The provisions of the Deserted Wives and Children Act are limited in that they do not apply after divorce has taken place, although jurisdiction can still be exercised with respect to the maintenance of children. After divorce, magistrates of the Local Court have no jurisdiction under that Act to order maintenance. At present there is no provision in the law which expressly gives power to Local Courts to make orders for maintenance after divorce has taken place.

Nevertheless, it would appear that if a woman who is otherwise divorced institutes proceedings against the husband and he appears before the court without disputing the marriage the court will presume, albeit incorrectly, that it has jurisdiction.

3. District Courts. District Courts also have power under the Deserted Wives and Children Act to order maintenance. The extent to which people in the rural areas make use of these courts is not known but having regard to their relative isolation from the majority of the people this is not expected to be very great.
4. Welfare Officers. Courts are not the only forums for the settlement of family related disputes like those dealing with or related to maintenance. Women in the rural areas often make use of this institution for advice and assistance regarding their legal positions. In many cases reconciliation is sought through mediation while in other cases assistance is requested so that legal proceedings can be taken against the husband.

The number of cases that go before welfare officers is not known but understandably it would be a lot lower than the situation in the urban centres like Port Moresby where, as we shall see, extensive use of them is being made by women. That being the case discussion of the nature and the number of cases going before these officers will be done below (using Port Moresby as an example) when we look at maintenance in the urban centres.

V MAINTENANCE IN THE URBAN CENTRES

The support needs and other economic constraints faced by women in the urban economy are greater and perhaps a greater social concern than the situation in the rural economy. In contrast to the rural areas where mutual support and dependence through the medium of kinship may offer some help, women who get geographically separated from this source cannot expect this help on the breakdown of marriage. As a result of separation many, if not most, lose the relatively stronger economic position they enjoyed in the rural economy. Many simply follow their husbands to their work places in the towns and as such have no income of their own so they are forced to depend entirely on the husband's incomes.

The right a woman has over her husband's income is dependent on her status as wife and to a lesser extent mother of their children. This right is a reflection of the traditional belief that a woman in her relationship with the husband is economically dependent on him. Though traditional this belief is a social reality for many women in the urban economy. The law in the form of the **Deserted Wives and Children Act** is based on this belief because while it recognizes the right of a woman to her husband's income it does not recognize any such right on the part of the husband.

The jurisdiction conferred by the Act does not vest power in any of the magistrates' courts to order maintenance after the dissolution of marriage. In the case of statutory marriages this can only be achieved in accordance with the **Matrimonial Causes Act**. As to customary marriages there is no provision in the law that expressly allows magistrates to exercise jurisdiction in post-divorce maintenance claims. But as mentioned earlier this does not affect the power of the courts with respect to the maintenance of children even after divorce has taken place.

1 Pre-divorce Maintenance .

(a) Magistrate's Courts. We have already seen that both Local and District Courts have power to order maintenance in a pre-divorce situation under the **Deserted Wives and Children Act**. The Act empowers a Local or District Court magistrate to order a husband to pay maintenance if he/she is satisfied that the husband had deserted his wife and had in fact left her without means of support (Section 2(1)(a) and 3(1) (a)(i), (iii)).

Statistics based on the results of research I did in 1981 reveal that extensive use of the magistrates' courts is being made by Papua New Guinean women in accordance with the Act. These figures are based on an analysis of the Port Moresby Local and District Court decisions and although the results are limited in this respect it is hoped that they will reflect the general situation in other urban centres.

The following table shows the total number of maintenance applications, excluding applications for variation, discharge or the enforcement of orders, that were brought before these courts between 1978 and 18th September, 1981. All the actions were brought under the Deserted Wives and Children Act.

TABLE 1

Year	Total number of maintenance applications	Number of cases in which an award was made	%
1978	47	35	74.5
1979	43	29	67.4
1980	60	41	68.3
1981	48	32	66.7
Total	198	137	69.2

From the table it can be seen that out of the total number of applications that were made 69.2% had resulted in an order being made. It also appeared during the course of the research that in cases where the welfare of children was also in question an order was invariably made in favour of the mother.

(b) Village Courts. Village Courts situated within urban centres or in close proximity to them do not handle many maintenance disputes. This is possibly because, first, women feel that Village Court magistrates may not be sympathetic to their claims and related to this is that magistrates themselves do not feel that they have power to award maintenance as such. As a result, in a lot of cases magistrates simply try mediation and if that fails they refer women to welfare officers or to a magistrate of the Local or District Court.

2. Post-divorce Maintenance.

In discussing maintenance after divorce it is important to bear in mind the distinction the law makes between customary and statutory marriages. In the case of statutory marriages post-divorce maintenance can only be sought in accordance with the **Matrimonial Causes Act**. Under that Act maintenance is an ancillary relief so that a woman can only ask for maintenance in conjunction with proceedings for principal relief such as divorce or separation Section 5(c)). As such an order for maintenance cannot be made if an application for principal relief has not been instituted (*Silvia Spichiger v. Fritz Spichiger* ((M.P. 28 of 1977)). All these proceedings can only be heard by the National Court.

Applications for maintenance in conjunction with divorce proceedings have been made in the National Court many times. Many social and economic factors come into play and often even determine whether or not a wife, for example, does in fact ask for maintenance. The most important factor is the presence or absence of finance or property, the economic strengths of the parties and their social position in society.

Below is a table showing the number of divorce petitions as well as the number of petitions that included applications for maintenance and requests for the settlement or transfer of property maintenance during the period 1978 - August, 1981.

TABLE 2

Year	No. of Petitions	No. Discont'd	Both Expats	Both PNGs	No. of Maintenance Claims		
					Both Expats	Both PNGs	Wife PNG
1978	29	4	9	10	9	4	1
1979	26	1	2	12	2	5	4
1980	25	1	12	8	12	4	
Aug 1981	20		2	8	2	4	
Total	100	6	25	38	25	17	5

From the table it can be seen that most applications involved expatriates. Participation by Papua New Guineans was limited to those in the high wage earning group and wives of expatriate men.

Secondly, the provisions of the Matrimonial Causes Act do not apply to customary marriages (Section 4). To date there is no provision in the law giving specific powers to any of the courts to make maintenance orders for a spouse after a customary marriage had been dissolved.

Whether there is any other source of jurisdiction for a Local Court or District Court to make orders for maintenance after divorce is a matter which will be considered below.

3. Welfare Officers.

Urban living gives rise to a great variety of disputes which reflect and often affect the stability of marriage. Many, if not most, of the disputes associated with marriage breakdown do not go before the official court system although a lot of them do eventually end up there. Many are solved between the parties themselves, sometimes with consequences adverse to the welfare of the mother and the children.

Urban living has problems which are particular to that way of life. This has often had the effect of rendering traditional methods of dispute settlement inappropriate or not readily available. Strathern (1975:376), for example, has noted that the fact that no big men had migrated to Port Moresby to become part of the urban Hagen community has led to serious problems of social control, since there is no ity to manage people, and socialatorical technique, the ability to manage people, and social prestige necessary to settle disputes effectively. As a result a great number of these disputes are taken to welfare institutions like the Catholic Family Service in Boroko, Port Moresby, or the state-backed Welfare Offices throughout the country.

The Catholic Welfare Service is an institution primarily concerned with reconciliation through mediation. Separation and divorce are discouraged by pointing out the legal, social and economic consequences that may follow their actions. However, if the parties or either of them is intent on leaving the marriage the norm is to refer the matter to the Public Solicitor's Office or elsewhere if the party or parties so desire.

Similarly, Welfare Officers in Port Moresby, like those in other urban centres, deal with a lot of family related matters such as separation, divorce, desertion, custody, affiliation and maintenance. A break-down of the cases which have been handled by the Hohola welfare Office shows that a lot of these issues do in fact go before Welfare Officers and this also seems to be the case in

other Welfare Offices throughout the country. The Hohola Office is special for three main reasons. First, it is the oldest in the country; secondly, it is the busiest in Port Moresby and perhaps the country as well; and thirdly, of the four Welfare Offices in Port Moresby it is the only one that provides statistical information on the number and nature of cases going before it.

These statistics show that between 1976 and 1980 inclusive a total of 955 family related cases had been taken to that Office. The nature of these cases ranged from domestic violence like wife-bashing to those related to marriage break-down such as neglect, custody, maintenance and separation or divorce. Disputes associated with marriage break-down such as separation and divorce represented over 55% (532 cases) out of the total number of cases. On the other hand, cases related to the economic consequences of marriage break-down formed 16.8% (161 cases) of the total figure (File No.3-7-1).

Welfare officers are often very sympathetic to women whose husbands have neglected or left them without support. In many cases they attempt to mediate between the parties with a view to reconciling them. But if this fails as often happens and there appears to be no prospect of them coming together the mediating officer may threaten the husband with or assist the wife to institute legal proceedings for maintenance.

In the course of mediation there is some evidence that welfare officers do at times arbitrate an agreement between the parties. There was, for example, a case where the husband who at the time was living with another woman to whom he claimed to be married, agreed to support his first wife. Under the terms of the agreement he had to pay K80.00 per fortnight as maintenance for herself and their children. In addition he agreed to allow his former wife to continue residing in the former matrimonial home which was subject to a tenancy agreement between the Housing Commission and himself. He also agreed to continue meeting the rentals due under the tenancy.(4).

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4. At the time of research the husband was still making these payments

Similar arrangements were made in another case. In that case it was agreed that the wife would return with their child to her village for a short period while the husband stayed on in Port Moresby to work. During this period the husband was to send K30 every 6 weeks to his wife while she and the child remained in the village.

These kinds of arrangements are, as I was told, not uncommon except that the role of the welfare officer is limited in that the officer can only act in this capacity if he or she is invited to do so. I was also informed that such agreements were not understood to represent legal documents in the sense that they are binding on the husband. This attitude is attributed to an uncertainty among welfare officers regarding the legal effects of such agreements. Some even expressed the view that rights and obligations created by such agreements could not be enforced in the courts.

However justified these views may be they have a direct link to the sort of training officers get. Welfare officers do not get any legal training. Many of them do not even know essential laws like the **Deserted Wives and Children Act** before they go out to work. Most of them get to know these laws while actually working and even then what they may know amounts to nothing more than a 'knowledge' of the remedies, for example maintenance, provided by those laws.

In the case of 'arbitrated' agreements what use are they if they cannot be enforced? Certainly some knowledge of the basic principles of family law regarding maintenance could remove a lot of these uncertainties regarding the legal effects of these agreements. Officers could then assist parties to enter into agreements that can be enforced in the courts.

The law dealing with maintenance before divorce does not empower courts to sanction agreements but in claims for maintenance the fact that there is such an agreement may influence the court when an order is made. In appropriate cases the court may enforce the terms of the agreement as their contract.

VI ACCESS TO A REMEDY

In the dispute settlement process generally, many social and economic factors come into play. These influence and in some cases even determine whether a particular dispute goes before the courts or some other institution. In the case of courts it is a social reality that not everyone is equal when it comes to access. This is especially true in the case of the National Court.

As regards maintenance remedies under the **Matrimonial Causes Act** access to them is beyond the hopes of most Papua New Guineans. In reality they are the preserve of the economically well-off few

who can afford the cost involved. The cost for an undefended divorce suit is more than K500 while a defended one is not less than K1000. And because maintenance is an ancillary relief the cost involved cannot be avoided.

Furthermore, the procedural requirements are complicated, cumbersome and time consuming. They are not easily understood except by lawyers and numerous forms have to be filled out to comply with the law. The result is that one has to either be familiar with the procedure before instituting proceedings or engage a lawyer, at extra cost, to advise and represent the petitioner in court.

Access and indeed justice are therefore not matters of right but commodities available only if one has the resources to obtain them. It was noted by Ghai (1978:116) that

"The professionalization of the legal system ... [has meant that] justice becomes a commodity obtainable only if one has resources to deploy skills and influence. The legal profession identifies itself with the wealthier sections of the population. Its services are available for a fee; it is based in the urban centres. ... It thus becomes an instrument whereby the essentially egalitarian communities are set on the road towards growing disparities of social and economic power. The goal of the satisfaction of basic needs is pushed further beyond reach".

Free legal aid is sometimes provided by the Public Solicitor's Office. In general terms aid is based on a 'needs' principle which means that before legal aid can be offered a person seeking it must qualify as a person who is in need in accordance with the Constitution (Section 177(4)). This section directs the Public Solicitor to take into account several things such as (1) the means of the person to obtain alternative legal assistance; (2) the availability of that assistance and; (3) the hardship the person might face if he or she were compelled to obtain assistance other than by the Public Solicitor.

However, problems of understaffing and finance that the office has been having over the years have made it extremely difficult for this service to be extended to every person who otherwise qualifies for it. As a result many are turned away while the limited resources the office has get channelled into criminal cases. One area that has suffered as a result is family related disputes such as divorce. The Public Solicitor reported in 1976 that

"There are a number of legal areas which we cannot deal with on our present staffing arrangements but which give rise to a lot of personal anguish and suffering. One of these areas stems from the breakdown of marriage.

Although matters of custody and maintenance receive high priority within the office (primarily because the actual physical welfare of either a mother, or a mother and child is involved), questions of divorce receive a very low priority rating indeed". (Public Solicitor, First Annual Report, 1975-76, p.6).

However, in 1979 as a result of the continuing staffing and financial problems and an increasing demand in criminal matters the Public Solicitor "had no alternative but to abolish legal aid in civil practice" (Public Solicitor of Papua New Guinea, Fourth Annual Report, 1978/79, p.1.) and the whole area of family law was no exception (Public Solicitor of Papua New Guinea, Fifth Annual Report, 1979/80, p.7). This, however, did not affect existing files.

Aid in the form of advice continued to be given on request but, as I was informed by a member of the office, as a general rule they would not process matrimonial disputes unless special or exceptional circumstances existed. This seems to be the general policy even today.

Matters such as the maintenance of deserted wives and children and illegitimate children and custody received a lot more attention over the years than any other area of family related issues. Much of this involved representing women in the magistrates' courts. Again, issues related to staff shortages and money have had an effect on how much time the office could give to these matters. Very recently it was reported that "If you are appearing in a District Court don't expect any help from the Public Solicitor's Office. They do not have any money" (The Times, 6th October, 1982, p.1.). As a result, the majority of those who need this assistance will now have to pursue their claims without it and this sad state of affairs is not likely to change for a long time to come.

Statistics provided by the Public Solicitor (5) show that as a result of the problems the office has been having there has been a marked decline in the number of family related cases the Public Solicitor has been handling. This can be seen from the table

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5. These can be found in the Public Solicitor of Papua New Guinea, Annual Reports for the periods covered. Annual Report, 1975-76, p.4).

below which takes into account the performance of every Public Solicitor's Office (numbering four) located in certain major urban centres of the country.

TABLE 3

Y E A R:	O F F I C E S							
	Pt. Moresby		Rabaul		Mt. Hagen		Lae	
	Number	%	Number	%	Number	%	Number	%
1975/								
1976	120	8.0	32	8.7	31	5.6	52	15.4
1976/	-	-						
1977	5	.4	31	5.6	50	8.8	75	12.9
1977/	-	-						
1978	7	.04	60	10.5	12	2.0	38	10.5
1978/								
1979	54	5.6	64	9.6	34	4.8	19	4.5
1979/								
1980	31	4.5	17	4.5	-		3	1.5
1980/								
1981	19	2.5	17	4.	3	.5	5	1.6
	8	5.4	22	3.6	5	.6	5	1.0
TOTAL	244		243		135		201	

The table shows the number and the percentage it represented out of the total number of cases the respective offices handled. The figures only cover the number of cases for which files were opened and do not account for those people who sought and obtained legal advice when requested.

Finally, it is important to bear in mind that the services provided by the legal profession in Papua New Guinea are not evenly distributed throughout the country. These are limited to the major urban centres of the country - Port Moresby, Lae, Rabaul and Mt. Hagen. Outside these centres therefore, free legal aid is extremely difficult although very limited use has been made of this service through government departments and agencies like Labour Department Offices and Welfare Offices (Public Solicitor, Annual Report, 1975-76, p.4). In rural areas private lawyers rarely appear before the National Court or the Magistrates' Courts. In the case of the National Court because of the additional expenses like airfares and accommodation that may be incurred private lawyers rarely represent clients when it is on circuit. This very uneven distribution means that the vast majority of the population has virtually no access to legal service.

VII CUSTOMARY MARRIAGES AND THE ENFORCEMENT OF SUPPORT OBLIGATION AFTER DIVORCE

Generally speaking, it is true that for a great many victims of marriage breakdown the 'social security' function performed by the self-sustaining extended family and the comparable "wantok" (6) system in the urban centres continue to provide for the support requirements (Latukefu 1979:41; Seifert 1975: 102-5). Having said this it would be false to assume that this happens in every case and for all affected parties. And it is perhaps this assumption that accounts for the absence of any law dealing specifically with the maintenance of customarily married women after divorce.

Changes associated with capitalist production are increasingly making inroads into the whole fabric of the kinship system in almost every society of Papua New Guinea (Morauta 1979:8; Seifert 1975: 102-5). And with new material needs of the modern economy it is now questionable whether traditional support from kin is adequate or appropriate. If this support is not forthcoming and assuming that there has been a valid customary dissolution of marriage the question then arises whether courts have power to order maintenance in appropriate cases. In other words, do courts have power to order maintenance after a customary marriage has been dissolved.

Although there is no express power given to courts in this respect, it is arguable that in some cases a customary obligation to provide maintenance after divorce has developed and should be enforced. The further possibility of the courts (especially the National Court) developing a new rule of the underlying law under Sch.2.3 of the Constitution will also be considered below.

1. Customs Recognition Act, Chapter 19.

Section 3(1) of that Act provides that "custom shall be recognized and enforced by, and may be pleaded in all courts unless, in the opinion of the court its recognition or enforcement would result ... in injustice or would not be in the public interest." This must be read together with Section 5(f) which provides:

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6. 'Wantok' is generally a person of the same culture or language group although it may be false to define the term in so simple terms because in practice it has a much more flexible interpretation. See further, Ballard, S.A. 1976 "Wantoks and Administration," University of Papua New Guinea.

"Subject to this Act and to any other law, custom may be taken into account in a case other than a criminal cases only in relation to -

(f) marriage, divorce or the right to custody or guardianship of infants, in a case arising out of or in connection with a marriage entered into in accordance with custom,

or where the court thinks that by not taking custom into account injustice will or may be done to a person"

It appears that having regard to the words "in relation to divorce" any matter at all which is incidental to divorce is a matter over which the courts have jurisdiction. This means that subject to the monetary limits imposed by the law all courts have jurisdiction over matters arising out of customary support obligations.

But as we have already noted traditionally there is no duty on the husband to support his wife after the marriage has been dissolved. And this happens to be the general position even today. This being the case it might be argued that courts cannot order maintenance under the Act, even if they wanted to because customary law does not recognize such a right. Courts are simply empowered to enforce existing customary laws as they find them. They themselves cannot create new rules that create rights and obligations and call them customary law. This is particularly tempting today when such customs are out of touch with the social realities. In Africa it has been noted, for example, that:

"The native community may assent to some modification of an original custom, but the modification must be made with the assent of the native community. It cannot be made by an individual or a number of individuals. Least of all can it be made by a court of law".

(Kajubi v. Kabali (1944) E.A.C.A. 34, at p.37).

Nevertheless, if there is evidence that customary rules regarding maintenance have changed as a result of contact with the money economy (Mitchell 1982: 13) there appears to be no reason why the courts cannot make orders for maintenance under the Act.

2. Powers of Individual Courts.

(a) National Court. This court has been established by the Constitution (Section 163) and is a superior court with unlimited jurisdiction (Section 166). In discharging its judicial function it is directed to "give paramount consideration to the dispensation of justice" (Section 158(2)). Therefore, in theory a woman can successfully make a claim for maintenance in that court in appropriate cases.

It is however doubtful whether the power the court has under Section 158(2) of the Constitution gives it the power to award maintenance to every woman who needs it. Although the court has unlimited jurisdiction it cannot make such an order if the claim is not based on some right which the law, whether a rule of the applied common Law, statute or of custom, recognizes. It cannot of itself develop or create such rights for to do so would be like legislating on the matter which only Parliament can do. Certainly there is a need for such a right and the National Court may well develop a rule of the underlying law under the Constitution (Schedule 2:3) to give effect to some of the changes that are taking place.

(b) **Magistrate's Courts.** By Section 13(1) of the Local Courts Act 1963, a Local Court has jurisdiction (subject to monetary limits etc.) over:

(b) all civil actions at law or in equity;

(c) all matters arising out of and regulated by native custom ...

In contrast, the District Courts Act 1963 does not refer specifically to custom, but by Section 29(1), the District Court has jurisdiction (again subject to monetary limits and some exceptions) in "all personal actions at law or in equity".

In **Henry Aisi v. Malaita Hoala** (N316(M) Appeal 329 of 1980, (Un-reported) the respondent's wife had left him and was living with the appellant. The respondent brought an action against the appellant under Section 29(1) of the District Courts Act, 1963 to recover the bride-price he had paid to her family some years previously. The District Court entered judgment for the complainant.

The defendant appealed on several grounds one of which was that the District Court had no jurisdiction to hear bride-price claims under Section 29(1) of that Act. It was argued that the power conferred by that provision was limited to personal actions at law only and not by custom. The National Court refused the suggestion that the phrase "at law" excluded customary law. It said:

"I consider that the phrase "at law" means allowed by the law of the land and encompasses common law, statutory law and also customary law. The Constitution has given a more important role to customary law than it hitherto enjoyed ... I think it is consistent with the important place given to custom by the Constitution that I should interpret the phrase at law" in S.29 to include personal actions for the recovery of a debt, or chattel or for damages arising out of customary tort or contract ... I consider that the magistrate had jurisdiction to hear the claim" (p.4)

It is therefore suggested that if it can be shown that in some parts of the country a customary obligation to provide maintenance after divorce has developed, such claims may be brought in either the Local Court or the District Court, subject of course to the location of the parties, and the amount involved.

A further question to be considered is what course the courts might take where it cannot be established that a customary rule recognizing an obligation to support a wife after divorce has developed.

(d) Formulating a new rule of underlying law

Section Schedule 2.3(1)(a) and (c) of the Constitution provide:

(1) If in any particular matter before a court there appears to be no rule of law [eg. custom J.L.] that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System ... to formulate an appropriate rule as part of the underlying law having regard -

(a) in particular, to the National Goals and Directive Principles and the Basic Social Obligations; and

(c) to analogies to be drawn from relevant statutes and custom;

and to the circumstances of the country from time to time".

Goals 2(8) and (12) provide that a complete relationship in marriage rests on an equality of rights and duties of the partners and that no citizen be deprived of his or her opportunities for personal fulfilment because of the predominant position of the other.

In developing a rule of the underlying law based on the customs of the people of Papua New Guinea it is important to note that there are two categories of custom - "local" and "nation-wide" customs. A customary rule that identifies itself with a particular community, hence "local", cannot, I think, be used to provide the basis for the formulation of an underlying law rule which will be applicable throughout the country. Before a customary rule can be used for such a purpose it must, it is suggested, generally be recognized throughout the country as well. It would be improper, I think, for the courts to impose the customs of one or two groups on the others particularly in a country like Papua New Guinea. This seems to be in line with Schedule 2.4 of the Constitution which directs the National Judicial System "to ensure that, with due regard to the need for consistency, the

underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time ...".

In Constitutional Reference No.1 of 1977 ([1978] PNGLR 298) the Supreme Court expressed the view that the phrase "rule of law" under Section Schedule 2.3(1) included the adopted common law principles and rules, statutes and nation-wide customs of the country.

In that case an action for damages had been brought against the defendant in the District Court by the complainant on the ground that the former had enticed the complainant's wife away from him. During the proceedings it was not established whether there was or was not in existence a relevant customary law regarding enticement. In fact the whole question had not been adverted to at all. The common law rules on the subject had been abolished before 1975 so they did not form part of the adopted common law principles and rules. The District Court magistrate found no rule to apply so the case was referred to the Supreme Court to formulate a rule of law of the underlying law concerning damages for enticing and harbouring another person's wife. In these circumstances the Supreme Court, inter alia, held:

The individual members of the court have individual experiences which lead them to believe that such custom as exists in Papua New Guinea traditional society as to the right to claim compensation for enticement of a wife, is not common to the whole country. I would incline to the view that there is "no rule of law" on the subject, within the meaning of Sch.2.3" (at p.298).

It was also implied that where it is clear that a nation-wide custom exists or is likely to develop concerning a particular matter this may be sufficient to allow the courts to develop a rule of the underlying law on that matter unless it would be improper to do so by a judicial act (Schedule 2.4). This, for example, would be the case if it is likely that Parliament will legislate on the matter in question.

There is certainly a growing need for the development of a rule of the underlying law regarding the maintenance after divorce of women married by custom. There is already evidence that customary rules regarding post-divorce maintenance are changing in many societies of Papua New Guinea. At the moment there is no state-run system of social security to cater for those who need support. There is also no legislation which imposes a duty on those who are reasonably expected to support victims, in our case women, on the breakdown of marriage.

The Law Reform Commission has made proposals to this effect (Working Paper No.9, Family Law (1978)) but to date Parliament has yet to consider them. The existence of these proposals has very grave implications for the development of an underlying rule by the Courts regarding post-divorce maintenance. The Chief Justice in the case we have already mentioned said that if the matter "is likely to be the subject of legislation by the Parliament in the relatively near future ... it would be quite improper for this Court to hazard an opinion as to what custom might be, or to declare what the law should be on this subject" (at p.299). For the moment at least it seems unlikely therefore that the courts will develop a rule of the underlying law on the subject of post-divorce maintenance of women married by custom.

To conclude, the position regarding the maintenance of customarily married women after divorce seems to be this; first where there is a local custom recognizing a right to maintenance after divorce an application for that purpose can be made and an order made in appropriate cases in accordance with the Customs Recognition Act Chapter 19 under the respective civil jurisdiction, discussed earlier, of the courts. Secondly, where there is no relevant customary rule that gives the woman a right to maintenance it seems that the courts cannot create such a right. Customary law generally provides no such right but this is not expected to remain unchanged. Far from it. As the rural economies become more and more integrated into the money economy and the urban communities become even more money-dependent, customs will change giving way to the creation of new rights and obligations as between spouses not previously known under custom.

These changes will no doubt be reflected in the decisions of the courts. As a result of these changes opportunities will arise which will enable them to formulate rules of the underlying law regarding maintenance. There is an increasing need for these rules and this is unlikely to change especially when we bear in mind the absence of any formal social security system. Nevertheless, it seems that although there is power in the courts to develop such rules they may feel reluctant to do so because it is likely that Parliament will be legislating on the matter in the near future. It is now up to Parliament to formulate and enact these rules to suit the changing circumstances of Papua New Guinea.

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