EARLY CUSTOMARY MARRIAGES: A VIOLATION OF A GIRL CHILD RIGHTS

BY

KAYULA JAMES
(25021109)

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I, **Anne Chewe Chanda,** do hereby recommend that this Directed Research prepared under my supervision by the said **Kayula, James**, entitled:

EARLY CUSTOMARY MARRIAGES: A VIOLATION OF A GIRL CHILD RIGHTS

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing Directed Research.

THE UNIVERSITY OF ZAMBIA
GREAT EAST ROAD MAIN CAMPUS
SCHOOL OF LAW
LUSAKA

Mrs. Anne Chewe Chanda, (LLB; LLM; AHCZ)

Supervisor .....AChewe.....

Date.....19/02/09.....

EARLY CUSTOMARY MARRIAGES: A VIOLATION OF A GIRL CHILD RIGHTS.

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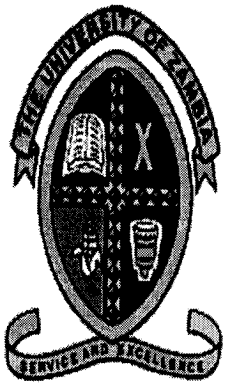
BY

KAYULA, JAMES
25021109



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SCHOOL OF LAW
LUSAKA

Approved by the Coordinator- Miss M. Lwatula (LLB; LLM), Supervised by Mrs Anne Chewe Chanda (LLB; LLM; AHCZ).

I, Kayula James, do hereby declare that I am the author of this Directed research, and that it is a creation of my own ingenuity. I therefore, remain accountable for the contents, errors and omissions herein. Further I declare to the best of my Knowledge, that this work has not previously been presented in any University for academic purposes.

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February, 2009
Kayulajames@yahoo.com

DEDICATION

Dedicated to all those that dream beyond their abilities, guided by strong will coupled with resilience, heroes they emerge. To such, I say no matter how much the wind blows and the untamed storms strike the deadliest, shall we believe convincingly that home is near, a place of utmost satisfaction.

ACKNOWLEDGEMENTS

My profound acknowledgments go to my very able supervisor, Mrs Annie Chewe Chanda, whose patience and unwithering hand of guidance has seen the facilitation of this undertaking into fruition. I must be quick to point out that the undertaking was in no a way a smooth sailing one but one that meandered, elongated and at some point almost too bleak to see the brighter new day beyond. Thank God Almighty, we have crossed over because of his unchanging and ever present love and grace.

ABSTRACT

The undertaking is meant to dramatise the violations of a girl child rights that occur as a result of early customary marriages. This study has been informed out of the realization that men and women must treat each other as equal partners in the process of development. This awakening and recognition that every right is ranked *pari pasu* in importance and contingent on the realization of others, creates a necessary and positive climate for the stimulation of action. It is hoped that the awareness raised in this study about the damaging effects of early marriages will not merely be academic but one that sets in motion a long match to the full realization of individual equality and autonomy by putting in place remedial measures that will quell this practice in our society.

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CHAPTER ONE

The idea that children have rights of their own that transcends the family setting is an idea that is apparently simple but is in reality complex and fraught with all manner of practical malaise in its exhaustive apprehension[1].

This obligatory essay has been intended to look at the plight of children in the area of marriage. Early marriages are practices perpetuated under the pretext and guise of customary law as most aspects under this law are opaque and miscellaneous. Probably what should be sought to be understood is what is meant by early marriages. The marriage Act chapter 50 of the laws of Zambia provides for 21 years of age as the contractual age for marriage or any age with parental consent but not less than 16.

Therefore, early marriages in this respect refer to marriages below the age of 16 which fall outside the purview of the marriage Act. An evidently growing recognition that children's special needs and life circumstances require special and extra response from society in law and in practice has provided a critical impetus for this study as a realisation that true advocacy and due consideration for children's rights is a necessary cornerstone in the design of a new and responsive social order. In the words of Javier Perez De Cuellar, the then United Nations Secretary General during the adoption of the United Nations Charter on the Rights of a Child in 1989, seem to lie an implicit instructive policy and legal frame work to be embarked upon by all state parties in their long match and insatiable quest to the full realisation of a pro-

[1]Malfrid, G, **A Voice for Children.** Jessica kingsley publishers, London 1991. P1

child welfare society. He stated that 'the way society treats its children reflects not only its qualities of compassion and protective caring, but also its sense of justice, its commitment to the future and urge to enhance the human condition for coming generations[2].'

STATEMENT OF THE PROBLEM

Modern society is inundated with unconscionable acts of early marriages that appear insurmountable as they are flagrantly on the upswing. It must however from the outset be understood that early marriages are legal. A suggestion in the converse cannot only fail to be countenanced by reason but also superficial, in defiance of logic and a pedestrian attempt to circumvent and whittle the trite position of the law. What must be understood is the fact that customary law has not evolved with time. In the past it was not problematic that girls who reached puberty age were married off because then girls attained maturity age in their twenties. However, modern development has shown a fundamental departure in the attainment of maturity age in that as young as eight year old girls are able to reach puberty age which development may have been precipitated by environmental changes. Alas, customary law has not responded to these exigencies obtaining on the ground in that the practice of using puberty age as the yardstick for ascertaining one's readiness for marriage has continued. It is this rigidity in customary law that has occasioned undue hardships on the young girls of today especially in rural areas. An illuminating question in this discourse would be to understand the problems that are associated with early marriages although such aspects will substantially be dealt with in the chapter

[2] Malfrid, G, **A Voice for Children.** Jessica Kingsley publishers, London, 1991. p1

designated for data analysis. Some of the sad effects of early marriages among others are that girls under the age of 15 are five times more likely to die during pregnancy and labour than women in their twenties. Further, children born from under 15 year old mothers are likely to suffer low birth weight, malnutrition and generally have late physical and cognitive development. Apart from these medical complications, early marriages are inimical to girl child education in the sense that girls who are supposed to be in school are married off at tender ages and are therefore coerced to abandon school which practice has perpetuated high illiteracy levels. In this modern day and age, education is the only surest way of ensuring that an individual is readily equipped to grapple the complexities of political, economic or social life. It is trite that education unlocks the riches of freedom, the security of the person and guarantees full independence. It is for the foregoing reasons among others that this study has been undertaken in a quest to devise remedies aimed at ameliorating this ruthless existing social order.

METHODOLOGY

This study has been informed by desk top research where much of the information has been obtained and has therefore to a larger extent determined the shape of this undertaking. The other component of the information has been obtained through interviews conducted in certain organisations with key personnel.

THE BRIEF OVERVIEW OF CUSTOMARY LAW IN GENERAL

African customary law refers to customs and practices generally accepted by the people to whom it applies. It is the basis of behaviour and guides everyday life. Customary law as experience has unveiled remains unwritten and varies from one ethnic grouping to another. Inevitably, it is very informal and has tended to flow from the tribal chiefs and leaders as an adjunct to their personal stature and political power. As a result of its specificity, it radically differs from place to place and tribe to tribe. More than anything else, it was and still remains a great oral tradition profoundly respected by most of the people and passed on from generation to generation.

There is no doubt that customary law is a viable and significant source of law in Zambia. It flourished before, during and after colonialism. It must be realised that prior to the advent of colonialism on the continent of Africa and in Zambia in particular, there was only African customary law. With the presence of the colonialists, there emerged the unbridled need to operate a dual legal system independent of each other to accommodate the peculiarities of racial groupings. This was all in a bid to respect and bestow validity on the traditional customs of the natives and that in a case of a dispute an individual should be subjected to the legal system he understood[3]. What this implies is that at the inception of colonial rule in Zambia, as in other British territories in Africa, customary law was preserved and continued to apply to the natives.

[3] Church, w. **Introduction to the law of Zambia**.1974.p178

This pedigree explains the existence of the dual legal system that Zambia operates. It needs to be emphasised that infact customary law has more direct impact on more Zambians than any other kind of law. With respect to the character of customary law, Church has argued that the rudimentary nature of customs has noticeably deterred efforts to codify it with statutory law. It has further been argued that the culture, traditions and subsistence way of life which customary law is designed to regulate inevitably change to respond to the outlook of society, therefore an attempt to codify it would be a blatant move to stultify this body of law and ultimately may end up being sterile, impotent and remote to society and the activities it seeks to regulate[4]. Undoubtedly, customary law seems to have been immensely subsumed or made subservient to statutory law. This seems to be the subtle message of Church implicit in his mental exposition when he asserted that customary law cannot adequately regulate or serve an economically, socially and politically modern nation state, it is far too ambiguous to play an economic role.

There seems to be general tenets upon which the existence of customary law is predicated and necessary for the establishment or ascertainment of customary law. These are actually four in number namely; that the custom must be reasonable, secondly that it must have been long established, thirdly, that it must have been uniformly observed and lastly that a custom must be certain. The ascertainment or rather the establishment of these factors is critical to the existence of a custom in question. Simply put, the existence of these factors confers the validity of a particular custom and the absence of which vitiates its validity. As a way of illuminating on the

[4] Church,W. **Introduction to the Law in Zambia**,1974. The University of Zambia Press. P174

above itemised elements, it is particularly imperative to understand what each of these factors entails.

With respect to reasonableness, it may be difficult to understand it in the abstract sense without making reference to a particular situation. Suffice to say, however that the court has in most instances held a particular custom to be reasonable where the custom was designed to prevent disputes among persons engaged in fishing but as unreasonable if it is contra bonos mores, injurious or oppressive[5].

Inextricably bound to the above element is the time of observance. The period of time that must elapse before a custom can be regarded as established must be fairly long and the period of prescription has not been suggested but all that is necessary or required is that the custom must have existed for a sufficient length of time to have generally become known. The next requirement is that there must be uniformity in the observance of the custom in question. By uniform observance is meant that the custom must have invariably been complied with by the public or by the class of persons to whom it applies and that they realised clearly that the obedience to the custom was obligatory and not merely optional permitting them to obey or not as they wished.[6]

The last requirement is that of certainty, the import of certainty is that the actual provisions of the custom must be proved with certainty. To surmount this hurdle, one

[5] Munalula, M. **Legal process: Zambian Cases, Legislation and Commentaries.** p 46.
[6] Munalula, M. **Legal process: Zambian Cases, Legislation and Commentaries.** P47

needs a substantial number of witnesses. This does not however suggest any standard number required. By making reference to custom and usage, it is well established that a reasonable number is necessary.

Most importantly, the application of customary law is made subject to the Local Court Act, Chapter 26 of the laws of Zambia, section 12 which provides that subject to the provisions of this Act, a Local Court shall administer the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law[7].

The Zambian constitution sanctions the application of customary as lucidly provided in article 23. For avoidance of doubt article 23 provides that subject to clauses 4, 5 and 7, a law shall not make any provision that is discriminatory either of itself or in its effect. Clause 4 for our purposes provides that clause 1 shall not apply to any law so far as that law makes provision [d] for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

The import of this provision is to grant validity to the application of customary law whether the application of such a law under the custom discriminates in either of itself or in its effect. However the application of customary law is not unfettered as evidenced under the Local Court Act. Section 12 is a manifest safeguard against the application of abhorrent laws. Nevertheless, the interpretation of this section has

[7] The Local Court Act, Chapter 26 of the Laws of Zambia

never been free from ambiguities because the terms used in section 12 have not been defined anywhere. We therefore seem to be in the realm of conjecture and speculation as to the meaning of morality and natural justice. The critical question, of course is precisely what these vague terms mean. This is a question that has defied a precise response. In the case of **R V Mutengule**,[8] it was categorically stated that it was not easy an attempt to attach a meaning to the visibly skeleton words in the Act and could only be best done by taking examples. For instance, in a case where native custom prevented a woman to obtain a divorce without her husband's consent was held to be contrary to natural justice.

According to Seidman,[9] although the repugnancy clause consists of several elements or components that is equity, justice, morality or good conscience, the boundaries of these components are not easy to delineate and they have been said to consist a lot of things in common with each other in content. In this respect Okoro,[10] states that the repugnancy clause as a whole has been said to require the rejection of rules of custom the consequences of which reasonable members of society would regard as unfair , inhuman and harsh. Further in the case of **Chiduka V Chidano**,[11] it was stated that whatever these words repugnancy to natural justice and morality may mean, I consider that they should only apply to customs as inherently impress us with some abhorrence or are obviously immoral in their incidence. In the light of the foregoing , it would be safe to comment that although the words in question have not been

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8.1951. LRNR. P 148.

9 Seidman, B.**The communication of development and the process of development**. 1972. P692.

10 Okoro, N. **The customary law of succession in Northern Nigeria**. 1966. P692.

11 1986. High Court of Nigeria. P55.

subject of precision in their interpretation, it may be absurd and devoid of legality to attempt to think that these words are empty. In any case the writer's view is that repugnancy to morality means anything that offends the sense of rightness or decency or is contrary to fundamental human rights.

Finally, the above discourse has unfolded that the advent of colonialism on the continent did not at least in the legal sense trigger the process of erosion of the indigenous law and its inextricable practices. What is seen is the conservation and validity conferred upon this body of law albeit its application was circumscribed and superintended by the provisions of the Local Court Act section 12 as the validity test. Thus customary law remains a vigorous and efficient instrument and an anchor upon which social change and development rests. It is also an engine of social order in that disputes concerning marriages and land holding are resolved within the mechanisms of customary law. However in view of constant changes that society is undergoing, it is desirable that in order to keep its integrity and dignity, this law should be tolerably flexible and responsive to the exigencies of any given time.

This first chapter has primarily looked at the general overview of customary law in general. Within this chapter, has been the statement of the problem and the methodology that has informed the study. The second chapter has narrowed down to investigate if at all there are sufficient procedural safeguards precedent to the contracting of marriages under customary law in comparison to statutory law. Chapter three has been devoted to investigating practices in other jurisdictions especially

within the continent of Africa and how they have harmonised their domestic laws to conform to the United Nations Convention on the Rights of a Child with respect to the subject of marriage. Chapter four has analysed the data and finally chapter five has unleashed the recommendations and findings.

CHAPTER TWO

This chapter is an investigative undertaking to try and probe whether marriages solemnized under customary law are also subject to rigorous procedures for them to be valid. It has also been the spirit of this chapter to further seek whether procedures for the validity of customary marriages are indeed protective of the girl child in this case. Therefore this chapter has not been complacent and content by the fact there are one or two formalities to be met but whether such formalities are designed to shield the girl child from any present or prospective detriment to be occasioned.

Before delving into specifics of this chapter, it has been seen expedient from the onset to fully understand the institution under scrutiny namely marriages. Recognizing the fact that the institution of marriage is one that straddles both customary and statutory law, it becomes pragmatic to define marriage in accordance with the dictates of each legal system.

It is clear that the marriage Act brings out no definition of marriage. However, a believably exhaustive definition of marriage is traced to the case of **Hyde v Hyde**[12], where Lord Penzance defined marriage as a voluntary union of one man and one wife for life to the exclusion of all others.

Going by this definition, it is clear that one of the core tenets crucial to the creation of a statutory marriage is that it must be voluntary. It is therefore clear that coercion or

[12] 1886. LR 1. P.56

undue influence or indeed duress will vitiate its existence. Voluntary also imports the aspect of recognizing the contractual capacity of both parties because if the parties to it are not possessed with sufficient knowledge to appreciate the solemnity of the institution, then they cannot be taken to have the contractual capacity to enter into marriage. The definition is also couched in lucid terms to the effect that a civil marriage is monogamous in nature hence no more intruders would be admitted within the meaning of this definition. Our interest, however is particularly directed to established procedural safeguards upon which this contract of marriage is premised. The marriage Act[13] is succinct as it categorically and visibly creates conditions as shall be seen later as validity tests of any marriage contracted under the Act. For our purposes considerable attention is drawn to the specifics of section 33 [1] of the Marriage Act, which states that a marriage between persons either of whom is under the age of sixteen years shall be void.

A similar provision is reiterated in section 27 [a] [ii] of the Matrimonial Causes Act of 2007[14], which states that a marriage shall be void if either party is under the age of sixteen. In other words one of the critical conditions for the contracting of a statutory marriage is that the parties have attained the contractual age or rather the marital age of twenty-one unless, if sixteen and above that, they have obtained written consent from the parent or legal guardian or where a judge of the High Court has, on application being made and on being satisfied that in the particular circumstance of

[13] Marriage Act,Chapter 50 of the laws of Zambia.
[14] Matrimonial Causes Act, Number 20 of 2007.
15 Mushota,L. **Family Law in Zambia; Cases and Materials**. The University of Zambia Press, Lusaka. P 80

the case it is not contrary to public interest, given his consent to the marriage. Any marriage contracted in disregard of this condition is void ab initio.

In contradistinction to the above, under customary law marriage, there is no specific age for marriage. A girl is considered ready for marriage as soon as she reaches puberty. Parental consent is important particularly because a girl is of tender age and without experience that would enable her to understand the nature of marriage.

Marriage payment is also an essential aspect of a valid marriage. Acceptance of the payment by the girl or woman's parent signifies their consent. The marriage payments are actually money and differ from one ethnic grouping to another.

According to Mushota[15], there are essentially three factors that affect the validity of marriage under customary law and these are;

[a] marital status; a girl must be single, widowed or divorced, while the marital status of the man does not matter since the marriage is potentially polygamous.

[b] consent of the parents. It must be noted that the consent of the parents of the girl is valued more than that of the girl. Consent here is signified by accepting the marriage payment made by the prospective groom's family. From the moment of consent and payment or part thereof a relationship is created between the two families of the bride and the groom.

With respect to marriage payment, a marriage is not considered valid in spite of [a] and [b] above, if marriage payment is not made at the various processes of marriages.

From the foregoing, it is apparent that the age of the girl is not a factor upon which the validation of a marriage can be predicated as long as she has reached puberty. In addition to that, it is also observed that consent of the girl is subservient to that of the parent.

The principle that age is not a factor as long as one has reached puberty age was canvassed in the case of **R v Chinjamba**[16], in this case Chinjamba married a girl below the age of 16 and lived with her as man and wife. It was held that it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married, despite the fact that the girl is under the age of sixteen. It was further stressed that the carnal knowledge must be unlawful and it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married.

Further, in the case of **Sibande v The People**[17], it was stated that in Zambia generally it is not unlawful for a man to have carnal knowledge of a girl under the age of sixteen if he is lawfully married to her under customary law. Lawfully in this case implies the satisfaction of requirements that validates a customary marriage being; consent of the parent, status of the girl being single or divorced and most importantly the payment of the bride price. The inveterate tendency of considering the above elements as exhaustive canons for establishing the validity of a customary marriage is vivid and evidently obtaining in this day and age. As way of depiction, the Zambia Daily Mail issue dated Monday, May 7, 2007 carried a headline ''ordeal of an early

[16] 5 NRLR, p50
[17] 1975. ZR 101

marriage survivor.'' The story quoted one Mary Banda of Mambwe district as saying,'' my parents forced me into marriage under the age of sixteen and that time I had just gotten my results indicating that I had been accepted into grade eight because I had passed with flying colours.'' At the time Mary was being forced into an early marriage, chief Jumbe summoned the parents and advised them not to marry her off but they defied the chiefs order and went ahead to marry her off. Mary was forced into marriage with a 26 year old man because her parents did not have the money to pay for her school requirements in grade eight.

This story is so much of relevance to this study in that it demonstrates how parents under customary marriages contumeliously disregard the best interest of the child with sheer arbitrariness in pursuit of their own self desires and as already indicated these interests are mostly economical.

One golden thread that is seen running through this discourse is that under customary law, the interest of the child is subsumed with impunity by those of the parent which practice is a gross violation of the girls' rights. It is clear that the object of the marriage Act by pegging the contractual age of marriage at 16 is to ensure that the children are protected because of their vulnerability due to lack of experience and maturity in life. They particularly need protection till they reach full potential. The protection is against unscrupulous actions, abuse or over bearance by adults upon whom they depend. The law further seeks to protect children from failings whose consequences may adversely affect their future. In our country for instance where it

seems that formal education is compulsory, the intention is to ensure that the child is equipped and acquires the basic tools for his or her future. In the case of **Gallick v West Norfolk and Wisbech Area Health Authority**[18], a question arose as to whether parents have independent rights over their children. The court decided that the principle of the law that parental rights are derived from parental duty is sacrosanct and exist as long as they are needed for the protection of the person and the property of the child. What therefore this implies is that the only instances in which it can be positively asserted that parents have rights over their children is when those rights are for the purposes of furthering the child's interest. It therefore follows that these rights can be extinguished if it is shown that the parent is not acting in the best interest of the child. The principle of the best interest of the child is reaffirmed and reiterated in the Convention on the Rights of Child which Convention has provided the most comprehensive legal and policy frame work for the protection of children and respect for their human rights. It enshrines four basic principles which confer substantive rights in themselves. They are further meant to guide national programs of implementation. The four principles in question are; non-discrimination ; best interest of the child ; the right to life, survival and development; respect for the views of the child[19].

The principle of the best interest of the child is key and primary in taking actions that affect the child. It must be appreciated as earlier intimated that the principle of the best interest of the child did not originate with the United Nations Convention on the

[18] 1986. AC 112

[19] Anyangwe, C. **Introduction to Human Rights and International Humanitarian** Law.The University of Zambia press. Lusaka .P 70

Rights of the Child but merely re-affirmed the commitment. It is clearly set out in principle 2 of the United Nations Declaration of Human Rights, which says that;
The child shall enjoy special protection and shall be given opportunities and facilities, by law and other means, to enable her or him to develop physically, mentally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child should be the paramount consideration.

Therefore following the above exposition, it would be tenuous for anybody to argue that he/she has rights over a child if such rights are being exerted to the detriment of the child. Of our keen concern again is the greatest challenge posed by article 23 of the Zambian Constitution[20], whose provisions have already been touched on. It is the writers view that this clause and particularly the exceptions are discriminatory by themselves and in their effect. This is because there is no guarantee that such customary law or practice as would apply to a minority grouping would not be exploited to discriminate against the individual members of that group. In particular the non application of the constitutional protection as regards the application of customary law in that group means that the rights of individuals such as girls in this case would be left at the mercy of culture and the traditional institutions. If as usually is the case, this culture and institutions lack the ideas of equality of all irrespective of gender, then the exception would be a recipe for discrimination, the very aspect the constitution attempts to address. Where as modern law and institutions are designed to equalize the social field for all and therefore disallow the application of different

[20] The Constitution, Chapter one of the laws of Zambia, article 23.

standards for women as regards their rights in various aspects of life, the preceding society would not usually have had the same foresight and therefore still allow the application of practices that would unwittingly promote and perpetuate the very practices that the constitution attempts to thwart.

In a nutshell, what is apparent under this chapter is the fact that the blatant absence of contractual age for marriage under customary law is the recipe for early marriages. The absence of stronger institutional framework to regulate customary law marriages with an embodiment of justice and equality reduces a girl child into an object of social injustice and ills. This is a sharp departure from the efficient and adequate protection bestowed to the parties to a marriage under the statute. It has been discovered however that coercing little girls into early marriages could have been probably done under a grave misapprehension of the parents' role over their children and the extent of their rights. It has been made plain that these rights that parents have upon their children are merely derivative as opposed to naturally endowed rights. This succinctly put, means that parents have rights that are drawn from the child rights and the purpose for which they exist is for protection and ensuring that the child's needs are taken care of. The key and primary factor to consider is that whatever rights parents seem to assert over a child must be for the best interest of the child. It is therefore clear that the parents rights over a child are circumscribed or rather delineated to the extent that the best interest of the child becomes the pigeon hole for the purposes of determining whether the parent has rights and anything done in the converse extinguishes the existence of those rights.

This chapter has also shown that constitutional provisions with regard to equality calls for thorough revisitation. In mind is article 23 which is riddled with a lot of exceptions amongst which is the sanctioning of discrimination under customary law. It is the writers view once again that this clause is not declaratory enough of the equality of all persons especially that it is the practice in modern systems of human rights protection that there must be unequivocal commitment to equality and sexual equality is made to specifically standout from other forms of discrimination, where necessary to emphasize its grievous nature.

CHAPTER THREE

This chapter is undertaken to investigate the practices in other jurisdictions with respect to the application of customary law. It is useful to look at how other countries have in their legislation incorporated the provisions of the human rights conventions hence limiting practices that offend or impugn the enjoyment of the guaranteed rights. This active reception of the human rights instruments especially those intended to address the plight of women inexorably touch on marriages hence early customary marriages are sought to be expunged in the social set up. It is intriguing to note that a number of countries are party to most of the international human rights instrument. However this not an end in itself, a further step must be taken to understand how far these countries have gone in ensuring that their national laws reflect and reaffirm their dedication and commitment that manifest during the ratification process. Therefore in discussing the practices that countries embrace in addressing gender imbalances in the area of customary marriages to be precise, adequate attention shall tilt towards assessing countries' efforts in this area of domesticating and realigning their national laws with the international human rights instruments.

To begin with, it must be made categorical that it is possible to bring customary law into agreement with constitutional and human rights provisions. Amongst the most pronounced and progressive conventions to which most of the women identify themselves is the Convention on the Elimination of all Forms of Discrimination

against Women[21]. This convention has been described by the United Nations as an international bill of rights for women as it has broadly defined what constitutes discrimination against women and sets an agenda for national action to end all such discrimination. Since its adoption it was envisaged to be a potent interpretative aid in trying to reconcile national laws with it and to frown on provisions that offended the spirit and the letter of this convention. The commitment by state parties to uphold its sacrosanct provisions is manifested by having ratified or acceded to the said convention and therefore they are expected to take a plethora of measures to effect practically the meaningful enjoyment of these rights and the ultimate realization of oneself in society. Amongst the measures that the state parties must ensure to embark upon in their quest to deliver the rights guaranteed in the convention include; the incorporation of the principle of equality of men and women in the legal system, the abolishment of all discriminatory laws and the adoption of the appropriate laws prohibiting discrimination against women.

The aim of this convention is succinctly laid in the preamble which is to reaffirm faith in the equal rights and dignity of men and women and the principle of non discrimination[22]. The convention has set out that such a seemingly huge task can only be achieved through changing the traditional roles of men and women particularly in the society and the family. In addition to the above Convention is the Universal

[21] Convention on the Elimination of all Forms of Discrimination against Women, adopted in 1979 .

[22] Anyangwe,C.[2004] **Introduction to Human Rights and Humanitarian Law.** The University of Zambia Press.Lusaka. p40

Declaration on Human Rights[23], section 16 to be precise whose import is that men and women of full age, without limitation due to race, nationality or religion have the right to marry and found a family. It also reiterates that they are both entitled to equal rights in becoming married, during and at its dissolution. For the purposes of this study, subsection two of the same section generates interest as it makes a bold pronouncement to the effect that marriage shall be entered into only with the free and full consent of both parties. It must be borne in mind that there are numerous conventions that have been promulgated with a view to redressing the gender imbalances that have ruthlessly reduced girls into mere objects of the social order.

However the study shall only be of service if it sought to demonstrate how the parties to these convention have adhered to provisions of the conventions that quintessentially touch on the rights of women, that is to say how such countries have revised their laws to ensure compliance with these human rights conventions. The purpose of looking at what is happening in the diaspora is to establish how far this country has gone in its strides to reach the intended ends of the conventions by drawing analogy between it and other jurisdictions. This approach is progressive because it affords us an opportunity to evaluate our efforts and see if we can take a leaf from what other counties have achieved.

For purposes of learning, the haven of guidance would be found in the south-African progressive and enabling constitutional and legislative framework[24]. The courts have

[23] Universal Declaration on Human Rights, section 16.
[24] The South-African Constitution, sections 39, 192 and 193

employed the critical tone and impetus created by the constitution by superintending and actively scrutinizing customary laws for compliance with the constitution. Like in the Zambian context, the South-African constitution is the supreme law of the land and has therefore set the benchmark for all levels and branches of government by requiring that the statutes and the executive measures create a legal environment conducive to ensuring the realization of women's rights. The courts in the South African case are given lucid direction to enquire into the compatibility and validity of any legislation including customary law with the constitution. The courts in this case are not left to speculate as to what should be the position of the Conventions vis- a - vis domestic law. The principle of equality has been clearly manifest in the South African constitution such that the courts when interpreting and developing customary law ensure conformity with the principles set out in the bill of rights and international law for the sole purposes of ensuring that no legislation or customary law circumvents the principle of equality.[25]

The principle of equality is deeply embedded in the South-African legal system by virtue of the clear couched sections of the constitution namely; section 192, 39 [2] and 193 whose wording is imperimateria to each other and provide to the effect that when interpreting legislation every court must prefer any reasonable interpretation of the legislation that is consistent with the international law over any alternative interpretation that is inconsistent with international law.

[25] Benouaich E. **Rights of the Child in the Republic Cameroon.** OMCT.P48

Such an unambiguous provision is golden and a cornerstone in the South African judicial process because it is both instructive and declaratory enough as to what approach the courts should take as they interpret the law with their ingenuity. It is such deliberate responsive measures towards the promotion of the women rights discourse that merit emulation by other countries especially the Zambian legal system.

Further, the South-African constitution prohibits punitively both state and private discrimination on the basis of inter alia race, gender, sex, marital status, pregnancy, sexual orientation, culture, language or social status or birth. This provision is mutatis mutandis like Article 23 of the Zambian constitution except that the Zambian one is subtle and riddled with exceptions that end up obliterating the very core it sought to arrest. On the contrary the South-African constitution according to section 36 only sanctions discrimination in instances where there is a justifiable reason ''in an open and democratic society based on human dignity, equality and freedom and lists a number of factors to be invoked in the process of ascertaining whether a particular right may be limited. It is clear that the above section has broadly sought to secure and enforce the principle of equality particularly between men and women. In the case of **Daniel v Campbell**[26] the court placed premium on the concept of equality when it held that the value of non sexism is foundational to our constitution. The court further stated that the purpose of the laws was to ensure that every person is accorded his or her rights instead of being precariously dependent on traditions and customs where the likelihood of discrimination and violation is eminent. The court

[26]2004. Constitutional Court. CCT40\03.

was on record to have stated that the purpose of the laws would be frustrated if customs were precluded from complying with the constitutional principle of equality on the pretext of operating a dual legal system.

What the court is reaffirming in this case is the sanctity of constitutional protection of rights whose enjoyment must not be subservient to customs and traditions as it may seem to be in other jurisdictions. Unlike in the Zambian constitution where the application of customary law is the ground for discrimination, the South-African constitution has no such broad and unguided provision but it instead makes it incisive that discrimination can only be embraced where there is a justifiable reason 'in an open and democratic society based on human dignity, equality and freedom. This caveat placed on discrimination is onerous to circumvent and has therefore secured and advanced aspects of affirmative action and the promotion of the welfare of the indigents and the downtrodden in society.

In the other case of Andrea **Szijjrto v Hungary**,[27] this case was based on sterilization and the court made a pronouncement which is of general application. The court stated that inability to give consent or making an informed decision on account of tender age or inadequate information or incomplete information provided on any given matter constitutes a violation of ones right. Therefore consent is cardinal on any matter in as far as an individual who is entering into a contract is concerned, it therefore follows that marriages that dispense with the consent of a girl is a violation of her right to willfully consent to marriage.

[27] 2004. Communication No 4

In the Nigerian case of **Chiduka v Chidano**[28], the Nigerian High Court found a haven of guidance in the repugnance clause which they have liberally interpreted to mean that anything that offends the sense of rightness or decency or is contrary to fundamental human rights. The manner in which the repugnancy clause has been adjudicatively determined gives an impression of the expansive nature in which the repugnance clause can be employed to protect the rights of the children who may be coerced into marriages in that such marriages offend the sense of decency and is contrary to fundamental human rights.

This bottle neck placed by the south African legal system if embraced by the Zambian legal system would stimulate action aimed at eradicating the practice in question. It is no longer in doubt that early marriages which are solemnized mainly to serve the interest of the guardians or parents have compromised and have a retroactive effect in the human rights promotion. The foundational tenets openly proclaimed in the South African constitution have bestowed vast latitude and leverage upon the courts and have risen to the challenge of upholding its role as the sole sentinel of individual liberties and freedoms by peremptorily frowning on customs that are offensive and inimical to the full enjoyment of freedom bordering on equality. The court in its pursuit to assert its position in the protection and promotion of human rights made a categorical pronouncement in the case of **Brink v Kitshoff**[29], where the constitutional court stated that the constitution and inclusive of the equality clause was meant to attack and remedy past systemic discrimination. The court

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[28] 1922 HC

[29] *1996. Constitutional Court.CCT 32\05*

acknowledged sexist practices and beliefs in the South African society and therefore the non discrimination clause in the constitution serves to improve the lives of groups that have historically suffered sexism.

The court also recognized the need to examine the context where discrimination may occur. This commands inquiry into the actual traditional and economic conditions of groups and individuals to ascertain whether the impugned action violates the rights to equality. To stretch the discussion, the South African constitution prohibits anyone who chooses to participate in a cultural group to deny to enjoy these same cultural practices to the others or to do so in the way that is inconsistent with the bill of rights[30]. This provision presents nothing peculiar and others may even say it is superfluous in nature since it still touches on discrimination. It is however the writer's view that such a pronouncement is warranted and merited since it seeks to emphasize the grievous nature of discrimination that needs obliteration by the sense of equality and justice.

An important question to ask is whether the South-African constitution has rendered customary law obsolete. On the contrary, in fact it allows the choice and practice of customary law, the important hall mark is that it does not allow customary law to override any of the basic fundamental rights to equality that all women living under customary law should enjoy as South-African citizens. As such an indelible hall mark

[30] Bedman. F. **The process of communication and the development of Human Rights Law.** 1995. P60.

of South-African constitution is that it has constricted the extent to which customary is able to adversely affect women's ability to fully exercise freedoms and rights[31].

The situation revealed above has not only demonstrated theoretical commitment of the South African government but has also practically shown the urge and the urgency to make the guarantees and the bulk of the entitlements women must be seen to enjoy practical. We must hasten to point out that mere ratification of the human rights convention devoid of the meaningful efforts to deliver practically the provisions of these conventions becomes sheer rhetoric and a mockery to the expectation of the recipients of such rights and entitlements. The protection of the human rights in Zambia like some other African countries presents a serious concern and it's a matter that needs dignified attention to ameliorate[32].

Zambia has experienced both policy drive and legislative malaise in the domestication of most of the conventions that are a paragon of human rights enhancement. For instance the Mwanakatwe constitution review commission recommended unambiguously that the right to equal treatment and freedom from discrimination for all including affirmative action for women and other disadvantaged groups, rights to found a family, and the protection of the family become constitutionally guaranteed. The reaction of the government was not only shocking

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[31] Kossin.A. **Human Rights Violations in Togo.** OMCT [2006] P47

[32] **Women Rights in African Customary Law.** A Publication by Non- Governmental organizations. P.6, 7 and 8

but demonstrative of government's non appreciation of the changing tides in human rights advocacy and its perennial stress on equality[33].

The government dismissed these recommendations and contended that the aspect of equality was already guaranteed by article 11 of the constitution which provides that it is recognized that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, meaning that whatever his race, place of origin, political opinions, colour, creed, sex or marital status but subject to the limitations contained in this part. But what must be appreciated is that this article like many others is not free from exceptions or limitation in application which therefore then becomes desirable to make the equality principle autonomous and not subject to exceptions.

The government further argued that other aspects of human rights were covered in the subordinate or ordinary legislations. This argument is strange and unpalatable that government would view the said article 11 as a sufficient equality clause and therefore dismiss any other measures meant to augment its efficacy. The article in question has always attracted attacks on the premise that the protections vested in these articles are not autonomous as already noted but subject to the limitation provided for in the bill of rights such as those required under article 23 which allows discrimination under customary law. By parity of reason, Article 21 of the new Ugandan Constitution[34] provides that '' all persons are equal before and under the law

[33] Bourke, J. [2002] **Violence against women in Zambia**. OMCT. P. 9
[34]Ugandan Constitution, article 21.

in all spheres of political, economic and cultural life and in every other respect and shall enjoy equal respect of the law.

The major difference between the Zambian Constitution and the Ugandan Constitution is that the latter makes no reference to cultural system or customary law as one of the conditions under which the fundamental right is made to depend. It was recognized in this model that the fundamentality of the principle of equality lies in its freedom from cultural standards and systems in traditional society. It is no doubt that Zambia has been reluctant to sweep away from society most of impediments against women in the customary system, religious practices and several others. Take for instance the response given by the government to the recommendations in the Mwanakatwe Constitution Review Commission was a disregard to the floor expansion of rights and lack of appreciation of the various changes and experiences across the world on gender and human rights in general.

Besides the argument by the government that constitutionalising the principle of equality is superfluous since such matters are covered in ordinary legislation is both preposterous and tenuous and demonstrative of government's impotence to draw a critical dichotomy between protections in ordinary legislations and those entrenched in the constitution. The customs and practices that are perpetuated against women can only be vanquished if there were meaningful desires to reaffirm the principle of equality between men and women in all aspects of life which achievement must be

legislative driven[35]. What is important to understand is that the inaction by government to put legislative framework in place to incorporate the provisions of the Universal Declaration of Human Rights and the Convention on the Elimination of all forms of Discrimination against Women has been fatal and derogative of the commitment it exhibited at the time of ratifying the said conventions. The South African model which has to a larger measure informed the scope of this chapter as well as the Ugandan model are not the only yard sticks Zambia must strive to attain but there are various others, for instance, Togolese Constitution, article 38 provides that treaties become effective only after ratification and publication. Reinforcing the above provision is article 140 which provides that treaties or agreements legitimately ratified or approved have, upon publication, higher authority than the domestic laws, subject to their application by the other signatory for each agreement or treaty. This provision in the national constitution is progressive because it captures directly the provisions of the human rights instruments without the need for domestication.

The argument that Zambia's legal system is dual as opposed to monism hence conventions or treaties can only be binding on the courts and part of the law in Zambia after domestication. Of course the process of domestication is well founded since it is meant to ensure that the executive arm of government is not implicitly seized with the power to legislate. This position is in consonance with article 62 of our constitution whose import is that the power to legislate is the preserve of the legislative arm of government. This therefore means that if the executive arm of

[35] Shwebel,E. The influence of the Universal Declaration of Human Rights on international and National law.1959. p217.

government ratifies a particular treaty and immediately becomes law without the participation of the legislature, it will effectively amount to usurpation of powers and inconsistent with the democratic tenet of the separation of powers. This rationale to the extent that it preserves the concept of the separation of power remains uncontested. However, the question we must address our minds to, is begin to scrutinize what it is that has been and being done to domesticate these conventions.

It is clear that the Zambian model has defaulted in delivering upon its commitment and urge to design a new era in the human rights dimension. In Togo as earlier noted because of the enabling clause in its constitution, the courts have been pro-active in their role as the fountain of justice by sieving every form of injustice[36]. The courts have directly and automatically invoked the provisions of international conventions to protect individuals when domestic law does not comply with international standards[37]. As an example, one would look at the decision handed down on the 8th November 2001 by the High Court of Tsevie located in the Northern part of Lome. The case related to land litigation in which the defendant was denying the woman plaintiff any right of ownership, arguing that in Ewe custom she cannot inherit land. The judge rejected this argument considering that the customary rule discriminated between men and women's right to property. According to the judge, this rule does not comply with the provisions of the Convention on the Elimination of all Forms of Discrimination against Women [CEDAW] and therefore must be rejected. This momentus evolution is undeniably a result of the genuine and active measures taken

[36] Alexander,K and others. [2005]**Human rights Violation in Togo**. OMCT. P.15 and 17.
[37] Frans, V.& Chidi,O. **The Prohibition of Torture and Ill-treatment in the African Human Rights System**. OMCT.P41

by those who wield power and entrusted with the responsibility to foster national development by sparking a multisectoral approach towards the eradication of all practices that engender the female counterparts.

What has been discussed above are the comprehensive measures to trigger the falling off of all the social ills that have perpetuated undue hardships that the girl child has been made to undergo especially in the area of early marriages. It has been pointed out and established through out the discourse that early marriages is a violation of a girl child rights as she enters the institution of marriage without giving her free consent to the hand of marriage. This is because under customary law the consent of the child is inconsequential to the valid solemnization of marriages. This is discrimination which the constitution must seek to remedy since under the marriage Act, the procedures leading to the contract of marriage are couched in a lucid and a more refined fashion which takes into account the consent of both parties as the premise on which the marriage must be predicated. Secondly, it is discrimination not only because the provisions under the statutory marriages are more protective but also that under customary law, it seems the consent of a man is necessary for a marriage while dispensing with that of the girl. Therefore the girl is being discriminated against and it is in such aspects that the law must quickly move in and cure these defects that have denied women basic rights in the community.

Many of the international human rights conventions that have been promulgated have sought to place premium on aspects of consent as well as placing the minimum marriageable age for women. For instance the Protocol to the African Charter on

Human and people's rights on the Rights of Women in Africa provides clearly under Article 6 that no marriage shall take place without the free and full consent of both parties and that the minimum age of marriage for women shall be 18 years. The Convention on the Elimination of all Forms of Discrimination against Women , under Article 15 states that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women [a] the same right to enter into marriage. [b] the same right freely to choose a spouse and to enter into marriage only with their free and full consent. These procedural safeguards are necessary guarantees to be enjoyed by every person including those that celebrate their marriages under customary law.

To synthesize the above discourse, what is clear is that Zambia has not lived up to the true creed of the commitment it sought to profess at the time of ratifying these conventions. This has been manifestly evident since in other jurisdictions greater strides have been made in fashioning legislation to align with the international human rights conventions. This is not in any way to suggest all hope is lost for many of our Zambian women who are yet to benefit in the awakening society's abundant guarantees of human rights. The Zambian government must realize that the fundamental shift in the policy attitude and political will is all that it takes for a nation to protect and promote the equal inalienable rights of its citizenry. Commitment to ratify is not enough to secure the respect and observance of these universal entitlements which are at the very core of human existence. It is therefore the writers

view that even though our women perennially go through these unspeakable horrors of human rights violations because of the unjustifiable machinations of the government of Zambia to propel the process of domestication, this desperation for relief can and will be attended to especially in today's relentless human rights advocacy which has led to the conception of a new epoch prepared to embark on a long match and quest for the realization of individual autonomy and equality.

CHAPTER FOUR

Through out the world marriage is regarded as a moment of celebration and as a milestone in adult life. Sadly the effects of early marriages give no cause for celebration. All too often the imposition of a marriage partner upon a child means that childhood is cut short and their fundamental rights compromised.

The previous chapters have demonstrated that early marriages are endemic and cancerous to any progressive society. It is therefore imperative that unwithering commitment is shown in the eradication of these practices. It has been discovered and emphasized that if these practices are not eradicated, they have the propensity to retard societal development and impact negatively in the realization of government programs. One golden thread that is seen running through the discussion is the fact that women must be regarded as equal partners in the development process. It has further been reiterated that a fundamental shift in the mindset of every person is key to the transformation of our society and capable of triggering policy shift and legislative action. It has also been realized that the widening gap between men and women in politics and overall in key decision making positions can only be bridged by ensuring that young girls future is secured out of every societal quagmire that makes their future bleak.

Chapter one in particular did establish how problematic this potentially damaging practice is. The problems associated with early marriages are inter alia, that these

children lack the capacity to understand the institution of marriage and their obligations[38]. We clearly saw that the inability by the girl child to consent consciously to this contract is a violation of her rights. Further it was discovered that girls who are married off under the age of 15 are five times more likely to die during pregnancy and labour than women in their twenties. In addition to that, children born from mothers under the age of 15 are likely to suffer low birth weight, malnutrition and generally have late physical and cognitive development. Springing from early marriages are also the sad experiences of illiteracy as well as poverty levels being alarmingly high among women. All these challenges in society can substantially be attributed to early marriages that rob a girl child of a golden opportunity of unlocking the door to a better, secure and healthy living. A larger picture out of chapter one was generally that early marriages are an impediment to the self realisation and actualisation of a girl child and ultimately impacts negatively on the welfare of the woman as a whole.

In the second chapter, there was an investigative undertaking in understanding the procedures that exist under customary law vis-a –vis statutory law prior to the contracting of a marriage. It was lucidly and manifestly established that statutory law was more protective and more refined in terms of the laid down procedures necessary for the contract of marriage. Whereas under customary law the procedures are rudiment and gender biased. For instance the consent of the girl is inconsequential to the validity of the marriage.

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[38] Bruce,J.[2002] **Married adolescents girls; Human Rights Health and Developmental neglected needs of a neglected majority**. Greenwood press. P.1

The sacred nature of marriage has led some scholars to observe that birth, marriage and death are the trio key important events in most peoples' lives. However of the three, only marriage is a matter of choice. The right to exercise this choice was recognized even in the roman times and has long been established in the international human rights instruments. However the situation in most countries including Zambia, many girls enter marriage without any right to exercise that choice to choose their marriage partners. Some are forced into marriage at a very early age. Others are just too young to make informed decisions about their marriage partners or about the institution itself.

While a lot of issues can be said about the implications of early marriages, one issue that stands out is the fact that it is a violation of human rights. The right to full and free consent to a marriage is recognized in the Universal Declaration of Human Rights of 1948 and in various other subsequent human rights instruments. The consent in question cannot be free if one of the partners is immature.

Early marriages have also profound intellectual, psychological and emotional impacts cutting off educational opportunities and chances of personal growth. It also entails premature pregnancy and child bearing whose impacts are likely to lead to a life time of domestic and sexual subservience over which the girl child has no control. It is shocking to note that an early marriage is supported and rationalized under pedestrian and unpalatable arguments inter alia family building strategy, an economic arrangement or a way to protect girls from unwelcome sexual desires. Indeed poverty

is seen to be at the helm of the reasons advanced in support of this hideous practice especially where poverty is acute, a young girl may be regarded as an economic burden and marrying her off quickly seems to be as a sigh of relief. It is true that the volatility of family welfare has caused profound social upheaval and economic marginalization. However such a highly draconian decision such as marrying off a girl at an early age, taken to the absolute detriment of a girl child cannot at any point be justified no matter how declining the economic fortunes are at a given time.

It has been observed that the striking features of the practice is that it gives rise to the emergency of a particular pattern to the effect that customs surrounding marriage including the desirable age and the way in which a spouse is selected depends on the society's view of the family[39]. With the increased advocacy in the promotion and respect of human rights it becomes sheer alien to accept unquestioningly a parental choice of a spouse for the child. It is not in dispute that the free and full consent of both parties to the marriage has been legally requisite since roman times[40]. What is bemoaned under early customary marriages is the loss of adolescence. The forced sexual relations and the denial of freedom and personal development attendant on early marriages have profound psycho, social and emotional consequences[41]. The impact can be subtle and insidious and the actual damage hard to assess. However fundamentally uncontested is that these children of school age are denied the right to

[39] Mensch,B. 1998. **The unchartered passage; girls adolescence in the developing world population council.** New york. P.8

[40]Ramson, E. [2002] **Making motherhood safer; overcoming obstacles on the pathway to care.** Population reference. Bureau, Washington. P.11

[41] Sing,S. 1998. **planning Adolescent child bearing in developing countries. A global review in studies in family.** Hokin University press.p.33

education which is needed for one's personal development, preparation for adulthood and effective contribution to future well being of the family and society. It has been noted that there is an appreciable close nexus between education and early marriage. The most important one being the loss of effective child hood as a result, the child grows up with no sense of the right to assert her own point of view and little experience in articulating oneself. Lack of self esteem or of a sense of ownership of ones own body exposes such girls to vulnerability.

Marriage therefore must be a voluntary choice for both partners. Equality must be stressed with due emphasis which unfortunately under customary marriages is not possible as one cannot ever think of equality when choice is absent[42]. Choices that are in the best interest of the couple usually benefit from the maturity that comes with age. It is therefore generally appreciated that raising the age of marriage will help both men and women arrive at a more satisfying and successful married relationship as well as reduce the girls' reproductive span and vulnerability to risky child bearing. At the same time adolescence must be supported as girls need life skills and other means of self protection to negotiate their passage from childhood to adulthood in society. The right to make choices about ones own reproductive health is elementary and particularly within the institution of marriage. It is a right that is shared by the couple, a right that is sometimes contested by tradition or claimed by others[43]. Early marriages severely undermine the adequate exercise of this right.

[42] Cooker, R,J.2003. **Reproductive health and human rights integrating medicine, ethics and law.** Viking penguin.p.80
[43] David.P. [1989] **Human rights and development.** Macmillan press.p.103

It has been recognized that women still face a number of snares in the enjoyment of their rights. Human rights are due to every person as a common set of standards that every individual is entitled to enjoy by virtue of being human and are universal, indivisible, interdependent and are enshrined in international conventions, agreements and declarations. Human rights not only give power to individuals, they are rich infinitely, moudable raw materials out of which individuals in communities and societies can shape their reproductive and sexual liberty. Governments are therefore obliged to respect, protect and fulfill the human rights of the citizens.

The tone of chapter three explored on the practice of early marriages and how other jurisdictions have moulded their laws to respond to this social phenomenon. Countries like South Africa, Togo and Uganda were surveyed in relation to their legislation and how they have incorporated the provisions of the fundamental Human Rights Instruments in a genuine quest to quell this practice. It was discovered generally that in these jurisdictions there has been a common sense of purpose and commitment in the designing of their legislations. This is because there has been clarity in the pronouncement of equality as a constitutional cornerstone whose sanctity cannot be sacrificed even under customary law. This has been a striking feature of their legislation lucidly distinguishable from other countries including Zambia where discrimination has been sanctioned with regard to customary law in the area of marriage. It has been revealed that Zambia as a nation has experienced legislative malaise in that many of the major Human Rights Instruments have not been incorporated into our domestic legislation hence one cannot rely on their

provisions since they are not binding on our courts but merely persuasive. This inactivity and machination by our government has been a betrayal of its professed commitment and dedication to the promotion and protection of human rights without any distinction.

In conclusion this chapter has codified the hallmarks of the previous discussions with sufficient clarity in order to facilitate the designing of appropriate remedial measures. The synthesis stage as the term implies has crystallized the preceding chapters and provides the tone for chapter five that shall be dealing with recommendations. Among the issues that have really been strongly pointed out is the common acknowledgement that the practice of early marriages is a violation of human rights and this unquestioning acknowledgement must stimulate action to ameliorate this scourge. The rationalizing views underlining the findings among others are that one of the critical conditions for any legal contract is that it must command the presence of free and full consent of the contracting parties. This condition is however far fetched with regard to early marriages given the fact that guardians seem to exercise this choice on behalf of a naïve girl in contumilliuos disregard of the best interest of the girl child. The disregard of the best interest of the child is a clear abrogation of the fundamental principle objectives of the United Nations Convention on the Rights of the Child of 1989, because parents as was observed in the previous chapters have no independent rights on their children and as such must not act inconsistent with the best interest of the child.

CHAPTER FIVE

The growing international attention to human rights and to the concerns of young girls in particular, provides an added opportunity to break the vicious circle of early marriages and the social cultural practices which violate the rights of women and girls and hamper their development.

This chapter is dedicated to bringing out the workable solutions that must be designed to thwart the practice of early marriages. In order for appropriate measures to be devised to cure the problem of early marriages, there must be a common agreement on the factors that propel early marriages.

First and foremost we must acknowledge that the problem in question is not one that is solely driven by economic consideration but by a complex combination of dynamics as shall be highlighted below. Hence forth a more workable solution lies in adopting a holistic strategy that takes into consideration all the dynamics that will be identified. To demonstrate how cross cutting the causative factors of early marriages are, it is desirable that we be guided by the report released by the Non-Governmental Organisation Coordinating Council.[44] The named institution is a non governmental organisation that carried a research on the causes of early marriages and it is believed by the author that for us to appreciate and be brought into perspective on how

[44]Non-Governmental Organisations Coordinating Council. **Early Marriages in Zambia- A Vicious Cycle**. 2008

multidimensional the problem of early marriage is, recourse must be made to their findings.

It is vividly explained in the report that cultural dynamics have played a central role in the continued existence of the practice of early marriages. It was indicated that more than 75 percent of the girls that were married off perceived marriage as the ultimate goal that every girl who became of age must strive for. It is important to appreciate that these are girls whose upbringing have been conditioned by strong cultural beliefs and attitudes, whose sisters have grown up and gotten married within the locality and have eventually accepted life to be that way and do not see anything wrong with marriage at a young and immature age[45].

Further, geographical location has also been understood to be one of the most remarkable and critical factors in the promotion of the vicious cycle of early marriages. A comparative analysis conducted indicated that schools that were more in remote areas for instance the Chiyuni Zone of Kapiri Mposhi had more cases of early marriages than those that were near urban centers or the line of rail. This disincentive compounded with the poor state of school infrastructure or educational facilities that is classrooms, desks and shower rooms tends to significantly define the incidence of early marriages. It was noted that one school authority did argue that the poor state of classrooms, desks was a critical factor in fuelling early marriages. A case in point is Fibanga Basic School in Mkushi. This school is 15 kilometers from Mkushi Boma.

[45] [45]Non-Governmental Organisations Coordinating Council. **Early Marriages in Zambia-A Vicious Cycle**. 2008**Cycle**. 2008

The state of the school infrastructure is to say the least shocking. The school catered for a population of more than 300 people. The Basic School had one classroom which classroom had part of its roof ripped off hence the classes had to be suspended during the rain season. Further it was observed in the research that the school only had a total of 5 desks that can at best be described as planks suspended on other planks.[46]

What about the state of conveniences which are notably so important in every institutional or indeed home setting. The state of the conveniences as significant as they are in life was nothing to write home about hence girls having their menses have to suspend school in the meantime. Yet this is the learning environment that the girl child given their uniqueness is supposed to receive lessons in whichever way one looks at the issue. The learning environment described above does not motivate the girl child to continue with school or rather in the education system.

Value ascribed to education is also believed to have played a pivotal role in determining the trends of early marriages in specific areas. It was noted that one parent argued vehemently that education in Zambia has no meaning whatsoever because children who have reached grade twelve or have graduated from College or University simply roam the streets. Essentially this is the type and nature of thinking that informs parents especially those in rural areas, when making a choice between the girl child education and early marriage. For most parents who are incidentally poverty stricken, an early marriage is a reasonable and justifiable choice.

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[46]Non-Governmental Organisations Coordinating Council. **Early Marriages in Zambia- A Vicious Cycle**. 2008

Having appreciated how multidimensional the problem of early marriages is, the government and other stakeholders need to acknowledge the seriousness of the problem at hand and its long term implications in terms of illiteracy, poor family planning, infant and maternal mortality rate. It is this solemn realization of the difficulties our children go through which must stimulate action. The following therefore are recommendations arrived at by the author following the identification of the causes and the damaging implications of early marriages.

First and most importantly, legislation must be made to reflect the principle of equality as one of the cornerstones of the constitution. It has clearly been noted that article 23 of the Zambian constitution is discriminatory and it therefore requires revisitation to realign it with the current dispensation in the human rights discourse which places premium on the equal treatment of men and women. An area of great concern on this article notwithstanding what the government may and could have been doing is the contradictory provisions contained in the constitution whereby article 11 guarantees the equal status of men and women yet article 23 [4] permits discriminatory laws to exist in the area of customary law with respect to any matter. It is recommended that article 23 be repealed and replaced with a provision that will sufficiently bring out the principle of equality.

Unlike the Zambian model, the South African constitution by openly proclaiming the principle of equality in its constitution has enabled the courts to have the much needed leverage in the promotion of girl child rights by peremptorily frowning on

early marriages. In the South African constitution, discrimination is only sanctioned or rather embraced where there is a justifiable reason in an open and democratic society based on human dignity, equality and freedom[47]. This provision is succinct and sufficiently protective of the principle of equality in that it has been made to stand out unequivocally as one of the curve marks against which any discriminatory measures must be weighed.

Therefore it is seen that if Zambia can emulate such a bold and unambiguous commitment by placing the principle of equality without being riddled with exceptions, such an innovation will go a long way in alleviating the problem of early marriages. It is noted that such succinct provision must further be echoed in the subordinate legislation having a bearing on marriage. For instance the marriage Act must make certain provisions such as minimum marriageable age and consent of the patties to be of general application whether the marriage is under customary law or the statute.

It has generally been observed in principle that the Zambian government has demonstrated its political will and commitment to eradicating discrimination against women by having acceded to or ratified international treaties that guarantee human rights without distinction based on sex or other grounds. It has also endorsed several plans of action for the equal and beneficial integration of women in all development activities. However like in most commonwealth countries, Zambia has a legal regime wherein international instruments are not self executing and requires enabling

47. South African Constitution, article 192 of 1996

domestic legislation to be directly enforceable[48]. In the course of discussion it was clear that Zambia has not been very keen in the domestication process of human rights instruments. It is therefore recommended that the government treats the process of domestication as one of great urgency and priority as they contain a plethora of provisions aiming at redressing this social imbalance. For instance like it was observed in the previous chapters, the Universal Declaration on Human rights article 16 whose import has already been discussed is very progressive in curbing this vice. In addition the Convention on Consent to Marriage, Minimum Marriageable age and Registration of Marriages, article 1 provides that no marriage shall be legally entered into without the full and free consent of both parties which consent must be expressed by them in person.

Further, article 16 of the Convention on the Elimination of all forms of Discrimination Against Women provides that men and women shall have the same right to enter into marriage and also the same right to freely choose a spouse and to enter into such marriages only with their full and free consent[49]. These conventions with their far reaching provisions if incorporated into our domestic laws would effectively guarantee the young girls the full enjoyment of their inherent and inalienable rights. However, what is observable in our jurisdiction is sheer reluctance and lack of political will to drive the process of domestication. This malaise has detrimentally and adversely affected the recipients of such rights proclaimed in the Conventions. It is reiterated once again that the government needs to treat the process

[8] Munalula. M. 2004. **Legal Process in Zambia – Cases and Materials.** The University of Zambia Press.

[9] Convention On the Elimination of all forms of Discrimination against Women.[1979]

of domesticating international instrument with the urgency and the urge it needs. The process of domesticating international instruments is one significant means in which the government can practically reaffirm its commitment to promoting human rights. It is only after incorporating the standards of the convention that Zambia shall reflect its true spirit of commitment to integrating women into the mainstream of social, political and economic sphere. This country is no doubt able to live up to its true professed creed of equality. Consequently the author finds it compelling to recommend that the process of domestication be regarded as an area of great concern and priority.

Apart from refining of legislation to conform to the international norms and structure in the fight for equality between men and women, there must be a deliberate policy by government and civil society to sensitize men, women, girls and boys about their rights and the course of action to be taken in discrimination cases. It is further suggested that a technical committee be constituted to review laws, enforcement measures and support systems relating to gender based violence and early marriages. The sensitization programmes are deemed necessary because of the fact that disparity between men and women is a consequence of historical and cultural factors. Such mindsets need to be transformed for the effective implementation of the legislative frame put in place.

It has also been observed that customary law is mostly administered in local courts which are dominated by male justices who are deeply embedded in patriarchal values

and attitudes[50]. These justices have no legal background and later alone human rights issues. Inevitably to expect such justices to address discrimination against women in their decisions would be preposterous. It is therefore recommended that there be a programme of training these local court justices to ensure that they are properly equipped to grapple the demands of the new era in the fight for human rights.

As has been unearthed in the preceding discussion, there is an inveterate tendency to regard marriage as an achievement hence worth striving for. In view of this perception, there must be a counterforce to drown this conception through the creation of a positive policy climate aiming at transforming mindsets in rural areas that marriage was not the ultimate goal in life. This must be coupled with programs that deliberately ascribe much value to education by creating more and better employment opportunities especially among teachers. Such meaningful campaigns will have to focus mainly on the provision of support services and programmes which are about upholding the rights of women and girls while seeking to improve gender equity, empowerment, participation and women agency, accountability and attention to vulnerable and marginalized groups. This is borne out of the realization of the fact that concerns around availability and affordability of services are just as important as the quality of care.[51]

Further the government needs to re-adopt the policy on the establishment of schools in 5 kilometer or less radius in rural Zambia. This should be coupled with better or

[50] Benouaich Eva. 2001. **Rights of the Child in the Republic of Cameroon.** OMCT. Geneva.
[51] Odinkalu, C & Frans, V. **The Prohibition of Torture and Ill treatment in the African Human Rights System.** [2006]. Eric Sotas Publications.

girl friendly infrastructure classrooms, shower rooms and desks. As noted above there is close interplay between early marriages and long distance to schools. Therefore there is need for government to effectively embark on building of schools in rural areas so that they are readily accessible. This must go hand in hand with a colliery principle of teacher training programmes to improve the provision of teaching services in rural areas where early marriages are rampant. It is notably true that in far flung areas of Zambia, infrastructure may be there, however such schools may not have enough human resource which demoralizes the pupils. In the light of this observation, it is further recommended that the government considers attaching a number of allowances to teachers serving in rural areas such as rural hardship, double class allowances as incentives to attract human resource in these areas.

In a nutshell, the government and other stakeholders being the civil society and Non-governmental institutions must co-operate as key partners in bringing the above recommendations to fruition. Leaving this enormous task to government alone may not be the best approach and the desired results may take long or may not be achieved at all. Comprehensive measures like the ones outlined need concerted and integrated efforts to melt down the practice of early marriages which negatively affects the whole outlook of our society and in the final analysis compromises our efforts to holistically develop our society.

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