HUMAN RIGHTS VIOLATIONS: A CRITICAL APPRAISAL OF
WOMEN’S RIGHTS IN ZAMBIA

BY

KENNETH TEMBO

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HUMAN RIGHTS VIOLATIONS: A CRITICAL APPRAISAL OF
WOMEN'S RIGHTS IN ZAMBIA

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An Obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LL.B)

Approved by the Coordinator: Dr. Margaret M. Munalula (JSD; LL.M; LL.B; AHCZ)
Supervised by Dr. Margaret M. Munalula (JSD; LL.M; LL.B; AHCZ)

I, TEMBO KENNETH do hereby declare that I am the author of this Directed Research, and that it is the creation of my own ingenuity. I, therefore, remain accountable for the contents, errors and omissions. I further declare that to the best of my knowledge, this work has not previously been presented in any University for academic purposes.

February, 2008
I recommend that the Obligatory Essay Prepared under my supervision by KENNETH TEMBO (COMP.No.22039546)

Entitled:

HUMAN RIGHTS VIOLATIONS: A CRITICAL APPRAISSAL OF WOMEN’S RIGHTS IN ZAMBIA

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

Date: [Signature]

Supervisor: [Signature]

Dr. M. M. Munalula. (JSD; LL.M; LL.B; AHCZ)
DEDICATION

To my parents, Rose and Morgan Tembo.

Your son is about to make history! The fighting spirit that burns deep inside my heart emanates from you. You have made me reach where I never thought I would. I thank you for giving me the best love that a son would ever long for and for being my source of strength.
ACKNOWLEDGEMENTS

First and foremost, I would like to thank God for giving me the most precious gift in the world: life.

I would like to recognize the hard work, diligence and commitment of my supervisor Dr. M.M. Munalula, Dean of the School of Law, University of Zambia, who provided me with guidance, valuable comments and material support, without which this work would not have reached fruition.

I would also like to express my gratitude to various governmental and non-governmental organizations namely the Ministry of Lands, the Women and Law in Southern Africa Trust and the academic staff of the Law School. Thanks also go to Mrs. Daisy Nkhata of Nyankhata Chambers.

Many thanks to my family who have always been there to ensure that I do not give up on life. My brothers Zifayo, Mulonyeni, Chrispin, Rodgers and Emmanuel. You are fighters. My sisters, Ruth and Maggie. You are simply awesome.

To my friends, Cramos (Chief), Chandomali (Saint), Wantemwa, Christopher, Thomas, M'tinta, Setwayo, Phingiwe and Martin (One fighter), thank you for your support and for being there for me whenever I needed you. Those whose names I have managed to acknowledge here by no means represent the full list of friends to whom I owe my many thanks.

Mr. Alfred Tembo, my gratitude would be incomplete if I did not acknowledge you. I still remember those days when you used to tell us that a man has to be prepared so that life to treats him fairly. Sir, I am pleased to inform you that I am prepared.

To the LL.B IV Class of 2007, you have been like a family to me. I am what I am today because of your positive influence. Thanks guys!

Finally yet importantly, I would like to thank my parents for their patience, support and encouragement.
TABLE OF LEGISLATION

NATIONAL LEGISLATION

Defence Act, Chapter 106 of the Laws of Zambia.

Local Courts Act, Chapter 28 of the Laws of Zambia.


INTERNATIONAL INSTRUMENTS

The Convention On Elimination Of All Forms Of Discrimination Against Women (CEDAW).

The Southern Africa Development Community on Gender and Development.
TABLE OF CASES

*Benjamin Banda and Cephas Mitu v The People* The Times of Zambia, November 14th 2006

*Bradwell v Illinois* 83 US (16 Wall) 130

*Edith Zewelani Nawakwi (Female) v the Attorney-General* 1990-1992) ZR 112(H.C)

*Ethel Sepiso Nyambe v Zambia State Insurance* No 62 of 1982 of the Industrial Relations Court.

*Martha Mwiya v Alex Mwiya* 1976) ZR 113

*Sara Longwe v Intercontinental Hotels* 1992/HP/765

*Elizabeth Mwanza and Clotildah Mulenga v Holiday Inn Court* 1995/HP/254

*Chilufya v City Council of Kitwe* (1972) ZR 111

*R K Thangal v RS Phulakka* AIR (1961) Manipur 1

*Re Griffiths* 413 US 717

*Zambia Sugar Plc v Fellow Nanzaluka* Appeal No.82/2001, unreported.
GLOSSARY OF KEY TERMS OR ABBREVIATIONS

CEDAW: Convention on Elimination of All Forms of Discrimination Against Women.

SADC: Southern African Development Community
ABSTRACT

Violations of women’s rights are as old as recorded history. In Zambia, women have always been marginalized as regards the enjoyment of their rights. This is especially true of women in the legal profession where most of the high legal offices are occupied by men. These violations do not only happen in legal employment. It has been found female students also encounter discrimination from all stakeholders in the School of Law. These include the male students who do not regard their female counterparts as capable of studying law. From the lecturers, this discrimination comes in form asking questions that demean the female students. There are also unconfirmed rumors of sexual harassment by these lecturers of the students.

What further perpetuates these violations is the fact that local legislation does not specifically provide for protection of women’s rights. This means that women in the legal profession do not have any redress, generally, as there are no laws to protect them. For example, the Constitution of Zambia does not specifically guarantee women’s rights.

The Convention on Elimination of All Forms of Discrimination is an international instrument which contains comprehensive provisions relating to women’s rights. For example, the document contains other classes of rights such as second generation rights, chief among them are the Rights to Education and Employment, which are cardinal to the enjoyment of legal education and employment in Zambia. However, this document is not applicable domestically in Zambia.

It has been suggested that in order to ensure that female law students are employed upon graduation from the Law School, law firms must be compelled to take them in for sponsorship to ZIALE and subsequent employment so that the numbers of women in private practice increases.
TABLE OF CONTENTS

Title Page (i)
Declaration (ii)
Dedication (iii)
Acknowledgements (iv)
Table of Legislation (v)
Glossary of Key terms or abbreviations (vi)
Abstract (vii)
Table of Contents (viii)

Chapter 1

INTRODUCTION 1
General meaning of human rights from the perspective of women’s rights 6

Chapter 2

NATURE OF HUMAN RIGHTS VIOLATION 11
Causes of these violations 13

Chapter 3

THE CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 21
The Zambian Bill of Rights 22
Enforceability of rights under Articles 16 and 23 of the Constitution 28
Enforceability of CEDAW 31
### Chapter 4

THE CEDAW, LEGAL EDUCATION AND EMPLOYMENT

<table>
<thead>
<tr>
<th>VIS-À-VIS SCHOOL OF LAW AND JUDICIARY</th>
<th>35</th>
</tr>
</thead>
<tbody>
<tr>
<td>The School of Law</td>
<td>36</td>
</tr>
<tr>
<td>Women Lawyers in Private Practice</td>
<td>39</td>
</tr>
<tr>
<td>Women Lawyers in academia</td>
<td>42</td>
</tr>
<tr>
<td>Women in the Judiciary</td>
<td>43</td>
</tr>
</tbody>
</table>

### Chapter 5

CONCLUSION AND RECOMMENDATIONS

<table>
<thead>
<tr>
<th>Conclusion</th>
<th>46</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recommendations</td>
<td>50</td>
</tr>
<tr>
<td>Bibliography</td>
<td>54</td>
</tr>
<tr>
<td>Appendix A</td>
<td>56</td>
</tr>
</tbody>
</table>
CHAPTER 1

INTRODUCTION

Human rights are rights inherent in human beings' nature and without them, mankind cannot live as human beings. They are the foundations of human existence and co-existence. It is, however, sad to note that women have not enjoyed their rights for many centuries, as they have occupied a low status and have commanded little respect in the social hierarchy. This study examines the extent to which this is true of Zambia.

The study is divided into five chapters. Chapter 1 includes the introduction and other preliminary matters such as the problem statement, research questions and methodology of the study. It also takes a look at the general meaning of human rights from the background of women’s rights and further explains the nature of human rights violations of women in Zambia. Also explained are the causes of these violations.

Chapter 2 will consider the Bill of Rights and violations of this part of the Constitution; in particular Articles 23 and 16. Case law will be applied.

Chapter 3 deals with the Convention on the Elimination of All Forms of Discrimination against Women with regard to violations of human rights in particular Articles 10 and 11 relating specifically to education and employment. The purpose being to make a link to legal education and employment. Case law is also provided.

Chapter 4 gives an explanation on the extent of the enforceability of the rights of women in compliance with Part III of the Constitution of Zambia and the Convention on the Elimination of All Forms of Discrimination Against Women.
The last chapter, chapter 5, contains the conclusion and the relevant recommendations intended to encourage a change in the struggle for equality between men and women.

PROBLEM STATEMENT

There have been violations of women’s rights in Zambia mainly based on their gender status. This is especially so in the legal profession. However, these violations are not brought to light. For example, despite the provision in the SADC Declaration on the Gender and Development that calls for 50% female representation in high public offices, the numbers of women holding high judicial or legal offices have increased only minimally in the last decade. Also, not so much litigation has been done on the Article 23 of the Constitution, also known as the Discrimination Clause. Moreover, the women have been discriminated specifically in attaining legal education and employment. The Convention on the Elimination of All Forms of Discrimination Against Women, however, has always been ignored because as stated by Anyangwe, "...there is a wide difference between the international legal order and the municipal legal order" and as such it cannot apply to Zambia. It is possible, hence, for women’s rights to be violated.

OBJECTIVES

MAIN OBJECTIVE

The objective of this study is to give a critical appraisal of Human Rights Violations from the context of women’s rights in Zambia. The main focus will be on the right to

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employment and education of women, with special reference to legal education and employment in Zambia.

**SPECIFIC OBJECTIVES**

1. Explicitly explain the nature of human rights from the perspective of women’s rights in Zambia.

2. Identify human rights violations of women in Zambia from the perspective of Part III of the Constitution of Zambia Act, Chapter One(1) of the Laws of Zambia with particular reference to Articles 23, also known as the Discrimination Clause, and 16, which provides for the right to freedom of property of the Act.

3. From the Convention on the Elimination of All Forms of Discrimination Against Women, explain violations of the Right to Education and Employment, found in Articles 10 and 11 of the Convention. Special reference will be given to legal education and employment.

4. Describe the enforceability of the Right to Education and the Right to Employment on individuals and Zambia as a state.

5. Suggest ways of how to make the prevention of violations under Articles 10 and 11 of the Convention enforceable in Zambia.

**RESEARCH QUESTIONS**

1. What are human rights and their nature from the background of women’s rights?

2. How does the Bill of Rights safeguard violations of women’s rights in particular Articles 23 and 16?
3. Of what importance is the Convention on Elimination of All Forms of Discrimination against Women in ensuring that rights in Articles 10 and 11 are safeguarded with special reference to legal education and employment?

4. To what extent have these rights been enforced from the perspective of part III of the Constitution and Articles 10 and 11 of the Convention on Elimination of All Forms of Discrimination against Women particularly in the area of legal education and employment?

**METHODOLOGY**

A variety of data collection will be done by way of desk research. Apart from this, there will be interviews conducted on a number of persons, especially women, around the University and outside from individuals and corporations. Case law, textbooks, statutes, articles and the internet will randomly be used to make the research more informative and educative. This is to ensure that qualitative data is collected.

**The Feminist Theory of Law**

The feminist theory of law is very helpful in understanding the concept of discrimination in legal education and employment. The conventional perception of law, as taught and learned in the traditional curriculum of Law Schools is that it is an institution that is above reproach. Law is presented as beyond reproach because it is said to be unbiased, objective, coherent and rational. Feminist jurisprudence denies that law has these attributes:

"It argues that basically law is made by men and in their image, reflecting masculine values and standards, serving male interests. This maleness of the law, it is contended, is a manifestation of patriarchal power, a power
that engenders the inequality between women and men and the oppression of women by men.²

Feminist jurisprudence therefore sets out to de centre the law, to expose its limitations and the myths about its rationality, neutrality and coherence. It advocates for the demolition of patriarchy in both the private and public domains as the solution to gender inequality.

In terms of its origin, feminist jurisprudence is generally considered as an of-shoot of, inter alia, the attacks by many female lawyers on the traditional law curriculum in the universities. An increasing number of women began to question a law curriculum that neglected issues of central concern to women such as rape, domestic violence, reproductive rights, unequal pay, sexual discrimination and sexual harassment. Not surprising, most of the leading feminist scholars are women who had read, or later read, law.

Today, all feminist legal feminists, irrespective of their inclinations and differences, are united in a belief that society, including the legal order, is patriarchal.

Feminism describes women’s subordination and oppression by men. It inquires how and why women continue to occupy a subordinate position. Feminist legal thought uses feminism to focus this inquiry on the legal system, the politics of law, particularly the law’s role in perpetuating patriarchal hegemony. Mackinnon, in this regard explains that:

The major themes that have exercised the minds of feminist scholars are: gender equality and differences; demolition of patriarchy; gender and women’s choices; power relations within the ‘public’ and the ‘private’

domains; cultural pluralism and women's rights; and feminist legal methods. Women's human rights of particular concern include equality in the home, access to political power, reproductive rights and the pervasive phenomenon of gender violence.

**Gender Equality and Differences.**

Initially, feminists pushed for equality with men. But the question began to be asked whether women in fact wanted to be like men and to be treated like men, and what precisely 'equality' meant. A liberal feminist scholar such as Wendy Williams takes the view that equality amounts to equal opportunity. But radical feminists such as Christine Littleton focus on differences between men and women and support affirmative measures

1.1 **GENERAL MEANING OF HUMAN RIGHTS FROM THE PERSPECTIVE OF WOMEN'S RIGHTS.**

Human rights have been defined by L.Henkin in her *The Age of Human Rights* as

> Claims that every individual has upon his society by virtue of being human and being endowed with reason and conscience. Every human being regardless of geography, gender, race, ethnic group, religion, political opinion, social status, national origin, etc, is entitled to human rights. Human rights ensure justice and peace.

From the definition, it is clear that human rights are supposed to be gender neutral. It is also worth noting that the rights of human beings encompass both man and woman alike. However, this is true in theory and not in practice. From time immemorial, women have always been discriminated against in many ways. Grounds applied to discriminate

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4 Ibid.p.92  
women against include sex, marital status, pregnancy, family status, house hold duties or responsibilities. Zambia, therefore, has not been an exception to the perpetuation of discriminatory practices.

The Pre-Colonial Period

The period was characterized by very few indigenous Zambian women fully enjoying their rights. Through the patrileneal system still present in many Zambian ethnic groups, women were mainly considered as vessels for producing children and harvests for the lineage. Marriage and family life did not create any rights for the women. Munalula stated that;

In this lineage, when a man died, his son inherited his socio-economic position as head of the family and custodian of his family’s property rights; the widow became the responsibility of her son.\(^6\)

The man was the chief custodian of the family in all dealings and had all the decision making power while the women were sidelined but expected to respect the decisions made by the male folk. During this time, it was unheard of for a girl child to go to school. Education was a privilege even to the African boy child as only privileged families such as royal families could send their children to school. Generally, the notion of women enjoying their rights was non-existent.

The Colonial Period

The colonial period brought insignificant change in the enjoyment of women’s rights save for the dual legal system of English Statutory law and the already existing African

Customary law where by the country had two systems of law in force. This favored women to some extent because some of the customs that were inhuman came to be declared null and void if they did not conform to the English law. This was espoused by section 12 of the Local Courts Act\(^7\) which stated that only those customs that were not repugnant to English principles of any written law were enforceable in the higher courts. Even if formal jobs were rare even for the male Africans, there was a strict custom that the kitchen and the home were the places where women were to be found, and not the classroom or the office.

**The Post Independence Period**

The-post independence era saw a slight change in safeguarding the rights of women. African empowerment led to a few ‘privileged’ women attaining both College and University level education. The 1970’s and 1980’s witnessed a rise in the empowerment of women with regard their rights. More women became independent and some women even made it to the legislature. The 1990’s and the 21\(^{st}\) century have seen significant strides being made in the field of human rights, aimed at the rights of women. Nevertheless, all these improvements leave much to be desired as women were still sidelined in the enjoyment of their rights as a whole. For example, a historical overview of the constitutional reforms vis-vis women’s rights reveals the following:

The 1973 One Party Constitution, it has been contended, was gender biased in its use of grammar and vocabulary:

\(^7\) The Local Courts Act, Chapter 28 of the Laws of Zambia
Further that the inclusion of the female gender in the references to the male gender as provided in Article138 (14) was unsatisfactory because it makes men the focus of legislative provisions, particularly rights.\(^8\)

The terms of reference given to the 1991 Mvunga Constitution Review Commission were broad as they included, inter alia, recommending appropriate arrangements for the entrenchment and protection of human rights. Conspicuously silent, however, were gender and women’s rights respectively.

The 1996 Mwanakatwe Constitution Review Commission had brilliant recommendations on women’s rights. For example, the Commission recommended the following:

(a) That the adoption of the Constitution should be by a Constituent Assembly and a national referendum. Further recommended was the composition of the Constituent Assembly.

(b) That the preamble incorporate among other values, the equality of men and women and their rights to participate freely in the political, economic and social system.

(c) That the Constitution should adopt a gender neutral language. Further that government should progressively work towards adopting a gender neutral language for all laws of Zambia.

(d) The Commission recommended retention of the National Anthem as is, in response to some women’s calls that it should change from ‘free men we stand’ to ‘freely we stand’.

(e) That the Constitution should widen the scope and regime of rights and freedoms as required by an open and democratic society. Further that existing rights be reformulated to ensure simplicity and comprehension. The Bill of Rights should therefore, inter alia, include:

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\(^8\) Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*, p50
(viii) The right to fair treatment, and freedom from discrimination, for all, including affirmative action for women and other disadvantaged persons, the right to found a family, children and handicapped persons.

However, most of the recommendations, especially the pertinent ones dealing with women’s rights were rejected by the government through its WHITE PAPER No.1 of 1995.

Currently, there is the Constitution making process taking place. Most women organizations have contended that the issue of women’s rights be seriously considered. Therefore, as the new Constitution is being planned, most women groups are expecting a positive result as regards women’s rights.
CHAPTER 2

2.0 NATURE OF HUMAN RIGHTS VIOLATIONS IN ZAMBIA.

Introduction

Women in Zambia experience various forms of human rights violations. They range from the subtle and indirect forms of discrimination to the most blatant abuse because the law does not adequately protect them. These include:

Physical Violence

Physical abuse is “any physical action towards another person; pushing, hitting, whipping, biting, throwing things, besting, slapping, choking, shoving, locking out, restraining and other acts designed to injure, hurt or cause physical pain.”9 When a person is hit, they also receive a message of worthlessness, the victim may think she is not good and therefore deserves to be hit. Physical abuse has devastating psychological consequences.

Emotional or Psychological abuse

Emotional abuse is defined as “Constantly doing or saying things to shame, insult, ridicule, embarrass, demean, belittle, or mentally hurt another person”10. For example, calling a person names such as fat, lazy, stupid, bitch, silly, ugly, failure and telling someone she cannot do anything right, is worthless, is unwanted, may amount to emotional abuse. Emotional abuse also involves “withholding money, affection, or attention, forbidding someone to work, handle money, see friends or family, make

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9 Jerry Brinneger, Breaking Free From Domestic Violence, (Compcare Publishers), Minneapolis, Minnesota, USA, 1992, p. 3
10 Ibid, p. 14
decisions, socialize, keep property, flaunting infidelity, engaging in destructive acts, forcing someone to do something she does not want to do, manipulation through threatening to abandon, refusing to help someone sick or hurt\textsuperscript{11}. The damage that emotional abuse causes may go as deep as physical wounds and may even take a longer time to heal if they ever do heal.

**Economic abuse**

Economic violence may be defined as “any act, which takes away or prevents a woman from using or enjoying something or any act which results in the exploitation of the woman for gain or benefit.”\textsuperscript{12} Depriving the family of income, or the husband’s failure to support his wife, considering wife’s property as husband’s and property grabbing are some of the examples of economic abuse.

Important to bear in mind is that in many abusive relationships, different forms of abuse are combined. While physical abuse generally is considered the most serious form of domestic violence because of the immediate threat to life and limb, this does not mean that the other forms should not be taken lightly, even if they do not seem “serious”. The other forms of abuse often precede physical abuse and function as warning signals.

**Discrimination in Education**

The general trend that prevailed in Zambia has been that the kitchen is the rightful place for the girl child while the classroom is the place befitting for a boy child. Though, it has

\textsuperscript{11} Dawn B. Berry, *Domestic Violence Sourcebook* (Lowell House, NTC\Contemporary Publishing Group), Illinois, USA, 1998, p. 1

been argued that this type of discrimination, in recent years, has reduced, this form of discrimination still persist. It has been noted that;

"Parity has yet to be reached in terms of the University education offered and the levels attained in higher education. Thus, the majority of women are still constrained in terms of career and occupational choice."\(^{13}\)

Discrimination in education has led to women having lower educational levels attributed to the preference to educate male children, which has in turn led to discrimination in terms of their employment.

**Discrimination in employment**

Males hold most senior positions in the formal sector employment in Zambia. Women’s work involves doing most of the household chores in their homes. The few lucky women who have found employment in the formal sector have also faced problems. Sharon Simasiku observed that;

Even when it comes to promotions women are rarely promoted, instead the promotion goes to the males. Across all sectors, women occupy low or mid-level positions and rarely rise to the top. They are greatly under-represented in administrative and managerial positions. The saddest thing is that even in women dominated professions such as teaching; women tend to fill the less prestigious, lower paying pre-schools and primary school jobs.\(^{14}\)

It is important to stress the fact that discrimination in employment stems from the lower educational levels attained by women as priority has always been given to males.

**CAUSES OF THESE VIOLATIONS**

\(^{13}\) Munalula, *Women, Gender Discrimination and the Law*, p.159  
The causes of violations of women’s rights in Zambia are numerous and interrelated. However, the following are the most frequently cited causes; Firstly, the lack of women in the enactment and enforcement of laws which is linked to their absence in the higher levels of the legal profession. Hence laws and the legal system lack gender sensitivity. The right to property illustrates:

Firstly, Article 16 of the Bill of Rights of the Constitution is a very important provision as regards women’s rights. Article 16 reads in part:

Except as provided in this article, property of an description shall not be compulsorily taken possession of and interest in or right over property of description, shall not be compulsorily acquired unless by or under the authority of the act of parliament which provides for the payment of adequate compensation for the property or interest or right to be taken possession of or acquired.\(^\text{15}\)

Article 16, though envisaged to protect women’s rights to property also has been found with flaws. This is due to the fact that, generally, the Constitution allows discrimination in circumstances that are reasonably justifiable in a democratic society. In line with this, T. K Mabula noted that;

The Constitution’s permission of discriminatory laws in matters of divorce, marriage, devolution of property and other matters of personal law and the application of customary law is problematic for the human rights of women, in most of the instances of denial of human rights lie in this sphere.\(^\text{16}\)

Although article 16 protects the right to property in that no one can be deprived of their property, even by the state without payment of adequate compensation, it has been noted however, that;

\(^{15}\) The Constitution of Zambia, Article 16
"Yet millions of women face the deprivation of property upon divorce or widowhood because of customary and statutory laws that do not recognize women’s full entitlement to property acquired by a couple during marriage." 17

Another hurdle presented by the ownership of property is the customary law inherent in the Zambian legal system as regards land. The customary system of tenure emphasizes the access of all persons to land in the community. Though this is the case, it is clear that this system has not provided for all let alone women. In other words it may be said that whereas the concept implies that land belongs to everyone, this in practice depends on sex, lineage or clan of the person.

Under patrilineal system for example, the Ngoni, on the death intestate of the holder of land, the land rights accrue to the male members of the lineage. The heirs normally are the eldest sons of the family. Hence the youngest male heir in a house has priority over an elder daughter. Female descendants may inherit land only if there are no male children available.

Under matrilineal systems, the Tonga for instance, nephews and brothers or an other male relatives of the deceased are preferred to females. A female of exceptional good character ma be chosen to inherit some land if there if there are no male heirs available.

Currently, the number of women seeking to acquiring land is dismal. This can be seen by the number of women acquiring land over the period 2003 to 2006 as compared to their male counterparts.

17 Munalula, Women Gender Discrimination and the Law, p.58
## STATISTICS OF INTEREST PRESENTED FOR REGISTRATION

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<td>Total number of offers for 2003</td>
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**Source: Ministry of Lands; Lands and Deeds Registry**

From the above statistics, it is right to state that women face more barriers than men in seeking to acquire land as in most cases first priority is given to men. The Constitution has little or no protection for women’s rights, generally.

The issue of customary law affecting women does not only end with land. Some tribes have always regarded women as non-beneficiaries in matrilineal property after divorce. The courts have however, not taken this lightly, as they have in most cases recently come to the aid of women which have been a step in the right direction. In Rosemary Chibwe v Austin Chibwe\(^\text{18}\) it was held that for example that the wife, married to the petitioner under Ushi customary law, was entitled to a reasonable share of the matrimonial property after divorce, and therefore, the K10,000,000 awarded for both maintenance and property adjustment was unreasonable taking into consideration the fact that the respondent was a very successful business man and that most of the property was acquired during the subsistence of their marriage. This decision actually upset

\(^{18}\) SCZ Appeal No.38/2000
Martha Mwiya v Alex Mwiya\textsuperscript{19} decided two decades earlier which went against the spirit of upholding women’s rights as it was held by the courts that according to Lozi tradition, a man was not compelled or obliged to support his divorced wife.

It can therefore be adduced that women face a lot of problems in acquiring property. This is because in many indigenous tribes, women are regarded as property themselves and as such cannot further own property.

Secondly, there are cultural, socialization and traditional practices. The Zambian society vis-à-vis social relations and women’s rights, has reflected gender inequality which in effect has substantiated men’s domination in almost all sectors, save for the informal and peasant agriculture sectors. These traditional practices have, generally, had a detrimental effect on women. It has been stated, for example, that “The traditional perception of values is that women constitute a sector of society which has a low status and if a woman stands up to establish her rights, customary law will be reluctant to appreciate that.”\textsuperscript{20}

Until recently, moreover, some tribes prevented divorced women from getting a share of the matrimonial property, leaving the divorced women in very disadvantageous positions.

It has been contended that;

“The expression such as; ‘The husband is the head of the house;’ ‘a woman is not a full human being but property’, and many more are commonly used in Zambian society to justify a man’s control over a woman…”\textsuperscript{21}

\textsuperscript{19} (1976)ZR 113
\textsuperscript{20} Women in Law and Development in Africa. Gender Bias in the Zambian Court System, WILDAF, June 1994.p.15
Furthermore, women are not allowed, traditionally, to be administrators of their husband’s estate. Due to these social conditions prevailing, most people view these violations as a normal part of everyday life.

Thirdly, the economic dependence of women is another factor. The economic Malaise that Africa has always faced has not spared Zambia. According to the Social Report [2006], about 72% of the populations in Zambia are living in poverty. Women are the most affected because of the social inequalities present which have led them to be confined to desperate economic situations. It is this economic dependence of women on men that has led to husbands physically abusing their wives because they cannot leave their abusive homes as they would suffer the consequences of lack of financial support. Fourthly, ignorance among women is high. The level of illiteracy in Zambia is high, especially among female persons. Most women are not aware of their rights and the law. They do not know what to do and where to turn to. This lack of knowledge and access to help makes them vulnerable to domestic violence. High Court Judge, Peter Chitengi, as he then was, at a Human Rights Commission workshop said;

In addition, absence of a human rights culture makes the problem even more “Given the fact that the majority of Zambians are illiterate and poor, many people in Zambia do not know their rights are protected by the Constitution and therefore they do not know they have the right to challenge their violations”

Fifthly, religious beliefs have been documented as a major factor against violations of rights of women. The church is the chief institution in reinforcing women’s subordination and encourages silence through their teachings and interpretations of the bible. For example;

22 Legal Resources Foundation[LRF]News Number 33,Lusaka,Zambia,2006,p.6
The 'rib' interpretation of creation in Genesis 2 verses 21-23, which says that 'woman was taken out of man'; There is also the claim that women are the root of all evil'...,'and even that the role of a woman is to submit to her husband' - Ephesians 5 verses 21-23. 23

Christian women therefore accept violations of their rights because of such beliefs and are usually advised to just meditate and pray over their sufferings.

It is, however, imperative to note that violations of women's rights cannot be attributed to any one factor, but is a repercussion of the inequalities in the social, religious, legal, economic, cultural and political fabric of society.

23 Monica K. Musonda, "War against Women as a violation of Human Rights" Obligatory Essay, [UNZA], Lusaka, 1995
CHAPTER 3

3.0 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN.

INTRODUCTION

The first part of the chapter takes a look at, generally, the Convention on the Elimination of All Forms of Discrimination Against Women and how important it is to this study. In the second part, the chapter looks the Bill of Rights vis a vis violation of Article 23 of the Constitution.

The Convention on the Elimination of All Forms of Discrimination against Women is without doubt the most important UN document for women. It goes further than the other documents in describing women’s rights and gives a wider definition of discrimination and discusses women’s inequalities in the broader context of poverty, racism, armed conflict and development. It also covers discrimination in the home; this is an important step as it incorporates the domestic realm within the human rights framework.

The CEDAW, in its preamble, is very clear on its objective:

The full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.\(^{24}\)

However, the convention, in its preamble, explicitly acknowledges that “extensive discrimination against women continues to exist” and emphasizes that such discrimination “violates the principles of equality of rights and human dignity”.

Discrimination is defined in Article 1 as

\(^{24}\)The CEDAW
"Any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil, and other field."\textsuperscript{25}

The above definition is more encompassing than the one found in Article 23 of the Zambian Constitution for two reasons. First, it aims at focusing primarily on the rights of women unlike the one under Article 23 which covers general rights. Second, it covers a broad range of human rights unlike the one under Article 23 which only concentrates on civil and political rights. The agenda for equality is defined in 17 subsequent chapters. The implementation of the Convention is monitored by the Committee on Elimination of Discrimination Against Women (Committee on CEDAW). The Committee's mandate and the administration of the treaty are defined in Articles 17 to 30 of the Convention. The Committee is composed of 23 experts nominated by their governments and elected by the states parties as individuals "of high moral standing and competence in the field covered by the Convention". It is however, important to note that even if Zambia ratified the Convention in 1981 she has not domesticated it meaning that the Convention is inoperative and cannot hence be relied upon by a litigant in Zambia. This of course, operates to the detriment of women as non-domestication of the Convention means that their discrimination can be perpetrated.

\textbf{The Zambian Bill of Rights}

The Bill of Rights, a very important part of the Constitution has been defined as

...a statement of basic rights that can either be imported into the Constitution or annexed to some other legislation aimed at guaranteeing and giving legal protection to human rights and fundamental freedoms.\textsuperscript{26}

\textsuperscript{25} Ibid, Article 1

\textsuperscript{26} Anyangwe, \textit{Introduction to Human Rights and International Human Rights Law}, p. 143
The Zambian Bill of Rights is incorporated into Part Three of the Constitution of Zambia, which runs from Articles 11 to 26. This Bill is justifiable and entrenched in the Constitution; in fact so entrenched that its provisions can be amended only by way of a referendum. The advantage in entrenching the Bill lies in the fact that the guaranteed rights cannot be lightly taken away or modified. However, the disadvantage is that the range of guaranteed rights can only be improved qualitatively and incrementally through the cumbersome process of a referendum.

**Violations from Article 23 of the Constitution**

Before Article 23 of the Constitution can be looked at, it is important to note that Article 11 is the core Article as it sets out the foundation of the Bill of Rights:

> It is recognized and declared that every person in Zambia has and shall continue to be entitled to the fundamental rights and freedoms of the individual that is to say the rights whatever his race, place of origin, political opinion, colour, creed, sex or marital status, but subject to the limitation contained in this part to each and all of the following, namely;
> (a) Life, liberty, security of the person and protection of the law...
> (b) Protection for the privacy of his home and other property and from deprivation of private property without compensation.\(^{27}\)

The above provision can be interpreted to mean that every person has the right not to be subjected to any acts that are likely to cause discrimination on them. In the same regard, it is right to argue that every woman has the right to feel safe from vices such as physical harm especially in her home. Article 23 of the Constitution, also known as the Discrimination Clause reads in part:

> No law shall make any provision that is discriminatory either of itself or in its effect.

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\(^{27}\) The Constitution of Zambia Act, Chapter 1 of the Laws of Zambia, Article 11
...a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.\textsuperscript{28}

According to this provision, the expression discrimination means affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin, marital status, political opinions, colour, or creed whereby the persons of one such description are subjected to disabilities, or restrictions to which persons of another such description are not made subject, or are accorded privileges, or advantages which are not accorded to persons of another such description.\textsuperscript{29}

While it is true that the Zambian Bill of Rights contains a very pertinent provision as regards protection against discrimination, this very provision has been seen to be almost ineffective in relation to the protection of women’s rights. Women have continually been discriminated against; inter alia, employment, land acquisition, marital status and education. This has been perpetuated by a lot of factors. First, cultural norms and beliefs in Zambia have advanced the idea that there are some things that a woman cannot do or engage herself in. For example, from a cultural perspective, a woman is not expected to be a hunter or fisherman. This is regardless of the fact that even if a woman fishes or hunts better than men, she may not be allowed to do so because society has taught her that it is something she cannot do. Second, Article 23 allows discrimination in the private sector, by confining protection to the public sector or to persons acting by virtue of the

\textsuperscript{28} Ibid, Article 23
\textsuperscript{29} Ibid
written law. This is, unlike, for example under the South African Constitution that prohibits discrimination in both the public and private sectors in that even individuals are answerable for human rights violations.

Also, the Article allows discrimination in the qualifications required for occupation of public, corporate or disciplined services as maybe justified in a democratic society. For example, a regards discrimination in the qualifications required for disciplined services, it has been noted that; “Two former soldiers have described a military law that prohibits women military personnel from either falling pregnant or getting married before clocking two years in the Zambia Army as discriminatory. The two former soldiers, Rhoda Banda, 22, and Grace Lungufyaya, 21, complained in an interview that the law discriminated against them because it infringed on their rights to have children whenever they wanted.”

The gist of the above unfair treatment emanates from section 72 of the Defence Act, which prohibits soldiers from getting married or being pregnant before serving for a minimum of two years in the army. However, the men usually go scot free from this provision because if they impregnate a woman, they, in most cases, deny the pregnancies, hence bringing about this unfair burden on their woman counterparts. It is, however, important to note that this to year hold applies in all public institutions in Zambia but is still discriminatory in that men usually elude the consequences this provision by denying the pregnancies.

Since everyone is affected by these exceptions on a daily basis, the effect of Article 23 is to provide a blanket approval of discrimination and negate the fundamental principles of equality and the rule of law of the Constitution. It is, however, important to note that the Zambian Courts have had the opportunity to adjudicate on matters bordering on the said

32 Chapter 106 of the Laws of Zambia

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much talked-about Article. The decision in *Sara Longwe v Intercontinental Hotels*\(^{33}\) has been controversial in that it has been proactive. Decided in the High Court before Musumali J, as he then was, the brief facts of the case were that the petitioner, Sara Longwe was refused entry into the Luangwa Bar of the respondent Hotel on the ground that she was not accompanied by a male person. According to the evidence of the only witness for the respondent, women not accompanied by a male person who were patronizing that bar used to fight among themselves for men before this rule came into force. As a result of that behavior, Hotel residents and other male patrons complained to the hotel management and urged it to do something to prevent unaccompanied women from entering the hotel.

Having been refused entry, the petitioner brought an action against the respondent hotel seeking, inter alia, the following declarations:

(i) That she had been and was likely to continue to be unfairly discriminated against on the grounds of sex.

(ii) That she and indeed any person female or male was entitled to human rights and it was therefore unlawfully for the hotel to refuse her admission to public places on the grounds that a person is female or a female person not accompanied by a male person.

It as held that the action of the respondent in refusing entry to the appellant on the grounds that she as not accompanied by a male person amounted to discrimination on the grounds of sex and came within the operation of Article 23(2). The sound decision by the learned judge was however a High Court decision and though sound, it as soon upset.

The upset came about in *Elizabeth Mwanza and Clotildah Mulenga v Holiday Inn Court*\(^{33}\) 1992/HP/765
In this case, the facts were similar to those in *Sara Longwe* in that the two applicants had brought an action before the High Court seeking redress alleging that the respondent seriously abrogated their freedoms of movement, association and assembly and further that they had been and were likely to continue to be unfairly discriminated on the grounds of sex. It was held, by Chitengi, J, that there had been no discrimination especially that an international instrument, the CEDAW had been used, whose provisions could not be relied upon as the document was not domesticated hence was inoperative.

There are a lot of situations in which discrimination manifest itself in the lives of women and one of them involves family life. In *Edith Zewelani Nawakwi(Female) v the Attorney-General*\(^{35}\), the applicant argued that she had been, and continued to be unfairly discriminated on the grounds of sex as the Department of Passport and Citizenship had refused the application to endorse on the applicant’s new passport the personal particulars of her children of a single parent family even after she had previously furnished the said Department with satisfactory documentary evidence as to the personal particulars and social status of the two children. She further contended that a single-parent family headed by a female be recognized as a family unit in the Zambian society. Musumali J had this to say:

“...The father had been made to have more say over the affairs of a child and the issuing to a child of a passport or a travel document are concerned...This practice is discriminatory to mothers on no basis than the fact that they are females.”

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\(^{34}\) 1995/HP/254  
\(^{35}\) (1990-1992)ZR 112(H.C)
It was held that there had been discrimination and that it is unacceptable and legally untenable legally or otherwise in these times of enlightenment. The Constitution, however, has no specific provision as to discrimination of women vis-a-vis family life

**Enforceability of Rights under Articles 16 and 23 of the Constitution**

The enforceability of rights under the Bill of Rights in the Zambia Constitution is that the rights that are contained in Part III are only enforceable against the state and not individuals. This is unlike the South African Constitution which is enforceable even against individuals. This is against the spirit of protection of women’s rights in Zambia because in most cases, the perpetrators are individuals and private organizations. Therefore; the rights in the Bill have a horizontal and not vertical application. This means that the only bodies to be taken to task are the government and public bodies. This is because a public authority has “...public or statutory duties ...” and therefore is clearly a state agent. The case of Chilufya v City Council of Kitwe36, is illustrative of this fact. In that case, the plaintiff alleged that his rights as provided under Section 25(2) and (3) of the 1964 Constitution had been breached as a result of the defendant’s action of terminating his right to trade in their market. Section 25 provided for the freedom from discrimination on the grounds of, inter alia, political beliefs.

Mallon J in passing judgment held that the defendant being a public authority, its act in terminating the license of the petitioner on the grounds of his political beliefs amounted to an action discriminatory of the defendant and therefore came within the operation of section 25.

36 (1972)ZR 111

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The prominent view taken by the Zambian courts prior to the decision in the *Sarah Longwe* case had been that human rights are binding only on the state. However, *Sarah Longwe* brought about some change though was contradicted by *Elizabeth Mwanza*. Having held that the Bill of Rights was binding on private individuals, his Lordship went on, in the former case, to identify six of such rights:

(i) The right to life under Article 12(1) and (2)
(ii) The right to personal liberty under Article 13(1)
(iii) The freedom from slavery and forced labour in Article 14(1) and (2)
(iv) The freedom from torture: Article 15
(v) The right to privacy of the home and other property: Article 17(1)
(vi) and finally the freedom of conscience: Article 19(1) (2) (3) and (4)

His lordship went on to hold that the petitioner’s right of discrimination in Article 23 had been abridged. It has been suggested that among the rights that where recognized as binding on individuals, the right to freedom of property should also have been included as it is a very important right to women. As we know, this decision does not stand due to the decision in *Elizabeth Mwanza*.

However, Zambia should take after other jurisdictions, for example, India, whose Constitution contains rights enforceable against private individuals.

According to the cerebrated Indian Constitutional law author Durga Das Basu, the fundamental rights guaranteed by the Indian Constitution can be divided into those only
available against the state and those which are guarantees against actions of private
individuals as well as the state.\textsuperscript{37}

Basu’s assertion is supported by several authorities of Indian constitutional law, one of
them can be quoted here;

Dr Shiv Dayal, for example has observed:

Most of the rights in part three of the Constitution are guarantees against
state...However, some of the provisions of the part three...constitute
 guarantees against private action...\textsuperscript{38}

Basu has even gone further and tabulated the rights, which according to him, are binding
on private individuals and these include the Article 17; abolition of untouchability the
Article 23(1) prohibition of traffic in human beings and forced labour, the prohibition
under Article 24 proscribing employment of children in factories.

According to Basu, these constitutional guarantees can be abridged by the acts of both the
state and private individuals.

For example, in the case of \textit{R K Thangal v RS Phulakka}\textsuperscript{39}, a village headman was in the
habit of compelling every householder to render free labour for every day every week for
his sole benefit. The free labour was rendered on paying of a fine. The defendant having
refused to render the free labour, and the payment of the fine, the plaintiff headman then
brought an action for the amount of the fine. The defendant raised an objection to the
effect that the rendering of free forced labour was in conflict with the provision of section
23(1) which is as follows:

\textsuperscript{39} AIR(1961) Manipur 1
Traffic in human beings and beggars are similar to other forms of forced labour and prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

The court held that the action of the village headman failed because it was contrary to the provisions of Article 23(1) to force his subjects to work.

Zambia would be said to offer adequate protection to human rights in the Bill of Rights, especially to women if these rights were also enforceable against private individuals.

As regards the Convention, its non-domestication by Zambia has, it has been contended, made it inoperative on the national plane. With the Constitution, the rights in the Bill, though enforceable against the government cannot be claimed against private individuals who are the greatest perpetrators of women’s rights.

**The Enforceability of CEDAW**

The enforcement of Conventions, generally, is done by the states themselves and where they fail the UN does the enforcement. There is no international police force for the human rights violations. Instead the system relies heavily on political pressure to enforce any human rights law. Most countries cooperate with this system because they are very sensitive to political pressure and do not want to be known internationally as human rights violators. Article 1(3) of the Zambian Constitution states:

> This Constitution is the supreme law of Zambia and if an other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void.\(^{40}\)

Therefore any law which is not in line with the Constitution is inoperative. Articles 10 and 11 of the Convention on the Elimination of All Forms of Discrimination against

\(^{40}\) The Constitution of Zambia, Article 1(3)
Women deal with the right to Education and Employment respectively. The Bill of Rights of the Zambian Constitution does not guarantee such rights. It has been noted that:

Domestically, Zambia’s legal order is governed by the Constitution as the most supreme document. In fact, this same Chapter One of the Laws of Zambia is conspicuously silent on the application of international law in Zambia.\(^{41}\)

The Bill of Rights, in this Constitution, does not contain any of the rights covered by Articles 10 and 11 of the CEDAW. What this means in effect is that these rights are not enforceable due to the fact that they are outside the scope of rights which the Constitution vows to protect. Also, this Bill does not contain any specific rights pertaining to legal education and employment.

It can further be argued that for these two rights to be enforceable in the Zambian municipal legal order, they have to be domesticated. This is due to the fact that:

\[\text{[According to dualism, to which Zambia belongs] International law and domestic law are two systems that are wholly distinct, intrinsically different in character, and incapable of inter-penetration.}\] \(^{42}\)

Based on this situation, the rights to education and employment as provided by the CEDAW cannot apply to Zambia because they are operative on the international scene and as such they cannot be pleaded nationally as regards legal education and employment due to the fact that even though the CEDAW was ratified by Zambia, it has not been domesticated.

Though no litigation is yet to be conducted concerning the right to education and employment with special reference to legal education and employment in Zambia, it can

\(^{41}\) The Legal Resources Foundation News (LRF) News. No 100 of September 2007. p 9

be generalized that the position that the courts have taken in relation to the applicability of other international documents will be applicable even in actions for the infringement of these rights under the CEDAW. In *Zambia Sugar Plc v Fellow Nanzaluka*\(^{43}\), the respondent was employed in 1992 by the appellant. His employment was terminated without notice in 1996. He was paid three months salary in lieu of notice. He brought an action in the Industrial Relations Court, which held that the law had been complied with but held that the termination was contrary to the International Labour Organization Convention No.158 of 1982 that protects workers against termination of employment without valid reasons. On appeal to Supreme Court, it was held that International Instruments on any law although ratified and assented to by Zambia cannot be applied unless they are domesticated and in the instant case, Zambia had not domesticated the Convention in question. In *Benjamin Banda and Cephas Miti v The People*\(^{44}\), a criminal case, the question before the Supreme Court was whether the death penalty was ultra vires the Constitution and whether the death penalty contradicted international law, in this regard, the Second Optional Protocol to the International Covenant on Civil and Political Rights. Zambia has neither domesticated the Covenant nor ratified the Second Optional Protocol. The death penalty in this case was upheld because there had been no domestication of the two International instruments. In *Elizabeth Mwanza v Clotildah Mulenga v Holiday Inn Garden Court Hotel*\(^{45}\), it was held that the Convention on the Elimination of All Forms of Discrimination could not be applied into Zambia’s municipal

\(^{43}\) Appeal No.82\2001, unreported  
\(^{44}\) The Times of Zambia, November 14\(^{th}\) 2006  
\(^{45}\) (1997)/HP/2054
law as it had not been domesticated. From the above, it can be seen that courts have declined to recognize International law as applicable in Zambia.

However, the best approach to be taken by the Courts can be borrowed from the obiter of Msumali J in *Sarah Longwe* when he said

"It is my considered view that ratification of such a document by a nation state without reservations is a clear testimony of the willingness by that state to be bound by the provisions of such a document, I would take judicial notice of that treaty or convention in my resolution."\(^{46}\)

It is easy, from the above hurdles presented by the Zambian domestic legal system, to ascertain that the enforceability of the CEDAW, and indeed any other international document ratified but not domesticated by Zambia has been problematic due to the fact that Zambia prides herself on having an independent legal system, distinct from the international one and that any international instrument has to be domesticated for it to be operative.

\(^{46}\) (1992)/HP/765
CHAPTER 4

4.0 THE CEDAW, LEGAL EDUCATION AND EMPLOYMENT VIS-A-VIS SCHOOL OF LAW, LAW AND THE JUDICIARY.

Introduction

This chapter looks at, firstly, Articles 10 and 11 of the CEDAW dealing with education and employment. Secondly, the chapter looks at discrimination in legal education and employment of women in Zambia. Case studious of, inter alia, the School of Law, judiciary and academia are taken into account.

Article 10 of the CEDAW stipulates, in part, that:

"States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on the basis of equality of men and women.

(a) the same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as urban areas; this equality shall be ensured in preschool, general, technical, professional and higher technical educational as well as all types of vocational training...

(c) the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education which will help to achieve this aim and in particular the revision of textbooks and school programmes and the adaptation of teaching methods...

(f) the reduction of female students' dropout rates and the organization of programmes for girls and women who have left school prematurely.\(^\text{47}\)

The responsiveness of the educational system to the special needs of women and girls is a human rights as well as social justice issue. Education in Africa as a whole is characterized by lower levels of literacy, lower enrolment and retention levels. In most countries of the developing world, Zambia being no exception, the literacy gap between

\(^{47}\) Article 10, CEDAW
women and men is an overall indicator of the degree of inequality between them. In the legal profession, the issue of discrimination in legal education seems to have been curtailed, save for a few subtle forms.

The School of Law

It has been noted that discrimination, as regards women attaining legal education has, to a great extent been insignificant. Since the early days of the University of Zambia, the School of Law has always selected the best students from the schools of Education and Humanities and Social Sciences. This has, in turn, given students, regardless of being male and female an equal opportunity to aspire for the legal profession in such a way that if an individual reaches the cut-off points set for entry into the School of Law, he or she would be admitted into the School.

However, Discrimination, though subtle, occurs, and continues to occur. For example, it is common for male students to jeer when a female student is asking a question. This, to some extent, demoralizes the female students and discourages them from actively participating in academic interaction in lectures. Another age-old form of discrimination emanates from ‘harmless’ remarks by male students stating that studying law befits only male persons and as such it is not a field for women⁴⁸. This has been coupled with the fallacious saying that men deal with and are concerned with the law, while women are associated with morality.

It has also been contended that male lecturers usually are in the habit of asking female students some academic questions and taking pride in seeing them fail to answer the

⁴⁸ Interview : Daisy Nkhata, Managing Partner, Nyankhata and Associates, 19 November, 2007
questions. In most cases, male students are not asked questions even if they know the answers. This situation is very prevalent currently, and it seems to be growing.

The most pressing issue faced by not only the School of Law is that of sexual harassment here has always been unconfirmed rumours that some male lecturers are in the habit of coercing female law students to sleep with them in order to get better grades.

However, though it is possible discrimination exists, though subtle, it is generally right to state that as regards pronounced discrimination, the law school has no such report as to where a female student has been openly discriminated in attaining her legal education.

**The Right to Employment**

Article 11 of the CEDAW states that:

1. State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on the basis of equality of men and women, the same rights, in particular:
   (a) the right to an inalienable right of all human beings
   (b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
   (c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including, apprenticeships, advanced vocational training and recurrent training.
   (d) the right to equal remuneration, including benefits, and to equal treatment in respect of work for equal value, as well as equality of treatment in the evaluation of the quality of work;
   (e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.
   (f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage, or maternity and in order to ensure their effective right to work, state parties shall take all appropriate measures:
   (a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissal on the grounds of marital status;
(b) to introduce maternity leave with pay, or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of childcare facilities;
(d) to provide special protection to women during their pregnancy in types of work proved to be harmful to them.

Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

The above provision brings to light the fact that a woman who has adequate qualifications for a job must be given equal opportunities to any respective job opportunity as her male counterparts. A woman, as this right implies, should not be forced to engage in any profession that she does not consent to engage into.

Equal pay for all means that women must have the same opportunities as men as regards the payment of wages and generally have the same treatment at places of work. Women, just like their male counterparts must be given, inter alia, sufficient benefits to sustain them into old age.

Women, normally require more protection in health matters at work. This is because it is a well known fact that they are not as strong as men and therefore more caution has to be exercised as regards their health especially when they work in men dominated fields such as the mines.

It is a well known fact that the legal profession is male dominated. This can be seen from the fact that the most important legal offices in Zambia have been allocated mainly to men. For example, since independence, there has never been a woman, Minister of

\[49\] Article 11, CEDAW

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Justice, Chief Justice, Attorney-General or Solicitor-General. The only score women have had involved the appointment of Ireen Mambilima, a Supreme Court Judge, as chairperson of the Electoral Commission of Zambia. Not even the body supposed to be in the forefront protecting women lawyers’ rights; the Law Association of Zambia (LAZ) has had a female chairperson or president. The highest post occupied by a woman in this organization has been that of Vice Chairperson by Ms Nelly Mutti in the 90’s. As regards the Office of the Director of Public Prosecutions there was one instance when a woman acted in such a capacity. This was Mrs. Sokoni. Her removal from this office by the President caused a lot of controversy especially that most women organizations regarded this as discriminatory as no reasons for her removal were ever furnished. It can be ascertained, as such that women lawyers are highly discriminated in attaining public offices as seen from the low numbers of them attaining public offices. 50

**Women Lawyers in Private Practice**

It has been argued that the onset of the liberalized economy brought about a change in the rights of women lawyers. It has been stated:

> Previously being in public practice (Ministry of Legal Affairs) meant that if a woman lawyer is pregnant, she had to go on maternity leave and this meant that as regards seniority, the woman lawyer would be left out as compared to her male counterparts” 51

The capitalist economy now meant that women lawyers were now free to start up their own practices without much hindrances as in the second republic where most law firms

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50 Interview : Matrine Bbuku Chuulu, Regional Coordinator, Women and Law in Southern Africa Educational Trust, 21<sup>st</sup> November, 2007

51 Interview: Nkhata, Nyankhata Chamber, 19<sup>th</sup> November, 2007
were own by men and as such the issue of a maternity leave being a drawback was curtailed.

However, the capitalist economy also had its own problems. Most big clients in the private arena such as banks and parastatals had already been siphoned by the male counterparts. Though not discriminatory in itself, this situation meant that women lawyers had to confine themselves to fields of law such as women, women's rights and matrimonial issues which were not so well paying.

The general situation, however, is that women generally are discriminated. It has been noted by Natala that:

If you ask any woman in the paid workforce if she is treated fairly, the sad answer will be NO! For even with the strides women have made in the workplace, they are discriminated on every level.°

The courts have had the opportunity to adjudicate in matters that concern women's right to employment, generally. In Ethel Sepiso Nyambe v Zambia State Insurance Corporation, the spouse of the complainant was transferred from one town to another. The complainant's employers refused to transfer her to join her husband. In this case, the Court emphasized the duty of the employers who employ married women to treat them justly. The court held that unless employers can show that they had no branch at the place where the husband was transferred, they would not be held to have discriminated against her.

The above decision shows the commitment of the court in ensuring the protection of the rights of women at work. However; there are some issues that negate these decisions. A

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52 Natala, Obligatory Essay, "Domestic Violence Against women in Zambia" p.23
53 No 62 of 1982 of the Industrial Relations Court
judgment of the IRC does not create binding law for other subordinate courts to follow. It is law between the parties to the case. Unless the individual judge feels it necessary to follow a decision of the Court in a particular case, he is not obliged. This has significantly weakened the contribution of this Court to the development of human rights of women.

In the United State of America, the notion of women lawyers practicing was dealt with in the nineteenth century. Original, the the notion of men and women to stand as equals before the law was not the original understanding. Thomas Jefferson put it in this way:

"Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in the gatherings of men."  

During the long debate over women’s suffrage, the prevailing view of the natural subordination of women to men was rehearsed frequently in the press and in legislative chambers. For example, an editorial in the New York Herald in 1852 asked:

"How did the woman first become subject to man as she now is all over the world? By her nature, her sex, just like the negro, is and will always be, to the end of time, inferior to the white race, and therefore, doomed to subjection, but happier than she would be in any other condition, just because it is the law of her nature. The women themselves should not have this law reversed."

The change, however, came about in 1873 when the Supreme Court of the United States had the opportunity to examine a woman’s claim to full participation in society through entry into a profession traditionally reserved for men. This was in Bradwell

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54 Herma Hillkay and Martha S. West, Sex Based Discrimination, Text, Cases and Materials, New York: American Casebook Journal, 1996, p10

55 Ibid
Myra Bradwell's application for a license to practice law had been denied by the Illinois Supreme Court solely because she was female. The Supreme Court affirmed this judgment with only one dissent, recorded but not explained, by Chief Justice Chase. Justice Miller's opinion for the majority was places on two grounds: (1) since petitioner was a citizen of Illinois, the privileges and immunities clause of Article IV, section 2 of the Federal Constitution was inapplicable to her claim; and (2) since admission to the bar of a state is not one of the privileges and immunities of the United States citizenship, the fourteenth amendment did not secure the asserted right. In *Re Griffiths*\(^{57}\), decided more than a century late, it was held that an arbitrary denial of the admission to the bar of a state violates the due process and equal protection guarantees of the fourteenth amendment. Although the decision in Bradwell qualifies as a museum piece, equality of opportunity for women in the legal profession remained unfinished business.

**Women Lawyers in Academia**

As regards women lawyers in the academic world, it is imperative to stress that there have been positive strides that have taken place. For example, in the history of the School of Law, this is the first time that the school is having a woman as Dean:

> Previously, the last ten Deans of the Law School have been men, starting from Dr Bentsi Enchill in 1966 to the late Prof Alfred Chanda early this year. This is the first time we are having a woman as Dean in the School of Law.\(^{58}\)

Of the about twelve full-time lecturers in the School of Law, five are female. The position of Dean and Assistant Dean, Under Graduate are held by two of them. This is an

\(^{56}\) 83 US(16 Wall)130

\(^{57}\) 413 US 717

\(^{58}\) Interview: N. Simbyakula, Director, Zambia Institute of Advanced Legal Education (ZIALE), 23\(^{rd}\) November, 2007
achievement because this never used to be the case previously. According to the University of Zambia regulations, for one to qualify as lecturer, they have to at least have a minimum of Masters Degree. This number of women lecturers, though small, shows that women lawyers are now looking beyond just a first Degree in Law. In the past, discrimination was there but insignificant because few women could either be sponsored for Masters Degrees or that the culture during that time was a woman, whether a lawyer or otherwise, could now settle down and start a family, while working and having no hopes of further education.

**Women in the Judiciary.**

In the judiciary, it has been seen that the most significant form of discrimination has been seen as regards seniority. When a female Magistrate, for example goes on maternity leave, that period when she is not working means that her male counterparts will continue working and attaining the requisite ten years for appointment as Judge of the High Court will be difficult because she will be regarded at the end of the ten years not to have clocked ten years at the bench for her to be appointed as Judge. Currently, some women on the bench have been appointed to sit on the Supreme Court bench. Notable among these are the Honorable Justices Florence Mumba, who recently was judge of the International Court of Justice, Mrs Lombe Chibesakunda and Mrs. Irene Mambilima, who is currently the Electoral Commission Chairperson.

In general, it can be adduced, safely, that gender discrimination exists at virtually every level of employment and the legal profession has not been an exception. However the

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59 Interview: Chuulu, WISA, 21st November, 2007
discrimination is subtle and insignificant as most women lawyers know the law and will not hesitate, it seems, to take legal action.\textsuperscript{60}

\textbf{Application of the Feminist Theory of Law.}

In the Law School, it is true that the perception of law that has always been brought out is that it is an institution that is above reproach. This characteristic of law, it is contended has been brought about because law is said to be unbiased, neutral, objective, coherent and rational. As such, law has been seen to be made by men and in their image, reflecting masculine values and standards, serving male interests. For example, the male ness of the law in the Law School is reflected by male students issuing such statements as the study of law is for males and not females. No deliberate measures further have been put up to curb this ‘silent’ form of male dominance.

The study of law involves as Feinberg and Gross put it, “...Statutes, judicial opinions, administrative regulations, constitutional provisions and all official pronouncements of law” \textsuperscript{61}It has been found that this law that is being taught in the School of Law is generally gender biased. For example, the Supreme law of the Land, the Constitution, is framed in gender biased language in that it does not reflect the female gender as what is written are terms as ‘He’ or ‘His’.

The biased, patriarchal nature of law is further seen in the appointment of men to the most important legal positions in the country. For example, the country has not had any female

\textsuperscript{60} Interview: Chuulu,WLSA,21\textsuperscript{st} November,2007

\textsuperscript{61} Joel Feinberg and Hyman Gross, \textit{Philosophy of Law},3\textsuperscript{rd} ed.London:Wadsworth,1980,p1
Minister of Justice, Attorney General or Chief Justice. Currently, there is no female State Counsel in the country.

The issue of sexual harassment in the Law School further exposes male patriarchy of the Law. Important to note is that there has never been any rumor of the opposite happening. However, most of the rumors that come about involve male lecturers and female law students. From the feminist perspective, it is right to state that this happens because females are viewed as sex objects and that if such issues are reported to the right authorities, no concrete actions will be taken.

It is, however, right to state that the feminist theory of law does not expose the real situation on the ground as pertaining to an institution such as the School of Law. For example, most of the forms of discrimination are only subtle and cannot be used as a yardstick to the discrimination of women in the school. Therefore, the biased, patriarchal nature of law is not seen as portrayed by this theory.

Secondly, there is the view that society, including the legal order is patriarchal. As regards the School of Law, this theory is misplaced as the patriarchy being portrayed is not present. This is because the Dean of the School of Law presently, is female. The Assistant Dean, Under Graduate is also a woman. Therefore, one of the most important legal institutions in the country, the School of Law; University of Zambia is headed women.
CHAPTER 5:

5.0 CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Human rights, being the foundations of human existence and co-existence are supposed to encompass all, regardless of being male or female. It is, however, sad to note that women have not enjoyed their rights since time immemorial. In Zambia, the situation has been worsened by the cultural and social beliefs inherent in society that women are subordinate to men. Other forms of discrimination that women are faced with include physical violence, emotional or psychological abuse, and economic abuse, discrimination in education and discrimination in employment.

The Part III of the Constitution of Zambia, otherwise known as the Bill of Rights has many flaws as regards women’s rights. For example, it does not have specific provisions on women’s rights. The right to found a family, a very pertinent right for women, is non-existent. Second generation rights which are crucial to the enjoyment of women’s rights such as the right to education and health are non-existent in this bill. Moreover, this Bill is enforceable only against the state and not individuals, who happen to be the biggest violators of women’s rights.

The best form of redress women in Zambia can get as regards the violations of their rights is the Convention on the Elimination of All Forms of Discrimination against Women, an International Document. This document has a broader definition of discrimination than the definition found in Article 23 of the Constitution. For example,
the definition under the CEDAW aims at focusing primarily on the rights of women unlike the one under Article 23 which covers general rights.

Legal education and employment in Zambia has been one of those fields whose human rights situation as regards women lawyers has not been monitored. In the Law school, female students have been faced with discrimination both from lecturers and their male counterparts. Most male students take pride in ‘assuring’ their female counterparts that the field of Law is not theirs because this field does not involve morals. Academic questions posed, in most cases by some lecturers are aimed at demoralizing these female students, this is regardless of the fact that male students at those particular times are willing to answer those questions. This discrimination has, however, not been investigated and interrogated because no reported instance has manifested this.

In the legal profession, discrimination also persists. Firstly, the legal profession is male-dominated. No woman lawyer has occupied the top posts in the legal profession. The Law Association of Zambia, the body tasked with the duty of safeguarding the interests of lawyers has not done much in safeguarding women lawyers’ interests. It has been ascertained that there has not been a women chairperson or president of the association. The only time the office of the Director of Public Prosecutions was occupied by a woman ended in controversy as the then acting D.P.P was removed from her post without even valid reasons being given for her removal.

Secondly women lawyers in private practice, generally, do not have it easy. In fact, their situation is the exception to the general rule that being in private practice is lucrative. Most favorable clients in the private arena usually opt for male-run law firms. Of course,
even before this, women lawyers who were coming from public practice found that most of the big clients had already been taken by their male counterparts. As a result, most women lawyers, even to this day, have confined themselves to fields of law with very little financial reward such as women’s rights and matrimonial issues. Case law, however, such as Ethel Sepiso Nyambe v Zambia State Insurance Corporation 62 shows that the courts have taken a proactive stance in ensuring that women’s rights to employment are protected and safeguarded.

As regards women lawyers in academia, a lot has been achieved. Of the twelve full-time lecturers that the Law School currently has, about five are female. This is the first time in the history of the School that a woman has become Dean. Dr Mulela Margaret Munalula can thus be seen not as only being an example to all women, regardless of profession, that they cannot only achieve the impossible but also she shines out to all female students the country over, especially the law students that with hard work and determination, a woman lawyer can be unstoppable. On the overall, women lawyers in academia show that achievements have been made as regards not only the right to education but also higher education and also that jobs such as lecturing, which previously were a domain of males are now also being filled by women.

In the Judiciary, though a few strides can be pointed out as to appointment of women sitting on the bench, discrimination is rampant in this area. The main form of discrimination occurs in relation to seniority. For example, a woman magistrate who goes on maternity leave in the first ten years of her sitting on the bench will not be regarded as having clocked tens for appointment to the High Court. The same is not the case with her

62 No 65 of 1982 of the Industrial Relations Court
male counterpart with whom she as called to the lower bench. However, a notable number of women have been appointed to sit as Supreme Court Judges. Among others are Justice Hon Mrs. Florence Mumba, Justice Mrs. Lombe Chibesakunda and Justice Mrs. Ireen Mambilima. With all due respect to the late Deputy Chief Justice, David Lewanika, it is now hoped that a woman Deputy Chief Justice will be appointed to fill this position.

Discrimination, it can be ascertained is existent at virtually all levels of employment and the legal profession is just one of them.

Lastly has been the enforceability of the rights to education and employment with special emphasis on legal education and employment. It has been ascertained that the CEDAW is, in its current form, inapplicable to Zambia. This is due to the fact that though ratified, it has not been domesticated. This in turn means that the rights in this document cannot be pleaded in any domestic legislation. Further, Zambia being a dualist nation, its municipal laws are superior to those on the international plane, the CEDAW included, and as such the laws in the municipal system are given first priority over those in the international system hence rendering any rights contained in the CEDAW subordinate to those in our Bill of Rights.

The Bill of Rights, it must be noted is only enforceable against the government. Its non-horizontal application has serious detrimental consequences for women’s rights.
RECOMMENDATIONS

Since Zambia has ratified the CEDAW and therefore and hence committed itself to major human rights, there is much that the government can do despite limited resources it possesses. The major step is to domesticate CEDAW so that it becomes part of municipal law and women can effectively claim their rights under it, if infringed. This would mean that whatever form of discrimination in the legal profession, whether subtle or pronounced will effectively be dealt with because the specific rights under which women can claim, that is, the right to education and employment will be available and readily enforced. So far, government has adopted a National Gender Policy, which attempts to address all existing gender imbalances in a comprehensive manner and provide equal opportunities for women and men. However, this policy has not been implemented. The best that government can do is to take concerted action and ensure that the policy is implemented.

As regards the School of Law, quotas should be introduced so that the cut-off point for female law students should be reduced. This will ensure that more females are admitted into the school. In the long term, more females will be off-loaded into the legal profession hence even making it easy for most of them to hold senior positions.

Further there should be a deliberate programme to employ fifty percent female lecturers in the School of Law. This will be in line with the SADC Declaration on Gender and Development that calls for 50% female representation in high public offices. This is notwithstanding the fact the at the moment, the school has the highest number of female
lecturers ever recorded because even this number does not satisfy the 50% threshold put up by the SADC Declaration.

As regards private practice, Law firms must be compelled to take in female law graduates for sponsorship to ZIALE and subsequent employment so that the problem that took place in the 90s of female lawyers finding it hard to gain ground in private practice is curbed. This will in turn bring about a situation whereby these female lawyers will have an equal playing field with their male counterparts as pertaining to big clients.

The right to freedom of property under Article 16 of the Constitution becomes a critical issue if looked at from the context of land ownership. Land ownership would enable many rural women generate income by selling the produce of their land. Statistics show that men hold nearly 85% of the land titles issued. In 2005, the gender gap in the acquisition of a new title was 69%. A gender policy pronouncement in May 2005 by the Ministry of Lands that 10% of all advertised land plots would be reserved for women, while the rest were competed for failed to take into account the fact that allocation is dependent on producing collateral as well as a non-refundable fee.\textsuperscript{63} Women do not have the money to meet this requirement generally. Alternatively, the non-refundable fee should be done away with until such time when women are economically empowered. The Zambian government should also seriously before domesticating CEDAW. For Example Article 3 of CEDAW reads:

\begin{quote}
"States parties shall take in all fields, in particular, social, economic and cultural fields, all appropriate measures, including legislation, to ensure that full development and advancement of women, for the purpose of
\end{quote}

\textsuperscript{63} United Nations Committee on the Elimination of Discrimination Against Women.
guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”

NGO’s have played a significant role in advancing and developing the gender movement in Zambia. Notable among these are the Women and Law in Southern Africa Research Trust (WLSA) and the National Legal Aid Clinic for Women under LAZ. The least that government can do for them is to ensure that they are adequately funded so that they carry their operations smoothly.

With the current issues of the Constitutional amendments, it is imperative that, although the Bill of Rights is entrenched, there is need to amend it so that it conforms to modern standards. New groups of rights such as second generation rights, for example the right to education, employment and health, and third generation rights such as the right to peace should be incorporated. Specific rights such as the right to family life should also be included. The incorporation of such rights would ensure that women are adequately protected under the Constitution. These rights, especially the right to education will be very valuable because if there is a violation of the right of a female to obtain legal education, legal remedies will be readily available.

The Article 23 of the Constitution, otherwise known as the Discriminatory Clause, should specifically be amended so that it encompasses discrimination from a wide perspective. Taking into account the fact that in most cases it is women that are discriminated against as regards their rights, this Article should specifically refer to women because it discriminates in the areas of adoption, marriage, divorce, burial, devolution of property or other matters related to personal law. This Article should be replaced with a broad anti-
discriminatory clause, which complies with international human rights instruments such as the CEDAW.

The horizontal application of rights in the Bill of Rights, it is hoped, should be abolished and replaced by the vertical application procedure which even makes private persons to be answerable for human rights violations. In its current form, the Bill takes Individuals out of the reach of the law in the event that they commit human rights violations. Countries such as South Africa should be emulated for including private individuals in the realm of human rights violators.

Lastly but not the least, the Law Association of Zambia should put up deliberate programmes during their AGMs so that women lawyers are allowed to stand, on mandatory basis, for the top positions such as President of the association. This will be one of the first sighs of showing that discrimination is being curtailed in the legal profession. In short quotas and reserved seats should be created in the association to enhance justice. Equality should not only be practiced but seen to be practiced by lawyers in Zambia.

These recommendations if implemented would not only aid the gender movement, but would revolutionise women’s rights, especially in the legal profession, not only in Zambia, but Africa as a whole.
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APPENDIX A

The University of Zambia

School of Law

L410-Directed Research

Interview Guide

Title: Human Rights Violations: A Critical Appraisal of Women’s Rights in Zambia

Interviewer: Kenneth Tembo

Dear respondent,

I’m a fourth year student in the School of Law, University of Zambia undertaking research on the above mentioned topic and you have been randomly selected as a respondent. I would be very grateful if you answer the questions in this questionnaire as honestly as possible. I assure you that all the information you will provide will be treated with the greatest level of confidentiality.

Thank You.

SECTION A

Please tick or fill in the provided spaces where appropriate.

IDENTIFICATION

1. What are your names? [ ]

2. What is your occupation? [ ]

3. What position do you hold in your organisation [ ]

SECTION B

4. How well do you know about human rights?
   (i) Very well
   (ii) Well
   (iii) Not very well
   (iv) Not at all

5. Have you ever been discriminated on the grounds of sex?
(i) YES
(ii) NO

6. If yes, how were you discriminated?
   (i) Work
   (ii) School
   (iii) Property Acquisition
   (iv) Others, specify ...........................................

7. If you answered question 6, upon being discriminated, what action did you take?
   (i) Court Action ...........................................
   (ii) Told some colleagues about it ..................
   (iii) Consulted relevant organisations e.g. YMCA ...

8. How do you view society as regards gender relations?
   (i) Biased on women ..................................
   (ii) Biased on men ....................................
   (iii) Balanced ...........................................
   (i) Others, specify .....................................

9. If your answer to question 8 is either (i) or (ii), what changes can you propose to be made?
   (i) Review and change the law
   (ii) Sensitize communities about equality
   (iii) Both (i) and (ii)