

**CONSTITUTIONAL EXEMPTIONS TO NON DISCRIMINATION:  
THE IMPACT ON THE RIGHTS OF WOMEN IN ZAMBIA**

**BY**

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**CONSTITUTIONAL EXEMPTIONS TO NON DISCRIMINATION: THE IMPACT ON  
THE RIGHTS OF WOMEN 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 (LLB).**

## DECLARATION

I Mwelwa Chingoma, computer number 26066068, do hereby declare that the contents of this Dissertation are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

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**THE UNIVERSITY OF ZAMBIA**

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**CONSTITUTIONAL EXEMPTIONS TO NON DISCRIMINATION: THE IMPACT ON  
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## **Abstract**

This dissertation had the task of looking at the impact of constitutional exemptions to non discrimination on the rights of women in Zambia. The dissertation endeavored to look at the inter alia, the legal position of women in Zambia, the delivery of justice by the judicial system, in particular the Local Courts and the effectiveness of the existing legal framework in protecting the rights of women in Zambia.

The dissertation found that gender discrimination continues to be a real problem in Zambia. Consequently the position of women in Zambia remains subordinate to that of their male counterparts. This is chiefly attributable to the duality of the legal system which recognizes the application of customary laws, most of which are oppressive on women and tend to subordinate them in many issues including family law.

It established that gender discrimination manifests in many areas of family law for example in customary law marriages. It was also established that the area of inheritance has equally posed many difficulties for women. Despite the enactment of the 1989 Intestate Succession Act, women still stand to face discriminatory practices after the death of their spouses when dealing with the distribution of land held under customary tenure. This study highlights the weaknesses inherent in the legal framework governing the rights of women in Zambia.

The dissertation recommends that appropriate legislation should be enacted particularly on those aspects of family and personal laws that are susceptible to violation. Therefore legislation to regulate marriages contracted under customary law is necessary to cover such matters as maintenance and provide concrete grounds for divorce.

## **DEDICATION**

To my late father Colonel Damson E. Chingoma. Thank you for always teaching me that I can achieve all I want in life through hard work. Your faith in me will forever remain an inspiration for me to excel in all I do. I wish you were around to see what your baby girl has achieved. However, I know that this very work will speak of your achievement. To my girls, Nkumbu and Mulima and my son, Kaluwe, thank you for understanding during times I could not be there for you, without you there could be nothing worth working hard for. I Love you.

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My brothers and sisters, thank you for being in my life, you are all a blessing.

## **TABLE OF STATUTES**

The Constitution Chapter 1 of the Laws of Zambia

The Subordinate Courts Act Chapter 28 of the Laws of Zambia

The Local Courts Act Chapter 29 of the Laws of Zambia

The Intestate Succession Act Chapter 59 of the Laws of Zambia

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The Deceased Brother's Widows Act Chapter 59 of the Laws of Zambia

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The Convention on the Elimination of all forms of Discrimination against Women (CEDAW), (1979)

The Universal Declaration of Human Rights (1948)

International Covenant on Economic, Social and Cultural Rights (1966)

International Covenant on Civil and Political Rights (1966)

## **TABLE OF REGIONAL INSTRUMENTS**

The African Charter of Human and People's Rights (1981)

The Protocol to the African Charter of Human and People's Rights (2003)

SADC Gender Declaration (1997)

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Mwiya v Mwiya [1977] ZR 113

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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.0 Introduction

Discrimination is a sociological term referring to the treatment taken toward or against a person of a certain group in consideration based solely on class or category. Discrimination is the actual behavior towards another group.<sup>1</sup> It involves excluding or restricting members of one group from opportunities that are available to other groups.

Discriminatory practices take many forms, but they all involve some form of exclusion or rejection. One such form of discrimination that has remained a major issue of concern the world over is gender discrimination. Gender Discrimination is defined as treating men and women differently simply because of their sex and/or marital status. Such differentiation should result in a negative effect on the person suffering discrimination.<sup>2</sup>

Gender discrimination results in the negation of Women's rights, these being the human rights of women. Mostly, they are the same as any other human right. However, women may have some special rights that arise by virtue of their physiological or biological make up, such as the capacity to conceive and carry a pregnancy and its natural consequences.<sup>3</sup>

It has also been recognized that gender discrimination has a negative impact on the development of any country and for this reason, gender activists have continued to call for the elimination of discriminatory laws. To this end, governments the world over have ratified various International Treaties such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the SADC Protocol on Gender and Development. The major thrust of these treaties is the elimination of gender discrimination and the advancement of women's rights through legal provisions.

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<sup>1</sup> R. Appelbaum, M. Dunier & D. Carr, Introduction to sociology. 7th ed. W. W. Norton & Company Inc, New York, 2009. Page 324.

<sup>2</sup> M.M. Munalula, Women, Gender Discrimination and the Law, UNZA Press, Lusaka, 2005. Page 15

<sup>3</sup> M.M. Munalula, Women, Gender Discrimination and the Law, page 15

For instance, the SADC Protocol provides that by 2015, all member countries shall endeavor to enshrine gender equality and equity in their constitutions and ensure that these are not compromised by any other provisions, laws or practices. Therefore, the women's movements in Zambia have been advocating for the elimination of gender discrimination in the country's Constitution<sup>4</sup> because it is the supreme law of the land from which all other laws derive their legitimacy.

The Constitution contains provisions guaranteeing to all citizens protection from discrimination as follows:

23. (1) subject to clauses (4) and (5) and (7), a Law shall not make any provision that is discriminatory either of itself or in its effect.

(3) In this Article, the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby 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.

(4) clause (1) shall not apply to any law so far as that law makes provision-

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

Therefore, in as much as Article 23 guarantees to all citizens the protection against discrimination, it nevertheless goes on to outline situations in which discrimination is allowed, particularly in the areas of personal and customary laws. However, this has been cited to be problematic for women as it is alleged that they are most likely to suffer abuses of their rights under customary law which is perceived as gender biased against women. For example, most Zambian customary laws do not support the maintenance of former spouses upon dissolution of the marriage. It has been observed therefore, that the constitution indirectly sanctions discrimination against women as the majority of them fall in the category governed by customary laws.

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<sup>4</sup> Chapter 1 of The Laws of Zambia

## 1.1 Background of the Study

In Zambia, the Constitution is the supreme law of the land. The enjoyment of rights by citizens is governed by the provisions of the Constitution and any infringement can only be challenged by reference to it. However, by allowing the application of customary laws to justify discrimination, Article 23 has been criticized by gender activists as presenting the biggest obstacle in the elimination of gender discrimination.<sup>5</sup> The exclusion of personal and customary laws from the guarantee against discrimination has been said to ultimately compromise the status of women.

One of the major problems identified in the application of customary law, is its lack of objectivity and uniformity. To illustrate this, Section 12 of the Local courts Act<sup>6</sup> provides as follows;

12. (1) Subject to the provisions of this Act, a Local court shall administer

(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

Although the law provides that customary law can only be applied subject to the repugnancy test, the major challenge lies in the determination of what amounts to repugnancy. Some customary laws which can be termed as repugnant have still continued to be practiced. This has led to varied decisions as to whether or not a particular custom is repugnant or not. In the case of *Mwiya v Mwiya*<sup>7</sup>, a Lozi custom that a divorced wife was not entitled to property settlement or maintenance was held to be valid.

## 1.2 Statement of the Problem

The division between customary and civil law in Article 23 of the Constitution prevents the scrutiny of all matters falling under customary law. In other words, the Constitution itself excludes personal and customary laws from constitutional scrutiny. Since it has been alleged that women's rights violations take place within the realm of culture, the inadequacies of

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<sup>5</sup> M.M. Munalula. *Women, Gender Discrimination and the Law*, Page62

<sup>6</sup> Chapter 29 of The Laws of Zambia

<sup>7</sup> (1977) ZR 113

constitutional provisions to ensure women's protection from discrimination is likely to result in the negation of many of their rights.

Many of the issues that affect women's rights fall within the context of personal or customary laws which are excluded from the guarantee against non discrimination. These include marriage, divorce, maintenance and inheritance. It is therefore in this area that women require the full protection of the law. Maintaining the qualified guarantee to non discrimination in the Constitution hinders the whole essence of prohibiting gender discrimination in the first place and threatens the advancement of gender equality.

How has the exclusion of personal and customary laws from constitutional scrutiny impacted the rights of women?

### **1.3 Significance of the Study**

The research is significant because violation of women's rights remains a source of concern the world over. There are potential problems for women in allowing the application of customary laws to justify discrimination. There still remains need for more practical steps to be taken by the State to eliminate completely the violation of women's rights and ensure that in no circumstances is discrimination against women permissible. If there is no unconditional provision to protect women from discrimination, women's rights will continue to occupy secondary status. It is therefore desirable that the constitutional provisions regarding discrimination are strengthened to improve the status of women in Zambia.

The study is therefore, significant as it shows how women's rights are negated by the exclusion of personal and customary laws from the guarantee against non discrimination and how this could be resolved.

### **1.4 Objectives of the Research**

The main objective of this paper is to evaluate the impact on women's rights of excluding personal and customary laws from the constitutional guarantee against discrimination.

The specific objectives are as follows:

- to examine the adequacy of constitutional provisions in protecting women from discrimination.
- to review the legal position of women in Zambia in view of the application of customary law.
- to analyse the equality of the delivery of justice system, particularly in the Local Courts which administer customary law.
- to establish how best gender discrimination can be eliminated by the Constitution.

## **1.5 Specific Research Questions**

The research questions addressed by this study are as follows:

- To what extent have existing legal constitutional provisions successfully protected women against discrimination?
- Does the constitution of Zambia adequately protect Women against discrimination?
- How are women in Zambia treated in the cultural and private spheres?
- How does the exclusion of personal and customary laws from the Constitutional guarantee against discrimination impact women's rights? and
- What improvements can be made regarding the guarantee of protection from discrimination for women?

## **1.6 Methodology**

The researcher employed two methods in conducting the research. The first part composed desk research in which various pieces of legislation, legal commentaries as well as case law and other publications that have been written on this topic were consulted.

Secondly, field work was carried out in order to extract interview data from various organizations and persons involved in the advocacy of women's rights and empowerment. Among the organizations visited were; Women and Law in Southern Africa Research Trust (WLSA), Zambia Law Development Commission (ZLDC), Women in Law and Development in Africa (WILDAF) and the Young Women's Christian Association (YWCA).

## **1.7 Organization of the Research**

The research is divided into five chapters as follows:

### **Chapter 1: General Introduction**

This chapter gives an introduction of the research, the general background of research, the significance of the research its purpose and methodology.

### **Chapter 2: The Legal Status of Women in Zambia**

This chapter focuses on the legal position of women in Zambia. It considers the extent of the rights and entitlements of women in the family. Further the chapter looks at how these rights are violated under the guise of customary law.

### **Chapter 3: The Legal Framework**

The chapter discusses the legal framework governing the rights of women in Zambia with particular emphasis on constitutional provisions regarding equality as well as those guaranteeing protection from discrimination with particular emphasis on the exemptions contained therein.

### **Chapter 4: The Delivery of justice**

This chapter has looked at how the exclusion of personal and customary laws has impacted on women's enjoyment of their rights within the family. In this part, the paper considers how the exemptions have been construed by the courts when dealing with family disputes.

### **Chapter 5: Conclusions and Recommendations**

This chapter highlights the salient features of the preceding chapters and concludes the research with a summary and recommendations.

## **1.8 Conclusion**

This chapter has given an introduction of the research, the general background of the research, the significance of the research, its purpose and methodology. It has highlighted the existence of gender discrimination under customary law. It also brings to the fore the fact that the Constitution of Zambia indirectly sanctions discrimination against women by allowing the application of customary law.

The next chapter examines the Legal position of women in Zambia with respect to the rights they enjoy in family law issues.

## **CHAPTER TWO**

### **THE LEGAL STATUS OF WOMEN IN ZAMBIA**

#### **2.0 INTRODUCTION**

Women's rights are human rights, some of which are specific to the female gender due to their physiological or biological makeup. Like all human rights, they are inherent in every person by virtue of being human and should therefore be enjoyed freely by all without any discrimination. However, there still remains a high level of discrimination on the basis of gender. One area in which gender discrimination manifests itself is in family relations hence the need for their regulation. In Zambia, owing to the dual legal system, family law issues are regulated by both customary and statutory law.

The focus of this chapter therefore, is to review how women are treated by the law with respect to family matters. The chapter begins with a brief statement on the legal position of women in Zambia in general. The rest of the chapter reviews some specific areas in which women's rights are affected by the application of customary law. These include marriage, divorce and inheritance.

#### **2.1 LEGAL POSITION OF WOMEN IN ZAMBIA**

The legal status of women in Zambia still remains subordinate compared to their male counterparts 46 years after attaining independence from colonial rule. The situation is mainly attributable to the continued existence of a dual legal system which recognises the application of customary laws.

All societies have patterns of related systems of customs, norms, values, expectations, beliefs, assumptions, which are rarely questioned but which guide the behaviour of individuals in the society. Customary law is derived from customs of a people.

Custom has been described as a usage or practice of society which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject matter to which it relates.<sup>8</sup> Further, Gluckman

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<sup>8</sup> M. Gluckman, *Ideas in the Barotse Jurisprudence*, University Press, Manchester, 1972

defined customary law as the unwritten African traditional law which consists of a variety of different types of principles, norms and rules, some of the state wide and general principles of morality and public policy to constitute an apparently enduring ideological framework for justice.<sup>9</sup>

Customary law evolves out of various norms and practices of indigenous people and it more often than not tends to impose many restrictions on women and as such most women in Zambia have extremely limited rights with regard to family matters.

Research conducted by the Zambia Law Development Commission (ZLDC) and the Women and Law in Southern Africa Research and Education Trust (WLSA) into the laws of inheritance, maintenance, family and gender violence show that both statutory and customary laws fall far short of the minimum standard of justice expected internationally and regionally.<sup>10</sup> While many customs were blatantly biased against women, statutory laws often appeared to be neutral on the surface, manifesting discrimination only when applied to specific situations,<sup>11</sup>

Gender and relationships determine what rights a woman can access under customary law. The legal status of women can, therefore, only be fully appreciated by looking at the common customary laws with particular emphasis on family issues. These include the laws on marriage, divorce and inheritance.

## **2.2 MARRIAGE**

Marriage has been said to be a re-arrangement of social structure. By social structure is meant any arrangement of persons in institutionalized relationships. In most societies marriage changes existing relationships and creates new social relations.<sup>12</sup>

In Zambia, marriage can be contracted under either statutory law or under customary law. Another type is the religious marriage, the most popular type among indigenous Zambians being

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<sup>9</sup> M. Gluckman, *Ideas in the Barotse Jurisprudence*.

<sup>10</sup> *Women in law and development (WILDAF), The Law of Maintenance in Zambia, Lusaka, 2004*

<sup>11</sup> *Women in law and development (WILDAF) 2004*

<sup>12</sup> *WLSA, The changing Family in Zambia WLSA Trust, Lusaka, 1997 Page 162*

the statutory and customary marriage. Research has established that even those married under the statute still comply with the customary law requirements of a valid marriage.<sup>13</sup>

### **2.2.1 STATUTORY MARRIAGE**

Statutory marriage is defined as the voluntary union between one man and one woman to the exclusion of everyone else.<sup>14</sup> It is therefore monogamous and is regulated by the Marriage Act.<sup>15</sup> The Act grants power to the Registrar of marriages to issue a Certificate of marriage to the parties if he is satisfied that the requirements of the Act have been met. These include the requirement that the parties are not less than twenty one years old, or if one of the parties is less than twenty one years, that written consent from one of his/her parents has been obtained; that there is no impediment whatsoever to the marriage; that neither of the parties to the marriage is already married under customary law; that the marriage will not be within prohibited degrees of kinship. The Act further specifies the formalities that must be complied with in order for the marriage to be valid.

Women married under the Act, are entitled to maintenance during the subsistence of the marriage and also stand a better chance to receive a more equitable share of the matrimonial property at dissolution of the marriage.

Although there exist in theory many advantages of contracting a marriage under the Act over a customary one, the tendency to incorporate customary practices into a statutory marriage has significantly affected the rights of women in the family. For instance, both the Penal Code and the Marriage Act prohibit a man from contracting another marriage during the subsistence of the marriage; a lot of Zambian men have 'married' more than one wife despite being married under the Act. These purported marriages are void and of no legal effect. However, few of the men that contract such marriages have ever been prosecuted for bigamy because their wives are influenced by cultural expectations that a woman should not take her husband to court and also fear to lose out on the financial support from their husbands. As a result, they fail to institute bigamy proceedings against their husbands.

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<sup>13</sup> ZLDC Working Paper on the Legislation to Regulate Marriages Contracted under Customary Law, 2010.

<sup>14</sup> Hyde v Hyde (1866) LR 1 P&D 130

<sup>15</sup> Chapter 50 of the Laws of Zambia

In *Mushota v Doreen Mwila*<sup>16</sup>, a widow sought an order that her marriage to the deceased husband under the Marriage Act, was valid until the time of his death and also that his subsequent marriage to Doreen Mwila was a nullity and void ab initio. The Court held that since the deceased had contracted a statutory marriage with the plaintiff widow, the purported second marriage to Doreen Mwila was a criminal offence under the Penal Code. The long association between the deceased and Doreen Mwila was null and void ab initio.

This study focuses on marriages under contracted under customary law.

## 2.2.2 CUSTOMARY MARRIAGE

Customary marriage is described as the association of a man and a woman in conjugal relationships according to the applicable *Zambian* customary law. As a result, the manner in which they are contracted varies from one ethnic group to the other. It is validated by the consent of both families and marriage payments made to the woman's family by the man's family. These payments may also vary in accordance with respective customs and traditions.

The marriage payment is commonly referred to as *lobola*. It has been said to be the most destructive feature of customary law marriages.<sup>17</sup> This is due to the fact that, originally meant as a symbolic payment received by the bride's family and used to help the young bride set up house and as gesture of gratitude on the part of the groom's family for looking after and bringing up the young bride, *lobola* is, however, like all traditional customs, open to abuse and distortion in the modern world.<sup>18</sup> It has been said that some men see women as "goods" that have been paid for.

Some families have often relied on *lobola* to acquire money to pay off their debts. Traditionally the *lobola* was in cattle as cattle were the primary source of wealth in African society. *Lobola* has become so prevalent in *Zambia* that in urban areas some members of tribal groups among whom it was not traditionally paid have now taken up the custom. If the payment of *lobola* is not made within a certain time following the marriage, actions for elopement and for the payment of the outstanding *lobola* have been brought before the Local Courts.<sup>19</sup>

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<sup>16</sup> 2000/HP/0078

<sup>17</sup> ZLDC, Working Paper on the legislation to Regulate Marriages Contracted under Customary Law, Page 2

<sup>18</sup> ZLDC, Working Paper on the Legislation to Regulate Marriages Contracted under Customary Law, Page 2

<sup>19</sup> Women in Zambia, <http://www.our-zambia.com/16.html>, last visited 3 March, 2011.

Further, among some ethnic groups, a portion of the *lobola* has to be paid back to the groom's family upon dissolution of the marriage and research conducted by ZLDC, shows that the lack of the means for repayment may force women to stay in abusive marriages.

Marriages contracted under customary law are not covered by any written law. Yet the majority of Zambians marry under customary law. And it is in such marriages where most violations against victims are perpetuated. Incidences of child marriages, polygamy, violation of couples right to privacy and other harmful cultural practices are found in customary law marriages which are not regulated by any statute.<sup>20</sup>

A customary marriage is polygamous or potentially polygamous in that there is during its subsistence no legal impediment to the contracting of another marriage by the husband. A 2003 demographic and Health survey found that polygamy affected sixteen percent of married women in Zambia and that the prevalence of the practice varies according to region and level of education.<sup>21</sup>

A research conducted by WLSA confirmed that polygamy is still generally being practiced and accepted among the ethnic groups in Zambia. Some of the reasons advanced for marrying additional wives include infertility/inability to bear children by the wife, Laziness, Sheer greed and selfishness by the husband, when the wife has aged, use of many wives as a source of cheap labour and denial of conjugal rights.

By custom, the first wife is required to consent to polygamy at the time of marrying.<sup>22</sup> In contemporary Zambian society, however, men rarely consider their wives' opinions before taking a second (or subsequent) wife.<sup>23</sup> Due to the fact that customary marriage is potentially polygamous, the husband often feels free to acquire mistresses and hence neglects the senior wife and increases the possibility of the spread of HIV/AIDS infection, which in turn can be transmitted to the wife.<sup>24</sup> Further, there is no way of ensuring equitable apportionment of matrimonial property among the wives.

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<sup>20</sup>ZLDC, Working Paper on Legislation to Regulate Marriages Contracted under Customary Law, Page 2

<sup>21</sup>Zambia Demographic and Health Surveys, 2001-2003

<sup>22</sup>Amatebeto, [http://www.travelpod.com/travel-blog-entries/n\\_case\\_w/zambia](http://www.travelpod.com/travel-blog-entries/n_case_w/zambia), visited on 1 March, 2011.

<sup>23</sup>ZLDC, Working Paper on the Legislation to govern Marriages Contracted Under Customary Law, Page 3

<sup>24</sup>ZLDC, Working Paper on the Legislation to govern Marriages Contracted under Customary law, Page 3

Women married under customary law also face the possibility of being subjected to a plural marriage through widow inheritance (levirate). The Deceased Brother's widow's Act<sup>25</sup> provides under section 3 that “ no marriage hereafter contracted between a man and his deceased brother's widow within Zambia or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of affinity. It is, however, worth noting that the practice is now very rarely practiced if at all.

Another common practice under customary law is that of early marriages. For the majority of rural women early marriages are the norm as none of the ethnic groups has a fixed minimum marriage age for boys and girls. Girls are generally considered ready for marriage as soon as they attain puberty. Various reports have revealed that Zambia is faced with a problem of early and forced marriages. A report by the an international non- governmental organization, Population Council, stated that about eight percent of Zambian girls are married by the age of eighteen.<sup>26</sup> A 2004 United Nations report estimated that twenty four percent of girls between the age of fifteen and nineteen years of age were married, divorced or widowed.<sup>27</sup>

It is worth noting that the Penal Code in section 138(1) provides that any person who has carnal knowledge of a child below the age of sixteen is guilty of the criminal offence of defilement. However the law excuses persons having sexual relations with girls under the age of sixteen if they are married to them under customary law. In the case of *R v. Chinjamba*<sup>28</sup> the Supreme Court held that a man who has sexual relations with a girl under the age of sixteen to whom he is married is not guilty of defilement.

The Supreme Court reiterated this position in the later case of *Sibande v. The People*<sup>29</sup> that a person accused of defilement need only say “we are married according to customary law because we did this and this and this...” and it would then be for the prosecution to show that the events alleged do not constitute a valid marriage according to customary law.

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<sup>25</sup> Chapter 57 of the Laws of Zambia

<sup>26</sup> Population Council. 2004 the Implications of Early marriage for HIV/AIDS Policy.

<sup>27</sup> OECD Social institutions and Gender Index, Gender Equality and Social institutions in Zambia

<sup>28</sup> 5 NRLR, 384.

<sup>29</sup> 1975, ZLR, 101.

## 2.3 DIVORCE

The dissolution of marriage is equally governed by the dual system of law. Unlike under statutory law which only provides for one ground of divorce, that is, the irretrievable breakdown of the marriage, customary law recognises numerous grounds for divorce even including external factors beyond the parties to the marriage, for instance a couple was granted divorce by a local court because;

“After gathering evidence from the parties, the court had found that the plaintiff does not like the defendant’s family and the defendant’s family does not like the plaintiff. Whether the court reconciles them, they wont stay. PLW1 (uncle) has supported the marriage to dissolve. Therefore, the court has endorsed divorce.”<sup>30</sup>

Customary law generally does not provide for maintenance of divorced women. Nor does it recognize the right of a divorced woman to a share of the matrimonial property, this being the property acquired during the marriage but not including those items which she acquired herself and which are recognized as her own.

The case of *Mwiya v Mwiya*<sup>31</sup> illustrates this point. In this case, a woman was divorced in the Local Court and was not given a share of the matrimonial property. On appeal, the High Court held that the decision was valid on the basis that there was no Lozi custom that compelled a husband neither to support his divorced wife nor to share any property acquired during the existence of the marriage.

However, the law was reformed in an attempt to reduce the hardships caused to women upon the dissolution of the marriage. Amendments were made to the Local Courts Act in 1991 which deals with customary law divorces to provide for maintenance payments as follows;

35. (1) subject to the provisions of this Act or of any other written law, and to the limitations imposed by its court warrant, a local court, in cases of a civil nature, may;
- (a) Order the award of compensation, which may include an amount for costs and expenses necessarily or reasonably incurred by a successful party or his witness;
  - (d) make an order for the payment of such monthly sum for the maintenance of a divorced spouse as the court may consider just and reasonable having regard to the means and

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<sup>30</sup> S. Mvududu, & P. McFadden, *Reconceptualising the Family in a Changing Southern Africa*, Harare, 2007 page 173

<sup>31</sup> [1972] ZR 113

circumstances of the parties for a period not exceeding three years from the date of divorce or until re-marriage of any child.

- (e) make an order for the maintenance of any child below the age of eighteen years whether born in or out of marriage:

Provided that where the child is born out of marriage an order under this paragraph shall be made with the consent of the parent against whom the order is to be made when that parent is not the natural parent of the child;

- (f) make any other order which the justice of the case may require; and may make any combination of the above orders.

The effectiveness of these new provisions has been hindered by many factors that include weak enforcement mechanisms, legal technicalities and the humiliating process of seeking to obtain such maintenance.<sup>32</sup>

## 2.4 INHERITANCE

Inheritance is an institutional act of apportioning and receiving property of a deceased person.<sup>33</sup> According to Black's Law Dictionary it is defined as the devolution of title to property under the law of descent and distribution. It connotes devolution of title based on the origins of an individual.

Inheritance under customary law follows either patrilineage or matrilineage systems which determine who is entitled to inherit the deceased's property. A patrilineal society traces descent through the father's line. Thus the only persons who can claim a share of the deceased's estate are those related to the deceased through a common male ancestor mostly sons, brothers and so on. In matrilineal systems on the other hand, descent is traced through the mother's line and property is inherited by the deceased's maternal uncles and nephews. Under both systems, the deceased's wife is not a potential heir.

In most societies, therefore, the potential heirs are male. In the 1960's the trend of property grabbing emerged through which widows were stripped of all the property left behind by the deceased husbands and were rendered destitute. This necessitated the passing of the Intestate Succession Act<sup>34</sup> in 1989.

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<sup>32</sup> M.M. Munalula, *women, Gender Discrimination and the law*. Page 87

<sup>33</sup> WLSA, (1997) *Inheritance in Zambia: Law and Practice*, Lusaka, page 12

<sup>34</sup> Chapter 59 of The Laws of Zambia

The Act seeks to make adequate financial and other provisions for a spouse, children, dependents and parents of the deceased. It is meant to govern succession where the deceased does not leave behind a Will and applies to all members of a community to which customary law would have applied had it not been passed.

The Intestate Succession Act in Section 5 provides for how the estate of an individual who dies intestate is to be distributed. It allocates twenty per cent of the estate to the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;

The Act provides that fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with the child's age or educational needs or both, while twenty percent is allocated to the parents of the deceased and that twenty per cent of the estate shall devolve upon the dependants, in equal shares.

The enactment of the Act helped to alleviate the hardship caused by the application of harsh customary laws in matters of inheritance especially in relation to the plight of women<sup>35</sup>. However, in as much as the Act is considered as a major breakthrough for women's rights, it has been highly controversial and has proved insignificant to most rural women because, among other things, it excludes rights to land held under customary tenure. As 80 per cent of land is held under customary tenure, many women find themselves unable to inherit the matrimonial home if it is built on customary land.

In the case of *Chilala v Milimo*<sup>36</sup> the Lands Tribunal was unable to adjudicate over a matter in which a widow was being forced to vacate her matrimonial home because it was built on customary land. It had to take the intervention of the Royal Foundation to stop the successor to her husband from using her backyard as a burial ground. By this time, there were a total of seventeen graves buried on the property.

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<sup>35</sup> ZLDC Review and Reform of Existing Legislation; The Intestate Succession Act page 21

<sup>36</sup> LAT 099/1999

Further, the Act also excludes family property which leaves many women in a precarious position as the deceased's family will often claim the property as family property. In these circumstances, the courts cannot intervene and customary law prevails.

For women in a polygamous marriage, the 20% of the estate must be shared among the surviving spouses, however many they are, thereby significantly reducing their inheritance. In comparison the male surviving spouse will always receive the 20% in full. The problem is worse where the matrimonial home is built on customary land to which the act does not apply. Other property belonging to the deceased is allocated according to the status of the wives within the marriage. Further, since there are no requirements to register marriages contracted under customary law the onus to prove that a woman claiming to be the second wife of a deceased man was not validly married lies on the true widow.<sup>37</sup> Polygamous marriages therefore, contribute to inequality especially in terms of rights to property and inheritance of customary land.<sup>38</sup>

In addition, the provision that a surviving spouse is only entitled to a life interest in the matrimonial home or until re- marriage usually negatively impacts widows more than widowers since property is more often than not registered in the husband's name.

Further the allocation of twenty per cent to the surviving spouse has been widely criticized as being inadequate and not reflective of the spouse's contribution to marital property. A study conducted by the Centre on Housing and Evictions revealed that distribution of the estate based on percentages creates a lot of problems in practice, especially where there is more than one surviving spouse or children born out of wedlock.<sup>39</sup>

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<sup>37</sup> *Mushota v. Mwila*, 2000/HP/0078

<sup>38</sup> General Recommendations made by the Committee on the Elimination of Discrimination against Women, Polygamous marriages contravene a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.

<sup>39</sup> ZLDC, Draft Working Paper on the Review and Reform of Existing Legislation: The Intestate Succession Act, Page

patriarchal and continue to relegate women to a subordinate position. In most traditional societies a woman has no absolute rights and it may be possible for her to remain a child all her life.

“She may not be allowed act independently and to take actions without reference to her husband and other extended family members. A woman’s personality and legal status are subsumed either within her family of birth or family of marriage,”<sup>40</sup>

The legal position of women, in the family in particular and society in general is still in need of improvement to ensure elimination of discrimination against women.

The succeeding chapter analyzes the constitutional provisions regarding equality as well as those guaranteeing protection from discrimination with particular emphasis on the exemptions contained therein.

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<sup>40</sup> S. Mvududu, & P. McFadden, *Reconceptualising the Family in a Changing Southern Africa*, Page 159

## **CHAPTER THREE**

### **LEGAL FRAMEWORK**

#### **3.0 INTRODUCTION**

This chapter focuses on the legal framework with respect to women's rights. The entitlement and enjoyment of human rights is determined by reference to legal provisions that lay down the rights. These may take the form of international, regional and domestic laws that obligate a country to uphold certain minimum standards of human rights. The chapter, therefore, begins by reviewing international and regional instruments. It also reviews the Constitution of Zambia, which provides legitimacy to all other laws of the country.

#### **3.1 INTERNATIONAL INSTRUMENTS**

By virtue of being a member of the United Nations (UN) and the international community, Zambia is party to several international and regional treaties which have a bearing on women's rights. The treaties and protocols place an obligation on Zambia to adhere to the minimum standards that members should uphold in their legal systems.

##### **3.1.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)**

Adopted in 1948, the UDHR is not a legally binding instrument but lays down basic standards for the conduct of international affairs. It protects civil, political, economic, social and cultural rights. In its preamble, it affirms the United Nation's commitment to respect fundamental human rights, the dignity and worth of the human person and the equal rights of men and women in order to better standards of life for all.

The UDHR prohibits any form of discriminatory treatment and provides for the equal treatment of all without discrimination of any kind<sup>41</sup>. It also emphasizes equality in both customary and statutory marriages:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.<sup>42</sup>

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<sup>41</sup> Article 7

However, due to its non binding nature and lack of enforcement machinery, members found it necessary to come with binding international instruments that would adequately ensure the protection of human rights. This eventually led to the adoption of two instruments in 1966 that together with the UDHR constitute what is referred to as the international bill of rights. They are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>43</sup>

The ICCPR in Part III outlines a number of civil and political rights, referred to as negative rights because they require the State to refrain from interfering with the liberties of citizens. These include the right to equality, the right to life, freedom from cruel, inhuman or degrading treatment, freedom from slavery, right to liberty and security of person, freedom of movement, equality before the law, right to privacy, freedom of thought, conscience and religion, right to peaceful assembly, freedom of association and recognition of the family.<sup>44</sup> These rights are meant to be accessible equally to all people regardless of sex.

Further, the ICCPR is premised on the fact that equality in all forms of activities is cardinal to the development of the human person and provides under Article 23, that the following are regarded as essential to the existence of the human family: the family is the natural and fundamental unit of society and is entitled to protection by society and the state. It recognizes the right of men and women of marriageable age to found a family and provides that no marriage shall be entered into without the free and full consent of the intending spouses and requires states Parties to the Covenant to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

The ICESCR on the other hand contains positive rights because they place a burden upon the State to do something towards the attainment of the economic, social and cultural rights.

Despite the existence of the aforementioned instruments, many people, women in particular, are unable to enjoy their rights as a result of some discriminatory practices and laws within their communities. This necessitated the adoption of additional laws aimed at eliminating

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<sup>42</sup> Article 16

<sup>43</sup> M.M. Munalula, *Women, Gender Discrimination and the Law*, Page 16

<sup>44</sup> Articles 6 to 27

discrimination. Of particular importance to the rights of women, was the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

### **3.1.2 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)**

CEDAW is the key international instrument on women's rights<sup>45</sup>. It was adopted by the UN General Assembly in 1979 following the realization that the various existing UN agreements did not adequately address discrimination against women. It, therefore, seeks to eliminate discrimination against women in order to ensure that they are able to access and enjoy their human rights in full.<sup>46</sup> Zambia signed and ratified this convention in 1980 and 1985 respectively.

In its preamble, the Convention explicitly acknowledges that persistent discrimination against women continues to exist, and emphasizes that such discrimination violates the principles of equality of rights and respect for human dignity. Article 1 defines discrimination as any distinction, exclusion or restriction made on the basis of sex...which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The convention requires all State Parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>47</sup>

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<sup>45</sup> [http// www. Women issues.com](http://www.Womenissues.com) visited on 20 February, 2011.

<sup>46</sup> M.M. Munalula, Women, Gender Discrimination and the Law, Page 17

<sup>47</sup> Article 3

The Convention specifically provides gender equality in the family in Article 16 (1) as follows:

State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Implementation of CEDAW is monitored by the Committee on the Elimination of Discrimination against Women. After reviewing the combined third and fourth periodic report of Zambia on 4 June, 2002, the Committee expressed concern at the contradictory provisions contained in the Constitution whereby article 11 guarantees the equal status of women and article 23 (4) permits discriminatory laws to exist in the area of personal law, namely: revenue allocation, adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law and customary law with respect to any matter. The Committee urged the State Party to repeal article 23 (4) of the Constitution, which permits discrimination in the area of law that most affects women.

It also expressed concern that polygamy is widely accepted and not effectively combated by the State Party. It recommended that the State take comprehensive and effective measures, including training for judicial and law enforcement officials and public awareness-raising campaigns, in order to eliminate the practice of polygamy.

The Committee has also observed that a polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. It further observed that this practice breaches the provisions of article 5 (a) of the Convention. The Committee also expressed concern that the Convention had not been directly incorporated into domestic law.

It is worth noting that Zambia operates a legal system under which international instruments are not self executing but require enabling domestic legislation that is directly enforceable by the courts. Therefore, as progressive as the provisions of CEDAW and the other international instruments may seem to be for the advancement of women's rights, they cannot be invoked in any Zambian court because the Convention is not directly incorporated into domestic law. In addition, the norms drawn from these instruments cannot be directly incorporated into customary law since customary law relies on practice.<sup>48</sup>

Mabula observes that Zambia lacks a culture of enabling statutes that would transform international human rights instruments into domestic law.<sup>49</sup>

## **REGIONAL INSTRUMENTS**

At regional level, there are some instruments that relate to women's rights that Zambia is party to. These include the African Charter On Human and People's Rights, the Protocol to the African Charter On Human and People's Rights on the Rights of Women in Africa, and the Southern African Development Community (SADC) Gender Declaration.

### **3.2.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

This is a regional human rights instrument specifically designed to reflect the history, values traditions and development of Africa. It combines African values with international norms by recognizing individual and collective rights.<sup>50</sup>

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<sup>48</sup> WLSA, Response of the justice Delivery System, WLSA Research Trust, Lusaka,2001 page85

<sup>49</sup>T.K. Mabula, The Enforcement of Human rights of Zambian Women: Sarah Longwe v Intercontinental Hotel revisited, Zambia Law Journal volume 21-29,1989 Page 30

<sup>50</sup>WLSA/ WILDAF, Minimum Standards Relating to Women and Children's Rights to be incorporated in the Republican Constitution, 2004.

Under article 2 of the charter, the Parties have agreed that every human being shall be entitled to enjoy his/her human rights without any discrimination irrespective of race, ethnic group, sex, language etc. it provides for the right to equitable share of the proceeds of goods and services worked for including matrimonial assets on dissolution of a marriage.

In its equal protection clause (Article 3), it states that every individual shall be equal before the law and be entitled to equal protection of the law. It further recognizes the rights of women in Article 18 (3) where it seeks to ‘...ensure elimination of every discrimination against women and ensure protection of rights of women’.

Although the Charter remains to date the most comprehensive regional document on the rights of women in Africa, it has, however, been criticized by women’s rights activists as being inadequate to protect women and protects them only within a limited context because it does not deal with many issues of marriage such as consent and equality of spouses during and after marriage. It has also been criticized for placing strong emphasis on traditional values without dealing with the harmful problems arising from their practice<sup>51</sup>

### **3.2.2 PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA**

Due to the perceived inadequacies of the African Charter on Human and People’s Rights, women’s rights activists sought a Protocol to the African Charter that would adequately reflect women’s experiences in human rights. Approved by the African Union Heads of State and Government on 11 July, 2003 in Maputo, Mozambique, the Protocol creates a new standard of justice for women. It reiterates the definitions of discrimination, violence against women and harmful practices contained in the CEDAW.

It requires State Parties to incorporate the principle of equality in their national laws and to modify social and cultural patterns of conduct through public education in order to eliminate harmful traditional and cultural practices. Under Article 2(1), the Protocol obligates States

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<sup>51</sup>WLSA/WILDAF, Minimum Standards Relating to women and Children’s Rights to be incorporated in the Republican Constitution

Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

### **3.2.3 SADC GENDER DECLARATION**

The Southern African Development Community (SADC) made a Declaration on Gender and Development in 1997 to address gender discrimination. The Declaration commits member States to urgently address and take measures to prevent and deal with the increasing levels of violence against women; repealing and reforming all laws, constitutions, and social practices etc., which subject women to discrimination.

Unlike international instruments, the regional instruments have been designed in such a way as to be binding on members with no further requirement of domestication. However, there still exist difficulties in ensuring state compliance with the provisions of these regional treaties. This is also compounded by the fact that most member states have Constitutional provisions that are in direct conflict with the provisions of the instruments.

## **3.3 DOMESTIC LEGISLATIVE FRAMEWORK**

### **3.3.1 THE CONSTITUTION**

Zambia, as alluded to above, operates a dual legal system which comprises the customary law and the statutes. All human rights including the human rights of women are enshrined in Part III of the Constitution<sup>52</sup> which is the supreme law of the land and any law that is inconsistent with it is null and void.<sup>53</sup>

It affirms the principle of equality for all under article 11 which guarantees every person in Zambia, subject to some limitations, the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

- (a) Life, liberty, security of the person and the protection of the law;
- (b) Freedom of conscience, expression, assembly, movement and association;

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<sup>52</sup> Chapter 1 of the Laws of Zambia

<sup>53</sup> Article 1(3) of the Constitution of Zambia

- (c) Protection of young persons from exploitation;
- (d) Protection for the privacy of his home and other property and from deprivation of poverty without compensation;

Articles 12 through to 22 provide for the other rights and freedoms to be protected by the State. These are the right to life, the right to liberty, protection against slavery or servitude, protection from torture, the rights to property provides that no one can be deprived of their property even by the State without the payment of adequate compensation, the right to privacy, the due process rights of the accused, rights of freedom of conscience, expression, assembly/association and movement.

The Bill of Rights articulated above has been said not to fully address or take into account the real life experiences of women especially in the cultural set up. It has been pointed out, for instance, that despite the provisions of article 16 on the rights to property, millions of women face the threat of 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.<sup>54</sup>

The most criticized provision is Article 23, the relevant parts of which are set out below. This is chiefly because, whereas Article 11 guarantees equality for all, article 23(4) permits discrimination in areas of personal and customary law.

Article 23(1) subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.

Article 23 (4) provides that clause (1) shall not apply to any law so far as that law makes provision;

(c)with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(d)for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

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<sup>54</sup> WILDAF/WLSA Minimum Standards Relating to Women and Children's Rights to be Incorporated in the Republican Constitution.

The effect of Article 23, therefore, is that the guarantee of fundamental rights and freedoms as outlined in Part III are subject to personal and customary laws. By excluding from its application areas of personal and customary law, article 23 indirectly permits discrimination under the guise of customary law despite the fact that it is in the area of customary and personal law that violations of women's rights more often than not occur.

Therefore as much as Zambia has made commitments to the promotion and protection of all human rights at the national, regional and international levels, people, especially women, currently face many obstacles to the realization of their human rights including discrimination in the application of customary laws relating to family and inheritance rights.<sup>55</sup>

It is worth noting that the Mungomba Constitution Review Commission acknowledged the importance of gender equality and was of the view that the situation warranted remedial constitutional intervention in order to enable women to enjoy fundamental rights and freedoms on an equal basis with men. It observed that women and men should have the right to equal opportunities in cultural, political, economic and social activities.<sup>56</sup>

It further observed that the exceptions to discrimination under Article 23 outlined above virtually, take away women's right to enjoyment of human rights and freedoms on equal basis with men and thereby permits the discrimination against women in laws relating to adoption, marriage, divorce, burial and devolution of property upon death as well as those involving the customary law of a particular race or tribe.<sup>57</sup>

The CRC also took the view that Zambia was under an obligation to incorporate the provisions of some international and regional instruments on gender equality and the rights of women to which Zambia is a party. It recommended, *inter alia*, that the Constitution should reaffirm the principle of equality of men and women in all respects and that the rights of women should be specifically stated in the Bill of Rights.

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<sup>55</sup> ZLDC Working paper on legislation to Regulate Marriages Contracted under Customary Law, page 20

<sup>56</sup> Interim Report of the Mungomba Constitution Review Commission, 2005, Page 170

<sup>57</sup> Interim Report of the Mungomba Constitution Review Commission, 2005, Page 175

Some of the rights recommended for inclusion in the Bill of Rights include the right of women to be accorded full and equal dignity of the person with men and the guarantee to exercise and enjoy fundamental rights and freedoms on a basis of equality with men.

Other rights outlined in the CRC Report are the right to equal treatment with men; equal rights with men with respect to marriage; equal rights with men regarding ownership, use, transfer, administration and control of land and enjoy the same rights with men with respect to inheritance and that laws, cultures, customs or traditions which are against the dignity, rights, welfare or interest of women or which undermine their status should be prohibited by the Constitution.

### **3.4 CONCLUSION**

This chapter has reviewed the existing legal framework with respect to women's rights in general and the elimination of discrimination in particular. Although Zambia has ratified international instruments that seek to eliminate discrimination, their provisions have little if any significance for women's rights not only because of the lack of domestication but also because of the provisions contained in article 23 of the Constitution. All the progressive aspects of International and Regional treaties as well as Part III of the Constitution itself are watered down by the exclusion of personal and customary laws from the protection against discrimination. There is clearly a conflict between the constitutional guarantee of non discrimination on the one hand and the exclusion of personal and customary law from constitutional scrutiny on the other.

The next chapter focuses on how the courts have dealt with matters in which discrimination has occurred under the guise of customary law.

## **CHAPTER FOUR**

### **THE DELIVERY OF JUSTICE**

#### **4.0 INTRODUCTION**

Justice remains an elusive concept but it is essentially understood to include principles of fairness, equity, fair play and impartiality. The emphasis is on the justice of rules and the systems through which they are interpreted, applied and enforced.<sup>58</sup> This chapter focuses on the administration of justice for women's rights particularly those affected by the application of customary law. In so doing, the starting point is a discussion on what comprises the justice delivery system. Finally case law dealing with customary law issues will also be considered to get an understating of how the courts handle matters falling under customary law since it is ultimately the courts that interpret the Laws.

#### **4.1 THE JUSTICE DELIVERY SYSTEM**

There are both informal and formal structures relied upon for the dispensation of justice. The informal structures include the family, church and Non Governmental Organisations. The formal structure is composed of the judicial system as well as the police and other law enforcement agencies.

##### **4.1.1 THE FAMILY**

The family in its different forms plays a very important role in dispute resolution among its members. Available literature confirms that the family as a dispute resolution mechanism is biased against women because marriage gives a husband exclusive rights over his wife. This makes the family an unsafe ground for women in certain instances.<sup>59</sup> This is particularly true in matrimonial disputes ranging from allegations of adultery on the part of the husband to violence in the home.

##### **4.1.2 THE POLICE**

The police and other law enforcement agencies also play an equally important role as a means of dispute resolution. Many aggrieved women seek the assistance of the Police to resolve domestic

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<sup>58</sup> WLSA, Women & Justice: A Myth or Reality in Zambia, Lusaka, 1999, Page 7

<sup>59</sup> WLSA, Women & Justice: A Myth or Reality in Zambia, Page 28

disputes. The creation of the Victim Support Unit (VSU) in the Zambia Police Service has significantly improved the response of the police, which before was varied with some women with non criminal complaints being sent away to reconcile differences with their husbands at home. The problem experienced in relation to the effectiveness of the VSU is that it is nonexistent in rural areas of Zambia<sup>60</sup> which are equally if not more plagued by disputes over customary matters. In addition, the public perception that the Police are corrupt and biased against women has resulted in a lot of women not reporting their grievances.

## 4.2 RECOGNITION OF CUSTOMARY LAW

The recognition of customary law is provided for in various pieces of legislation, paramount among these, the Constitution<sup>61</sup>. The Local Courts Act has original jurisdiction in dealing with customary law. In addition, the High Court and the subordinate courts Acts also provide for the administration of customary law provided that it is not repugnant to natural justice, morality and good conscience.<sup>62</sup>

The Constitution prohibits discrimination on any grounds including sex.<sup>63</sup> However, the exception provided for in the same Article permits discrimination on matters of personal law such as adoption, marriage, divorce, burial, devolution of property on death and those under customary law. This provision plays an important role in the justice delivery service for women. It gives rise to difficulties because it is in the very areas that it excludes from the guarantee against non discrimination that women are most likely to face discrimination.

The Constitution regulates guarantees and protects an individual's fundamental rights and freedoms. One such freedom is the right to own and use land without arbitrary interference.<sup>64</sup> However, the provisions of Article 23 (d) make it legal for this freedom to be interfered with if the land in question is held under customary tenure.

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<sup>60</sup> ZLDC Draft Working Paper on the Review and Reform of Existing Legislation: The Intestate Succession Act page 23

<sup>61</sup> Chapter 1 of The Laws of Zambia

<sup>62</sup> Section 16 and 12 of The Subordinate Courts Act, Chapter 28 of the Laws of Zambia and the High Court Act, Chapter 27 of the Laws of Zambia respectively.

<sup>63</sup> Article 23(1)

<sup>64</sup> Article 11 of the Constitution of Zambia

The case of *Chilala v Milimo*<sup>65</sup> is illustrative of this point. In this case Mrs. Chilala was being forced out of her matrimonial home after her husband's death by the successor whom she refused to marry as required by Tonga custom. The house was built on land held under customary tenure and the Tonga custom requires widows who are not inherited to return to their natal home. Mrs. Chilala had been married for over thirty years when her husband died and his pension had been used to develop the land which was their home prior to his death. Eventually, the successor turned Mrs. Chilala's backyard into a burial ground. The Lands tribunal was unable to adjudge the case on grounds that it had no jurisdiction over customary land and awarded costs amounting to K 50,000,000.00 to Milimo. The burials only stopped after mediation by Royal Foundation of Zambia<sup>66</sup> and by this time there were a total of seventeen graves buried there. The K50, 000,000.00 costs are still hanging over Mrs. Chilala.

### **4.3 DELIVERY OF JUSTICE IN THE LOCAL COURTS**

The Local Courts Act<sup>67</sup> grants Local Courts presided over by Local Courts Magistrates original jurisdiction in causes arising from customary law. The application of customary law is made subject to the condition that such law is not repugnant to natural justice and morals or incompatible with the provisions of any written law.<sup>68</sup>

This was affirmed in the case of *Kaniki v Jairus*<sup>69</sup> in which the Court held that a customary practice known as *Akamutwe* requiring a surviving spouse to pay compensation to the family of the deceased spouse was contrary to natural justice.

The problem that has been posed by the repugnancy clause is that it does not explicitly state what amounts to repugnancy in customary law. In relation to customary law marriages, the Act does not define what would not be in tandem with written law. Consequently, the issue of what would be repugnant to the principles of natural justice or morality or incompatible with any written law is

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<sup>65</sup> LAT 099/1999

<sup>66</sup> ZLDC, Draft working paper on Review and Reform of Existing Legislation: The Intestate succession Act. Page 8

<sup>67</sup> Chapter 29 of the Laws of Zambia

<sup>68</sup> Section 12

<sup>69</sup> [1967] Z.R 71

left to the subjective interpretation of those who administer the law. Hence a number of injustices may be perpetrated under the guise of customary law.<sup>70</sup>

Further, customary law, as already alluded to, tends to be insensitive to gender equality and more often than not is disadvantageous to women. It is generally accepted that most customary laws treat women as subordinate to their male counterparts. In family matters the allocation of property rights leans towards the favour of men to the detriment of women. Discrimination at the dissolution of customary marriages occurs on a wide scale and it is in these matters that many women have sought the intervention of the judicial system to obtain relief.

However, there have been many cases in which the Local Courts have failed to address the complaints of female litigants. An illustration can be found in a case handled by the Young Women's Christian association (YWCA) of Vivian Bwalya Mulenga.<sup>71</sup> During divorce proceedings, the local court justice treated her in a hostile manner. He castigated her and called her a prostitute based on unsubstantiated allegations by the husband that she was having an affair with a Minister. Divorce was granted and she was not given a share of the property.

She appealed to the Subordinate Court against the decision on property settlement and got a stay of execution, allowing her to stay in the matrimonial home. The husband forcefully evicted her and eventually succeeded in selling the house without recourse.<sup>72</sup>

The gendered application of customary law is compounded, in many cases, by the fact that the Local Courts Magistrates do not have formal legal qualifications or gender sensitive training apart from their knowledge of customary law.<sup>73</sup> They are, therefore, frequently unaware of developments in human rights law that need to be considered in the application of customary law. The result is that they seldom take into consideration the gender dimensions of the cases before them.<sup>74</sup>

A study on gender bias in the Zambian court system undertaken in 1994 by WILDAF found that of the cases reviewed, 100 per cent of the petitions for divorce brought by women against their

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<sup>70</sup> ZLDC 2010 working paper on Legislation to Regulate Marriages contracted Under Customary Law

<sup>71</sup> Unreported.

<sup>72</sup> WLSA Report on the Justice Delivery system in Zambia page 46

<sup>73</sup> ZLDC 2010 working paper on Legislation to regulate Marriages Contracted under Customary Law

<sup>74</sup> ZLDC 2010 Working Paper on the Legislation to Regulate Marriages contracted Under Customary Law page 14

husbands on grounds of adultery were thrown out on the basis that under customary law, a man cannot commit adultery. In contrast the study found that the local courts readily granted men divorce on mere suspicion that wives had committed adultery.<sup>75</sup>

Further, customary laws remain unwritten and subjective. Consequently, Local Court Magistrates often use their own judgment when deciding cases. The situation is even more complicated in towns, where magistrates have to deal with several customs or tribes simultaneously. It has been said that the customary law applied by urban Local Courts has become a myth. That urban Local Courts have become institutions for resolving community disputes and the guiding principle in the cases they decide is simple logic and common sense.<sup>76</sup>

The fact that customary law remains unwritten and subjective has not helped the cause of women either. Local Court Justices have to usually depend on their own subjective judgment to reach decisions. The danger in this is chiefly due to the dominance of male adjudicators whose view of customary law is likely to be patriarchal and reflect their own perceptions and opinions on what constitutes customary law.<sup>77</sup>

Past research by ZLDC<sup>78</sup> established that the lack of uniform and prescribed grounds and procedures for divorce have also resulted in suffering for women married under customary law, especially those living in rural areas. Whereas under statutory marriages there is only one ground for divorce, namely that the marriage has broken down irretrievably<sup>79</sup>, there are innumerable reasons under customary law marriages. The most commonly invoked reasons for the termination of the marriage are wide and imprecise including; adultery, witchcraft, barrenness, desertion, insanity and various kinds of gross misbehaviour by a spouse against the other. The marriage maybe dissolved even on very flimsy grounds.

Local Courts are used largely by women because they are more conversant with the nature of issues that directly affect women's rights in the family such as land related disputes, adultery,

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<sup>75</sup> [http// www. Equalitynow.org](http://www.Equalitynow.org). visited on 3 March 2011

<sup>76</sup> An Afronet Report 1998 on the Judicial Sector Administering Customary Law, The Dilemma of Local Courts in Zambia: A Question of Colonial Legal Continuity or Deliberate Customary Law Marginalization, quoted in the ZLDC Working Paper on Legislation to Regulate Marriages contracted Under Customary Law.

<sup>77</sup> Interview with Ms. Constance Lewanika, former Director of WILDAF on 2 March, 2011.

<sup>78</sup> ZLDC, working Paper on Legislation to Regulate Marriages Contracted Under Customary Law

<sup>79</sup> Section 8 of the Matrimonial Causes Act No.20,2007

divorce and domestic violence. They have also proven popular among women because they are easily accessible because of proximity to population centers, low costs and simple procedures.<sup>80</sup>

However, while Local Courts Magistrates may be well versed in the various customary laws, they are not trained in human's rights issues, the result of which is that they seldom take into consideration the gender dimensions of cases before them.<sup>81</sup> In addition, parties in proceedings before Local Courts are not entitled to legal representation and this often has a prejudicial impact on their ability, in particular women, to present their claims.<sup>82</sup>

Decisions of the Local Court may be appealed against to the Subordinate Court and overturned in that forum. This affords women who feel unfairly treated by the lower court an opportunity to seek justice from the higher court. For example, a Lusaka Subordinate Court in dissolving a customary marriage ruled that "notwithstanding that the parties in this matter were married under customary law, justice demands that when a marriage has broken down, the parties should be put in equal position to avoid any one of them falling into destitution"<sup>83</sup>

In many cases, however, the Subordinate Courts have confirmed the decisions of the local courts despite the discriminatory effect on women. This can also be attributed to the dominance of male magistrates in the judicial structure. The fact that most adjudicators are male who may perceive their own circumstances in the facts of the cases before them has been highly problematic for women litigants.<sup>84</sup> This usually occurs in family disputes. Ms. Matrine Bbuku Chuulu observed that some judgments in the Local courts are influenced by the attitudinal limitations of some of the magistrates who allow their personal opinions to affect the outcome of the decisions. She emphasized the need for continuous human rights training for Magistrates as a way of ensuring that their ruling are in line with human rights developments<sup>85</sup>.

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<sup>80</sup> WLSA report on the justice delivery system in Zambia page 26

<sup>81</sup> ZLDC Draft Working paper on the Review and Reform of Existing Legislation: the Intestate Succession Act

<sup>82</sup> Women in Zambia, <http://www.our-zambia.com/171.html>, visited on 2 March, 2011.

<sup>83</sup> Magistrate Chanda Mwamba in Martha Kembo Mwanamwalye and Collins Mwanamwalye. ; 2005 quoted in ZLDC working Paper on Legislation to Regulate Marriages Contracted Under Customary Law page 4

<sup>84</sup> M.M. Munalula, Women, Gender Discrimination and the Law, page 201

<sup>85</sup> Interview with Ms. Matrine Bbuku Chulu, regional Coordinator of WLSA on 22 March, 2011 at WLSA Regional Offices, Lusaka.

#### 4.4 CASE LAW

Court interpretation of legal principles breathes life and authority into existing law and either affirms or destroys people's confidence in the justice delivery system.<sup>86</sup> The courts have had occasion to deal with allegations of discriminatory customary practices in numerous cases, prominent among them, the case of *Mwiya v Mwiya*<sup>87</sup>, in which proceedings were commenced in the Mulobezi Local Court by Mrs. Martha Mwiya against Mr. Alex Mwiya for not giving her any share of the matrimonial property after divorcing her under Lozi customary law.

The defendant gave his own account of the story and contended that he had given her many things including new suits. The court granted divorce and awarded a paltry sum to be given to the plaintiff. She appealed to the subordinate court of the second class on grounds *inter alia* that the court did not state the reasons for granting divorce and that the matrimonial property was not shared equally.

The appeal was dismissed in favour of the respondent who did not even appear in person before the court. On appeal, the High court, which sat with two assessors, found that there was no Lozi custom which compelled a husband to share property with a divorced wife and therefore upheld the decision of the lower courts.

The case is a vivid illustration of the court's inability to rise above gender discrimination when it is presented as customary law.<sup>88</sup> The court failed to take into consideration the discriminatory nature of the Lozi custom and applied without regard to the possible violation of Mrs. Mwiya's rights.

It is worth noting, however, that exposure to human rights discourse as well as enactment of more progressive pieces of legislation such as the Intestate Succession Act<sup>89</sup> and Amendments to the Local Courts Act in 1991 have all brought about a marked improvement in eliminating gender discrimination in customary law. The courts are in a better position to effect gender justice as can

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<sup>86</sup> WLSA Botswana, *Chasing the Mirage: Women & the Administration of Justice* (1999) page 60

<sup>87</sup> [1977] ZR 133

<sup>88</sup> M.M. Munalula, *Women, Gender Discrimination and the Law* page 208

<sup>89</sup> Chapter 59 of The Laws of Zambia

be illustrated by a decision made over twenty years after the Mwiya case was decided, *Chibwe v Chibwe*<sup>90</sup>, a case which went all the way from the local court to the Supreme Court.

The facts surrounding the case are that the appellant (wife) was originally sued in the local court in a divorce petition brought by the former husband (respondent in the Supreme Court). The respondent sued the appellant for divorce before the Mufulira local court under Ushi customary law alleging, inter alia, unreasonable behaviour and adultery with some unknown person. The court granted the divorce as prayed.

The appellant appealed to the magistrate's court on the grounds that the local court justices had misdirected themselves by dissolving the marriage on unestablished grounds as there was no proof of the allegations leveled against her by the respondent, and that the local court justices had not addressed their minds to the question of maintenance and property adjustment of the property acquired by the respondent during the subsistence of their marriage. The appellant also alleged that the local court justices were prejudiced in favour of the respondent.

Upon appeal to the Subordinate Court, the learned magistrate heard de novo the evidence and sat with assessors in Ushi customary law. The magistrate dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant then appealed to the High Court and raised the grounds, inter alia, that the learned magistrate was biased in favour of the respondent, that the learned magistrate failed to order a lump sum maintenance order and that the learned magistrate misinterpreted the provision of section 16 of the Subordinate courts Act.

The learned High Commissioner chose to receive written submissions from the parties and held that since the appeal was not against divorce in principle; his main concern was property adjustment. After considering Ushi customary law, he ruled and ordered that the respondent pays a lump sum of K10,000,000.00, with simple interest at the rate of 10 per cent from 8 July, 1991, to the date of judgment, which was 25 June 1998, to the appellant. The appellant then appealed against the decision of the High Court Commissioner to the Supreme Court.

The Supreme Court noted that, it had observed in this case with interest the dichotomy resulting from the application of an unrecorded customary law against the background of the changed

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<sup>90</sup> SCZ Judgment No. 38 of 2000

environment of macro economic with its ramifications, the growth of the common law of Zambia with the changes in the social values influenced by the international values received by Zambia through its ratification of various international instruments more or less creating two justice paradigms...

The court also referred to section 16 of the Subordinate Courts Act which provides for the administration of customary law. The court further observed that the marriage in issue was conducted under Ushi customary law and expressed surprise that both the local and magistrates courts which sat with assessors made no reference to Ushi customary law in dissolving the marriage and in making property adjustments. The court was of the view that this was improper and misdirection. The court issued a stern warning against bias.

The court also observed that customary law in Zambia is recognized by the Constitution provided it is not repugnant to any written law. According to Ushi customary law which ought to have been referred in the High court, the appellant was entitled to a reasonable share in the property acquired during the subsistence of the marriage.

Ultimately, the Court relied on English Divorce law to interfere with the decisions of the lower courts. The court ordered the transfer of one viable income generating property to the appellant. The court also ordered that the properties that were transferred to a limited company could not escape the order of the Supreme Court.

## **OBSERVATIONS**

Analysis of the decision, however, reveals that it did little to make a clear position on the application of customary law. The court failed to make an unequivocal ruling that would settle the matter. It leaves to question what would happen where a negative customary law is involved for instance if a case with the facts of the Mwiya case were to be brought before the courts.

There are differences in the Lozi and Ushi customs when dealing with matters of divorce and property settlement. Under Lozi custom, the divorced wife is not entitled to a share of the matrimonial property whereas according to Ushi customary law, a divorced woman regardless of any accusation of any matrimonial offence, is entitled to a reasonable share of matrimonial property. This brings to the fore the fact that the lack of uniformity of customary law creates

different standards for different women. Some women may be discriminated against depending on which customary law governs them.

Moreover, few women are aware of the right to appeal to the superior courts and even fewer can afford to take the cases further than the Local Courts. In an interview with Mrs. Joyce Macmillan<sup>91</sup>, she said that the court's decision in the Chibwe case left the door ajar to be pushed in either direction depending on the facts presented before the courts. She expressed the view that the equitable distribution of property at dissolution of a customary marriage should be made regardless of the governing customary law of the parties involved. She added that the decision could easily be challenged as unconstitutional if applied in, for example, a marriage under Lozi customary law.

#### **4.5 CONCLUSION**

The delivery of justice is influenced by many factors which either promote or deter confidence in the ability of the courts to adequately dispense justice. For women, treatment by the court system is an important determinant of access to justice. This chapter has focused on the prevailing justice delivery system with particular emphasis on the role of the courts when dealing with matters bordering on the application of customary law. It has highlighted the existence of bias against female litigants especially in the local courts. It has also highlighted the evolution, albeit slow, of the legal system to move with the international human rights demands.

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<sup>91</sup> Interview, Joyce Macmillan, Deputy Director, Zambia Law Development Commission on 2 March, 2011.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.0 INTRODUCTION

This study focused on the impact of constitutional exemptions to the principle of non discrimination on the rights of women. In so doing, the paper looked at the legal position of women in Zambia and the current legal framework governing the rights of women in Zambia. It also reviewed the delivery of justice for women with particular emphasis on the application of customary law by the local courts. The focus of this chapter therefore is to highlight the general conclusions that have been reached and further to make recommendations based on the said conclusions and other related factors.

#### 5.1 GENERAL CONCLUSIONS

From the research carried out it was observed that despite the global recognition that all human beings are equal, gender discrimination continues to be a real problem in Zambia. Consequently the position of women in Zambia remains subordinate to that of their male counterparts. This is chiefly attributable to the duality of the legal system which recognizes the application of customary laws, most of which are oppressive on women and tend to subordinate them in many issues including family law.

It has been established that gender discrimination manifests in many areas of family law for example in customary law marriages. It was observed that most women who contract marriage under customary law face a lot of difficulties. It was noted that the widely accepted practice of polygamy has negatively impacted on women's rights. Polygamous marriages contravene women's rights to equality with men, and can have serious emotional and financial consequences for them.<sup>92</sup>

At dissolution of a customary marriage, women are also the most disadvantaged firstly because the grounds for divorce are imprecise and broad, women can find themselves divorced even for the flimsiest of reasons, some of which may not even concern the parties to the marriage. The second problem relates to the award of maintenance and property settlement. Customary law

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<sup>92</sup> ZLDC Working Paper on Legislation to Regulate Marriages Contracted Under Customary Law page 11

generally does not recognize the award of maintenance to a divorced woman and this has resulted in many women being rendered destitute. The Local Courts (Amendment) Act of 1991 provides for maintenance of women married under customary law after divorce for a period of three years but enforcement of judgments has been highly problematic for many women.

It was also established that the area of inheritance has equally posed many difficulties for women. Despite the enactment of the 1989 Intestate Succession Act, women still stand to face discriminatory practices after the death of their spouses when dealing with the distribution of land held under customary tenure.

This study has also highlighted the weaknesses inherent in the legal framework governing the rights of women in Zambia. Whereas Zambia has ratified numerous international and regional instruments, it is still yet to domesticate them. The implication of this is that these instruments do little to improve the lives of women because until they are domesticated they can not be invoked in any court of law in Zambia. In addition, even in the case of those instruments directly applicable to Zambia, the state has not moved towards implementation or compliance with their requirements.

Most importantly, it was observed that the most fundamental law of the land, the Constitution indirectly legalizes discrimination against women by providing that customary law will not be considered as discriminatory<sup>93</sup>. Therefore, whereas the Constitution guarantees equality for all<sup>94</sup> in the enjoyment of fundamental rights and freedoms, this provision is diluted by the provisions of article 23. By excluding customary law from the constitutional guarantee of non discrimination, women have been made vulnerable to many violations since it is essentially in these areas that most violations to their human rights take place. The constitution fails to unequivocally prohibit discrimination against women nor to entitle them to the full protection of the law.

The study also established the existence of discrimination in the delivery of justice. The local courts, which have the original jurisdiction in administering customary law still lag behind in internationally recognized human rights standards for women. The rulings reflect gender bias

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<sup>93</sup> Article 23 (d)

<sup>94</sup> Article 11

against women which run through almost all customs. The problem is compounded by the dominance of male adjudicators who, because of socialization tend to harbour patriarchal values and will normally perceive them in matters before them.

The Local Courts and Subordinate Courts Acts under Section 12 and 16 respectively provide that the Court shall not deprive a person of the benefit of customary law provided that the law is not repugnant to natural justice, equity or good conscience or incompatible with any written law for the time being in force in Zambia

However there is a view that courts administering customary law are in most cases insensitive to many unjust cultural practices perpetrated in customary law marriages. The belief that old cultural practices must be upheld if society is going to be prevented from disintegrating has greatly influenced the position of the courts on many issues. Unfortunately, this has been to the detriment of the people, especially the women who are in customary law marriages.<sup>95</sup>

The research found that the application of customary law lacks uniformity and is therefore mostly subjective. It was, however, found that, as a result of increased sensitization of human rights developments, the local courts are beginning to take gender dimensions into consideration when deciding cases before them. The above notwithstanding it was observed that the pace of evolution for the legal system was too slow and needed to be stepped up if any meaningful improvement is to be achieved.

The paper also found that other channels of delivery of justice for women have not been very effective. For instance, the family is considered to be an unsafe ground because in most cases, they tend not to act upon complaints brought by women. This is also attributable to cultural beliefs that women are subordinate to their male counterparts.

Further, the effectiveness of the VSU has been compromised by the perception of the public that they are not properly equipped to handle cases dealing with violations of women's rights in a just and impartial manner. Further, the absence of the VSU from rural areas has also affected the

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<sup>95</sup> ZLDC Working Paper on the Legislation to govern marriages Contracted under Customary Law page 18

effectiveness of the VSU since a lot of violations based on the application of customary norms mostly occur in those areas.

## 5.2 RECOMMENDATIONS

Having discussed the impact of constitutional exemptions to non discrimination, it is recommended that the following measures be implemented;

Since it has been observed that most violations to women's rights are perpetrated under the guise of customary law, it is recommended that following the restatement of customary law it is imperative to promote its positive aspects and remove all negative and harmful practices. The customary law of the country should be reviewed with a view to identifying those positive aspects that should be maintained and codified. This also requires coming up with customary laws that are consistent with human rights standards. This will help in eliminating the problems currently faced by the lack of uniformity, that is, the problem of subjectivity.

It is also recommended that appropriate legislation should be enacted particularly on those aspects of family and personal laws that are susceptible to violation. Therefore legislation to regulate marriages contracted under customary law is necessary to cover such matters as maintenance and provide concrete grounds for divorce.

The Intestate Succession Act<sup>96</sup> should also be reviewed with a view to addressing the provisions that still give rise to difficulties such as the exclusion of land held under customary tenure from the distributable estate of the deceased. Further, sensitisation programmes should continue to be conducted to ensure that more women are made aware of some of the progressive provisions of the Act, without which some women will continue to fall victim to property grabbing.

The Zambia Law Development commission is currently engaged in the process of reviewing the Act with the aim of reforming Intestate Succession Act.

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<sup>96</sup> Chapter 59 of The Laws of Zambia

The paper also recommends further sensitization and human rights training for adjudicators to ensure equitable interpretation of customary law. Although some improvement has been recorded in rulings of Local Court Magistrates, there still remains need for further sensitization programmes to be carried out among Local Court Magistrates to ensure that human rights standards are taken into account when deciding matters that impact on the human rights of women.

With regard to the legal framework, the paper recommends the immediate domestication of Regional and International Instruments that seek to improve the lives of women. Particularly, the State must fully implement the provisions of the CEDAW which calls for state parties to take:

“all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.”<sup>97</sup>

Finally, in view of the fact that all the legal provisions that govern the enjoyment of fundamental rights and freedoms for women ultimately derive their validity from the Constitution, the qualified protection against discrimination should be removed from the Constitution.

It is recommended that Article 23 should be repealed and replaced with a broad anti discrimination clause which complies with international human rights. The protection from discrimination should not specify any limitations or derogations. In addition, it is also recommended that the constitution should be amended to include a specific provision that guarantees equality between the sexes in all respects.

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<sup>97</sup> Article 3

### **5.3 CONCLUSION**

Despite the fact the recognition, respect and protection of the fundamental human rights of every person regardless of their sex are critical in every democratic society, gender discrimination continues to exist in Zambia. Women are the most affected by the discriminatory practices of customary law. It is therefore imperative that the above recommended measures are put in place to eliminate discrimination on any grounds and to ensure equal opportunities for all as well as equal protection of the law.

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