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OBLIGATORY ESSAY

NAME : MUSONDA, KAONGO

COMP No : 97081582

SUPERVISOR : MR. ENOCK MULEMBE

CORDINATOR : MR. MUMBA MALILA

TOPIC : **WOMEN AND THEIR LEGAL PROTECTION:AN
AFRICAN EXPERIENCE WITH SPECIFIC
REFERENCE TO ZAMBIA.**

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By:

KAONGO MUSONDA

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

I RECOMMEND THAT THE OBLIGATORY ESSAY PREPARED UNDER MY
SUPERVISION

BY

MUSONDA, KAONGO

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WOMEN AND THEIR LEGAL PROTECTION: AN AFRICAN EXPERIENCE WITH
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STUDENTS NAME.....*MUSONDA, KAONGO*.....

SIGNATURE..........

DATE.....*17th DECEMBER, 2004*.....

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DEDICATION

For my parents; Dad, Mr. Paul Kaongo Musonda and my late Mum, Mrs. Grace Kangwa Musonda (M.H.S.R.I.P)

ABSTRACT

The woman in society has been subjected to an awful lot of injustices ranging from being perceived and treated as the weaker sex to an outright denial of access to equal opportunities with their male counterparts in spheres such as education, employment and the like. Therefore, with the basic understanding that every human being is equal irrespective of their gender, one realizes that the marginalisation that women have been subjected to is totally unjustified.

To that extent this study is an endeavour to look at why it has been justified or the rationale behind the “extra” legal protection of women over and above that which men in modern society enjoy. This has been done by looking, generally at the African Continent and specifically at the Zambian context.

Therefore, the objective of this research has been:-

- (a) To illustrate the background of the present need to concretize/strengthen the Legal protection of the rights of women in society.
- (b) To show that there is an indispensable need to protect women from societal injustices and/ or generational prejudices.
- (c) To make recommendations on what should be done to secure a sustainable and lasting solution to address the aforestated injustices.

In order to accomplish this, there are 4 chapters in this paper; with Chapter One looking at the fundamental principles of women’s rights as an instance of human rights; chapter two focuses on what has necessitated the extra promotion and protection of women’s rights on the African continent; Chapter three looks at the status of women and the reasons for justifying their extra legal protection in Zambia; and chapter four encompasses some recommendations to remedy the problem of gender inequalities both in Zambia and Africa on the African continent..

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CHAPTER ONE

1.0. Women's Rights as a Particular Instance of Human Rights

In most African societies, the lived reality of women in the various family forms, and their access to and control of resources shows that power relations between men and women continue to be unbalanced in favour of men. This raises questions as to whether the contemporary universal conception of rights is useful or relevant to the reality of African women. In the tradition of most human rights declarations, there seems to be an underlying assumption that such rights are natural and therefore attached to every human being. In reality, however, a select few, these generally being the male property owning individuals have historically enjoyed full rights. Therefore, although human rights declarations are framed in universal language, their application has always been 'particularistic and exclusionary'¹ as the struggles of women the world over attest to this assertion.

Therefore, the instant chapter focuses on the fundamental principle of human rights with specific reference to the rights of women. It will further look at the various human rights instruments, which establish the fact that every human being is born with given inherent rights, which are equal, by all definitions. Gender inequality or imbalances entail a kind of discrimination against a particular group, which in this study refers to the marginalisation that women have been subjected to. Such discrimination usually takes the form of less favourable treatment of some groups-politically, socially, culturally or

¹ The Women and Law in Southern Africa Research Trust, Botswana (1997), edited by Kidd, E. Puseletso *et al*, **Botswana Families & Women's Rights in a Changing Environment** Gaborone, Lenswe la Leased Ltd.

economically.² Therefore, in this particular context, emphasis is laid on the woman's disadvantaged plight in society in so far as their legal status and protection is concerned.

1.1. Gender Discrimination as a Human Rights Violation

To that extent, therefore, it should be noted that in this paper gender discrimination should be perceived within the fundamental concept of human rights due to reasons discussed below. Basically, human rights have been variously defined as "the rights which every human being possesses and is entitled to enjoy simply because one is a human being"³. Therefore, in a more precise way, human rights are the rights one has simply because one is a human being, that is regardless of their gender..

Further, a right may refer to entitlements or interests that have been specially entrenched in a system of justifications and therefore substantially transformed, giving them priority in ordinary circumstances over, for example, mere considerations of social interest. It has also been stated that rights/titles provide a warrant for making and pressing claims. Human rights are, therefore, held or exercised primarily against the state⁴. This particular definition seems to lay emphasis on the fact that the source of a right may be contract or some kind of agreement among members of a given society. In the context of this paper, however, much consideration is given to those rights which are inherent and not just acquired or conferred by mere agreement.

According to another writer, human rights are a complex of relations, which is constituted of real relations between individuals who have the duty to act (or refrain from

² Permanent Human Rights Commission (1999-2009) **National Plan of Action for Human Rights**. p.46

³ Ibid., p.3

⁴ Donnelly, Jack (1985) **The Concept of Human Rights**, New York;. p.5

acting) towards each other and the relation of every human being to certain (things circumstances) seeing his or her well-being. This complex of relations exists independently of the acts of law, and independently of whether it is apprehended by any individual or not⁵.

Accordingly, the **United Nations (UN) Charter** as well as the **Universal Declaration of Human Rights (UDHR)** have proclaimed and agreed that non discrimination and equality of treatment are cardinal norms of international human rights law. In Article 1 of the UDHR, it has been declared that all human beings are born free and equal in dignity and rights and that (Article 2) everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind, such as race, colour, *sex*, language, political or other opinion, national or social origin, property, birth or other status. Other major human rights instruments followed the Charter and the UDHR in prohibiting discrimination.

Therefore, it can be deduced from the definitions above that to have a human right one need not be or do anything special, other than be born a human being. It, therefore, follows that since all human beings have the same basic nature and have it equally, the rights based on this nature must be universal and held equally by all. In the same vein, it has further been asserted that human rights are universally applicable, inherent, inalienable, equal, non-discriminatory, indivisible, and interdependent⁶.

⁵ Marek, Piechowiak (2000) "What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification" in **An Introduction to the Protectin of Human Rights**, edited by Hanski, Raija & Suksi, Markku. p.10

⁶ Supra note 1 pp.1-5

Having considered the issues above, it can be asserted that insisting on the rights of women is in essence a call for human rights. This entails a call for an end to discrimination against women. In this paper "Discrimination against women" is used to mean :-

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.⁷

The rationale behind the notion of equality, according to one scholar is that once irrelevant criteria which makes people different and about which they cannot do anything (for example, race, colour, tribe or sex) are removed, all individuals should be treated equally⁸. In other words, therefore, women should not be discriminated against simply because of their sex/gender.

In addition, other instruments such as the **African Charter** and **Additional Protocol on the Rights of Women** have also underscored the importance of the need to eliminate all forms of discrimination against women. According to Article 18(3) of the African Charter, the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women...as stipulated in the international declarations and conventions. One such convention is the **Convention on the Elimination of All Forms of discrimination Against Women (CEDAW)**, which promotes and protects the rights of women. In this regard, Article 11(1) of CEDAW categorically states that;-

⁷ Article 1, Convention on the Elimination of All Forms of Discrimination Against Women

States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular (a) the right to work as an inalienable right of all human beings (b) the right to the same employment opportunities, including the application of the same criteria for selection in matters on employment.

Further, Article 10(c) focuses on the elimination of any stereotyped concept of the roles of men and women at all levels. It is, therefore, clear that many instruments in international law have condemned the discriminatory practices against women. This principle has been recognised and incorporated in other important instruments such as Article 1 of **United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention against Discrimination in Education**, the **International Covenant on Civil and Political Rights (ICCPR)** which provides that everyone has a right to be recognized everywhere as a person before the law⁹ and according to the **Human Rights Committee**, this right means that "women may not be treated as objects to be given together with the property of the deceased husband to his family."¹⁰ This is a direct nullification of the custom of wife inheritance which is so rampant in most African countries and apparently a violation of human rights. Further, the **African Charter on Human and Peoples' Rights (African Charter)** also requires that all rights be implemented in a nondiscriminatory way.¹¹ The **UDHR**, which is widely regarded as customary international law¹², provides that, "Everyone has the right to own property

⁸ Tembo, L. *et al.* (1984) **A National Survey on Sex Biases in Zambian Textbooks in Primary and Junior Secondary Schools and Their Implication for Education in Zambia.** (UNESCO) p. 21

⁹ Article 16.

¹⁰ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 19.

¹¹ Article 14.

¹² Because it has been universally accepted and concerns itself with questions of rights between several nations or nations and the citizens or subjects of other nation.

alone as well as in association with others."¹³ At a minimum, this right means that men and women must have equal property rights. It is, therefore, categorically clear that the concept of non-discrimination against women is widely affirmed and demanded for such that any detraction from this norm is in flagrant violation of the well-established standards of international law.

In this vein, it has to be reiterated that all human beings, regardless of physical or other attributes, are entitled to the enjoyment of ALL human rights. It has, however, been contended that in order to bring all categories of people on an equal footing vis-à-vis the enjoyment of human rights, certain special measures have to be put in place. This is why international law has recognised the importance of according special protection for vulnerable groups of people, such as women. This recognition has inspired various governments the world over to incorporate the fundamental concept of the equality of men and women in their constitutions. For instance, the **Zambian Constitution**, in Article 23 categorically prohibits or proscribes discrimination on the ground of race, ethnic origin, national or social origin, religion and *sex*(emphasis added). Zambia is also a party to all the major international conventions, which contain protection against discrimination.

It can be observed that a substantial amount of space has been dedicated to an endeavour to show that women's rights are human rights. This is because it is imperative that everything discussed in this paper should be understood against this backdrop. This has also been necessitated by the fact that researches, the world over, including Zambia, have

¹³Article 17.

shown that despite the many instruments and conventions at international, regional and national levels women's rights have continued to be violated¹⁴ due to customary, historical and other reasons to be discussed in the next two chapters.

Therefore, the promotion, protection and enjoyment of human rights in any society is incomplete if the human rights of one gender are not fully promoted and/ or protected, or are even deliberately violated. Hence, despite the principle of equality and non-discrimination being declared and encompassed in world acclaimed documents such as the UDHR and the UN Charter, it was soon realised that despite their pertinent provisions, discrimination against women was being perpetuated. Consequently, the **Commission on the Status of Women** was established to promote and protect the rights of women world-wide¹⁵.

Similarly, the need to promote and protect the human rights of women has been re-affirmed through several activities including four world conferences, which have taken place in the last 30 years. This has resulted in the adoption and drafting of several international human rights instruments to tighten the "loose ends" in the world's awareness to why it is imperative to recognise women's rights. For instance the **Beijing Platform for Action** was adopted unanimously at the fourth **World Conference on Women** in 1995. This addresses the issue of women's rights as one of its focal areas. Earlier, in 1993, the **Vienna Conference on Human Rights** re-affirmed that "...the human rights of women and the girl child are inalienable , integral, indivisible and part of universal rights".

¹⁴ Supra note, 1, p. 31-32.

¹⁵ Permanent Human Rights Commission (1999-2009) National Plan of Action for Human Rights. p.32

1.2. International Standards

Fundamentally, the main international instrument for the promotion and protection of women's rights is the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** aforementioned which came into force in 1981. Its main provisions include a detailed explanation of the meaning of discrimination specifically against women. Such discrimination encompasses any difference in treatment on the grounds which intentionally or unintentionally disadvantages women, in both domestic and public spheres; or which prevents women from exercising their fundamental human rights and... further obliges state parties:

- (a) to embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) adopt appropriate legislation and other measures, including sanctions where appropriate prohibiting all discrimination against women;
- (c) to establish legal protection through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (d) to take all appropriate measures to eliminate discrimination against women by any person organisation or enterprise;
- (e) To take all appropriate measures; including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (f) To repeal all national penal provisions which constitute discrimination against women¹⁶.

¹⁶ Article 2 of the CEDAW

In addition, the Convention calls upon state parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieve the elimination of prejudices and *all customary practices* (emphasis added) which are based on the idea of the inferiority or superiority of either of the sexes or stereotyped roles for men and women¹⁷.

Generally, therefore, it has been the essence of this chapter to draw attention to the fundamental principles pertaining to the study in issue. These include such principles as what human rights are, the principle of discrimination, the principle of gender equality/inequality. Further, the chapter has also endeavoured to highlight the various human rights instruments, which establish the fact that every human being is born with given inherent and inalienable rights, which are equal, by all definitions. It has also been shown that women's rights are human rights.

¹⁷ Article 5(a) UN Fact Sheet No. 22

CHAPTER TWO

2.0. The Legal Status of Women in Africa: Why the Need for extra Protection?

Laws and practices governing women's personal status, their legal capacity and role in the family, deny women their human rights in many countries. While the type of discrimination varies from region to region, women throughout the world find that their relationship to a male relative or husband determines their rights. Personal status laws in some Middle Eastern countries curtail women's rights entering into, during, and at the dissolution of marriage. For instance some women in Asia, Africa, Europe, and the Middle East have their citizenship rights curtailed or denied because of the race or nationality of their husbands.

In many countries, children born in their mother's country are denied her nationality because women cannot transmit nationality. For example, Egyptian women who are married to foreign men cannot pass their nationality to their offspring. Moreover, discriminatory laws and customary practices in countries like Kenya deprive women of their equal rights to own, inherit, and control property, including land and housing.¹⁸

The current state of gender relations in most African countries has been said to treat male dominance as legitimate, natural, obvious and inevitable. This has led to the creation of a social-power hierarchy, in the context of which women are, by-and-large, reduced to powerlessness, economic marginalisation, social vulnerability, and cultural inferiority, without any regard to their actual level of contribution to social production and

¹⁸ Report of the Task Force for the Review of Laws Relating to Women, Nairobi, 1998

development.¹⁹

There are a myriad reasons why there has been concern about the plight of women in most parts of the world more especially on the African continent. In Africa, women's property rights violations are caused and aggravated by various factors such as discriminatory laws, customs, distorted attitudes, widespread ignorance of rights, and ineffective enforcement mechanisms.

2.1. Discriminatory Laws

Most countries in Africa have provisions in their constitution's which outlaw discrimination on the basis of sex, but concomitant exemptions almost totally nullify these nondiscrimination provisions. For instance, article 70 of Kenya's constitution provides that all Kenyans are entitled to fundamental rights and freedoms, whatever their sex. Article 82(1) prohibits any law that is "discriminatory either of itself or in its effect" and article 82(3) defines discrimination to include discrimination on the basis of sex. However, article 82(4) exempts certain laws from the discrimination prohibition. It permits discrimination with respect to areas vital to women's property rights, such as marriage, inheritance, and the application of customary law, where discrimination is expressly permitted and sanctioned.²⁰

Further, most common wealth African countries have undeveloped statutory laws on division of family property remains such that lawyers must resort to England's 1882

¹⁹ www.hrw.org/reports/2003

²⁰ Article 82(4), Constitution of Kenya. The constitution was last amended in 1998.

Married Women's Property Act²¹. Case law in Kenya establishes that women are entitled to half of the family property if they can prove contribution. This principle applies even to customary and Muslim marriages. However, the absence of statutory regulations pertaining to the division of property makes the application of this case law uneven. A study by an organisation called Human Rights Watch, revealed that many local court justices did not have an idea that women could be entitled to anything, much less half of the family property, upon separation or divorce."²²

Similarly, customary property laws, as described above overtly discriminate on the basis of sex by giving men greater rights than women to own, inherit, acquire, manage, and dispose of property. With the drastic changes in family and social structures since pre-colonial times as well as the health risks of HIV/AIDS and other diseases that thrive on women's subordination, this gender differentiation and the profound inequalities it produces are no longer justifiable, hence the justification for the 'extra' protection provided to women.

2.2. Biased Attitudes

The other factor which has contributed to the discrimination that women have been subjected to is the biased attitudes held by many people especially in the traditional setting. For example, a chief in a given African village said, 'A woman and the cows are

²¹ The MWPA applies in Kenya as a statute of general application pursuant to a 1971 High Court decision.

²² Human Rights Watch Report, November 3, 2002.

a man's property'²³ which comment shows how biased men are about the position of a women in most African societies and other developing societies.

Further, it has been asserted that in most African societies the husband has to own the property because the wife belongs to the husband. In other words the husband owns the wife. This attitude has been fuelled by the fact that most women are not literate in Africa. It is, therefore, believed that women cannot do anything by themselves. Hence, women have to rely totally on men. For instance, in the Masaaai tradition, a woman cannot sell property without consulting her husband. But he can sell without consulting his wife.²⁴ Similarly, a woman is considered a minor for her whole life, in Lesotho. She is always under the guardianship of her family lineage and may not be allocated land in her own right. This culture is overtly discriminatory and out of sink with this era in which the recognition of women's rights is common place.

A women's rights lawyer said an elderly woman recently told her, "If we give land to a woman...she will be arrogant and won't serve her man."²⁵ An NGO representative attributes this attitude to socialization. She explained that very few women have property registered in their name because of patriarchy. The message is always reinforced that women cannot own property. Even some women believe this. Women are socialized in many ways to think that this is the domain of men. Even well educated women fall in the same trap. Because of such discriminatory customs and attitudes some women have

²³ Wilson Tulito Molill, senior chief, Ngong, October 25, 2002

²⁴ *Supra* note 22.

²⁵ Human Rights Watch interview with Judy Thongori, then deputy head of litigation, International Federation of Women Lawyers (FIDA-Kenya), Nairobi, October 16, 2002.

accepted having inferior property rights, and others even oppose the idea of women having equal property rights with men.

2.3. Unresponsive Government and Traditional Authorities

The other factor, which has contributed to the perpetuation of discrimination against women, has been the unresponsiveness of government's and traditional authorities. Many men-and some women-in Africa believe that women should not be entitled to property rights, at least not on an equal basis with men. These attitudes influence the interpretation of customary laws, and vice versa. This perspective has further led to the legitimizing of women's subordination and inequality for many generations in the African society.

Overall, most African government's have not made women's property rights a priority. Most government's neither conduct any civic education on women's property rights nor fund NGOs that do. There is no government legal aid system (other than for murder and treason cases) in most countries. Similarly, there are usually no policies on women and land, neither is there any conscious effort to encourage women to own land.²⁶ This further aggravates the already disadvantaged plight that women are in.

2.4. Ineffective Courts

The other factor which has greatly contributed to the continued discrimination against women has been the ineffectiveness of the courts of law in dealing with cases pertaining to women's rights. Lawyers and individual women in most African countries complain

²⁶ <http://www.nationaudio.com/News/DailyNation/Today/News/News81.html>, Human Rights Watch telephone interview with Chiboli Shakaba, deputy secretary, Ministry of Lands, Nairobi, November 12, 2002.

that courts are biased against women, slow, corrupt, and often staffed with ill-trained or incompetent judges and magistrates. These perceptions discourage women from using courts to assert property claims. Some say judges embody the attitude that women are inferior to men. "Judges are men who were brought up to believe less in the rights of women," said one property rights lawyer. "Judges say, 'Why should women get property?'"²⁷

Most courts in African countries are also slow in the disposition of cases brought before them, the obvious reason being the courts' backlog. This has further been aggravated by the fact that most procedures pertaining to succession have remained inordinately complex to the detriment of the intended beneficiaries these being women.

In some African countries it has been alleged that sometimes courts simply do not enforce laws that could protect women's property rights which could be due to ignorance of the law or the judges' personal beliefs which could interfere with application of the law. One Court of Appeal justice in Kenya said that the Law of Succession Act should not apply to any rural land. He so firmly believes that customs sufficiently protect women that he denied women suffer property rights violations. He said:

It's idiotic to say that women can't get land in Luo land...If a woman says she's having difficulty getting land, it's crap. She ought to know that clan land can't be inherited by a woman. It has been this way since time began. If a [husband] dies, the widow has a life interest. It has

²⁷ Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

nothing to do with women's human rights...It's in the interest of everyone that rural communities are governed by their rules.²⁸

Therefore, these and many other examples show how the biased attitudes in societies have contributed to the perpetuation of the discrimination effected on women, hence the need for radical changes and awareness in these communities.

2.5. Women's Ignorance about their Rights

There have been a lot of obstacles to women asserting their property rights in most African societies. The most serious are women's lack of awareness about their legal rights, the time and expense of pursuing property claims, violence, social stigma, poverty, and harassment of NGOs working on women's property rights.

Women's property rights abuses are not exclusive to one social class, ethnic group, religion, or region. This is not to say that no women inherit, own, or control property, but rather that the problems cut across populations. Human Rights Watch interviewed illiterate women and those with advanced degrees, and found their property experiences remarkably similar. This can be traced back to a number of historical factors.

2.6. Historical Reasons

In their raw state, prior to the colonial era, property in most African societies was primarily controlled and allocated at the clan level. Land in particular could not be transferred without approval of clan elders, who were almost always men. Women's access to most property was through male relatives (usually husbands, fathers, brothers, or sons). In most ethnic groups, a husband's clan essentially "absorbed" a woman upon

²⁸ Report by the Human Rights Watch Nairobi, November 7, 2002.

marriage. Married women left their parents' homestead to live and work on their husbands' clan's land. Men typically controlled land allocation, yet women were responsible for most aspects of crop production. Although women's property rights were limited, social structures protected both women and men against exclusion from land.

In most ethnic groups, inheritance was patrilineal. A married woman did not inherit from her parents since her husband's family was expected to provide for her. Unmarried daughters could expect to inherit something, but not on an equal basis with their brothers. Women did not inherit from their husbands, but if they had sons, they could continue to live and work on the husband's land, holding it in trust for the sons. Sometimes, women were inherited by male relatives of the deceased husbands.⁷ Customary divorce rules varied among the ethnic groups, but women generally got either nothing, the items their own families gave them, or personal effects and a small portion of the family property, if they contributed to its acquisition.

After the British colonized certain African countries in the late 1800s, communal, clan-based property systems eroded as colonial authorities expropriated land, uprooted many indigenous Africans from their ancestral lands, crowded them onto "native reserves," and later introduced an individual titling system. The land titling system recognized men's right to allocate land for agricultural use as more akin to ownership, and men gained title deeds. Women's right to use land received no legal recognition.

As the cash economy developed and land grew scarce, men could sell land whether their families agreed or not. Moreover, men as titleholders had sole rights to agricultural

surplus although women provided most of the labor. Colonial authorities also introduced piecemeal legislation on marriage, divorce, and inheritance, applying different rules to different populations.

After gaining independence from their colonial masters, most African countries retained some colonial-era laws as well as introduced many new laws, none of which adequately protected women's property rights. Women continue to suffer property discrimination sanctioned by most constitutional laws and other traditional practices.

2.7. Customary Laws

Customary laws have a profound impact on women's property rights in the legal systems of almost all the African countries. Customary laws are mostly unwritten and constantly evolving norms that exist in parallel with statutory law. There are as many customary laws as there are tribal communities, and each has its own unique characteristics. Most African legal systems formally recognize customary laws. Most jurisdictions provide that courts should be guided by customary law so far as it is "applicable and is not repugnant to justice and morality or inconsistent with any written law."²⁹ In terms of their content, customary laws largely follow pre-colonial patterns with regard to women and property rights.

2.7.1 Widow Inheritance and Ritual Cleansing

Customary practices such as wife inheritance and ritual cleansing continue in parts of Africa with some permutations. Wife inheritance generally refers to the long-term union

²⁹ Judicature Act, chapter 8, article 3.

of a widow and a male relative of the deceased, and cleansing typically refers to a short-term or one-time sexual encounter with a man paid to have sex with the widow. The original practice of wife inheritance was a communal way of providing widows economic and social protection, since an inheritor was supposed to support the widow and her children.

Wife inheritance and cleansing practices also pose frightening health risks due to the fact that most women are forced to have unprotected sex with men³⁰. Condoms are usually not used because cleansing is not considered complete unless semen enters the widow and because women's inequality makes it difficult to demand condom use. According to one man who is paid to effect the cleansing rituals on women brought to him; "I don't use condoms with the women. It must be body to body. I must put sperm in her...If no sperm comes out, she is not inherited..."³¹

This custom is mainly motivated by superstition. It is believed that the spirit of the deceased can haunt people and that if a widow is not cleansed, she and her children will have bad luck and be ostracized. In most circumstances women are forced to do this. However, it has been acknowledged that there is no comparable cleansing for widowers (men), which shows how discriminatory these practices are that is they are one sided. Widows who refuse to be cleansed or inherited are called "dirty women."³²

³⁰ Beatrix Nyakisumo, "A vile custom that must go," *Africanews*, May 1997 [online], http://www.peacelink.it/afrinews/14_issue/p6.html (retrieved January

³¹ Human Rights Watch interview with Guy Udoyi, Siaya district, November 3, 2002.

³² Human Rights Watch interview with Alie Eleveld, coordinator, Society of Women against AIDS in Kenya

The other customary practice which most African women have been subjected to is the practice of female circumcision commonly known as female genital mutilation (FGM). The reasons given for FGM are purely cultural and traditional in a society deeply rooted in patriarchy. This is usually practiced for social acceptance and respect. According to locals in Tanzania, many men are potentially polygamous and FGM is seen as the only way to ensure that their spouses "remain faithful". This practice sometimes involves extreme mutilation and sewing up of female genitalia/sexual organs to reduce the pleasure derived from sexual intercourse. The other reason given for this vile practice is that women should endure pain. FGM has serious consequences such as death and permanent mental and physical scarring and therefore, flagrantly violates the rights of women.

Although this practice has been declining over the years, it is recorded that in 1999 alone almost 100 per cent of females in about five regions of Tanzania underwent FGM. Uncircumcised women in Tanzania are stigmatised as they are called all sorts of names (prostitutes, uncultured and unclean). This practice has been perpetrated despite the fact that it is criminalised by the Tanzanian constitution and attracts a maximum penalty of 15 years imprisonment upon conviction.³³

2.9. Breadwinner Theory

In addition the 'breadwinner' theory has also been another reason used in the subordination of women. According to the traditional view the husband is the 'breadwinner' and the wife's place is the home. The husband, being the head of the

³³ Banda, Pauline: *'Tanzania: Fight Against Female Circumcision Gains Ground'*, Zambia Daily Mail, Thursday, July 29, 2004, p.6c

household, is seen as the provider of household cash income and the wife, seen as the helper, who only provides supplementary income. Consequently, the husbands as the dominant decision-makers, have sought to specialise in 'productive' labour and confine their spouses to 'reproductive' labour. Any efforts by wives to engage in productive labour have been widely resisted since such liberties have been often construed as threats to husbands' authority and decision-making powers. This has been dubbed as a type of unfounded male *chauvinism*.³⁴

The challenging practice in most African cultures has been the payment of bridewealth custom, an action which culturally determines and seals the man's authority and household headship. This custom further re-affirms the belief stated above that the man is responsible for the reproductive aspects of the family while the woman is simply there for reproductive purposes and their place is supposed to be in the home. Such cultural considerations preclude male participation in reproductive labour and condemn women to virtual domestic slave and hence the need to accord them 'extra' protection over and above that accorded to men.³⁵

When women are forced out of their homes, stripped of their belongings, and coerced into risky sexual behaviors in order to keep their property simply because they are women, and when the government does little to prevent and redress this, they are not just experiencing "culture," they are experiencing human rights violations.

³⁴ Sithole, Sylvia et al (1995) **Gender Research on Urbanisation, Planning, Housing & Everyday Life;** Gruphel, Phase One: (Harare: Zimbabwe Women's Resource Centre Pub.), pp. 103-105

³⁵ Ibid., pp. 106-107

As was noted in the first chapter, international human rights law proscribes discrimination, including on the basis of sex. A number of treaties and rights are implicated when women's property and personal rights are violated as will be shown below because the principles of non-discrimination and equality are central to human rights.

The core international treaty on women's rights, the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** obliges states to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation" and to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."³⁶ It also requires that states "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs* and practices which constitute discrimination against women."³⁷ The fact that men in most African cultures have greater rights than women when it comes to owning, accessing, and inheriting property under the constitution, the Law of Succession Act, and customary laws violates the principle of non-discrimination.

CEDAW also recognizes that many women's rights abuses emanate from society and culture, and compels governments to take appropriate measures to correct these abuses.

CEDAW requires governments:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the

³⁶ CEDAW, article 2.

³⁷ *Ibid.*,

inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.³⁸

Most African government's have done little or nothing to comply with this requirement with respect to women's property rights. Their constitution's and statutes expressly permit the application of customary laws based on women's inferiority and stereotyped roles for women. Officials condone customary laws and practices even when they realize that they discriminate against women. The government's acquiescence to social and cultural patterns of conduct that harm women's property rights violates **CEDAW**.

Human rights law also requires that governments address the legal and social subordination women face in their families and marriages. Under **CEDAW**, states must:

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

(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 at its dissolution;[and]...

(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.³⁹

Interpreting these provisions, the **Committee on the Elimination of Discrimination against Women** (CEDAW Committee) noted that violations of women's marriage and

³⁸ Ibid., article 5(a).

³⁹ Ibid., article 16. The ICCPR also provides that governments must guarantee the equal rights of spouses as to marriage, during marriage, and at its dissolution. ICCPR, article 23(4).

family rights are not only discriminatory, but stifle women's development. The **CEDAW Committee** observed that:

[A]ny law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family, and to live in dignity as an independent person.⁴⁰

It is, therefore, submitted that most laws and customs in some African countries violate women's marriage and family rights under **CEDAW**. For instance, the coercive nature of wife inheritance arrangements, where widows do not have a reasonable alternative and cannot choose the union freely, violates the right to choose a spouse and enter into marriage with free and full consent.

Since women are unable to inherit and retain family property upon separation or divorce on an equal basis with men, their rights are unequal to men's in respect of owning, acquiring, enjoying, and disposing of property. Women are less able than men to manage, administer, and dispose of property during marriage: customarily and in practice, men have far greater rights than women to determine how family property will be used or transferred. All of this violates **CEDAW** and other sources of international law.

International human rights law increasingly recognizes women's right to sexual autonomy, including the right to be free from nonconsensual sexual relations. The right to sexual autonomy is reflected in a number of international declarations and conference

⁴⁰ CEDAW Committee, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994), para. 28.

documents.⁴¹ Sexual autonomy is closely linked to the rights to physical security and bodily integrity,⁴² the right to consent to and freely enter into a marriage, as well as equal rights within the marriage.⁴³ When women are subjected to sexual coercion with no realistic possibility for redress, a woman's right to make free decisions regarding her sexual relations is violated.

In most African countries, women's rights to sexual autonomy, physical integrity, and security of person are violated when women are forced to undergo traditional rituals like cleansing and wife inheritance involving nonconsensual sex and when they are physically abused in connection with property rights violations.

International human rights law does not address HIV/AIDS directly, but protections against abuses associated with HIV/AIDS are included in numerous treaties. In 1998, the **Office of the United Nations High Commissioner for Human Rights** and the **United Nations Programme on HIV/AIDS (UNAIDS)** issued "HIV/AIDS and Human Rights: International Guidelines," which provide a framework for governments seeking to incorporate human rights protections related to HIV/AIDS into national law. The guidelines cover a range of issues, such as the need for protection against discrimination and eliminating violence against women, including harmful traditional practices, sexual

⁴¹ United Nations, *Programme of Action of the United Nations International Conference on Population and Development* (New York: United Nations Publications, 1994), A/CONF.171/13, 18 October 1994, para. 4.4(c) and United Nations, *Beijing Declaration and Platform for Action* (New York: United Nations Publications, 1995), A/CONF.177/20, 17 October 1995, para. 223. Second international consultation on HIV/AIDS and human rights, 23-25 September 1996, Geneva), U.N.Doc. HR/PUB/98/1, Geneva, 1998.

⁴² ICCPR, article 9. Article 9 of the ICCPR guarantees to everyone "liberty and security of person."

⁴³ ICCPR, article 23 and CEDAW, article 16. See also article 16 of the UDHR.

abuse, and exploitation⁴⁴. According to the **Committee on Economic, Social and Cultural Rights** (CESCR), the right to the enjoyment of the highest attainable standard of health under article 12 of the **International Covenant on Economic, Social and Cultural Rights** (ICESCR) includes the right to information and education concerning prevailing health problems, their prevention, and control.⁴⁵ Similarly, under the **African Charter**, states must "promote and ensure through teaching, education and publication" respect for and understanding of human rights. Therefore where ever there is a failure on the part of any government to combat women's property rights violations as a means of halting the spread of AIDS and a failure to ensure that citizen's understand the HIV/AIDS and other health risks associated with women's property rights violations and harmful customary practices violate these rights and obligations.

In conclusion, therefore, it is worth noting that most violations of women's rights have been largely due to the role that culture dictates the woman should have in both the family and community at large. It has been shown in the discourse above that most women are denied a lot of opportunities simply because of their gender which is an obvious violation of many international human rights instruments which both proscribe and prohibit such unfounded violations.

⁴⁴ Second international consultation on HIV/AIDS and human rights, 23-25 September 1996, Geneva), U.N. Doc. HR/PUB/98/1, Geneva, 1998.

⁴⁵ Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14, The right to the highest attainable standard of health, U.N. Doc. E/C.12.2000.4, paras. 12(b), 16 and note 8.

CHAPTER THREE

3.0. The Legal Status of Women in Zambia: Why the Need for Extra Protection?

The legal status of women in Zambia is still inferior to that of men. Although women contribute 51 percent of Zambia's population, they have not benefited from the development process in comparison with men due to the gender imbalances in the social, economic and political spheres.

3.1. Why the Gender Discrimination

Agriculture has become a key sector in the Zambian economy. A gender review paper, reveals that women are the main producers, providers and traditional managers of food production at family and national levels. However, women's productivity has been strained by lack of access to productive resources such as credit, improved technology and extension services. Information on production techniques and resources of capital is distributed by agricultural extension workers who seldom visit women farmers. Therefore, although women pillars of subsistence farming, their role and contribution are not recognised or supported by Government policies⁴⁶.

Land, which is one of the major factors of production, is predominantly controlled by men, even though women are the most active participants in agricultural and environmental activities. Statutory and customary laws and practices are biased against women, preventing them from owning and inheriting land on an equal basis with men. For

⁴⁶ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p. 23

example, under traditional tenure, land is usually granted to and inherited by males. Following kinship patterns, leaving women with no say⁴⁷.

There has also been an evidently insufficient decision-making power by women in Commerce Trade and Industry along with gender biases which has contributed to the unfair situations women encounter as they strive to engage in business. This extensively contributes to women engaging in petty trading and other marginalised ventures in the informal sector where most female labour is concentrated.

Marginalisation of women has also been apparent in the rules and regulations applied by leading institutions; banks until recently, insisted that married women obtain consent from their husbands to get credit. There are other gender biased economic constraints such as laws making it illegal to operate a business from home and lack of a material childcare support system that limits the women's productive capacities. According to a gender analysis of formal sector employment, there was wide disparity between men and women. Up to the 1980's, there was a rapid increase in male employment in mining, manufacturing, construction, transport and utilities. Women were neglected to lower levels of the expanding public sector and service industries such as sales related positions⁴⁸.

Since 1995, all land in Zambia is vested absolutely in the President who holds it in perpetuity on behalf of the people of Zambia⁴⁹. This law has renamed land categories into "customary land" of which about 90 percent land available for agriculture is under the

⁴⁷ Republic of Zambia, NCDP draft national gender policy, Lusaka, April, 1996.

⁴⁸ Supra note 47, p.23

customary regime, controlled by traditional chiefs. These chiefs follow patriarchal principles so that women virtually have no direct access to land. Although a chief may allocate land to a woman in unusual circumstances, a woman's use of land usually derives from her being "allowed" to use land which was allocated to her supervising male—a husband, father, uncle or brother⁵⁰.

Similarly, the 1995 land laws gives the President the administrative right to alienate land vested in him to any Zambian or non Zambian through the Ministry of Lands. However, where customary land is concerned, the president has to solicit for consent from the Chiefs and local authority in which the land is located⁵¹. In 1996, of the total land title deeds issued by the Ministry of Lands, only 13 percent were given to women.

3.1.1. Causes for Discrimination

The status of women described above has been a result of the culmination of a combination of different factors yet to be examined. As was seen at the general African level, women have been subjected to many injustices since times immemorial. As stated in the earlier chapters, the fundamental rights and freedoms guaranteed every citizen under the Constitution are neglected in the case of women in the area of personal law (that is, marriage, divorce, inheritance, devolution of property). Further there are several administrative practices, rules and regulations that perpetuate gender discrimination; such as the *de facto* discrimination in the areas of property ownership; inheritance, rights and

⁴⁹ Section 3; Lands Act No. 29, 1995.

⁵⁰ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p. 23

⁵¹ Section 3; Lands Act No. 29, 1995.

duties. The conflicts between statutory and customary personal law often works against the interest of women⁵².

Zambia took a huge step in the direction of protecting women's rights when it ratified CEDAW in 1985. However, despite Zambia's ratification of several international and regional instruments regarding the status of women, appropriate steps are yet to be taken to make the ratified provisions part of Zambian law, so that they can be used by the women in the Zambian Courts, that is becoming justiciable rights.

3.1.2. Law Reforms

It is worth, noting, however, that law reforms over the past few years have been effected by Government to remove all traces of discrimination in our statute books. For instance, there have been positive changes in as far as access to employment is concerned. Before these changes, women were prohibited from working underground in mines or working night shifts in industry. Similarly, the age of retirement from the Civil Service is now 55 irrespective of gender, where previously women were required to retire at 45 and men at 50 which was overtly discriminatory. There have also been changes in personal income Tax where previously women were taxed at a higher rate than men, and without deductions for child allowance, which position has now been rectified by the equity treatment which is not gender biased.

In addition, reforms have been effected in the area of inheritance law; widow's entitlement to a share in marital property, where statutory law was previously silent, prior to these changes. Traditional law served to support the practice of a widow being robbed

⁵² Omit' n 22

of all marital property when her husband died intestate (as is almost always the case in Zambia). In this view, Zambia has drafted a new **Intestate Succession Bill** to replace the 1989 Intestate Succession Act for which the woman's movement worked for so long. The bill increases the percentage of the estate inherited by the surviving spouse from 20 to 25 percent which is an improvement, though many women feel the percentage should be higher⁵³.

Further, article 23 of the **Constitution of Zambia** has set out protection from discrimination as it has now expressly mentioned the fact that gender and marital status must not be used as a ground for discrimination against women.

3.1.3. Customary Law

It should be noted that the main problem which underlies the discriminatory application of the law, is that unwritten customary law remains in effect in Zambia. Zambia's dual system of law provides the main legal basis for perpetrating and legitimising gender discrimination in country. The duality of Zambia's legal system obtains in the fact that the Country recognises two systems of law that regulate people's lives especially in matters affecting the family. The two systems so recognised are the customary laws and the general received law.⁵⁴

One of the greatest challenges in as far as the application of customary law in concerned, has been its lack of uniformity and certainty. This is so because these laws differ between

⁵³ The Women's Watch, International Women's Rights Action Watch, University of Minnesota, USA, V.10, No. 2, December 1996

⁵⁴ Ncube, Welshman *et al* (1995) **Widowhood, Inheritance laws, Customs & Practices in Southern Africa**; Harare; Jongwe Printers; p. 74

one tribe and another. Worse still, most of these laws are actually unwritten/uncodified. Generally, customary law is patriarchal law, which systematically puts the male as the head of the household, and women subject to the decisions of men. In customary law, land is normally allocated to men with women regarded as legal minors, under the custody of husbands, or else fathers, uncles or brothers. Accordingly it has been asserted that the belief in male supremacy underpins customary law and provides the ideological basis for male dominance of both domestic and public life⁵⁵.

Other debasement implications of the belief in male supremacy which runs through customary law manifests in customary marriage law. Herein consent between parties does not include the consent of the bride to be. Technically, the bride is either sold for a bride price (Lobola)⁵⁶ or given away for a token, which act signifies the status of a wife as her husband's property to deal with as he wishes. The practice of paying bride price technically removes the right of a woman to opt out of a marriage, since she or her relatives are likely to have to repay the money to dissolve the marriage. As was noted in chapter two, this practice is exercised in most African countries and undermines the woman's bargaining power in almost every affair in the home.

Further, customary law allows polygamy – a man may take as many wives as he wishes, whereas a woman may have only one husband. Apparently a husband is entitled to have girlfriends on the basis that these are prospective wives, and therefore, not considered adultery. By definition therefore, adultery in customary law is primarily a female offence. Where a husband dies, a brother of the deceased may inherit his widow and where a

⁵⁵ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p. 35

woman cannot conceive, it is considered appropriate for the man to seek alternative means of producing kids, that being impregnating another girl whereas the woman does not enjoy similar privileges, which makes these practices discriminatory. As noted above, such customary practices which overtly approve male philandering are mainly responsible for the rapid spread of HIV/AIDS in Zambia.

Gender discrimination also occurs in administrative practice because there is a lack of affirmative provisions and an inherent weakness of the constitution. For instance; the Passport Office requires a mother, who applies to add her children's names to the Passport, to get the written permission from the father, although there is no like requirement for fathers wishing to do the same. This requirement is registered on the application forms, despite a 1990 High Court ruling against the Passport Office in **Edith Nawakwi Vs The Attorney General**⁵⁷ where the Court categorically outlawed the said provision as being discriminatory and out of sink with the modern shift to equality and non discrimination against women.

3.1.4. Historical Reasons

The discrimination described above has been a result of multiple reasons discussed below:-Initially, ethnic groups in Zambia were divided into 73 district linguistic entities which have now been revised to 80⁵⁸. However, its been asserted that sufficient cultural similarities exist to justify the regrouping of these linguistic entities into seven; Bemba, Nyanja, Tonga, Lozi, Luvale, Lunda and Kaonde. Lineage is varied and complex

⁵⁶ Stewart, Julie *et al* (1990) **The Legal Situation of Women in Southern Africa**; Harare: University of Zimbabwe Pub., p 157

⁵⁷ Edith Nawakwi Vs The Attorney General 1990/HP/1724

⁵⁸ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p. 23

including matrilineal, patrilineal and bilateral groups. Each of these groups has its own customary law. A bilateral community has been defined as one, which practices both matrilineal and patrilineal inheritance that is decent can be traced through both the mother's and father's alike⁵⁹.

Kinship descent and property rights are through the mother's family in a matrilineal group or the father's family in a patrilineal group. According to the Zambian Association for Research and Development (ZARD) there is evidence to suggest a progressive patrilinealisation in Zambia. Intermarriage is much more common than in the past and is having a profound impact on kinship (lineage) structures and inheritance practices⁶⁰.

In this discourse, attention is mainly drawn to the shift towards patrilinealisation and its contribution/ implications on gender based discrimination against women. Patriarchy is here defined as a tradition of male monopoly of control over decision-making, resources, and female reproduction⁶¹. The main patriarchal elements in traditional culture are based on polygamy. Even where a man remains with only one wife in a traditional marriage, he retains the rights of a polygamist. He is always a potential polygamist.

Polygamy was widely practiced in Zambia and had differing functions. For example, in situations where one wife could not have children, the husband could marry another. Zambian men also tended to see many wives as a measure of wealth and sign of

⁵⁹ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p. 23

⁶⁰ *Ibid.*, p.40

⁶¹ *Opcit.*, p.23

patriarchal and sexual power along with the economic function of having more wives to work on the land. Polygamy is still practiced in Zambia, although at a reduced rate.

At independence, in 1964, Zambia inherited a dual system of marriage. It recognised unions under customary law and under statute (ordinance) as equally valid. Today the latter form of marriages is becoming increasingly popular, especially for the urban middle classes, suggesting a movement toward the nuclearisation⁶² of the family. This drift is to great extent advantageous to the women as most of the rights being promoted are formerly recognised in statutory law.

Customary marriage is validated by fulfillment of traditional rites and obligations. The consent of the women's family and marriage payments by the man's family are particularly important. Marriage payment gives a husband rights to his wife's labour and the fruits of her labour. Marriage payment or lobola, endorses male dominance in marriage and results in total ownership of wife by husband⁶³. The woman loses all her rights, and becomes a Legal minor in the custody of her husband. She has no say about her income, job, children or any other aspect of her life. She simply becomes part of her property. It is this concept of a woman as property which bedevils the application of the 1989 Interstate Succession Act.

Therefore, although the **Matrimonial Causes Act** gives husband and wife equal place in matrimonial disputes, marriages contracted under ordinance are likely to retain many of

⁶² Ibid., p40

⁶³ Stewart, Julie *et al* (1990) The Legal Situation of Women in Southern Africa; Harare: University of Zimbabwe Pub., p 157

the customary aspects of gender relations in terms of the husband as head of the household and owner of the marital property. This traditional form of marital relations is bolstered by the high proportion of couples who are married under ordinance, but who also undergo at least some aspects of traditional marriage practice such as the payment of lobola which is considered normal in ordinance/statutory marriages as practiced in Zambia.

Matters of inheritance in Zambia are governed by the **Intestate Succession Act** of 1989 and the **Wills and Administration of Testate Estates Act** of 1989. Under these laws, distribution of the estate at the death of the spouse is as follows: children get 50 percent, surviving spouse 20 percent, parent(s) of the deceased get 20 percent and the remaining 10 percent goes to the dependants.

The **Intestate Succession Act's** gender neutrality use of the term spouse does not indicate that the Act provides for gender equality. On the contrary however, there is a presumption in the law that the marital property is owned by the husband, and (for an estate of any size) a widow is not entitled to 50 percent. By merging the earlier provisions of Statutory and Customary law, the 1989 Act has retained some of the discrimination.⁶⁴

Despite the 1989 Intestate Succession Act, property grabbing often occurs where the relatives of the deceased take all the property and leave her destitute. In 1997 Parliament passed **Intestate Succession Act** which replaced the 1989 Act. The Act takes away some of the limited aspects of women's advancement which characterized the earlier Act, and

⁶⁴ Mwanza, I (1990) **Give Me a Little Peace of Mind: The Law Of Succession and the Intestate Succession Act 1989**; Lusaka; University of Zambia Press. p. 23

is said to be clearly retrogressive. According to ZARD, the 1997 Act assumed that property belongs to the husband and allows no inheritance for a childless widow. It further precludes the widow from being the administrator of her deceased husband's estate, and does not require the widow's consent in the appointment of an administrator⁶⁵.

3.1.5. Sexuality

As earlier stated, Zambia is primarily a patriarchal nation and most people are socialised to believe that women are inferior to men, meaning that women should do everything possible to make men happy even if it is at the expense of their own happiness. Therefore, this notion manifests itself in many different ways one being sexuality. In Zambia women are taught to please and submit to men from the time they are young. This is further enshrined during premarital celebrations and initiation ceremonies. Emphasis in these arrangements is on pleasing the man, because if they do not, he may justifiably walk out and go to another woman. In this way, a woman is educated to see herself primarily as a sex object and an instrument of sexual pleasure. According to a study done among a sample of sexually active women in Lusaka, 86 percent of those interviewed practiced "dry sex" (that is using herbs to dry out vaginal fluid before sexual intercourse) in which case the woman has to endure the act of sex because dry sex is extremely painful⁶⁶.

Within the patriarchal sexual relationships, males control the use of contraceptives, and are not likely to agree to wives using condoms, or other forms of contraception. It is therefore difficult, or impossible for a woman to protect herself from the risk of pregnancy or HIV/AIDS infection.

⁶⁵ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p.41

3.1.6. Religious Beliefs

Religious beliefs have also fueled the adherence to the patriarchal ideology. Zambia being predominantly a Christian nation, with Muslim and Hindu minorities, a prevalent belief in spirits and witchcraft exists. Despite Christianity appearing to be in sink with the modern egalitarianism, there are still many among the Christian sect who adhere to extreme fundamentalist interpretations of the Bible. Most notions about the inferiority of women to men are based on some Sections of both the Old and New Testament, which commands women to submit to male authority⁶⁷. Consequently, a lot of men believe in a God-given or biologically-given right to rule over females. Men ideally view themselves to be more clever, strong, decisive and adventurous.

3.1.7. Socialisation

The other factor that has contributed to the perpetuation of gender discrimination of women has been the type of socialisation both within the family and the formal school system. These systems are infused together with patriarchal values and implicit messages concerning the correctness of male domination and traditional gender division of labour, both within the family and society. However, the Ministry of Education has established a gender unit to eliminate stereotyping and patriarchal messages within the School curriculum, as part of their new education policy⁶⁸.

The media has also been blamed to a given extent for its usual negative portrayal of women. According to a ZARD publication, newspapers commonly publish misogynistic

⁶⁶ Research Conducted by Mary Nyirenda in 1992, cited in Zambia's **World AIDS Day Newsletter**.

⁶⁷ Ephesians 5 v 22-24

(that is hate for women) articles and letters which support opinions that women are biologically inferior, the source of evil and a lower form of humanity in Gods eye's. Advertisements on locally produced television programs carry a common and pervasive message that women are the domestic servants. In most adverts, women do the laundry, buy detergents, scrub the floors, change babies nappies/diapers and do the cooking. All socialising women into believing that these are their roles whilst men take the other formal and intellectually challenging roles⁶⁹.

In conclusion, this chapter has discussed the various factors that necessitate the extra protection that women are being accorded in Zambia. These include such things as negative socialisation and stereotyping, misperceptions about sexuality, outdated, archaic and barbaric customary practices such as wife inheritance, widow cleansing, the belief that the wife is the husbands property and the like. It has been noted further that injustices exist in such aspects as inheritance of marital property when the male spouse dies and the inequalities that exist in the alienation of land where women usually require some form of affiliation to a man for them to enjoy such benefits as the man enjoys completely independent from his affiliation to a woman.

⁶⁸ Siame, Mercy *et al* (2004) **Beyond Inequalities: Women in Zambia**; Harare: Cannon Press, p.48

⁶⁹ Longowe, S, (1993) *Gender and the Media: issues for Media Personnel*, ZARD, Lusaka, p.

CHAPTER FOUR

4.0. Recommendations

4.1 Legal Reforms

Government's in Africa should take immediate steps to improve systematically women's property rights in law and in practice and remove obstacles to their realization. In specific terms the government should:-

Adopt justiciable key provisions in their constitution's, including those that: Prohibit discrimination on the basis of sex and marital status; guarantee women's right to equal treatment with men, including equal rights to inherit, have access to, and control property; prohibit any law, custom, or tradition that undermines women's dignity, welfare, interest, or status and require parliament to enact laws protecting spousal rights to inherit land and laws protecting matrimonial property during and at the termination of marriage and/ or death of a spouse.

Further, these constitutional rights should apply equally to women from all religions and ethnic groups: any concessions to religious or customary laws should not diminish women's equal constitutional rights. In addition, the government should enact legislation that prohibits gender-based discrimination and promotes women's equal property rights, including laws that: create a presumption of spousal co-ownership of family property; establish a presumption that family property should be divided equally upon separation or divorce. Legislation that promotes women's access to and ownership of land should also be enacted. Spousal rape should also be criminalized as is the case in the United Kingdom. This is in specific reference to the fact that according to Section 132 in the

Penal Code of Zambia, there can be no rape between a marriage couple. However, in United Kingdom, rape can occur within the marriage as attested to by the case of **R(1991) 4 All ER 481**, wherein Mr. R had forceful sex with his wife after which she reported him to the police. Mr. R was later convicted and sentenced for rape. R's appeal in **C.R V UK**⁷⁰ was thrown out.

4.2. Institutional Reforms and Initiatives

The government and other stake holders should launch awareness campaigns to inform the public about women's property rights. Further, information should be distributed in local languages about rights to inheritance and division of family property; writing wills; registering marriages; co-registering property; and the health risks of customary sexual practices tied to property rights, such as the risk of contracting HIV/AIDS. The government should also support greater participation by women in decision making at the community level. Everything must be done to eradicate harmful customary practices such as "wife inheritance" and ritual "cleansing" of widows, including by prosecuting rape and forced marriage cases. Likewise the president, members of parliament, and other government leaders should publicly condemn laws and customs that discriminate against women and should publicly announce feasible reforms.

There should be specialised training for judges, magistrates, police, and relevant local and national officials on laws relating to women's equal property rights and their responsibility to enforce those laws. In the same vein, family divisions in courts should be established outside capital cities and ensure that family division judges and magistrates have expertise in family law and women's rights.

⁷⁰ (1996) 21 EURO. HUM. R. 362

A national legal aid system should be set up with the capacity to represent indigent women in civil property matters which is similar to what the Victim Support Unit in Zambia is doing. Further, the Zambian government should strengthen the Permanent Human Rights Commission by ensuring that it operates independently and is adequately funded, staffed and equipped.

4.3. Donors and International Organizations

The World Bank, donors, and United Nations agencies must work with the government's of African countries to ensure that development policies and programs are designed and implemented to promote women's property rights. Donors should increase financial and technical assistance to civil society organizations and government offices that promote and safeguard women's rights.

The United Nations Commission on Human Rights should continue to adopt resolutions on women's equal ownership, access to, and control over land and the equal rights to own property and to adequate housing; the elimination of violence against women; and the protection of human rights in the context of HIV/AIDS. The African Union should improve and adopt the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, including by recognizing women's equal inheritance rights and by removing any termination of such rights upon remarriage. Donors should link some funding provided through the New Partnership for Africa's Development (NEPAD) to development initiatives that address women's equal property rights.

CONCLUSION

In conclusion, therefore, it can be noted that a complex mix of cultural, legal, and social factors underlies women's property rights violations in most African countries. For instance, Zambia's customary laws—largely unwritten but influential local norms that coexist with formal laws—are based on patriarchal traditions in which men inherited and largely controlled land and other property, and women were "protected" but had lesser property rights. Past practices permeate contemporary customs that deprive women of property rights and silence them when those rights are infringed. Zambia's constitution prohibits discrimination on the basis of sex, but undermines this protection by condoning discrimination under personal and customary laws. The few statutes that could advance women's property rights defer to religious and customary property laws that privilege men over women. Further, sexist attitudes are infused in most African societies: according to a Human Rights Watch report most men believe that women are untrustworthy, incapable of handling property, and in need of male protection. The guise of male "protection" does not obscure the fact that stripping women of their property is a way of asserting control over women's autonomy, bodies, and labor—and enriches their so-called "protectors." Currently, most women often have little awareness of their rights and seldom have means to enforce them. Women who try to fight back are often beaten, raped, or ostracized.

As important as cultural diversity and respecting customs may be, if customs are a source of discrimination against women, they—like any other norm—must evolve. This is crucial not only for the sake of women's equality, but because there are real social consequences

to depriving half the population (women) of their property rights. International organizations have identified women's insecure property rights as contributing to low agricultural production, food shortages, underemployment, and rural poverty. In Zambia, more than half of the population lives in poverty, the economy is a disaster, and HIV/AIDS rates are high. The agricultural sector, which greatly contributes to most countries gross domestic product and depends on women's labor, is usually stagnated due to injustices on women. In order for Zambia, and Africa at large, to meet development aims, property inequalities that hold women back will have to be adequately and systematically addressed.

The paper has further noted that unequal property rights and harmful customary practices violate international law. Zambia has ratified international treaties requiring it to eliminate all forms of discrimination against women (including discrimination in marriage and family relations), guarantee equality before the law and the equal protection of the law, and ensure that women have effective remedies if their rights are violated. International law also obliges states to modify discriminatory social and cultural patterns of conduct which obligations are being violated by most African Countries.

Property rights abuses inflicted on women through out the world should be recognized for what they are: gross violations of women's human rights. Discriminatory property laws and practices impoverish women and their dependents, put their lives at risk by increasing their vulnerability to HIV/AIDS and other diseases, drive them into abhorrent

living conditions, subject them to violence, and relegate them to dependence on men and social inequality⁷¹.

Despite the slow recognition that property rights violations harm not just women and their dependents but society's development as a whole, little has been done to prevent and redress these violations. Averting these abuses on a continent where dispossessing women is considered normal will be difficult. A concerted effort is needed not just to improve legal protections, but to modify customary laws and practices and ultimately to change people's minds. With extreme poverty, a moribund economy, rampant violence, and catastrophic HIV/AIDS rates, Zambia can no longer afford to ignore women's property rights violations. Eliminating discrimination against women with respect to property rights is not only a human rights obligation; for many women, it is a matter of life and death.

⁷¹ Professor Yash Pal Ghai, chairman, Constitution of Kenya Review Commission, Nairobi, October 23, 2002

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