

**THE PROMOTION OF GENDER EQUALITY IN THE DISPENSATION OF  
CRIMINAL JUSTICE IN ZAMBIA: A CASE STUDY ON THE APPLICATION OF  
GENDER EQUALITY IN SEXUAL OFFENCE CASES.**

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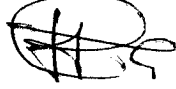
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An Obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelors of Laws (LLB)

2011

## DECLARATION

I **Luka Lytons Chiwowa of Computer Number 26065070**, 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 or any omissions herein.

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**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

I recommend that this obligatory essay prepared under my supervision

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Entitled

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## DEDICATION

I dedicate this obligatory essay to my lovely wife Nyembezi Tembo Chiwowa. You are the greatest gift God has given to me in my life. I will forever cherish your love, understanding and encouragement you gave to me. My success would have not being forthcoming without you. Thank you for always being the rock of strength and the pillar that has been on my side throughout my busy study period. Your love, understanding and encouraging has been so overwhelming. I will always be indebted to you for the sacrifices you have made for me throughout my study period. Once more I say thank you for your undying love, encouragement and single handedly taking care of our children. To God be the glory for having you as my wife.... I LOVE YOU MORE THAN EVER BEFORE.

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To my late loving father, thank you for your bravery, encouragement and support throughout my educational life. Although you are no more, your soul still lives in me. I always remember your words that good things do not easily come. You always said to me, "*follow your heart and success is certain and you will reach your destiny.*" May Your Soul Rest in Peace, I miss you. To all those that I have forgotten to mention by name, to you all I say thank you.

## **TABLE OF CASES**

### **ENGLISH CASES**

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### **ZAMBIAN CASES**

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Chinjamba v The People (1949) NRLR 384.

Emmanuel Phiri v The People (1982 ZR 77 (SC).

ICT Chali (Executor of the will of the late Mwalla Mwalla) v Liseli Mwalla SCZ Judgment No. 2 of 1997.

Mweemba and Another v The People 1973ZR 127 C.A.

Nsofu v The People (1973) ZR 103 (SC)

Tembo v The People (1966) ZR 126.

The People v Chitambala (1969) ZR 142.

Zimba v The People (1978) ZR 44 (SC).

## **LIST OF STATUTES**

### **SOUTH AFRICAN STATUTES**

The Sexual Offences and Related Matters (Amendment Act No. 32 of 2007) of the Laws of South Africa.

### **ZAMBIAN STATUTES**

The Constitution, Chapter one of the Laws of Zambia.

The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

The Local Courts Act, Chapter 29 of the Laws of Zambia.

The Penal Code, Chapter 87 of the Laws of Zambia.

The Penal Code Amendment Act No. 15 of 2005 of the Laws of Zambia.

The Police Act, Chapter 107 of the Laws of Zambia.

The Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

## **TABLE OF CONVENTIONS**

The Additional Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Adopted on 11<sup>th</sup> July, 2003.

The Convention on the Elimination of All forms of Discrimination Against Women. 03<sup>rd</sup> September, 1981.

The Universal Declaration of Human Rights, 10<sup>th</sup> December 1948.

The Southern Africa Development Community Declaration on Gender and Development. Adopted on 08<sup>th</sup> September, 1997.

## **LIST OF ACRONYMS**

AIDS	Acquired Immune Deficiency Syndrome.
CEDAW	Convention on the Elimination of all Forms of Discrimination Against women.
HIV	Human Immunodeficiency Syndrome.
UN	United Nations.

## **ABSTRACT**

This dissertation was seized with the task of ascertaining the promotion of gender equality in the dispensation of criminal justice in sexual offences cases in Zambia and establish whether or not existing laws are adequate to curb the vice considering the current laws and legal procedures. The research also endeavored to provide the reasons that have led to the high prevalence of gender imbalances in the dispensation of justice in sexual offence cases in the Zambian jurisprudence.

The study through research discovered that there is a high prevalence of gender imbalance in the dispensation of criminal justice in sexual offence cases. It further established that there are a number of causes that have led to high prevalence of gender insensitivity in the administration of justice by adjudicators. The research determined that among the causes or weakness in the laws identified stem from the Constitution of Zambia and its subsidiary laws like the Penal Code. Other deficiencies in the law identified by the study relate to the various procedures, requirements and rules that tend to work against complainants of sexual offence cases. More so, the research found that existing laws governing sexual violence do not provide adequate protection to the victims. Further it has established through research that there is need for the Constitution and relevant laws to be amended by parliament so that they contain provisions that protect women and girl children against sexual violence.

It is with this background that this study was necessary to ascertain the gender biasness which exists in the administration of justice in sexual offence cases in Zambia. The researcher has also made recommendation that government must take into consideration in order for it to achieve fair and equal dispensation of justice to all regardless of gender.

## DEFINITION OF CONCEPTS

### **Corroboration**

Evidence that confirms the accuracy of other evidence in a material particular.<sup>1</sup>

### **Gender**

The condition of being male or female, one's sex.<sup>2</sup>

### **Justice**

A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs.<sup>3</sup>

### **Marital Rape**

Any unwanted sexual acts by a spouse or ex-spouse, committed without consent and/or against a person's will obtained by force or threat of force, intimidation or when a person is unable to consent.<sup>4</sup>

### **Rape**

Any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation or any kind, or by fear of bodily harm or means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.<sup>5</sup>

### **Sexual Offence**

Any offence that involves sexual intercourse or any other sexual act.<sup>6</sup>

### **Sexual Violence**

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<sup>1</sup>“Corroboration.” A dictionary of Law, sixth Edition, Oxford University Press, New York. 2006.

<sup>2</sup>“Gender.” Chambers compact dictionary, 10<sup>th</sup> Ed. Chambers Harrap Publishers Ltd, London, 2008.

<sup>3</sup> “Justice.” A dictionary of Law, sixth Edition, Oxford University Press, New York. 2006.

<sup>4</sup> Kaitamaki v R (1991) 4 All ER 48.

<sup>5</sup> Section 132 of the Penal Code, Chapter 87 of the laws of Zambia.

<sup>6</sup> “Sexual Offence.” A dictionary of Law, sixth Edition, Oxford University Press, New York. 2006.

It is the use of sexual contact by one person to another against his or her will and may include such acts as forced penetration of the vagina or anus or penis or other object to touch the perineum including the penis, vagina or anus or oral sex (placing the mouth or tongue on a person's vagina, penis or anus), rubbing of a penis, hand or other object against another's perineum and performing sexual acts with an animal.<sup>7</sup>

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<sup>7</sup> C.M.V Clarkson and Keating. Criminal Law, Text and Material, (London: Sweet and Maxwell, 2003) P. 600.

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## CHAPTER ONE

# THE PROMOTION OF GENDER EQUALITY IN THE DISPENSATION OF CRIMINAL JUSTICE IN ZAMBIA: A CASE STUDY ON THE APPLICATION OF GENDER EQUALITY IN SEXUAL OFFENCE CASES.

### 1.0. INTRODUCTION

In every society the law, be it substantive or procedural is seen as an instrument of social control to the benefit of all. It is used to serve the needs of society by balancing gender needs against legal needs.<sup>8</sup> Therefore, law is always resorted to in order to deal with social occurrences, differences and further the interests of society regardless of one's gender.<sup>9</sup> When a particular law is perceived by society to be bad or gender insensitive there is always uproar from the general public especially the victims.<sup>10</sup> A good law is one which is gender sensitive and is an instrument for achieving social balance where all human beings are treated the same.<sup>11</sup> This research is aimed at examining whether gender equality is exercised in the dispensation of criminal justice in sexual offence cases in Zambia.

### 1.1. BACKGROUND OF THE STUDY

Human rights are rights inherent in all human beings and are acquired by virtue of a person being born human for without them mankind cannot live as human being, hence they are the foundation of human existence and co-existence.<sup>12</sup> Human rights are a minimum threshold for the delivery of equal justice to all and an understanding of the justice system must respond to

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<sup>8</sup> Paul Chavula, A critical analysis of the application of the law relating to corroboration by Zambian courts. An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2008.

<sup>9</sup> Raymond Wacks, Understanding Jurisprudence: An Introduction to Legal Theory, Oxford University Press, New York, 2005, P198.

<sup>10</sup> Paul Chavula, A critical analysis of the application of the law relating to corroboration by Zambian courts. An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2008.

<sup>11</sup> Kenneth Tembo, Human Rights violations, A critical appraisal of women's rights in Zambia. An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2008.

<sup>12</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law, Published by Unza Press, Lusaka. 2004.

gender needs and differences.<sup>13</sup> It has however been sad to note that women have been marginalised in so many ways, one being in the dispensation of criminal justice in sexual offences.<sup>14</sup> Zambia being a state party to the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), has in its gender policy under the Ministry of gender adopted the gender mainstreaming approaches with the major aim of promoting gender equality in all spheres of life including the dispensation of justice.<sup>15</sup>

However, Zambia has not adopted most of the clauses in the Convention on the Elimination of all Forms of Discrimination Against Women as observed by Anyangwe that,

“there is a wide difference between the international legal order and the municipal legal order as such states cannot be forced to adopt them,”<sup>16</sup>

Zambia is not exception to this observation. Contrary to what has been provided in the Additional Protocol to the African Charter on the Rights of Women in Africa, that there should be equality in the dispensation of justice regardless of gender and nature of offence,<sup>17</sup> Zambia as a state party has continued to maintain what are perceived to be gender insensitive approaches in dealing with sexual offence cases.<sup>18</sup> Although Article 11 and Article 23 (2) (3) of the Constitution<sup>19</sup> do allude to the fact that no person shall be treated in a discriminatory manner by any person or body corporate regardless of one’s sex, race, marital status, colour or creed, stereotype seem to still exist in the adjudication of sexual offence cases.<sup>20</sup>

In Zambia the dispensation of justice in sexual offence cases has still remained patriarchal due to the existing legal requirements to be met in proving offences like rape and defilement in

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<sup>13</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Cases and Materials, Published by UNZA Press, Lusaka. 2005. P 8.

<sup>14</sup> Kenneth Tembo, Human Rights violations, A critical appraisal of women’s rights in Zambia. An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2008.

<sup>15</sup> The Ministry of Gender and Development, Gender and development policy paper., 2000.

<sup>16</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law, Published by Unza Press, Lusaka. 2004. P 9.

<sup>17</sup> Article 8 of the Additional Protocol to the African Charter on the Rights of Women in Africa, 2003.

<sup>18</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 206.

<sup>19</sup> (As Amended in 1996) Chapter One of the Laws of Zambia.

<sup>20</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 201.

Zambia.<sup>21</sup> The requirement for corroboration, the cautionary rule for adjudicators and the protection given to perpetrators of these crimes in the constitution has still maintained patriarchy tendencies.<sup>22</sup>

### 1.2. STATEMENT OF THE PROBLEM

It is constitutional that all persons must be treated equally before the law and that the administration of criminal justice must be dispensed without discrimination based on gender.<sup>23</sup> In Zambia there are still legal challenges in the manner criminal justice has been dispensed in sexual offence cases. Although punishment for rape and defilement has been stiffened,<sup>24</sup> there still remains the biggest challenge of the level of proof or benchmark to secure a conviction.<sup>25</sup> The requirement for corroboration, cautionary rule, the lack of protection of women in marriage, the indirect criminalisation of prostitutes and the constitutional protection of offenders, to mention few have still remained a challenge in the dispensation of equal justice because of gender differences.<sup>26</sup> The research was aimed at analyzing whether Zambia was promoting gender equality in the dispensation of criminal justice in sexual offence cases.

### 1.3. OBJECTIVES OF THE RESEARCH

The objective of the research was to assess the applicability of gender equality in the dispensation of criminal justice in sexual offence cases and the areas of concern were as follows:

- i. To establish the nature and extent of gender equality in the dispensation of criminal justice in sexual offence cases.

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<sup>21</sup> Mtonga H. Patrick, A close look at the law on rape with regards to marriage ( Why marital rape is not possible in Zambia). An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2005.

<sup>22</sup> Carlson Anyangwe, An outline of the study of Jurisprudence, Published by UNZA Press, Lusaka. 2005. Page 353.

<sup>23</sup> Article 11 of the Constitution of Zambia (AS Amended in 1996), Chapter 1 of the Laws of Zambia

<sup>24</sup> Penal Code Amendment Act No. 17 of 2005 of the Laws of Zambia.

<sup>25</sup> Mtonga H. Patrick, A close look at the law on rape with regards to marriage ( Why marital rape is not possible in Zambia). An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2005.

<sup>26</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 202.

- ii. To outline the legal requirements in proving sexual offence cases in the Zambian criminal jurisprudence.
- iii. To evaluate the arguments for and against the use of corroboration, cautionary rule and the lack of a legal framework in marital rape in Zambia's legal system.
- iv. To analyse the approach taken by the Zambian Courts in adjudication of sexual offences taking into account the Constitution and gender policy provisions.
- v. To review and analyse the provisions in the Convention on the Elimination of All Forms of Discrimination Against Women and the Additional Protocol to the African Charter on the Rights of Women in Africa in relation to Zambia's judicial systems in the dispensation of justice in sexual offence cases.

#### **1.4. RATIONALE AND JUSTIFICATION OF THE RESEARCH**

The dispensation of criminal justice in sexual offence cases in Zambia has posed a great challenge in the achievement of gender equality in its administration. Some of the challenges are the requirement for corroboration and the need for adjudicators to caution themselves against the dangers of convicting on uncorroborated evidence.<sup>27</sup> Much as it has been appreciated that the cautionary rule and corroboration were meant to ensure that women victims do not report false rape or other sexual related offences against men,<sup>28</sup> the court's excessive discretion to discount women's testimony has created gender stereotype. This has created a situation where victims of sexual offences seem to be put on trial, because of the need to have their complaints corroborated by other evidences such as medical reports, signs of resistance, injuries sustained and early complaints.<sup>29</sup>

The cautionary rule and corroboration have further created an assumption to the adjudicators that prostitutes cannot be raped or defiled.<sup>30</sup> Though in Zambia prostitution is not illegal, the law has made all that the prostitute came into contact with a crime hence making her look like a leper as

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<sup>27</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 202.

<sup>28</sup> Tembo v The People (1966) ZR 126.

<sup>29</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 202.

<sup>30</sup> Mtonga H. Patrick, A close look at the law on rape with regards to marriage ( Why marital rape is not possible in Zambia). An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2005.

such she has no protection of the law.<sup>31</sup> Further, the Zambian jurisprudence presupposes that there can be no rape in marriage as a woman is deemed to have submitted to a man.<sup>32</sup> The African traditions and cultures emphasize on the woman's submission for sex to a man upon getting married, hence the husband can demand for sex at any time as they believe that sexual intercourse in marriage is their right.<sup>33</sup> It therefore entails that as established in R v Chinjamba<sup>34</sup> in which the High court overruled the decision of the lower court and held that there cannot be defilement or rape in a marriage which is under customary law, since customary law allows a girl to be married immediately she reaches puberty regardless of the age.

This resulted into women being at high risk of contracting HIV/AIDS,<sup>35</sup> however in English legal system the courts in R v R,<sup>36</sup> did acknowledge the existence of marital rape by convicting the husband who had forced himself to have sex with his wife without her consent. To the contrary this has not been the case in the Zambian legal system as the adjudicators still maintain Smith and Hogan arguments that the term unlawful in this context probably meant simply intercourse outside the bond of marriage. Sexual intercourse between husband and wife is sanctioned by law and hence all other sexual intercourse is unlawful.<sup>37</sup> This therefore has posed a great challenge to the dispensation of criminal justice in the Zambian jurisprudence.

## 1.5. SPECIFIC RESEARCH QUESTIONS

- i. What is the nature and extent of gender equality in the dispensation of criminal justice in sexual offences in Zambia taking into account the existing constitutional and statutory provisions?
- ii. What are the arguments for and against the use of corroboration, cautionary rule and lack of legal framework in marital rape?

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<sup>31</sup> Carlson Anyangwe, An outline of the study of Jurisprudence, Published by UNZA Press, Lusaka. 2005. P 353.

<sup>32</sup> Fareda Banda, Women, Law and human rights, An African perspective,. Published by Hart Publishing, Oxford and Portland (2005). P 173.

<sup>33</sup> Mtonga H. Patrick, A close look at the law on rape with regards to marriage ( Why marital rape is not possible in Zambia). An essay submitted to the University of Zambia in partial fulfillment to the requirement for the award of the Bachelor of Laws degree (LLB) 2005.

<sup>34</sup> (1949) NRLR.

<sup>35</sup> Fareda Banda, Women, Law and human rights, An African perspective. Page 170.

<sup>36</sup> (1992) 1 AC 599.

<sup>37</sup> R v Clarke (1949) 33 Cr. App. R. 216: R V Miler (1954) 2 QB 282.

- iii. What is the approach that has been taken by the Zambian Courts in the dispensation of criminal justice in sexual offence cases taking into account the need to apply gender equality?
- iv. Has Zambia adopted the provision in the Convention for the Elimination of All Forms of Discrimination Against Women and the Additional Protocol to the African Charter on the Rights of women in Africa with regards to the dispensation of justice in sexual offences?

## **1.6. RESEARCH METHODOLOGY**

This study will be based on both primary and secondary data. The primary data will include interviews with the Judiciary, the officers at the Law Association of Zambia, the Police Service Commission, Non-Governmental Organizations, and the clerk of the National Assembly. People to be interviewed will be randomly selected. Up to ten people are earmarked for this interview. Questionnaires will equally be used and about ten randomly selected respondents are targeted. Secondary sources will include Statutes, International human rights instruments, judicial decisions, textbooks, Law Journals, articles, internet and published reports.

## **1.7. OUTLINE OF CHAPTERS**

Chapter one gives a historical background of the study and whether there is equal dispensation of justice in sexual offence cases taking into consideration the need for gender equality. This chapter carries with it the rationale for the study, statement of the problem, purpose of study, objectives, and research questions, significance of the study, methodology and synopsis of the research.

Chapter Two will analyze the effect and impact of the International Instruments in promoting and protecting the respect for gender equality in the dispensation of justice in sexual offences in Zambia.

Chapter Three presents the analysis of the Zambian legal system and the law in relation to the dispensation of justice in sexual offences, cases dealt with and decision arrived at. It will also analyze the decisions and comments given by adjudicators against evidence adduced by victims of sexual offences.

Chapter Four will focus on what measures the Zambian government has taken in light of these identified failures in the judicial systems and the law in ensuring that gender equality is applied

in the dispensation of criminal justice in sexual offences in Zambia.

Chapter Five will deal with the conclusion and recommendations made to help improve on the equal and fair dispensation of criminal justice in sexual offence cases by the adjudicators taking into consideration the need for gender equality in Zambia.

## **CONCLUSION**

This chapter gave an introduction to the topic being researched on. Further, the statement of the problem was set out in this chapter. The chapter also defined the key concepts that will be employed in the study. Furthermore, the objectives and research questions were laid out in this chapter. The methodology that will be employed to arrive at the findings has been spelt out.

## CHAPTER TWO

### INTERNATIONAL AND REGIONAL INSTRUMENTS

#### 2.0. INTRODUCTION

The development of human rights started way before the advent of the unprecedented and glaring human rights abuses that took place during World War II which created the need to internationalize human rights.<sup>38</sup> In this regard states world over came together to find a lasting solution to stop the reoccurring of such incidences, hence the formation of the United Nations as an international body that was mandated with the responsibility of maintaining of peace and protection of humanity.<sup>39</sup> The first instrument to be initiated was the United Nations Declaration of Human Rights which was adopted in 1948 and set the basic standards to be adopted when coming up with other international, regional and domestic bill of rights.<sup>40</sup>

The United Nation Declaration of Human Rights contains the protection of civil, political, economic, social and cultural rights, but did not directly address human rights violations that affected down trodden groups of persons like women. It also did not have enforcement mechanism which made the instrument not effective.<sup>41</sup> This resulted into state parties unanimously agreeing to come up with human rights instruments that are binding to all state parties.<sup>42</sup> The differences in the governance systems posed a great challenge as to which rights in the United Nations Declaration of Human rights were to be prioritized. States parties then resolved to come up with two instruments namely the International Convention on Civil and Political rights and the International Convention on Economic, Social and Cultural Rights which were both adopted in 1966.<sup>43</sup> The International Convention on Civil, and Political Rights were perceived to be negative rights, meaning that states parties were expected not to interfere with the rights.<sup>44</sup> While the International Convention on Economic, Social and Cultural Rights were

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<sup>38</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 16.

<sup>39</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 32.

<sup>40</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 16.

<sup>41</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 16

<sup>42</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 53.

<sup>43</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Pages 33 - 34.

<sup>44</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 16.

referred to as positive rights where states parties are expected to provide for these rights to their citizens, hence they have a notion of government spending.<sup>45</sup>

However most of the African countries, Zambia inclusive found it easier and convenient to domesticate the International Convention on Civil and Political Rights as they only require states parties to refrain from interfering with them, unlike the International Convention on Economic, Social and Cultural Rights where state parties were required to spend resources to meet them.<sup>46</sup> These two documents although detailed in their promotion and protection of human rights, including equality of people before the law did not directly address the needs and concerns of down trodden groups like women.<sup>47</sup> The need then to initiate human rights instruments which were to address the concerns of women became paramount.<sup>48</sup>

The imaging of feminists in the 1960's exposed the gross discrimination and subordination of women through their critical analysis of the two documents where it become evident that they were inadequate to address the specific challenges faced by women internationally and regionally.<sup>49</sup> The feminist advocated for equal treatment of men and women with emphasis on the elimination of discrimination, subordination and stereotype towards women.<sup>50</sup>

## **2.1. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN.**

As noted above that the imaging of feminist activists brought in awareness for the recognition and protection of the rights of women who had been subordinated and discriminated based on gender differences.<sup>51</sup> Hence in 1967, the United Nations called on the commission on the status of women to come up with documents that would protect the interests and concerns of women. Later in 1979 the General Assembly adopted the Convention on the Elimination of All forms of

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<sup>45</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 34.

<sup>46</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 35.

<sup>47</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 16.

<sup>48</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 17.

<sup>49</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 17.

<sup>50</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 17.

<sup>51</sup> Raymond Wacks, Understanding Jurisprudence. An Introduction to Legal Theory. Published by Oxford University Press. London. (2005). Page 310.

Discrimination Against Women which was meant to address the rights of women and promote gender equality.<sup>52</sup>

Women's rights are said to be those rights which women enjoy by virtue of their physiological and biological makeup.<sup>53</sup> These rights however are no different to the general human rights only that they are specific to women because of their biological differences with men.<sup>54</sup> Although the Convention on the Elimination of all forms of Discrimination Against Women did address most of these concerns raised by women in the field of economics, social, political and cultural,<sup>55</sup> it has not clearly addressed the concerns of inequality in the manner justice is dispensed in relation to matters mainly affecting women although in Article two (a) it states that (taking only relevant provisions):

“States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end , undertake:

(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 realization of this principle;”<sup>56</sup>

In its preamble, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) acknowledges that the International Bill of Human Rights have not specifically addressed the shortfall in the promotion, protection and respect for the rights of women in areas of law, economics, social and political spheres where like in Zambia stereotype, inferiority and culture is used to marginalize women.<sup>57</sup> Article two (d) (e) (f) provides that,

“States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end , undertake:

(d) 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;

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<sup>52</sup> The preamble to the Convention on the Elimination of All forms of Discrimination Against Women. Adopted on 03<sup>rd</sup> September, 1981.

<sup>53</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 15.

<sup>54</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 15.

<sup>55</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 58.

<sup>56</sup> Article 2 (a) of the Convention on the Elimination of All forms of Discrimination Against Women adopted on 03<sup>rd</sup> September, 1981.

<sup>57</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 57.

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;<sup>58</sup>

Article two (d)<sup>59</sup> entails that states parties must enact laws and come up with administrative systems that will eradicate discriminatory procedures or requirements like the cautionary rule, corroboration, non criminalization of marital rape and stereotype existing in its judicial systems.<sup>60</sup> While Article two (f) requires states parties to abolish all the existing laws, regulations, customs and practices that discriminate against women, Article two (g) emphasizes what Mackinnon stated that there should be a complete overhaul of the penal law so that a new legal order which is gender sensitive and non patriarchy is enacted, minus that gender equality in all spheres of life will not be achieved.<sup>61</sup> Further Article three provides that,

“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, 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.”

It does ask state parties to ensure that existing customs, policies, practices and regulations are in tandem with the principles of gender equality including the dispensation of justice. Article five (a) provide that,

“States Parties shall take all appropriate measures: (a) 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 inferiority or the superiority of either of the sexes or on stereotype roles for men and women;

These provisions are very instrumental in the reformation of all legal systems in order to eliminate prejudicial procedures, beliefs and customs that still exist in some of the states parties, Zambia inclusive. Stereotype was exhibited in the case of ICT Chali ( Executor of the will of the late Mwalla Mwalla) V. Liseli Mwalla (Single woman),<sup>62</sup> in which the petitioner was a daughter to the deceased who had been sexually abusing her. She testified that her late father was also the

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<sup>58</sup> Article 2 (d) (e) (f) of the Convention on the Elimination of All forms of Discrimination Against Women adopted on 03<sup>rd</sup> September, 1981.

<sup>59</sup> The Convention on the Elimination of All forms of Discrimination Against Women adopted on 03<sup>rd</sup> September, 1981.

<sup>60</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 19.

<sup>61</sup> Carlson Anyangwe, An outline of the study of Jurisprudence. Published by UNZA Press, Lusaka. (2005). P 352

<sup>62</sup> SCZ Judgment No. 2 of 1997.

father to her child and that the matter had been reported to the police. The petitioner was challenging the will which was made in favor of her step mother leaving her and the child out of the will. The High Court accepted her evidence and nullified the will, but on appeal, the Supreme Court quashed the decision of the lower court by refusing to accept the uncorroborated testimony of the petitioner's alleged sexual abuse, meanwhile protected the character of the father defiler to be put to question. Instead the court questioned the integrity of the petitioner by putting her previous life style to question and took it as an integral part in coming up with the decision, hence still showing patriarchy tendencies which resulted into prejudicing the petitioner.

Although Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), provided for the protection and promotion of women's rights, it has not adequately protected and directly condemned the existing gender discrimination perpetuated by custom, religion, traditional and ethnic beliefs that are a hindrance in the attainment of the rights of women in Africa.<sup>63</sup> This has resulted into adjudicators in African states who are mainly male perpetuate inferior or stereotype approaches towards women when adjudicating in sexual offences.<sup>64</sup> Further CEDAW, did not directly address the issues of violence and harmful practice that are so rampant in most African communities.<sup>65</sup> Article two (c) in its wording seemed to suggest that men are a benchmark on which women should set their progression.<sup>66</sup> This however is not possible because of the gender differences, hence women have their own unique rights that should be protected and their progression must take cognition of these unique rights like those in relation to reproduction or procreation.<sup>67</sup> Further, the instrument has not emphatically and directly condemned or demanded the reforms by states parties in the manner adjudicators should apply legal rules, procedures and requirements when adjudicating over gender related cases in the area of sexual offences.<sup>68</sup>

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<sup>63</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 201.

<sup>64</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 62.

<sup>65</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 162.

<sup>66</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 38.

<sup>67</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 59.

<sup>68</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 201.

## **2.2. THE ADDITIONAL PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.**

It must be appreciated that although the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), has addressed the concerns of the women, it has been discovered that women in different regions face different types of discrimination.<sup>69</sup> As such it was felt by the African feminists that the Convention on the Elimination of all forms of Discrimination Against Women in its state was inadequate to address the challenges faced by African women for example the instrument did not address the issue of violence against women, harmful practices and discriminatory cultures such as sexual cleansing, genital mutilation, polygamy, inheritance and restrictive land ownership that came as a result of these harmful traditions and customs.<sup>70</sup>

The women in law and development in Africa did acknowledge that “to date, no African instrument relating to human rights proclaimed or stated in a precise way what the fundamental rights of women in Africa are. There is thus a vacuum in the African Charter as regards real taking care of women’s current preoccupation in Africa.”<sup>71</sup> The African Charter on Human and Peoples Rights did not address the issues of non discrimination against women and their reproductive rights adequately. As such in the 1990’s a number of feminist activists advocated for the regional instrument that would address the protection of the rights of African women.<sup>72</sup> The major achievement came in 2003 when the then Organization of African Unity which later transformed into the African Union adopted the Additional protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa on the 11<sup>th</sup> July 2003. The main aim was to address the specific African cultural and traditional practices that were discriminatory to women.<sup>73</sup>

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<sup>69</sup> Carlson Anyangwe, An outline of the study of Jurisprudence. Page 365.

<sup>70</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 112.

<sup>71</sup> Drafting Process of the Draft Protocol on the Rights of Women in Africa ( Item 8 (e) DOC/OS/(XXVII)/159b Art.1.

<sup>72</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 33.

<sup>73</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 68.

In Africa women were perceived to be inferior beings and were highly subordinated.<sup>74</sup> The main concern was in the areas of marriage, law, social and economic sphere of life.<sup>75</sup> In the African custom there was no specific marriage age but as long as a girl reaches puberty she was deemed to be ready for marriage.<sup>76</sup> Further, once a woman is married she is deemed to automatically have consented to sex which a husband can demand at will,<sup>77</sup> hence Article six, was meant to eradicate forced sexual intercourse and girl marriages.<sup>78</sup> In this respect states parties are required to enact laws that will protect the rights of women. However the Additional Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa has no provision that talks against specific vices such as marital rape but it somehow protects women because it still acknowledges the need to repeal and reform discriminatory laws, rules and procedures in line with African values.<sup>79</sup>

Therefore in the preamble to affirm this commitment in the Addition Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African states have pledged to eliminate all forms of discrimination and harmful practices against women but women in Africa still continue to be victims of discrimination and harmful practices.<sup>80</sup> Further Article 8 (a) (d) (f) provides that:

“Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- (a) effective access by women to judicial and legal services including legal aid;
- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights:
- (f) reform of existing discriminatory laws and practices in order to promote and protect the *rights of women.*”

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<sup>74</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 67.

<sup>75</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 117.

<sup>76</sup> R v Chinjamba (1949) NRLR 384.

<sup>77</sup> Lillian Mushota, Family Law in Zambia. Cases and Materials. Published by UNZA Press. Lusaka. (2005). P 48.

<sup>78</sup> “States parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: (a) no marriage shall take place without the free and full consent of both parties; (b) the minimum age of marriage for women shall be 18 years.”

<sup>79</sup> Article 2 (d) of the Protocol to the African Charter on Human and Peoples' Rights in Africa on the Rights of Women in Africa. “Taking corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.”

<sup>80</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 117.

This entails that states parties must ensure that all those laws, procedures and rules that are discriminatory to women are repealed to achieve gender equality in the dispensation of justice. It must also be noted that there was a lot of compromise in the drafting of the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa in the spirit of consensus because of differences in the African people's traditions, religions, customs and ethnic beliefs and groupings.<sup>81</sup> For instance, Article six (2) (a) initially intended to abolish polygamy but because of differences in customs and traditions a consensus was reached. Therefore it was agreed that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.<sup>82</sup> This is as a result of still upholding and jealously protecting patriarchy tendencies which are beneficial to men and in turn creating an impression that women are still subordinate to men. Further Article three (4)<sup>83</sup> states that:

“States Parties shall adopt and implement appropriate measures to ensure the protection of every women's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”

Some states parties like Zambia have continued to maintain discriminatory judicial procedures, laws and regulations that make women to still be perceived with stereotype as subordinate to men.<sup>84</sup> This has resulted into the legislatures, executives and the judiciary not recognizing and criminalizing marital rape and other violations against women.<sup>85</sup>

It suffices here to state that like the Convention on the Elimination of all forms of Discrimination Against Women, the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa urge states parties to take corrective and positive action in all areas where discrimination against women, particularly in the field of law still continues to exist.<sup>86</sup> Although all these provisions do exist in the Additional protocol to the African Charter on

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<sup>1</sup> Mulela Margaret Munalula, *Women, Gender Discrimination and the Law*. Page 37.

<sup>2</sup> Article 6 (c) of the Additional protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted on 11<sup>th</sup> July 2003.

<sup>3</sup> The Additional protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted on 11<sup>th</sup> July 2003.

<sup>4</sup> Mulela Margaret Munalula, *Women, Gender Discrimination and the Law*. Pages 49 – 50.

<sup>5</sup> Fareda Banda, *Women, Law and Human Rights, An African Perspective*. Page 175.

<sup>6</sup> Article 2 (d) of the Additional protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted on 11<sup>th</sup> July 2003.

Human and Peoples' Right on the Rights of Women in Africa most of the states parties have not fully reformed their legal systems to meet these requirements and expectations.<sup>87</sup>

Further the instrument still does acknowledge that most African states have continued with practices, traditions and customs with discriminatory vices like marrying out young girls, non recognition of marital rape and polygamy in their municipal laws hence affecting the administration of justice.<sup>88</sup>

### **2.3. THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY GENDER DECLARATION AND ADDENDUM.**

In spite of African states having adopted the African charter on Human and Peoples' Rights and the Additional protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, sub regions have as well come up with their own initiatives in the protection of the rights of women. This came about after the United Nations realized that every sub region has human rights challenges that are unique to that particular region because of diversities in their traditions and cultures.<sup>89</sup> As such the United Nations encouraged these regions to come up with human rights instruments that are going to address their human rights challenges whilst taking into account the existing international human rights instruments.<sup>90</sup> This saw the birth of the Cairo Declaration of Northern African states, the Economic Community of West Africa which has a protocol on democracy and good governance and the Southern Africa Development Community which also has an addendum to the 1997 declaration that focuses on issues of violence against women.<sup>91</sup>

Zambia being in Southern Africa has ratified and adopted the Southern Africa Development Community declaration and its addendum. It has pledged to address the human rights concerns more especially those affecting women in southern Africa.<sup>92</sup> The Southern Africa Development Community Declaration on Gender and Development does acknowledge and has identified

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<sup>87</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 117.

<sup>88</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 32.

<sup>89</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 107.

<sup>90</sup> Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law. Page 107.

<sup>91</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 51.

<sup>92</sup> Lillian Mukuka Zimba, Ministerial Gender Policy Paper for the Ministry of Communications and Transport. October 2007.

violations against women in its member states which are perpetuated by the existing traditional and cultural beliefs that perceive women as inferior beings.<sup>93</sup> Some of the indentified gender based violations include physical, emotional, economical, sexual, and psychological which have affected the governance systems in the state parties. This instrument also acknowledged that as a result of these noted violations women have been victims of discrimination and stereotype hence being prejudiced in all spheres of their life including in the dispensation of criminal justice.<sup>94</sup>

This is a clear manifestation that there are still serious concerns regarding the purse at which reforms in the legal, cultural, social and economic spheres is taking place as it seems selective.<sup>95</sup> The main hindrance has been the continued protection and preservation of these discriminatory customs, traditions, practices and/ or regulations that governments still practice. One of the areas of concern is in the administration of justice, specifically in the field of criminal law were still in this age and time southern African states, Zambia inclusive despite having very good international and regional instruments that advocates for a complete change in their municipal laws and administration of justice, they still continue with practices and rules that are prejudicial to women.<sup>96</sup>

The Southern Africa Development Community Declaration Gender declaration and the addendum has committed itself to ensure that repealing and reforming all laws and changing social practices which still subject women to discrimination and enacting empowering gender sensitive laws and procedures is prioritized by all states parties.<sup>97</sup> It is in this respect that Zambia should take reforms in its legal system in order to eradicate rules, practices and procedures that cause stereotype and adjudicator's prejudicing of women because of the still existing legal requirements of corroboration and cautionary rule that still seem to question the integrity of women victims.<sup>98</sup> Further Southern Africa Development Community Declaration has not directly

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<sup>93</sup> Section C (i) of the Southern Africa Development Community Declaration on Gender and Development, 8<sup>th</sup> September 1997.

<sup>94</sup> Section C (i) of the Southern Africa Development Community Declaration on Gender and Development, 8<sup>th</sup> September 1997.

<sup>95</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 54.

<sup>96</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 201.

<sup>97</sup> Section H (iv) of the Southern Africa Development Community on Gender and Development adopted on 8<sup>th</sup> September 1997.

<sup>98</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Pages 24 – 29.

addressed the still existing prejudicial and stereotype in the legal systems in the administration of justice by the adjudicators more especial in sexual offence where there is still worse violation of the rights of women that border on the dignity and self realization of a woman.<sup>99</sup>

Notwithstanding that section H (iv) has addressed the need to repeal, amend and reform all discriminatory and gender insensitive laws and procedures, there is no specific emphasis on the reforms in the judicial systems as it is the fountain of justice that should advocate for gender equality. However the instrument has been very categorical in the areas of marriage, inheritance, economic and social empowerment of women but has not directly addressed the serious gender discrimination and stereotype that exist in the judicial systems.

## **CONCLUSION**

The chapter began with the consideration of the development of human rights and further looked at gender equality in the dispensation of justice in Zambia. It also considered the feminists analysis of the international law in line with the international and regional women's rights instruments. The chapter also goes on to analyze selected provisions in the Convention on the Elimination of all forms of Discrimination Against Women, the Addition Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa, and the Southern Africa Development Community on Gender and Development in the fight against gender discrimination with a bias on equality in the dispensation of criminal justice in sexual offence cases by African adjudicators, particularly in Zambia.

Consideration has been on the need of having region and sub- region instruments that will adequately address the concerns and ills that are face by women because of the dynamics in the traditions and customs in Africa. Women suffer different types of discrimination which are a castrated by the differences in religion, culture and ethnic beliefs of the African society.

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<sup>99</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law.. Pages 24 – 29.

## CHAPTER THREE

### THE ANALYSIS OF THE ZAMBIAN LEGAL SYSTEM, THE LAW AND COURT PROCEDURES IN THE DISPENSATION OF JUSTICE IN SEXUAL OFFENCE CASES.

#### 3.0. INTRODUCTION

The Chapter looks at how gender insensitive the legal system in the dispensation of criminal justice in sexual offence cases in Zambia is. It will deal with the court procedures and the requirements by the law to adjudicate over sexual offence cases. Further the chapter will analyse selected clauses in the constitution, statutory laws and case law that relate to how sexual offence cases have been dealt with by the Zambia adjudicates in reference to the need to promote gender equality.

The analysis of the current laws of Zambia on sexual offence cases in relation to gender equality in the criminal justice system has in the recent years become a concern by many advocates of gender equality.<sup>100</sup> Every society has a penal system in which certain conduct is criminalised, therefore it is the essence of the law to regulate the conduct of the people in society regardless of one's gender but this has not been the case.<sup>101</sup> Although the Constitution of Zambia does provide that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority,<sup>102</sup> it however does allow the existing gender inequality by its Article 23 which provides that:

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

(d) for the application in the case of members of a particular race or tribe, or 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>00</sup> Timothy Daka, The Prevalence of Sexual Violence: Are existing laws adequate to curb the vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB), 2010. Page 10.

<sup>01</sup> Simon Kulusika, Text, Cases and Materials on Criminal Law in Zambia, Published by UNZA Press, 2005. Page 2

<sup>02</sup> Article 23 (2) of The Constitution of Zambia, Chapter One.

### 3.1. EVALUATING THE RATIONALE OF USING CORROBORATION AND CAUTIONARY RULE BY THE ADJUDICATORS IN SEXUAL OFFENCE CASES

#### (i). THE CAUTIONARY RULE

This rule requires adjudicators to exercise caution when dealing with evidence of certain witnesses in sexual offence cases.<sup>103</sup> Although the rule is mostly applied in sexual offence cases, it has no fixed criterion that the court must meet to ascertain the witness's trustworthiness.<sup>104</sup> The cautionary rule will most often than not be overcome if there is some corroborative evidence although corroboration is not essential. It is meant merely for the court to warn itself against convicting on uncorroborated evidence and not that a case has been proved beyond any reasonable doubt. This was espoused in a South African case in which the Appellant Division court held that mere reference to the cautionary rule applicable in sexual offence cases would not suffice. Ekesteen J.A. stated that 'it was not sufficient that the presiding officer be satisfied that the cautionary rule applicable to a single witness had been overcome; even the presence of the corroborative evidence would not suffice if the court did not clearly show it was conscious of the inherent dangers of such evidence in sexual offence cases.'<sup>105</sup>

From the common law view, the cautionary rule is based on the assumption that women are deemed to be untruthful hence demeaning them and this has contributed to secondary victimisation of women which has resulted to none reporting of sexual offence cases.<sup>106</sup> Although the other justification is that the cautionary rule assent that it must be applied to the complainant in sexual offence cases because such cases occur in privacy and leave no outright traces,<sup>107</sup> making it difficult to refute an assertion that there was consent or not. However the absence of outright trace has now been seen not as an obstacle for the accused but an addition to the hurdles for the prosecution to overcome in proving the guilty beyond reasonable doubt of the accused.<sup>108</sup>

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<sup>103</sup> Section 140 of The Penal Code, Chapter 87 of The Laws of Zambia.

<sup>104</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 202.

<sup>105</sup> S v S (1990) (1) SACR S (A).

<sup>106</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 159.

<sup>107</sup> Mukunga v Republic (2002) 2 EA 482.

<sup>108</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 176.

In the case of S v Katamba,<sup>109</sup> the Supreme Court held that, “although the cautionary rule should no longer be applied, this did not mean that the nature and circumstances of the alleged offence need not be considered carefully.” Further the South African criminal law in abolishing the cautionary rule to be applicable to sexual offences states as follows,

“notwithstanding any other law a court may not treat the evidence of a complainant of a sexual offence pending before the court with caution on account of the nature of the offence.”<sup>110</sup>

Despite other states like Namibia and South Africa realising that this rule is discriminatory, demeaning and a hindrance to the achievement of gender equality in the dispensation of justice in sexual offence cases, Zambia is still embracing and maintaining it in its judicial procedures and rules.<sup>111</sup>

## **(ii). CORROBORATION**

Unlike the cautionary rule, corroboration is said to be evidence that prove the material fact of the case at hand.<sup>112</sup> In sexual offence cases it has been made mandatory that an accused person cannot be convicted on uncorroborated evidence.<sup>113</sup> Evidence such as medical examination results, a witness who saw the accused, signs of force used or resistance may be corroborative evidence. Corroboration is one of the prevalent obstacles to the success of a prosecution in sexual offence cases.<sup>114</sup> This was shown in the case of Tembo v The people,<sup>115</sup> in which the accused was acquitted on a charge of rape by the High Court on the basis that there was no corroboration on the sexual element as the medical evidence was inconclusive, despite such corroboration being present as to the lack of consent by the victim’s screaming for help, also the identity of the accused who was seen by a witness walking away from the crime scene and the visible assault on the victim who had a bruised face and dirty clothing. All this corroborating

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<sup>109</sup> (2000) (1) SACR 162 (NMS).

<sup>110</sup> Section 60 of The Sexual Offences and Related Matters, Amendment Act No. 32 of 2007 of The Laws of South Africa.

<sup>111</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 167.

<sup>112</sup> Timothy T. Daka, The Prevalence of Sexual Violence: Are existing Laws Adequate to Curb the Vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB), 2010. Page 11 – 14.

<sup>113</sup> Section 140 of The Penal Code, Chapter 87 of the Laws of Zambia.

<sup>114</sup> Timothy T. Daka, The Prevalence of Sexual Violence: Are existing Laws Adequate to Curb the Vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB), 2010. Page 11 – 14.

<sup>115</sup> (1966) ZR 126.(HC).

evidence was not taken into consideration by the High Court but it merely relied on the alleged inconclusive medical report to acquit the rapist at the expense of the tormented and humiliated victim of sexual crime which borders on the dignity and integrity of women and girls.

The requirement for corroboration in sexual offence cases has constrained efforts aimed at combating gender inequality in the dispensation of justice<sup>116</sup>. It is evident that the need for corroboration implies that a large number of offenders who have committed these sexual offences will go unpunished because such crime is mostly committed in privacy making it difficult to corroborate evidence.<sup>117</sup> This requirement therefore tends to provide a shield to perpetrators at the expense of the hopeless victims. It is disappointing that even where there is corroborating evidence, the court uses its discretion to refute admitting such evidence as corroborating the commission of the crime.<sup>118</sup> This was evident in the case of Zimba v The People,<sup>119</sup> in which the appellant was not convicted of rape. It was alleged that the appellant seized the complainant in the bush and raped her. The victim was there after seen crying by an independent witness. The complainant further stated that during the course of the alleged rape she sustained bruises and even looked distressed with dirt clothing. However the Supreme Court contended that in the circumstances, there was complete lack of corroboration and the evidence of distress, bruises and the dirt on the clothes may not be enough to amount to corroboration. The court sadly quashed the conviction and set aside the sentence.

Furthermore in the case of Machalika v The People,<sup>120</sup> the appellant was convicted of rape. Although a qualified medical practitioner did find as a fact that there was medical evidence of penetration and even spermatozoa was found. The Supreme Court in quashing the decision of the lower court held that since spermatozoa can live for several days in the vagina, the medical evidence was not corroborative enough to prove that the complainant was raped by the accused, but it was simply evidence that she had sexual intercourse with someone within the period prior

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<sup>116</sup> Pamela J. Schwikkard. The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act. Namibia Law journal. Volume 1 Issue 1<sup>st</sup> January 2009.

<sup>117</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 173.

<sup>118</sup> Tembo v The People (1966) ZR 126 (HC).

<sup>119</sup> (1978) ZR 44 (SC).

<sup>120</sup> (1978) ZR 44.

to the conducting of the medical examination. This was on the bases that the complainant was a married woman.

It is such decisions that clearly show the weaknesses of corroboration and discretionally power which the judge has to either accept or reject corroborating evidence given by the complainant.<sup>121</sup> This has further hindered efforts aimed at reducing the prevalence of sexual violations in Zambia and perpetrators of sexual offences end up been acquitted even when they committed the offence.<sup>122</sup> These legal technicalities coupled with the discretion of the adjudicators has tended to work against the distressed, humiliated, violated and harmed victims who are supposed to be protected by the law which on the face of it seem to be on their side.<sup>123</sup>

### **3.2. AN ANALYSIS OF HOW GENDER INSENSITIVE THE ZAMBIAN PENAL SYSTEM IS IN THE DISPENSATION OF JUSTICE IN SEXUAL OFFENCE CASES.**

#### **(i). RAPE/ MARITAL RAPE**

The Penal Code prohibits virtually all abuses associated with sexual violation of women and girls, and has established offences against morality in chapter xv. However the manner in which the clauses are phrased and the legal procedures or requirements have made some of the sexual offence cases like marital rape fail to qualify in the provided definitions. Though a few African jurisdictions have criminalised marital rape like South Africa and Namibia, Zambia has not still criminalised marital rape.<sup>124</sup> If marital rape was enacted into law it could have been a milestone towards the achievement of gender equality in the dispensation of criminal justice in Zambia. In the celebrated Namibian case of Kaitamaki v R.<sup>125</sup> The court convicted and sentenced the husband of rape after he was found guilty of forcefully having sex with his wife without her consent.

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<sup>121</sup> Pamela J. Schwikkard. The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act. Namibia Law journal. Volume 1 Issue 1<sup>st</sup> January 2009.

<sup>122</sup> Timothy T. Daka, The Prevalence of Sexual Violence: Are existing Laws Adequate to Curb the Vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB) ,2010. Page 16.

<sup>123</sup> Mohamed v Republic, Criminal Appeal No. 210 of 2003.

<sup>124</sup> Timothy T. Daka, The Prevalence of Sexual Violence: Are existing Laws Adequate to Curb the Vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB) ,2010. Page 38.

<sup>125</sup> (1991) 4 All ER 48.

First and foremost it is important to note that Zambia like most African states have defined rape in such a manner that it does exclude marital rape. The definition of rape is one of the hurdles faced in criminalisation of marital rape which is so rampant in the African societies, Zambia is no exception.<sup>126</sup> Rape is defined as,

"the act of having unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, in the case of a married woman by personating her husband."<sup>127</sup>

This definition in its current form excludes rape occasioned by a spouse. The cautionary rule and corroboration are the obstacles to the criminalisation of marital rape.<sup>128</sup> Since marital rape most often than not takes place in privacy between spouses it is difficult to prove it because of the procedural requirements of the cautionary rule and corroboration as the case was in Emmanuel Phiri V The people,<sup>129</sup> In this case the court held that in sexual offences there must be corroboration of the commission of the offence, the identity of the offender and the evidence of lack of consent in order to eliminate the dangers of false complaints and false implication. Therefore in sexual offences the judge must warn himself against the danger of convicting on uncorroborated evidence and the record must show that this was done. This principle was further elucidated in the case of Nsofu v The People,<sup>130</sup> where the court stated that the corroborated evidence serves to satisfy the court that it is safe to rely on the complainant.

Further in the African tradition and custom a woman is presumed to have submitted to the husband upon getting married and the husband can demand for sex at anytime.<sup>131</sup> The women is not expected to resist as doing so is an abomination and such women are deemed uncultured. This has made women to loss their self realisation and bodily integrity resulting into having no say over their sexual life.<sup>132</sup> Also the payment of bride price has given men the impression that they own their wives hence cannot be stopped from demanding sex at anytime they so wish.<sup>133</sup>

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<sup>126</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 175.

<sup>127</sup> Section 132 of The Penal Code, Chapter 87 of the Laws of Zambia.

<sup>128</sup> Mohamed v Republic Criminal Appeal No. 210 of 2003.(KLR).

<sup>129</sup><sup>129</sup> (1982) ZR 77 (SC).

<sup>130</sup> (1973) ZR 103(SC).

<sup>131</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 173.

<sup>132</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 175.

<sup>133</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 172.

Suffice it to state that male adjudicators and legislatures who are in the majority come from similar custom as such fear to criminalise marital rape because they are potential perpetrators of this vice.<sup>134</sup>

The requirement for corroboration and cautionary rule have made the prosecution of rape cases difficult even when there is convincing corroborating evidence.<sup>135</sup> In the celebrated case of Mweemba and Another v The people,<sup>136</sup> the appellant was acquitted on a charge of rape by the Court of Appeal on the basis that the trial magistrate did not warn himself on the dangers of convicting someone on uncorroborated evidence, though there was evidence before court which was capable of corroborating the alleged rape. The overwhelming evidence as to the lack of consent by the victim, the assault on the victim as a result of her strangling, even the distressed condition in which the victim was in, the loss of one pair of shoes and a torn chitenge skirt. This case clearly shows how subjective to the victim the cautionary rule is in dealing with rape. Although the court was not in dispute of these facts, it still acquitted the appellant on the bases that the magistrate did not warn himself against the dangers of convicting on such evidence.<sup>137</sup>

## **(ii). DEFILEMENT**

Like rape, defilement is one of the offences that are provided for in the Penal Code, Chapter 87 of the Laws of Zambia. Defilement was described by Kulusika as “a deliberate, criminal and sexual assault violative of the victim’s integrity of a girl under sixteen year, thereby depriving her of her chastity in cases involving virgins or otherwise self- esteem and inflicting serious physical and psychological injuries on her.”<sup>138</sup> While the Penal Code provides that,

“Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.”<sup>139</sup>

It further provides that,

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<sup>134</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page208.

<sup>135</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page202.

<sup>136</sup> (1973) ZR 127, Court of Appeal.

<sup>137</sup> Simon. E. Kulusika, Text, Cases and Materials on Criminal Law in Zambia, Page 542.

<sup>138</sup> Simon E. Kulusika Legislative and Criminal Justice Response to sexual violence in Zambia, Zambia Law Journal Vol. 38. P 1 – 14 (2006).

<sup>139</sup> Section 138 of The Penal Code (Amendment Act No. 15 of 2005), Chapter 87 of the Laws of Zambia.

“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life.”<sup>140</sup>

From these definitions it entails that to constitute defilement sexual intercourse must have taken place with a girl under the age of sixteen years and consent is immaterial in the offence of defilement.<sup>141</sup> Though the definition is very specific and clear, the maleness of the laws in Zambia and the dual legal system which also recognises customary law has resulted in the adjudicators justifying defilement when committed under customary law. This has disadvantaged a lot of innocent girl children at the expense of the ruthless men.<sup>142</sup>

Although the family law in Zambia under the Marriage Act and the Protocol to the African Charter on the right of Women has indicated the minimum age at which a girl can contract for marriage as 18 years, customary law has no specific age for marriage as observed in the case of The People v Chinjamba,<sup>143</sup> in which the appellant was convicted by the lower court for conspiracy of defilement, the High court acquitted the appellant of the charge on the bases that customary law allows a girl who has reached puberty to be married regardless of the age of the girl minor. This has created parallel application of the law where statutory law criminalise any sexual intercourse with a girl under the age of sixteen years, while customary law allows sexual intercourse with a girl under the age of sixteen years as long as there is consent from her parents. The definition of defilement was meant to protect the girl children who are by law deemed not capable of making any rational decision in regards to sexual intercourse or contracting marriage. The case show how patriarchy, discriminatory and gender incentive the Zambian legal system is in the dispensation of justice in sexual offence case.

### **(iii). ABORTION**

The Termination of Pregnancy Act defines abortion as "the law relating to abortion" means sections one hundred and fifty-one, one hundred and fifty- two and one hundred and fifty-three of the Penal Code, and includes any written law or rule of law relating to the procurement of

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<sup>140</sup> Section 138 (2) of The Penal Code , Chapter 87 of the Laws of Zambia.

<sup>141</sup> Simon. E. Kulusika, Text, Cases and Materials on Criminal Law in Zambia, Page 517.

<sup>142</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Pages 40 – 41.

<sup>143</sup> (1949)NRLR 384.

abortion; Cap. 87.<sup>144</sup> Although it allows abortion in section 3(1) and provides that: (Taking only relevant clauses)

“Subject to the provision of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if he and two other registered medical practitioners, one of whom has specialised in the branch of medicine in which the patient is specifically required to be examined before a conclusion could be reached that the abortion should be recommended, are of the opinion, formed in good faith- (a) that the continuance of the pregnancy would involve-

- (i) Risk to the life of the pregnant woman; or
- (ii) Risk of injury to the physical or mental health of the pregnant woman; or
- (iii) Risk of injury to the physical or mental health of any existing children of the pregnant woman; greater than if the pregnancy were terminated;<sup>145</sup>

The requirement for at list three doctors to approve the operation and the rigorous medical examinations make most of the women and girls opt to conduct illegal abortion that have resulted into an increase in maternal mortality.<sup>146</sup>

Even though the law on one hand allows abortion, it has on the other hand criminalised it under the Penal Code which provides that:

“Any person who, with intent to procure miscarriage of a woman, whether she is or is not with a child, unlawfully administer to her or causes her to take any poison or other noxious thing, or uses any force of any kind or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.”<sup>147</sup>

“Every women being with a child who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing or uses any force of any kind or uses any other means whatever or permits any such thing or means to be administered or used is guilty of a felony and is liable to imprisonment for seven years.”<sup>148</sup>

State’s restriction on woman’s right to terminate unwanted pregnancies also implicates constitutional guarantees of gender equality.<sup>149</sup> It is these same legal provisions which although seem to support women, they indirectly perpetuate gender discrimination. These restrictions deprive women to make their own decisions when to have a child and how many children they intend to bear. The decision to terminate or continue a pregnancy has no less an impact on a

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<sup>144</sup> Section 2 of the Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

<sup>145</sup> Termination of Pregnancy Act, Chapter 304 of The Laws of Zambia.

<sup>146</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Pages 184 – 185.

<sup>147</sup> Section 151 of The Penal Code, Chapter 87 of The Laws of Zambia.

<sup>148</sup> Section 152 of The Penal Code, Chapter 87 of The Laws of Zambia.

<sup>149</sup> Article 12 (1) (2) of The Constitution of Zambia (As Amended in 1996).

woman's life than decisions about contraception or marriage.<sup>150</sup> More often than not women have been forced into marriage after getting pregnant because they cannot make a choice whether to terminate or keep the pregnancy and end up get married against their wish.<sup>151</sup>

#### **(iv). BIGAMY**

The Penal Code of Zambia does define bigamy as;

Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years.

However because of Article 23 (4) (d) in the Constitution, the dual legal system where both statutory and customary laws are applied, have created discrimination in the manner the law is applied amongst people of the same gender.<sup>152</sup> This is so because of the maleness of the legal system where the law makers and adjudicators who are mainly male are trying to protect their interest as they are potential perpetrators of such offences.<sup>153</sup> The rationale of having a law that applies differently to the people of the same gender promotes discrimination and demeans the women and girl children who are under privileged under customary law.<sup>154</sup> This type of gender inequality show itself in the case The People v Chitambala<sup>155</sup> in which the court convicted the accused for the offence of bigamy. In convicting him the court stated that if parties to a marriage that is under statutory law marries another women, he commits bigamy but if he is married under customary law he could have not been convicted because the law allows polygamy in marriages under customary law, hence not applicable to all those married under customary law.

#### **(v). PROSTITUTION**

The Zambian penal system is silent on the legal position of prostitution commonly referred to as sex work.<sup>156</sup> Although the law has not criminalised it, the legislatures have made the life of the prostitute to be in the lime right of criminal law. The prostitute is excluded as a subject by the

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<sup>150</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 184.

<sup>151</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Pages 185 – 187.

<sup>152</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 59.

<sup>153</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 82.

<sup>154</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 82.

<sup>155</sup> (1969) ZR142.

<sup>156</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 151.

legislature which affects every aspect of her life and threatens to criminalise almost every person with whom she comes into contact. Although prostitution as stated is not illegal per se, the law has created variety of offences which indirectly criminalise all what they do.<sup>157</sup> In the course of her business a prostitute can be charged with soliciting after it is proved that she has been cautioned before for loitering or soliciting on two occasions. She can in the end even receive the label of a common prostitute, meaning therefore that any complaint of sexual in nature which she lodges to the police will be highly undermined hence making her not protected under the criminal law against any sexual violations.<sup>158</sup>

What makes it worse is that even the person she lives with will be charged for the offence of living off immoral earnings.<sup>159</sup> If she is renting, the landlord can be charge for brothel keeping, while her client can face the offence of kerb crawling meaning that all her life is subjected to the criminal law. She is treated like a legal leper who may affect all that she comes into contact with.<sup>160</sup>

## CONCLUSION

The chapter considered the existing status of the law and the procedural requirements in the dispensation of criminal justice in sexual offence cases. It further looked at the weaknesses in the law, the influence customs and traditions have on adjudicators in coming up the decision when faced with cases of sexual in nature. It has been ascertained that procedural requirements under the existing laws provide protection to perpetrators of sexual violations. It is also evident that efforts to reduce the prevalence of sexual offence cases are constrained by the bias and discrimination in the justice delivery system. Worse more, the current legal framework does not criminalise sexual intercourse with a girl under the age of sixteen years provided such a girl is lawfully married under customary law hence exposing young innocent girls who cannot make rational decisions to the pleasure of their parents and overzealous men. The chapter has also shown how the law has made marital rape difficult to be criminalised.

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<sup>157</sup> Carlson Anyangwe, An Outline of the Study of Jurisprudence, Page 353.

<sup>158</sup> Carlson Anyangwe, An Outline of the Study of Jurisprudence, Page 353.

<sup>159</sup> Carlson Anyangwe, An Outline of the Study of Jurisprudence, Page 353.

<sup>160</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 152.

## CHAPTER FOUR

### THE MEASURES TAKEN BY GOVERNMENT IN MITIGATING THE IDENTIFIED GENDER INEQUALITIES IN THE DISPENSATION OF JUSTICE IN SEXUAL OFFENCE CASES.

#### 4.0. INTRODUCTION

Sexual violations against women and girls is a global health human rights and development issue that transcend geography, class, gender, culture, race and religion touching every community in all corners of the world.<sup>161</sup> It is assumed that at least one out of every three women world over have been beaten, coerced into sex and other abuses in their lifetime.<sup>162</sup> In Zambia the overwhelming negative impact of sexual related offences and inadequacies in the administration of justice is sanctioned by customs, legal procedures and the limitations in the law.<sup>163</sup> Also gender inequality in the dispensation of justice in sexual offence cases is as a result of the patriarchal tendencies of the adjudicators and legislatures, resulting in the need for government to come up with innovations that may mitigate these imbalances.<sup>164</sup> This chapter will look at government interventions and shortcomings in ensuring gender equality in the criminal justice system of sexual offence case.

#### 4.1. GOVERNMENT'S INTERVENTION TO GENDER INEQUALITY IN THE DISPENSATION OF CRIMINAL JUSTICE IN ZAMBIA.

The Zambian government has taken measures to address the promotion of gender equality and has ratified almost all the relevant International Instruments in relation to women and girl rights.<sup>165</sup> Some of these instruments being the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter

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<sup>161</sup> Gender In Development Division Cabinet Office, National Action Plan on Gender – Based Violence (NAP – GBV) 2008 – 2015. Page 6.

<sup>162</sup> G. Mutangadura, Achieving Gender Equality, Women's empowerment and ending Violence against women in Africa: A review of the role of the family policy and social protection. Page 8.

<sup>163</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 201.

<sup>164</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: An issue paper presented for the Commission on legal empowerment of the poor. Page 6.

<sup>165</sup> Gender In Development Division Cabinet Office, National Action Plan on Gender – Based Violence. Page 6.

on Human and Peoples Rights on the Rights of Women, the African Charter on the Rights and Welfare of the Child and the Southern African Development Community Declaration on Gender and Development plus its addendum.<sup>166</sup> Government in fulfilling the obligation outlined in these instruments or treaties has established a number of key interventions under the Ministry of Gender and Development which was established and mandated to deal with all matters concerning violation of the rights of women, children and the under privileged.<sup>167</sup>

However the Zambia government has not domesticated most of the pertinent clauses in these women's rights instrument that promote gender equality and protection of the rights of women.<sup>168</sup> This is so because of the dualist system of laws of Zambia inherited from Britain which ensures that treaties ratified by Zambia do not automatically become part of the Zambian law. Issues like marital rape, enactment of non- discriminatory laws and procedures in the dispensation of justice and codification of customary law still remain areas of concern in the Zambian jurisprudence.<sup>169</sup> Further there are weak enforcement mechanisms of the laws against sexual and domestic violation because of lack of specific law and policy guidelines on domestic and sexual violations.<sup>170</sup>

The equitable and fair dispensation of justice cannot be achieved without the involvement of Public Prosecutors who in the subordinate courts are mainly Police officers or from other security wings of government. As empowered by the Constitution and the Criminal Procedure Code, the Director of Public Prosecution can appoint the Police Officers and any other persons as prosecutors.<sup>171</sup> In enhancing capacity government through the Director of Public Prosecution embarked on the training of all Police Officers or personnel appointed as Public Prosecutors to undergo prosecution training course which is specifically provide for them at National Institute

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<sup>166</sup> Ministry of Communication and Transport, Ministerial Gender Policy – October 2007.

<sup>167</sup> Gender In Development Division Cabinet Office, National Action Plan on Gender – Based Violence (NAP – GBV) 2008 – 2015. Page 10.

<sup>168</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 23.

<sup>169</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law. Page 8.

<sup>170</sup> Fareda Banda, Women, Law and Human Rights, An African Perspective. Page 171.

<sup>171</sup> Article 56(4) of The Constitution of Zambia (As Amended by Act No. 18 of 1996), Chapter One. “ the powers of the Director of Public Prosecutions under clause (3) May be exercised by him in person or by such public officer or class of public officers as may be specified by him, acting in accordance with his general or special instrument:” Also Section 86 (1) (2) (3) of The Criminal Procedure Code, Chapter 88 of The Laws of Zambia.

for Public Administration (NIPA).<sup>172</sup> Besides these interventions government has also advanced in its quest to create the Public Prosecution Authority, so that all cases are prosecuted by well trained personnel who will be under one umbrella.<sup>173</sup>

#### **4.2. LEGISLATIVE REFORMS IN RELATION TO GENDER RELATED VIOLATIONS**

Zambia being a dualist state has integrated two legal systems in its jurisprudence that is the statutory and customary law. Although under the statutory law which includes the Constitution, Zambia has domesticated the protection of social, cultural and political rights, it leave serious concerns in the customary law spheres where nothing much has been done to address the problem of gender discrimination.<sup>174</sup> This has perpetuated the violations of the rights of women leading to even adjudicators making reference to such discriminatory laws as the case was in The People v Chinjamba,<sup>175</sup> that a girl lawfully married under customary laws regardless of her age cannot be said to have been defiled. Furthermore the Constitution of Zambia in Article 23 provides that;

Clause (1) shall not apply to any law so far as that law makes provision—

- (a) For appropriation of general revenues of the Republic;
- (b) With respect to persons who are not citizens of Zambia;
- (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 case of other persons; or---<sup>176</sup>

This clause in the constitution seems to perpetuate discrimination and gender inequality which is practiced in customary law and other state regulatory systems of the Courts in Zambia.<sup>177</sup> Further

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<sup>172</sup> Dr. Matibini P. Access to justice and the role of the law : An issue paper presented for the Commission on legal empowerment of the poor. Published by Unza Press. Lusaka. 2008.

<sup>173</sup> Dr. Matibini P. Access to justice and the role of the law : An issue paper presented for the Commission on legal empowerment of the poor. Published by Unza Press. Lusaka. 2008.

<sup>174</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 6.

<sup>175</sup> (1949)NRLR 384.

<sup>176</sup> Article 23 (4) (a – d) of The Constitution of Zambia As Amendment in 1996.

<sup>177</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 59.

the Local Court Act<sup>178</sup> also does still acknowledge customary law in the dispensation of justice and it provides that:

Subject to the provision of this Act, a Local Court shall administer; The African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provision of any written law;<sup>179</sup>

### **(i). THE PENAL CODE REFORMS**

Although the Penal code prohibits sexual violence, rape, incest, defilement and other associated sexual abuse offences in Chapter XV, it previously did not give a precise and specific imprisonment period for some of these offence cases like defilement.<sup>180</sup> The Zambian government in 2004 embarked on the amendment of Chapter 87 and revised the Penal Code to criminalize acts such as rape, abduction, indecent assault, defilement of girls under the age of sixteen years, sexual trafficking, brothel keeping and others, with the minimum sentence for defilement being twenty five years.<sup>181</sup> It has also removed discriminatory clauses against women and promotes the use of gender – neutral language, and the laws regulating employment, property and land rights among others.<sup>182</sup> However, implementation of such progressive laws still lag behind largely because the judicial officers and law enforcers are not gender sensitive because they are still influenced by the cultural values, judicial procedures or requirements like corroboration and cautionary rule that derogate the rights of women.<sup>183</sup> Further there are no matching reforms of judicial processes including values that are aimed at upgrading the jurisdiction of Subordinate courts to allow them to pass appropriate sentences to offenders. The absence of such provisions renders most changes a mockery.<sup>184</sup>

The Penal Code (Amendment Act, No. 15 of 2005) was enacted by parliament as a way of government's acknowledgement of the clause in the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination Against Women which

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<sup>178</sup> Chapter 29 of the Laws of Zambia.

<sup>179</sup> Section 12(1) (a) of the Local Court Chapter 29 of The Laws of Zambia.

<sup>180</sup> Timothy T.Daka, The Prevalence of Sexual Violence: Are existing Laws Adequate to Curb the Vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB) ,2010. Page 38.

<sup>181</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: Page 7.

<sup>182</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 24.

<sup>183</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 201.

<sup>184</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: Page 7.

requested stated parties to take steps in repealing or amending their laws to provide for stiffer penalties aimed at deterring offenders of sexual offence cases.<sup>185</sup>

These reforms in the Penal Code also amended Section 138 by removing the provision that provide that,

any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for fourteen years: provided that it shall be sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.<sup>186</sup>

This clause made offenders escape defilement charge unpunished if they can prove that they honestly believed that the girl was above the age of sixteen years old. The amendment did away with that presumption and it provided that;<sup>187</sup>

any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.

Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fourteen years and not exceeding twenty years.

Any person who prescribes the defilement of a child as cure for an ailment commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and may be liable to imprisonment for life.

A child above the age of twelve years who commits an offence under Subsection (1) or (2) is liable, to such community service or counseling as the court may determine, in the best interests of both children.<sup>188</sup>

## **(ii). POLICE SERVICE REFORMS**

The government created the Police force, now transformed into a Police Service through the enactment of the Police Act.<sup>189</sup> This body was created to maintain peace and order in the nation. In its quest to address gender based discrimination in handling sexual offence cases and other related cases the Zambian government in its reforms of 1994 did establish the Police Victim Support Unit which was fully operation in 1998. The aim of the Police Victim Support unit is to

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<sup>185</sup> Gender In Development Division Cabinet Office, National Action Plan on Gender – Based Violence (NAP – GBV) 2008 – 2015. Page 11.

<sup>186</sup> The Penal Code (Amendment No. 26 of 1933 and No. 25 of 1941) of the Laws of Zambia.

<sup>187</sup> The Penal Code (Amendment No. 15 of 2005) Chapter 87 of the Laws of Zambia.

<sup>188</sup> (As amended by Act No. 15 of 2005) of the Penal Code, Chapter 87 of the Laws of Zambia.

<sup>189</sup> Chapter 107 of The Laws of Zambia.

address mostly gender sexual related complaints so that victims of such violations are properly handled, counseled and helped by specially trained personnel.<sup>190</sup> To enhance capacity in police officers under training government through the police service introduced in the police training program, gender violence and human rights in their curriculum.<sup>191</sup> With this initiative there has been an increase in the number of cases reported to the Police victims support unit. The following were the estimated reported cases, about 5,655 cases were reported in 2001, 6,837 cases were reported in 2002, 7,081 cases were reported in 2003 and 7,690 cases were reported 2004, showing an increase of cases reported to the Police Victim Support Unit because people grew confidence in the police due to the manner Police Officers handled the cases with confidentiality.<sup>192</sup>

#### **4.3. GOVERNMENT’S FAILURE TO ADEQUATELY ADDRESS GENDER BASED SEXUAL VIOLATIONS.**

As already identified and acknowledged that the government of Zambia has a dualistic system of law. This system has resulted into the adjudicators not applying the law uniformly.<sup>193</sup> For instance in Chinjamba v The People<sup>194</sup> the appellant was acquitted on a charge of defilement on the bases that the girls was married under customary law hence defilement can not suffice. While the Penal Code clearly states what qualifies the commission of defilement as unlawful carnally knowing a girl under the age of sixteen years.<sup>195</sup> Further the adjudicators are empowered by law to pass alternative verdict on cases of rape or defilement if the court is of the opinion that the accused is not guilty of the offence but that he is guilty of any other offence found in Chapter xv of the Penal Code.<sup>196</sup> This however is rarely applied resulting into acquitting persons who have genuinely committed an offence as the case was in Chinjamba. The dualistic nature of the Zambian legal system has created two parallel ways that are applied by the adjudicator in

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<sup>190</sup> Gender In Development Division Cabinet Office, National Action Plan on Gender – Based Violence (NAP – GBV) 2008 – 2015. Page 30.

<sup>191</sup> Office of the United Nations High Commissioner for Human Rights. Geneva, Switzerland. Report of the Promotional Mission to the Republic of Zambia, 14 – 18 April 2008. Page 37.

<sup>192</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: Page 6.

<sup>193</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: Page 5.

<sup>194</sup> (1949)NRLR 384.

<sup>195</sup> Section 138 of The Penal Code, Chapter 87 of the Laws of Zambia.

<sup>196</sup> Section 186 (1) (2) (3) of The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

interpreting the laws, For example the girl child in the village who is mostly affected by customs and traditions is not protected by the statutory law because of the customary law which engulf the whole of her life, while the girl child in urban area is usually protected by the statutory law hence creating disparities in the application of the law to people of the same gender bases on their life style.<sup>197</sup>

Though government has taken an affirmative action towards the promotion of equal dispensation of justice, it has remained reluctant to codify customary law so as to make it also acceptable in the present globalised world.<sup>198</sup> Customs must move with change and technological advancement hence government's failure to codify customary law has created difficulties to completely eradicate gender related discrimination in all spheres of women and girl's life including in the administration of justice.<sup>199</sup> Marital rape has still remained a concern in Zambia to the gender advocates because government has continued to pay a deaf ear to it. Worse more the definition of rape in the Penal Code does exclude marital rape as an offence.<sup>200</sup>

The government has through the judiciary still maintained discriminatory procedures or legal requirements such as corroboration and the cautionary rule in sexual offence cases which have created disparities in the way adjudicator's decide on case. For example in the case of Tembo v The People,<sup>201</sup> the appellant was acquitted on a charge of rape by the High Court on the basis that there was no corroboration on the sexual element as the medical evidence was inconclusive, despite such corroboration being present as to the lack of consent, the assault and the dirty clothing, while in Butembo v The People<sup>202</sup> a conviction of rape was upheld even though the trial judge did not warn himself of the danger of convicting on the uncorroborated testimony of the prosecutix. The Court's reasoning was that this omission did not prejudice the accused as the trail judge had otherwise dealt with the evidence in such a way that the danger of false

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<sup>197</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Page 121.

<sup>198</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: Page 6.

<sup>199</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Pages 25 – 29.

<sup>200</sup> Mulela Margaret Munalula, Women, Gender Discrimination and the Law. Pages 25- 29.

<sup>201</sup> (1966) ZR 126.

<sup>202</sup> (1976) ZR 193.

implication had been excluded.<sup>203</sup> The two cases have shown how inconsistent the courts are and the disparities created by the adjudicators in the manner these legal procedures and requirements are applied.

Government in the recent past has made steady progress in empowering women by appointing women in decision making positions. The judiciary which is the fountain of justice has seen an increasing in the appointment of female judges in the High Court in the recent past. For instance, in 2006 the Republican President appointed four female High Court judges as compared to two male High Court judges. While in 2010 the President appointed twelve female High Court judges as compare to six male High Court judges.<sup>204</sup> Further, for the first time the appointment of a female Deputy Chief Justice and the Deputy Speaker of the National Assembly are just but some of the government's commitment to address gender bias in the judiciary and the legislative body that is perpetuated by men. This is one way in which government wants to promote gender equality in the administration of justice so that patriarchy tendencies in the judiciary are eradicated.<sup>205</sup>

## CONCLUSION

There can be no meaningful legal reforms if the implementation and enforcement mechanisms are subjective. Every good legal system draws its achievements from the way the courts interpret the law. This is the more reason why Justice Holmes, a realist propounded that the law is enacted by the judges and the legislature are only there to give a guide of what the law ought to be. With this in mind, it is evident then that a fair, just and equitable judiciary is a fountain of justice. The nation can have good laws but if the implementers or interpreters who give effect to it do so in a discriminatory way, then that law will not be good law.

This can be achieved if government can have independent justice systems where the separation of power is respected. Government interventions in achieving gender equality in all spheres of life must be seen to be practical and progressive, not only on paper but also in action. The

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<sup>203</sup> Timothy Daka, The Prevalence of Sexual Violence: Are existing laws adequate to curb the vice? An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the degree of Bachelors of Laws (LLB), 2010. Page 38.

<sup>204</sup> Interview with Mwamba Chanda, the Deputy Registrar of the High Court of Zambia on 10<sup>th</sup> February, 2011.

<sup>205</sup> Dr. Patrick Matibini, Access to Justice and the role of the Law: Page 13.

chapter has reviewed and analyzed government's strength, commitment and shortcomings through its bodies or agencies in the dispensation of gender sensitive and non discriminatory justice to all.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATION

#### 5.0. CONCLUSION

The focus of this research paper has been to assess the application of gender equality in the dispensation of criminal justice in sexual offence cases in Zambia and whether existing laws or court procedures are adequate to curb the scourge. In addition, it seeks to evaluate the efficacy of the laws, rules and court procedures regulating the administration of justice in sexual offence cases. It can be stated that the research carried out indicates that there are a lot of inadequacies in the law and criminal court procedures that regulate the dispensation of justice in sexual offences. Various weaknesses in the law regulating sexual behaviour have been highlighted. To this end, among many weaknesses noted are the Constitution provisions that avoid interfering in the private domain if it has to do with custom, marriage, devolution of property on death and divorce where most of these sexual offences take place. Another is the corroboration that the law requires for prosecutors to prove sexual offence case as one of the deficiencies in the legal systems that govern the adjudication of sexual offence cases in Zambia.

I. The paper also established that the Penal Code which is the principle piece of legislation in regards with criminal matters contains a lot of weakness or lacunas that do not adequately address sexual related cases.

II. The study revealed that patriarchy tendencies are the causes of the still existing stereotype in the dispensation of justice in sexual offence cases in Zambia. The Constitution in its current form, specifically in Article 23(4) has acknowledged the parallel application of customary law and statutory laws. It has allowed the adjudicators to use this clause to justify their gender insensitive judgements.

III. The research has revealed that the dual legal system in Zambia is the major source of discrimination in the dispensation of criminal justice in sexual offence cases, however the research has revealed that in the recent past there has been an increase of female judges appointed to the bench and even in decision making position. This has helped to change the perception of people that women are inferior beings to men.

IV. Further, the paper has revealed that procedural requirements of corroboration and cautionary rule in adjudicating in sexual offence cases have not only created stigma to the victims but also let perpetrators of sexual offences free because of lack of corroboration or failure on the party of the adjudicators to warn themselves of the danger to convict on uncorroborated evidence. These requirements are subjective and only unique to sexual offence cases, hence creating an impression that women are not credible or reliable witnesses.

V. It has also been observed that gender inequality and reluctance in the repealing or amendment of the existing gender insensitive laws is a result of patriarchy tendencies and dominance of men in the legal and legislature systems.

## **5.2. RECOMMENDATIONS**

Having discussed the manner in which justice is administered and the inadequacies in the law in adjudicating over sexual offence cases in Zambia, there is therefore need for a concerted effort by all sectors of society to advocate for gender equality in the administration of justice in Zambia. It is against this background that this paper recommends urgent measures to be taken in the following ways.

I. It is recommended therefore that Government should initiate through Parliament Constitutional reforms and implementation of safeguards to ensure dispensation of equal justice to all regardless of one's gender by including women's rights in the bill of rights.

II. There is also urgent need for the legislature to codify customary law so that it is harmonised with statutory law. The codification of customary law will help to have certainty, predictability and stability of the jurisprudence of Zambia.

III. Further, it is recommended that Parliament should amend the Penal Code to include all forms of sexual offences or violations which society has identified such as marital rape and criminalisation of polygamy.

IV. There is also need for the judiciary to introduce expert witnesses who can attest and help the court to appreciate the effects of sexual violations on women and girls. To further make adjudicators understand the trauma, stigma and humiliation suffered by the victims.

V. It is also my recommendation that the legislature must amend existing criminal procedures in sexual offences so that they conform to the International and Regional Instruments. The criminal procedures must dispense with the requirement for corroboration and cautionary rule as the prerequisite for the successful conviction of sexual offence cases.

VI. My other recommendation is that there is urgent need for Government to initiate through Parliament the enactment of a Sexual Violence Act that will criminalise all forms of gender violations against women and girls. It should also contain procedures on how to prosecute sexual offence cases without discrimination based on gender

VII. It is also recommended that the sentences imposed on the perpetrators of sexual offence cases must always take into account HIV/Aids, stigma and humiliation suffered and the effect to women's integrity. It is further recommended that criminal proceedings should be followed by civil proceedings in order to compensate the victims for all the injuries suffered.

VIII. Additionally, I recommend that Parliament should amend the Subordinate Courts Act so that magistrates have the power to impose maximum sentence for these sexual offence cases. This will also help to expedite the prosecution of these cases without referring them to High Court as the case is now.

IX. It is also my recommendation that the Ministry of Education should initiate a deliberate policy in the education curriculum that will include gender equality as a subject so as to inculcate in the minds of the upcoming generation a culture of equality between men and women.

X. Additionally, it is recommended that there should be an equal representation of both men and women in the judiciary and legislative bodies so as to achieve gender balance in the enactment of the law and dispensation of justice.

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