

INTERNATIONAL LAW, WOMEN'S RIGHTS AND THE COURTS: A ZAMBIAN PERSPECTIVE¹

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Introduction

Zambian law and jurisprudence dates back to colonial times, when the dual legal system was introduced by the colonial government and it persists to the present day, although the reasons for its retention are very different from those for which it was introduced.

In 1874, the Colonial Office of the British Colonial Government, under the administration of the British South Africa Company, decided that it would apply British common law in its rule of the colonies – being the rules of equity and statute law in force in England on 24 July 1874, the date of the Colonial Charter. However, the juridical relationships of Africans would be governed by customary laws in civil suits “as regards marriages, wills, transfer of property and devolution on intestacy”, as far as customary law was not repugnant to natural justice and equity. The promulgation was made in the Orders-in-Council, has survived all the constitutional amendments since independence, and could be said to be responsible for the perpetuation of the subordination of women.

I argue that, through this promulgation, the Colonial Office intended that in matters of personal law, Africans would be left to resolve their own issues according to their customary laws and practices as the Colonial Office did not want to be entangled in tribal matters that were diverse and intrinsic to different peoples. Thus, for example, provision was made that the High Court would have authority over all persons, whilst providing that nothing would “deprive any person of any benefit of any law or custom not being repugnant to natural justice, equity and good governance.”³

These laws were typical of dual legal systems in Africa.⁴ However, what started under colonial rule as an attempt to preserve customary laws and practices in the personal matters of Africans, translated into the preservation and reinforcement of patriarchy – an unjust social system of inequality between the sexes.

Women's fight for equal rights gained increased recognition in many regional and national legal instruments in Africa after the United Nations Women's Conference in Beijing, China, in 1995.⁵ In the years that followed, the Government of Zambia came up with a National Gender Policy,

1 This paper is a modification of the one presented at the Judicial Colloquium on the Rights of Vulnerable Groups held at Protea Hotel, Chisamba, Lusaka, Zambia, on 26-27 February 2014.

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3 Section 8 of the High Court Procedures and Regulations of 1904. A similar provision is now in section 16 of the Subordinate Courts Act, Cap 28 of the Laws of Zambia.

4 R Seidman “Law and Stagnation in Africa” in M Ndulo (ed) *Law in Zambia* (1984) 271-295 available at http://saipar.org/wp-content/uploads/2013/10/CHP_12_Law_in_Zambia.pdf.

5 United Nations *Fourth World Conference on Women: Action for Equality, Development and Peace*, 4-15 September 1995, Beijing, China.

and passed some laws with gender-neutral language, such as the Matrimonial Causes Act⁶ and the Anti-Gender-Based Violence Act.⁷ These measures have contributed to *de jure* equality to women. Paradoxically, the *de facto* situation of women is very different.

This paper – after discussing women’s rights and the Constitution of Zambia – discusses two examples of how courts in Zambia have ensured gender equality. It further considers the extent to which courts, in domestic litigation, have sought to benefit from developments in women’s rights at the international level, through the application of international human rights law when interpreting constitutional rights provisions.

Women’s rights and the Constitution of Zambia

The Constitution of Zambia⁸ provides for fundamental human rights. Article 11 of the Constitution⁹ prohibits discrimination on the grounds of sex and marital status, *inter alia*; while articles 23(1) and (2) provide the most encompassing statements that can be attributed to gender equality and women’s rights. In article 23(4)(c), however, the guarantees of fundamental rights, given by the right hand, are taken away by the left, as that sub-article excludes the application of anti-discriminatory provisions to matters of personal law, tribal customs, and traditional practices.¹⁰ Personal law represents particularly pernicious discrimination against women, because often a man, as head of the family, is endowed with roles that are superior to women. Personal law includes laws related to marriage, divorce, maintenance, custody of children, property rights, and, in many cases, participation in societal affairs.

I argue that while the Constitution is the highest law of the land, by exempting personal law from the anti-discriminatory provisions under the Bill of Rights, the Constitution is subordinating itself to traditional laws and practices.

It may be argued that this constitutional provision was passed on from the Orders-in-Council of the Colonial Office and inherited from the Zambia Independence Order of 1964, which established the Independence Constitution of Zambia. In my view, the Colonial Office considered it a fundamental right that indigenous people, men and women alike, be governed by their own laws in personal matters and provided for this in the Bill of Rights as a protectionist measure. Yet, article 23(4)(c) arguably protects customary law, which is blatantly discriminatory, from constitutional scrutiny.¹¹

6 Act No. 20 of 2007.

7 Act No. 1 of 2011.

8 Act No. 17 of 1996.

9 Article 11 – “It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status ...”

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

Article 23(2) – “Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.”

Article 23(4) – “Clause (1) shall not apply to any law so far as that law makes provision – (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.”

11 It should be noted that courts have increasingly sought to limit the applicability of exception type clauses such as those in article 23(4)(c). See for example *Rono v Rono* (2005) AHRLR 107 (CA) and *Ramantele v Mmusi and Others*, CAGCB-104-2012

In this context, there have been some judgments from the Zambian courts which sought to enforce women's right to equal treatment. In *Nawakwi v Attorney General*,¹² Nawakwi, a single mother, was required to submit forms to the passport office, signed by the father of her children, before the passport office could endorse the children in her passport. She successfully challenged the requirement, because no such requirement existed in the case of a man. Nawakwi relied on the constitutional provision that guaranteed equality of every person in Zambia, regardless of race, place of origin, political opinion, colour, creed, sex, or marital status. The High Court held that a single-parent family headed by a male or female constituted a recognised family unit in Zambian society and that the failure to endorse her children in her passport amounted to unfair discrimination on the ground of sex.¹³

After evaluating the applicant's case, the late Musumali CJ, held that discrimination based on gender had to be eliminated from society:

In my considered view it is not at all justified from whatever angle the issue is looked at, for a father to treat himself or to be treated by the institutions of society to be more entitled to the affairs of his child/ren than the mother of that child or those children ...

Here the petitioner is both the father and mother of the two children. She is an unmarried mother. She is bringing up her two children without a husband. Now is it fair for this society to have to require of her to have been or to be married in order for certain things to be possible to be done for her children? The answer, in my considered view, is in the negative! It is in the negative because firstly the reality of her situation and of many others like her, is that she has illegitimate children; and secondly because discrimination based on gender only has to be eliminated from our society. Men and women are partners and not only partners but equal partners in most human endeavours. They must be treated equally.

The other landmark decision, also by Musumali J, is *Longwe v Intercontinental Hotel*.¹⁴ Longwe sued Intercontinental Hotel, seeking, *inter alia*, declarations pursuant to articles 11 and 23(2) of the Constitution. Briefly, the facts are that Sara Longwe, a pregnant woman, had been at the Intercontinental Hotel, attending a workshop hosted by the Zambia Association for Research and Development (ZARD). She was one of the organisers of the event. After the closure of the workshop, she remained in the conference room to pack materials, and then followed her colleagues to Luangwa Bar in the hotel for refreshments. She was refused entry on the ground that she did not have male company, which was a requirement by the hotel for women wanting to go into the bar. She challenged that requirement and argued that Zambia had ratified many international and regional treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and was a party to the African Charter on Human and Peoples' Rights (ACHPR). She also quoted the Bangalore Principles of Judicial Conduct.¹⁵

(CA).

12 1990/HP/1724 (HC). See M Hansungule "Domestication of International Human Rights Law in Zambia" in M Kilander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 83-108, 76.

13 The Court refers to sex and gender interchangeably in this judgment.

14 1992/HP/765 (HC). This case is also referred to in SB Nkonde "Judicial Decision-Making and Freedom of Expression in Zambia: The Case of *People v Paul Kasankomona*" in this publication.

15 The Bangalore Principles of Judicial Conduct (2002) adopted by the Judicial Group on Strengthening Judicial Integrity, as

It must be noted that the respondent, Intercontinental Hotels, had argued that constitutional provisions apply to state actions and public bodies or offices only and that their application is vertical and not horizontal, as between private individuals.

The judge rejected that argument, referring to the definition of human rights used by Louis Henkin,¹⁶ who said that human rights are:

... claims which every individual has, or should have, upon the society in which he/she lives. To call them human [rights] suggests that they are universal: they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development. They do not depend on gender or race, class or status.¹⁷

Musumali J concluded that “the Constitutional provisions in this country are intended to apply to everybody: public or private persons unless the context otherwise dictates”.¹⁸ He also pointed out that most, if not all rights guaranteed in the Bill of Rights, are also covered by personal or private law, such as the law of torts or criminal law, and that an aggrieved party had a choice to proceed under the Bill of Rights or under another branch of the law – “[t]he golden choice in this regard is the aggrieved person’s”.¹⁹ He ordered that the regulation be scrapped forthwith on the basis that it discriminated on the grounds of sex.²⁰

The *Longwe* decision was not appealed against, and remains law until over-ruled or reversed by the Supreme Court. However, this has not meant that other hotels stopped discriminating against women. Five years after the decision in *Longwe*, a similar situation occurred at another hotel in Lusaka.²¹ In *Mwanza and Mulenga v Holiday Inn Garden Court Hotel*,²² two women were refused admission to the Holiday Inn by a security guard because they were not in the company of a man. Notably, even though the judge said he was well aware of the facts of *Longwe*, no reference was made to the arguments on which that decision was based. The petition was dismissed on the basis that the two women were allegedly intoxicated and thus the hotel had a legitimate reason to deny them entry.

The relevance of international law in domestic litigation on women’s rights

The *Longwe v Intercontinental Hotel*²³ judgment is particularly important because it promotes the recognition of international human rights law and its relevance in adjudicating disputes in domestic courts.²⁴

revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

16 L Henkin “Rights: Here and There” (1981) 81 *Colum L Rev* 1582, 1582.

17 Cited in *Longwe v Intercontinental Hotel* 1992/HP/765, J15.

18 *Longwe v Intercontinental Hotel* 1992/HP/765, J16.

19 *Id* J17.

20 *Id* J20.

21 See a discussion on the policy of hotels to refuse women, and on the *Longwe* and *Mwanza and Mulenga* cases in S Longwe “Case Study: Legal Action to Stop Hotels Discriminating against Women in Zambia” (2011) 15 *Feminist Africa* 83-104.

22 1997/HP/2054 (HC). See: M Hansungule “Domestication of International Human Rights Law in Zambia” in M Kilander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 83-108, 76.

23 1992/HP/765 (HC).

24 For a discussion on the relevance of international law in domestic courts, see RE Kapindu “The Relevance of International Law

After analysing the facts and the constitutional provisions, Musumali J concluded:

Before I end, I have to say something about the effect of International Treaties and Conventions which the Republic of Zambia enters into and ratifies. The African Charter on Human and People's Rights and the Convention on the Elimination of All Forms of Discrimination Against Women are two such examples. It is my considered view that ratification of such documents by a nation State without reservations is a clear testimony of the willingness by that State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of the Treaty or Convention in my resolution of the dispute.

As for documents such as the Bangalore Principles, I am of the view that they do not enjoy the same status as the Treaties and Conventions. This is because it is my very considered view that in the separation of powers principle, I do not think that a meeting of jurists in an international forum can make resolutions which are binding on their respective States, in law. I am of the strong view that such powers are entrusted in the executive wing of the State. So whilst it is not wrong to take note of such resolutions I think it is a misdirection in law to treat them as standing at par with Treaties and Conventions entered into and ratified by the executive wing.²⁵

Subsequently, and in a similar vein, Ngulube CJ, in the often-cited High Court case of *Sata v Post Newspapers Ltd and Another*,²⁶ held:

I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation but also because the opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to have a persuasive value. At the very least, consideration of such decisions may help us to formulate our own preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent. What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in the various jurisdictions can have or have had a uniform approach. For one thing, as the examples I have quoted show, the right to free expression and free speech is qualified by exceptions, in some cases more heavily than in others. For another, we are at different stages of development and democratisation and the courts in each country must surely have regard to the social values applicable in their own milieu.²⁷

While the above passage by Ngulube CJ shows both an acceptance of reference to international law and a caution against its use, the first part of the passage has been quoted as authority for referring to international law in the more recent High Court case of *Kingaipe and Another v Attorney General*,²⁸ where Muyovwe J noted:

This court is at large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision

in *Judicial Decision-Making in Malawi*³⁰ in this publication.

25 *Id* J19.

26 [1995] ZMHC 1.

27 *Id*.

28 2009/HL/86.

made by other courts on any aspect of the law is worth considering.²⁹

Ngulube CJ has, however, re-emphasised the need for caution in the Supreme Court case of *Mmembe and Mwape v The People*.³⁰ Nevertheless, the Supreme Court has, at times, taken considerable note of comparative jurisprudence to interpret constitutional rights – even if not explicitly acknowledging that it is doing so.³¹

In *Attorney General v Clarke*,³² in which the respondent claimed a violation of his rights to freedom of expression and non-discrimination, the Supreme Court said:

We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws.³³

Interestingly, the extent to which courts can use international law to interpret constitutional rights has most often been raised in cases relating to freedom of expression and freedom from discrimination. This is precisely because the Constitution of Zambia, in its current form, contains outdated limitations which inhibit rights unless interpreted within a broader international human rights framework. That said, the Supreme Court's hesitance to embrace international customary law and international treaties to which Zambia is a signatory, is disappointing. A stronger formulation in line with other courts in the region would have been that courts must have regard to international treaties to which a state is party, even if not domesticated, unless explicitly contradicted by existing domestic law.

In Botswana, in *Attorney General v Dow*³⁴ – a landmark case on the rights of children to citizenship where only the mother is a citizen of Botswana – consideration was taken of various international instruments in deciding whether the constitutional guarantee of equality included discrimination based on sex. The Botswana Court of Appeal held that courts ought to interpret legislation in a manner that gives effect to international instruments to which the state of Botswana is a party, even though such instruments have not been enacted by Botswana:

Botswana is a signatory to this Charter [ACHPR]. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned judge a quo made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of

29 *Id* J42.

30 ZMSC Case No. 4 of 1996.

31 See for example *Mulundika and Seven Others v The People* Case No. 95 of 1995 (SC). In that case, Ngulube CJ held that a provision of the Public Order Act violated the rights under articles 20 and 21 of the Constitution of Zambia. The Court cited comparative jurisprudence from a range of countries and regional courts in support of its argument, and declared the provision null and void.

32 2008 (1) ZR 38.

33 *Id* at para. 69.

34 1992 BLR 119 (CA). This case is also discussed in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" and SB Nkonde & W Ngwira "Accused's Rights and Access to Prosecution Information in Subordinate Courts in Zambia" in this publication.

enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution ... [W]e should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations ... Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.³⁵

The Kenya Court of Appeal case of *Rono v Rono*³⁶ is also instructive. Section 82 of the Constitution of Kenya is similar to article 23 of the Constitution of Zambia. The case dealt with distribution of the deceased estate of a man who had been in a polygamous marriage, and who had sons from one marriage and daughters from the other marriage. On appeal, all three judges agreed that there could be no basis for distinguishing between sons on the one hand, and daughters on the other. Despite being a dualist country, the Court held that international law was relevant in consideration of the case and interpretation of the exception to the prohibition against discrimination. The Court acknowledged that "current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation".³⁷ The Court cited the *Longwe* case, with approval. Waki JA further cited Principle 7 of the Bangalore Principles, which provide that:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law ...

Waki JA, going a step further than the view expressed above by Msusumali J in the *Longwe* case, held that the Bangalore Principles "amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women".³⁸

Because the Kenya Court of Appeal was so unequivocal in its support of international law, the Kenya High Court was subsequently, in *Estate of Musyoka*,³⁹ able to affirm that – based on *Rono* – international law is applicable in Kenya as part of its law, as long as it is not in conflict with existing law, even without it being adopted by specific legislation. Thus, it was held that the limitations to the prohibition against discrimination which exempted customary law must be read in terms of the provisions of CEDAW and the ACHPR, which require the elimination of discrimination against women.

35 *Id* 153-154.

36 (2005) AHRLR 107.

37 *Id* at para 21.

38 *Id* at para. 21.

39 Succession Cause 303 of 1998.

It is submitted that the approach set out by the Courts of Appeal in Kenya and Botswana is a progression from the approach to international law adopted by the Supreme Court of Zambia and courts in Zambia should follow suit.

Conclusion

While customary laws and culture are important for a people's heritage, it is within the power of government to repeal those laws that are repugnant to natural justice and good conscience, and which hinder development of the law in line with international law. A number of courts have taken on the role of ensuring gender equality within the realm of customary law and many courts in Africa have used the country's international legal obligations to ensure gender equality.