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The Dormant Clause:

How the Failure of the Repugnancy Clause has allowed for  
Discrimination against Women in Zambia

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## **Abstract**

Zambia's system of dual legalism seeks to unite its unwritten customary law with post-colonial statutory law. However, select customary law traditions clash with human rights statutes promoting gender equality. Though the repugnancy clause should promote the supremacy of written law in such discrimination cases, it has not been utilised effectively. This paper argues that the inconsistent application of the clause stems from various sources: vagueness in wording, colonial history, and inadequate direction provided to Local Court Magistrates. The statutory exception in Article 23(4) of Zambia's Constitution exempting customary law from review in discriminatory matters further distorts the boundaries of when the clause applies. This paper is based on fieldwork and interviews conducted in Lusaka, Zambia, in June and July of 2013.

## Abbreviations

AMCAA	Affiliation and Maintenance of Children Act
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
GIZ	Gesellschaft für Internationale Zusammenarbeit
HIV	Human Immunodeficiency Virus
LCM	Local Court Magistrate
NGO	Non-Governmental Organization
NGOCC	Non-Governmental Organizations Coordinating Council
NLACW	National Legal Aid Clinic for Women
UNZA	University of Zambia
WLSA	Women and Law in Southern Africa Trust Zambia
ZLDC	Zambia Law Development Commission

## Introduction

Regardless of Zambia's domestic and international legislation proclaiming equal treatment for women, women continue to face prejudice in the judicial system. This paper argues that this discrepancy exists due to the failed implementation of the repugnancy clause, the provision of the Zambian constitution that dictates the boundary between customary and statutory law. First, this paper explains the development of Zambia's dual legal system. Under colonial rule, the system was first implemented to introduce statutory law while allowing native residents to be governed under African customary law. Next, this paper discusses Zambia's constitution as well as its ratification of international treaties and explains why these statutes are unable to protect women from discrimination under customary law. Following this explanation, this paper outlines the history of Zambia's Local Courts, which have original jurisdiction over many personal matters under customary law, such as divorce settlements and property inheritance. While the repugnancy clause restricts the authority of the Local Courts to discriminate in these cases by outlawing any customary law that is "repugnant to natural justice or morality or incompatible with the provisions of any written law", this clause is rarely implemented. We argue that this infrequent use of the clause is a result of its vague wording, colonial history, and the inadequate direction provided to Local Court Magistrates (LCMs). Subsequently, we illustrate cases demonstrating how an active application of the repugnancy clause could counter customary practices that discriminate against women. Finally, we discuss areas for further study to prevent continued discrimination against women in customary law. Limitations for this study are included in the Appendix section.

This report was conducted by reviewing the existing literature on the repugnancy clause in Southern Africa. Interviews were held with Boma and Chelstone LCMs, as well as senior Local Court officials, women's legal advocacy non-governmental organisations (NGOs), and individual researchers. This report is based on fieldwork that took place in June and July of 2013.

## Dual Legal System

After attaining independence from Britain in 1964, Zambia adopted and practised a system of dual legalism. The two legal systems in place are the customary law system and the statutory law system. These systems are an outgrowth of the colonial division of common law (later statutory law) to the English and the administration of customary law to Africans. Following a pattern of indirect rule, the British generally preferred to maintain African legal structures during colonial occupation.<sup>3</sup> As a result of this strategy, statutory law was introduced not with the intention to oust customary law, but rather to operate concurrently with the other.

Customary and statutory law each possess a distinct set of characteristics. Customary law pertains to the unwritten set of indigenous and traditional rules that each tribe uses to govern its people. Although customary law differs by tribe throughout Zambia, all groups share a similar foundation of beliefs and values in their tenets.<sup>4</sup> Customary law tends to be

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<sup>3</sup> T. W. Bennett, "Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe". *The International and Comparative Law Quarterly* (January 1981): 64.

<sup>4</sup> "The general principles of African customary law are well known, even though they are not written down. For example, it is well known that if a man commits adultery with another man's wife, he has to pay compensation to the husband. If any court denied the existence of this law, everyone would say the court was wrong," Zambia Law Development Commission, *Matrimonial Causes Act Study* (Lusaka: Zambian Law Development Commission, n.d.), 2.

more static in rural communities than in urban areas. Most Zambians use this indigenous law as a model of governance in their behaviour, especially when pertaining to “marriage, inheritance, and traditional authority”.<sup>5</sup> Chuma Himonga divides customary law into two categories, official and living, which she claims are often different from each other. Official customary law refers to formalised African custom that serves as precedent in court matters and is recorded in textbooks. Living customary law refers to the routine “customary practices or norms observed by people living under customary law in their day to day lives”. Living customary law changes in response to the current reigning values, while official customary law remains more static and is often filtered through a western perspective.<sup>6</sup>

Certain traditions cited today as African custom are in fact an outgrowth of the English interpretation of customary laws. For example, one customary practice dictates that children are kept with their mother until they are seven years old. Such a practise was actually derived from Victorian law.<sup>7</sup> Some customary laws reflect Zambia’s collectivist nature, as they place a high value on reconciliation at the family and community level. However, other customary laws contain patriarchal practices that are discriminatory towards women, such as polygamy. Many modern day activists believe that this system of law undermines women as “second class citizens”.<sup>8</sup> In this respect, customary law is at odds with modern statutory law, which often promotes equality amongst the sexes.

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<sup>5</sup> Muna Ndulo, "African Customary Law, Customs, and Women's Rights," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 88.

<sup>6</sup> Chuma Himonga, "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" *The South African Law Journal* (2000).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., 89.

To reconcile the two separate customary and statutory legal systems, Zambia implemented dual legalism. This model allows for both systems to coexist under a single constitution and for citizens to choose by which set of law to be governed. However, because statutory law can dictate the validity of customary law in certain aspects, statutory law maintains a degree of supremacy over customary law. The illegalisation of sexual cleansing serves as an example.<sup>9</sup> Sexual cleansing was once a widespread practice under customary law, but was outlawed in 2011 by the Anti-Gender-Based Violence Act. A legal obstacle to apply this approach to customary practices that discriminate against women is presented in Article 23(4) of the Zambian constitution. As discussed further below, this provision exempts customary law from scrutiny when relating to discrimination.

## **Constitution**

Since 1991, Zambia has incorporated anti-gender discrimination provisions into its Constitution. Article 23, Clause 1 of the Constitution pertains to anti-discrimination, stating that “a law shall not make any provision that is discriminatory either of itself or in its effect”.<sup>10</sup> Discrimination is defined in the Article as “affording different treatment to different persons attributable, wholly, or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed”.<sup>11</sup> However, this anti-discrimination clause is limited in its application by Section 4(d) of the same article. Section 4(d) of Article 23 states that Clause 1: “...shall not apply to any law so far as that law makes provision ... for the application in the case of members of a particular race or

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<sup>9</sup> A tribal custom in which female widows must sleep with their deceased husband’s relative in order to remarry.

<sup>10</sup> Refer to Appendix IV; Constitution of Zambia, art. XXIII, cl.1.

<sup>11</sup> Ibid.

tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons”.

This clause restricts statutory powers of review against customary law when dealing with discrimination. Even though Zambia’s constitution prohibits discrimination, Article 23(4) (d) exempts customary law from this provision. As a result, this greatly hinders the judiciary’s ability to mould customary law to accommodate prevailing gender equality movements.

## **International Treaties and Protocols**

In 1985, Zambia became a state-party to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). Adopted by the UN General Assembly in 1979, this initiative seeks to end different forms of discrimination against women. Zambia also adopted the Beijing Platform for Action in 2000, which seeks to promote gender equality by “removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making”.<sup>12</sup> In addition, Zambia is a state party to the African Charter on Human and People’s Rights, as well as the Protocol to the African Charter on the Rights of Women in Africa. The latter urges signatories to “take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist”.<sup>13</sup>

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<sup>12</sup> United Nations Entity for Gender Equality and the Empowerment of Women, "The United Nations Fourth World Conference on Women," last modified 1995, <http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm>, accessed July 19, 2013.

<sup>13</sup>African Charter on Human and People's Rights, "Protocol to the African Charter on Human and People's Rights on the Rights of Women". n.d., [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf), accessed July 19, 2013.



Indubitably, Zambia has signed on to a wealth of international treaties that promote women's rights. Nevertheless, there is a significant problem in enforcing international legislation due to Zambia's dualist common law doctrine. Under this system, "ratified international treaties do not form part of domestic law".<sup>14</sup> Zambia considers itself unobligated to follow international provisions unless those provisions have been first incorporated into domestic law through legislative action. Accordingly, individuals cannot bring suit pertaining to a breach of international legislation if that legislation is not reflected in domestic law. Because current domestic law, primarily Article 23(4)(d), allows certain forms of discrimination, international protocols are ineffective in tackling issues of discrimination against women.

### **Structure of the Local Courts**

Zambia's judiciary is composed of five sections: the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts, and the Local Courts. The lowest level of courts is the Local Courts, whose jurisdiction lies exclusively in customary law. The Local Courts were established by the Local Courts Act of 1966. This Act specifically provided for the "recognition and establishment of Local Courts to amend and consolidate the law relating to the jurisdiction of and procedure to be adopted by Local Courts".<sup>15</sup> The Local Courts were meant to replace Traditional Courts, but Traditional Courts still exist.<sup>16</sup>

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<sup>14</sup>Fergus Kerrigan, Lungowe Matakala, Wilfred Mweenya, Charles Dinda, and Miriam Moller, *Access to Justice in the Republic of Zambia: A Situation Analysis Carried Out on Behalf of the Governance Secretariat* (The Danish Institute for Human Rights, 2012), 36.

<sup>15</sup>Local Courts Act, art. 1.

<sup>16</sup> Zambia Law Development Commission (ZLDC), *Review of the Local Court System. Study* (Lusaka: Zambia Law Development Commission, 2006).

Traditional Courts developed based on the different judicial traditions throughout Zambia. While they are not recognised by the government, traditional rulers nonetheless staunchly defend their authority. These traditional rulers apply customary law, and are especially popular among rural areas, where they are much more accessible within villages than the Local Courts.<sup>17</sup> Although LCMs are not bound by Traditional Court decisions, most “indicated that they defer to the authority of traditional leaders and Traditional Courts in at least some instances”.<sup>18</sup> In fact, as many as 55% of LCMs deferred cases “mainly involving witchcraft, land disputes and conflicts within and between families to the Traditional Courts”.<sup>19</sup>

Local Courts are found all over the country, and are present in all ten provinces. As of 2013, there are over 500 Local Courts throughout the country, a number that continues to grow.<sup>20</sup> While each Local Court is mandated to have at least two or three magistrates, in practice this is not always the reality. Due to lack of funding, many of the Courts have only one presiding magistrate or are completely unable to operate. While there are over 500 Local Courts, there are only 551 LCMs on staff, indicating that many Local Courts lack more than one magistrate on the bench. Moreover, infrastructure in Local Courts remains a continuous issue. Some districts do not have a local courthouse, or the courthouse jointly

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<sup>17</sup> Ibid., 53.

<sup>18</sup> Fergus Kerrigan, Lungowe Matakala, Wilfred Mweenya, Charles Dinda, and Miriam Moller, *Access to Justice in the Republic of Zambia: A Situation Analysis carried out on behalf of the Governance Secretariat*, (The Danish Institute for Human Rights, 2012), 232.

<sup>19</sup> Ibid.

<sup>20</sup> Senior Local Court Officer, interview by Pamela Amaechi and Erica Mildner, June 2013.

functions as a clinic, market, or church due to insufficient space.<sup>21</sup> Lack of infrastructure led one Local Court to hold its proceedings under a tree.<sup>22</sup>

The Local Courts handle the highest volume of cases in the judiciary. According to a study published by the ZLDC in 2006, “Local Courts cater for more than 80% of the population in dispute resolution”.<sup>23</sup> An interview of Boma Local Court Magistrates revealed that they often preside over and deliver judgment on 10-20 cases per day. Since Local Courts are not courts of record, these judgments do not take into account case law from other Local Court rulings. These courts are considered highly accessible because of their low access costs, fast turnover of justice, and close proximity to population centres. The use of local languages in Local Court proceedings adds to their accessibility. The cases most often brought to the Local Courts revolve around divorce, defamation/insults, unpaid debts/credit issues, and virginity damage.<sup>24</sup> The personal nature and high volume of cases brought before the Local Courts cause LCMs to play a pivotal role in determining the daily lives of the average Zambian woman.

The Local Courts mainly handle customary law in their proceedings, except when served a rare mandate from a higher court or authority. One mandate, issued in 2007, involved the cessation of marriage interference cases. Marriage interference is defined as the intrusion into a marriage by another outside party. Due to the living nature of customary law, marriage interference arose over time to be recognised as a significant

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<sup>21</sup> Director of the Local Courts, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>22</sup> Professor at University of Zambia School of Law, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>23</sup> Zambia Law Development Commission (ZLDC), *Review of the Local Court System* (Lusaka: Zambia Law Development Commission, 2006).

<sup>24</sup> Fergus Kerrigan, Lungowe Matakala, Wilfred Mweenya, Charles Dinda, and Miriam Moller, *Access to Justice in the Republic of Zambia: A Situation Analysis carried out on behalf of the Governance Secretariat*, (The Danish Institute for Human Rights, 2012), 231.

tradition. Suing for marriage interference was a means for wives to hold their husbands accountable for adulterous behaviour, since they cannot sue their husbands for adultery. The Local Courts became inundated with hearing these types of cases, which were often based on hearsay evidence. In 2007, the Director of the Local Courts issued a directive to cease these cases, stating that the “whole issue of marriage interference is an alien concept to our customary laws and hence it must not be practised in the Local Courts”.<sup>25</sup> Despite the Director’s reasoning, some have argued that this mandate ignored the living nature of customary law in adopting new traditions, and unfairly “safeguarded male interests” at the expense of women.<sup>26</sup>

## **Repugnancy Clause**

Other than through directives issued by judicial authorities, the Local Courts are limited in their rulings by the repugnancy clause. The purpose of the repugnancy clause is to reconcile any disagreement between customary and statutory law. The repugnancy clause acts to define the boundary between the two legal systems, ensuring that statutory law supersedes customary law where the two conflict. In theory, the repugnancy clause allows customary law to adapt to prevailing values in Zambian society. In the event that written law does not pertain to a section of customary law, customary law is allowed to exist as

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<sup>25</sup> National Legal Aid Clinic for Women, "Marriage Interference," [http://www.nlacw.org.zm/legal/PDFs/MARRIAGE\\_INTERFERENCE.pdf](http://www.nlacw.org.zm/legal/PDFs/MARRIAGE_INTERFERENCE.pdf), accessed July 19, 2013.

<sup>26</sup> Professor at University of Zambia School of Law, interview by Pamela Amaechi and Erica Mildner, July 2013.

long as a judge does not find it repugnant to natural justice or morality. A particular custom must first be formally challenged in court to be declared repugnant.<sup>27</sup>

Section 12(1) (a) of the Local Courts Act contains the repugnancy clause. It states that a “Local Court shall administer the African customary law applicable to any matter before it insofar as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law”.<sup>28</sup> The Local Courts Handbook, a guide given to LCMs as a means of training, defines natural justice as a streamlined and fair means to determining guilt and retribution. The Handbook defines morality as “the sense of rightness or decency”, and defines repugnancy to morality as “anything which offends [this] or is contrary to fundamental human rights”.<sup>29</sup> The Handbook provides examples of when to apply the repugnancy clause, instructing that statutory law takes precedence over customary law whenever there is an inconsistency. Beyond the examples in which the law is inconsistent, there are no examples to clarify when the “natural justice or morality” provision of the repugnancy clause should be used.

Although the repugnancy clause exists to reconcile customary and statutory law, it is rarely, if ever invoked. It is therefore unsuccessful in promoting justice and reducing gender discrimination. Reasons for the failure of the clause include its inherent vagueness, the lack of training among LCMs, personal subjectivity from society’s perception of women, and history’s designation of repugnancy as a colonial instrument.

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<sup>27</sup> Dean of University of Zambia School of Law, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>28</sup> Local Courts Act, §12, cl.1, a.

<sup>29</sup> Refer to Appendix III, I. B. Masupelo, ed., "The Local Court Handbook," Lusaka, 28 August 1996.

### *Vagueness in the Wording of the Clause*

Both provisions of the repugnancy clause are considerably vague and ambiguous. The first provision does not define the terms natural justice or morality, while the second provision fails to clarify the degree to which written law must be contradicted to be repugnant. The dilemma is aggravated by unclear guidelines over which system of morality, African or English, to use in the application of the clause. Further contributing to this confusion is the Supreme Court's failure to establish a legal standard or test to determine what qualifies as repugnant. The vagueness in the clause is such that it can be applied either narrowly to only the most egregious violations, or broadly to prevent any perceived injustice or immorality.

### *Lacking of Training among LCMs*

The lack of training provided to LCMs additionally contributes to the ineffective application of the repugnancy clause. Before appointment to the bench, LCMs are not required to have prior legal experience and are not interviewed as to their understanding of customary or statutory law.<sup>30</sup> According to the Director of Local Courts, LCMs no longer anchor most of their decisions in customary law and base their decisions in "conscience", referring to an assessor<sup>31</sup> when necessary.<sup>32</sup> LCMs undergo two weeks of training, during which they are ideally given a copy of the Local Courts Act as well as the Local Court Handbook. They are additionally encouraged to attend post-training workshops, many of which are sponsored by GIZ. However, lack of funding often prevents the dissemination of

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<sup>30</sup> Director of the Local Courts, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>31</sup> An expert consulted in matters referring to a tribe's specific customs.

<sup>32</sup> Director of the Local Courts, interview by Pamela Amaechi and Erica Mildner, July 2013.

training materials, as well as opportunities to attend the workshops. In the small sample of Local Courts visited in Lusaka, only one of six magistrates interviewed was able to produce a copy of the Handbook. One male magistrate expressed that the Local Court Handbooks were hard to come by, and that he was forced to source from other places.<sup>33</sup> In addition, the Handbook is rarely updated to reflect prevailing international human rights norms and contains little guidelines as to what could qualify as a repugnant practice.<sup>34</sup> With little access to handbooks, funds to attend workshops, or written guidelines on what qualifies as a repugnant practice, magistrates are limited in their knowledge of how to apply the repugnancy clause. In fact, an interview with LCMs in Chelstone revealed that they were unfamiliar with the clause's existence. To address this problem, the Director of the Local Courts articulated that the judiciary is organising a pilot course with 30 LCMs to educate magistrates on human rights issues and the repugnancy clause.

Because many LCMs are unfamiliar with statutory law, they may be unsure as to what the boundaries of their jurisdiction are or when to apply the repugnancy clause.<sup>35</sup> For example, the LCMs interviewed agreed that the act of sexual cleansing was repugnant. When asked why it was repugnant, however, no LCM interviewed specifically cited case law or the Anti-Gender- Based Violence Act as the impetus. Rather, they cited common sense as their reasoning. Even though the LCMs' rulings do not conflict with written statutes in this case, their lack of knowledge about statutory law poses dangerous implications if they are unaware of a conflict between their judgment and written law.

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<sup>33</sup> Local Court Magistrate, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>34</sup> National Legal Aid Clinic for Women, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>35</sup> Ibid.

Local Court Officers receive several daily complaints requesting that Local Court decisions be reviewed in compliance with written law, prompting disciplinary committee hearings to investigate.<sup>36</sup> The effects resulting from LCMs' inadequate knowledge of statutory law are exacerbated by the fact that "there are almost no meaningful appeals from the Local Courts on customary law cases due to the practical necessity for an advocate in the higher courts" since "more than 80% of Zambians who go to Local Courts on issues of customary law generally cannot afford an advocate".<sup>37</sup> Consequently, the magistrates who have the least amount of legal training in the judicial hierarchy often make the final decision in determining access to justice for women.

### *Personal Subjectivity*

Many LCMs have a conservative outlook on customary law and rule in favour of maintaining customary legal norms. As such, some LCMs are reluctant to rule in a liberal or progressive manner that would challenge customary norms, resulting in inconsistent interpretations of the repugnancy clause. Besides the practice of sexual cleansing, the LCMs interviewed did not have consistent answers as to when the clause should be applied. When interviewing two female LCMs in Boma, they expressed that they would use the repugnancy clause to prevent discrimination against women. On the other hand, a male LCM at the same court articulated that while discrimination against women in customary law is unjust, it would be uncouth for him to betray Zambia's longstanding customary

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<sup>36</sup> Director of the Local Courts, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>37</sup> Zambia Law Development Commission (ZLDC), *Review of the Local Court System* (Lusaka: Zambia Law Development Commission, 2006), 24.



tradition. He referred to this predicament as his “hands being tied”.<sup>38</sup> Despite this ambiguity, the Senior Local Court Officer stated that this clause should be used to prevent customary practices that discriminate against women.<sup>39</sup> However, without any directive on the use of the repugnancy clause from a higher court or government authority, it is unlikely that the repugnancy clause will be applied uniformly to prevent continued discrimination against women in customary law.

Gender also plays a role in influencing the personal subjectivity of the Magistrates. Men, especially in the rural areas, are more encouraged than females to attain an education. While there is parity in education until grade one, this equality drops off after grade seven, right before secondary school begins.<sup>40</sup> To meet the requirements for becoming an LCM, an applicant must have at least completed Grade 12. The disparity at the secondary school level means that men are more likely to be considered for an LCM position. As of 2013, over 77% of appointed LCMs are male.<sup>41</sup> At the traditional courts, a sample of 268 traditional rulers similarly found that over 80% were male.<sup>42</sup> This finding is especially significant considering that the majority of LCMs indicated deferring to traditional rulers in their decisions. Ndulo points out the danger in men’s overrepresentation in these positions, stating that “such men are more inclined to defend what they see as traditional norms than

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<sup>38</sup> Local Court Magistrate, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>39</sup> Senior Local Court Officer, interview by Pamela Amaechi and Erica Mildner, June 2013.

<sup>40</sup> Executive Director of the Non-Governmental Organisations’ Coordinating Council, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>41</sup> See Appendix II.

<sup>42</sup> Fergus Kerrigan, LungoweMatakala, Wilfred Mweenya, Charles Dinda, and Miriam Moller, *Access to Justice in the Republic of Zambia: A Situation Analysis carried out on behalf of the Governance Secretariat*, (The Danish Institute for Human Rights, 2012).

the living law of communities".<sup>43</sup> Thus, personal subjectivity on the basis of gender inhibits progressivism.

### *History of the Repugnancy Clause*

The conservative and discriminatory application of the repugnancy clause dates back to its colonial history. The British instituted the repugnancy provision to ensure that customary law would be respected, but that English common law would always take precedence if the two systems came into conflict.<sup>44</sup> In Zimbabwe, English colonial rulers did not give "blanket recognition" to customary law, which allowed for practices such as killing of twins, trial by ordeal, and non-consensual marriage.<sup>45</sup> Courts found such customs "obviously immoral" and adapted their application of the clause to that standard. Therefore, even though there is the potential for the clause to be applied more expansively due to its broad wording, interviews at the Boma and Chelstone Local Courts reveal that LCMs have sustained a conservative approach. This approach is exemplified in the case of polygamy. While courts did not rule polygamy itself to be repugnant, they have found that taking on extra wives solely for the sake of sexual slavery or forced labour to be repugnant.<sup>46</sup> The clause's British origin has further reinforced the conservative application of the clause, as "it has been regarded as a white man's tool of looking down on African

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<sup>43</sup> Muna Ndulo, "African Customary Law, Customs, and Women's Rights," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 96.

<sup>44</sup> T. W. Bennett, "Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe," *The International and Comparative Law Quarterly* (January 1981): 83.

<sup>45</sup> *Ibid.*

<sup>46</sup> Anonymous, interview by Pamela Amaechi and Erica Mildner, July 2013.

customs and tradition”.<sup>47</sup> LCMs may be reluctant to use the clause if they believe it will “westernize” their traditions.<sup>48</sup>

Besides its conservative application, another legacy of the repugnancy clause includes its propagation of gender discrimination. Because the repugnancy clause was introduced by a colonial power with many patriarchal practices in its legal system, these biases carried over in the implementation of the clause. While the colonial courts ruled that woman-to-woman marriage was repugnant, practices such as polygamy remained “untouched”.<sup>49</sup> Ndulo proposes that this patriarchal move ironically set a precedent to strike down provisions that empowered women.<sup>50</sup> This history may explain why some LCMs interviewed readily acknowledged that customary law was discriminatory towards women but insisted it was not the place of the repugnancy clause to correct this injustice.

In sum, vagueness in wording, lack of training amongst the LCMs, personal subjectivity, and the colonial origin of the clause substantially contribute to its sparse usage at the Local Court level.

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## Potential Uses of the Repugnancy Clause

While evidence collected suggests that the repugnancy clause is not used at the Local Court level, interviews revealed the clause is used effectively to combat discrimination during appeals to the Subordinate Courts. Justices will overrule Local Court decisions as

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<sup>47</sup>Zambia Law Development Commission (ZLDC), *Matrimonial Causes Act* (Lusaka: Zambia Law Development Commission, n.d.), 247.

<sup>48</sup> *Ibid.*, 90.

<sup>49</sup> Muna Ndulo, "African Customary Law, Customs, and Women's Rights," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 96.

<sup>50</sup> *Ibid.*

long as a clear statutory law exists contrary to customary law.<sup>51</sup> Despite the current narrow application of the repugnancy clause, well-defined legislation forces Statutory Court justices, who are well versed in the law, to invoke the repugnancy clause.<sup>52</sup> The National Legal Aid Clinic for Women (NLACW) states that all cases brought on appeal from the Local Courts to the Subordinate Courts on this basis were overturned. According to NLACW, these judicial victories and advocacy efforts from women's rights organisations have increased the number of appeals from female litigants.

As discussed above, the repugnancy clause is not currently utilised to rectify discrimination against women except on appeal. However, if applied effectively, the clause can remedy common discriminatory practices in the areas of customary marriage and divorce, child custody, and property settlement.

### *Marriage and Divorce*

Women are typically disadvantaged under a customary law marriage. In order for women to marry under customary law, she must be single, unmarried, widowed, or divorced. This same provision does not apply to men, meaning they are free to take on more than one wife.

A woman plays the passive role in marriage. Oftentimes the rights conveyed to her through marriage, such as the right to be "looked after by the husband, and to be provided shelter, food, and clothes" leave her in a state of dependence. In contrast, the man has a more active role. The man customarily has the right to "polygamy" and to "own property",

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<sup>51</sup> Dean of University of Zambia School of Law, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>52</sup> Ibid.

which elevates his social status and enhances his independence.<sup>53</sup> This imbalance in power leaves the husband more able to divorce at will than the wife. While a man can divorce a woman for committing adultery, a woman commonly faces a higher standard to prove that a man committed persistent adultery or habitual criminality to obtain a divorce.<sup>54</sup> Men can also divorce women on the grounds of infertility and barrenness, which often victimises women in divorce proceedings.<sup>55</sup> Because of these factors, many men prefer to marry under customary law, which treats women less equitably.

Under the 2007 Matrimonial Causes Act, there is no difference in grounds for divorce based on gender. According to the Act, courts may grant a divorce if the party filing for divorce proves “that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent”.<sup>56</sup> If the repugnancy clause is applied in the case of grounds for divorce, women would not be held to different standards than men since statutory law would take precedence over custom.

### *Child Custody*

There are many statutes or principles concerning child custody in the judicial system. Upon parental divorce, the Affiliation and Maintenance of Children Act (AMCAA) requires courts to consider the welfare of the child as “paramount” and to disregard “whether ... the

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<sup>53</sup>Women and Law in Southern Africa (WLSA), *The Changing Family in Zambia* (Lusaka: Women and Law in Southern Africa Trust, 1997).

<sup>54</sup> Zambia Law Development Commission (ZLDC), *Matrimonial Causes Act* (Lusaka: Zambian Law Development Commission, n.d.), 31.

<sup>55</sup> Women and Law in Southern Africa (WLSA), *The Changing Family in Zambia* (Lusaka: Women and Law in Southern Africa Trust, 1997).

<sup>56</sup> Section 9(1)(a) of the Matrimonial Causes Act of 2007.

claim of the father in respect of custody is superior to that of the mother”.<sup>57</sup> The Matrimonial Causes Act specifically requires courts to consider the “welfare, advancement, or education of children” when determining custody.<sup>58</sup> Some Local Courts apply a similar “best interest of the child” standard when determining custody, a principle articulated in the UN Committee on the Rights of the Child.<sup>59</sup> However, traditional customary law imparts custody of children based on the matrilineal or patrilineal nature of the tribe. Though statutory law should supersede this custom, an LCM at the Chelstone Local Court expressed that they give custody of children based on the tribal custom of the couple unless the receiving parent appears exceptionally unfit. If the repugnancy clause were used in custody matters, LCMs would be required to decide custody based on the existing statutory law rather than deferring to tribal tradition.

Moreover, LCMs can also apply the clause’s natural justice or morality provision in custody matters, as exemplified in the High Court case *Nkomo vs. Tshili* (1973). In this case, a couple had a child out of wedlock. Upon the father’s death, other relatives desired custody of the child even though the child had primarily lived with his maternal grandmother. The Judge prevented the child from being removed from his grandmother’s care by using the natural justice provision of the repugnancy clause and “interpreted it to mean the child’s ‘best interests’”. While Lungowe Matakala points out that this ruling does not clearly define when the natural justice provision should be used, this case displays

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<sup>57</sup>Section 15.2 of the AMCAA.

<sup>58</sup> *Ibid.*, Section (75)(1) .

<sup>59</sup>Fergus Kerrigan, Lungowe Matakala, Wilfred Mweenya, Charles Dinda, and Miriam Moller, *Access to Justice in the Republic of Zambia: A Situation Analysis carried out on behalf of the Governance Secretariat* (The Danish Institute for Human Rights, 2012), 232.

introduces the potential flexibility of the clause to prevent customary practices that may be discriminatory.<sup>60</sup>

### *Property Settlement*

Traditionally, the right to own property is skewed to benefit men rather than women. Once married, all acquired property of the couple is considered the male's possession, regardless of whether the women helped to obtain it.

#### i) Death of a Spouse

In 1989, Parliament passed the Intestate Succession Act. This Act guarantees a widow 20% of her deceased spouse's estate and divides the rest among relatives. By implementing this new spousal inheritance system, the Act thus removed the traditional form of inheritance through bloodlines and increased fairness for both parties. This Act was hailed as a union of customary and statutory law, since it both respects property rights of the widow while considering the importance of family in a customary marriage.<sup>61</sup> Despite this achievement, the Act remains unclear and difficult to administer in some regards. A common problem is that agricultural property (e.g. animals and farmland) does not divide neatly into percentages.<sup>62</sup> The Act also disadvantages women as it fails to account for the contributions of the surviving spouse to the matrimonial home.<sup>63</sup> Furthermore, a polygamous marriage would force all the wives to share 20% of the property, reducing property rights for women. Finally, the Act does not apply to customary land, negating the

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<sup>60</sup> Lungowe Matakala, *Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambian Laws* (unknown, 2012).

<sup>61</sup> Zambia Law Development Commission (ZLDC), *Matrimonial Causes Act* (Lusaka: Zambia Law Development Commission, n.d.), 51.

<sup>62</sup> O'Brien Kaaba, *Record, 06 19, 2013* (Lusaka: , 2013).

<sup>63</sup> *Intestate Succession* (Lusaka: National Legal Aid Clinic for Women, 2009), 13.

protection of land inheritance for many women in rural areas.<sup>64</sup> Since this Act is statutory law, the application of the repugnancy clause would not change inheritance practices after a spouse dies. To remedy these provisions that disadvantage women, the Act itself would have to be amended.

## ii) Divorce

In a customary law divorce, tribal custom dictates property devolution. Previously, the only property women were entitled to under customary law were their kitchen utensils.<sup>65</sup> The Supreme Court ruled in *Chibwe v. Chibwe* (2000) that the divorcing couple share property equally according to the Ushi customary law, which requires divorce settlements to be “reasonable”.<sup>66</sup> While the Court did divide the couple’s property equally, it still upheld the principles of Ushi custom. Many other tribes do not mandate that property be divided using a standard similar to the Ushi tradition. The Court stayed within the boundaries of Ushi custom after finding no violation of “justice, equity or good conscience” that would be grounds for “depriv[ing] any person of the benefit of African customary law”.<sup>67</sup> The Court exercised judicial restraint in favour of preserving this custom, choosing not to invoke the repugnancy clause. *Chibwe* exemplifies the judicial attitude of deference to customary law, unless in obviously repugnant cases.

As a result, this case does not require LCMs to split a couple’s assets equally, unless required to do so by their custom. In the ZLDC Report on the Matrimonial Causes Act, the Commission found that while some LCMs apply the “50-50 Rule,” most courts do not share

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> *Rosemary Chibwe v. Austin Chibwe*, No. 38 of 2000 (The Supreme Court, December 5, 2000).

<sup>67</sup> Subordinate Courts Act §16.



matrimonial property.<sup>68</sup> One LCM in Chelstone expressed that she believed equal property settlements in divorce were unfair to men, especially in cases where the man was the primary breadwinner and the woman stayed home to take care of the children.<sup>69</sup> In urban areas, such as Lusaka, where there are many interethnic marriages, it is often impossible to apply each tribe's customary law when dividing property. In these cases, LCMs articulated that they try to decide what is "reasonable", or that they use "common sense". The Director of the Local Courts claims that LCMs are given general guidelines on property division but are not provided with case law to inform their decisions.<sup>70</sup>

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## Conclusion

There has been little to no application of the repugnancy clause to change discriminatory practices. One could argue, however, that because Article 23(4)(d) nullifies the repugnancy clause's power to combat discrimination, there is no impetus for the repugnancy clause to be used in this fashion. On the other hand, others point out that the Constitution is a form of statutory law, and courts retain the power to employ the repugnancy clause when custom is "incompatible with the provisions of any written law".<sup>71</sup> As a result, courts could employ the repugnancy clause when custom conflicts with the provisions of the Constitution prohibiting sex discrimination. This debate over the legal basis to combat discrimination in customary law is almost irrelevant considering that every

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<sup>68</sup> Zambia Law Development Commission (ZLDC), *Matrimonial Causes Act* (Lusaka: Zambian Law Development Commission, n.d.), 34.

<sup>69</sup> Chelstone Local Court Magistrate, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>70</sup> Director of the Local Courts, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>71</sup> Lungowe Matakala, *Inheritance and Disinheritance of Widows and Orphans in Zambia: Getting the Best out of Zambian Laws* (unknown, 2012).

LCM interviewed had little or no knowledge of either Article 23(4)(d) or the repugnancy clause. Therefore, even the potential repeal of Article 23(4)(d) through the current constitutional review process would be insufficient to protect women from discrimination unless LCMs are aware of the repeal and are held accountable for enforcing the changes in this provision.

Adding to this discrepancy in justice, Subordinate Court justices who are aware of the repugnancy clause presently invoke it to overturn almost all Local Court rulings involving discrimination.<sup>72</sup> Although Subordinate Courts apply the repugnancy clause in a proactive manner to limit discrimination, many women, especially those who are poor, are unable to access the Subordinate Courts and lack resources to appeal.

Furthermore, Subordinate Courts as well as higher courts may not always issue non-discriminatory rulings that invalidate customary law. In *Sifafula v. Ndango*, Local Courts granted a lump sum maintenance payment upon divorce to a wife married under Lozi customary law. Because customary law makes no provision for maintenance, however, the Subordinate Court struck down this ruling.<sup>73</sup> The *Chibwe* ruling is another example of judicial hesitation to nullify official customary law. In grounding their decision in customary rather than statutory law in *Chibwe*, the Supreme Court echoed a similar unyielding deference to custom. Himonga asserts, in comparison to the Subordinate Courts, that Local Courts are more responsive to changing customs within communities. She argues that Local Courts are more “innovative and dynamic in applying customary law and

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<sup>72</sup> National Legal Aid Clinic for Women, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>73</sup> Chuman Himonga, *Property Disputes in Law and Practice: Dissolution of Marriage in Zambia* (unknown, n.d.)

adapting it to changing social and economic conditions".<sup>74</sup> The higher courts' rigid adherence to official customary law may hinder the natural ability of customary law to be flexible and adapt to society's changing values.<sup>75</sup>

Despite this setback in the higher courts, the NLACW currently finds the Subordinate Courts to be a viable option for women to appeal their discrimination cases. Along with other women's advocacy organizations, the NLACW trains paralegals in rural areas to advise women on their legal right to appeal. Nevertheless, many hurdles remain in ensuring women have the ability to appeal to the Subordinate Courts. Women have only one month to appeal Local Court rulings and are further delayed by the backlog of cases at the Subordinate level.<sup>76</sup> They are additionally discouraged from the appeals process due to intimidation by husbands, high legal fees, and travel costs.<sup>77</sup> As a result of these deterrents, women's activists argue that relying on the appeals system for justice is not a viable solution and that women's rights should be addressed at the community or village level.<sup>78</sup>

The steady increase in the number of female LCMs may yield mixed results for the clause's future. This would rectify the gender imbalance and provide Zambian women with more representation on the bench. However, our interviews with female LCMs in Boma and Chelstone revealed that merely appointing more female LCMs may not change discriminatory attitudes underlying the administration of customary law. Female LCMs expressed biases against equal settlements for women in marriage, divorce, and property cases. In explaining this phenomenon, the Dean of UNZA Law School suggests that Zambia's

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<sup>74</sup> Ibid.

<sup>75</sup> The 1991 amendment to the Local Court Act enables women to access maintenance for a limited period after divorce.

<sup>76</sup> Director of the Local Courts, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>77</sup> Anonymous, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>78</sup> Ibid.

strong Christian ideals, as well as the patrilineal nature of certain African customs, creates an atmosphere of female subservience to men.<sup>79</sup> Adding more women to the judiciary may not safeguard against discriminatory rulings at the Local Court level.

One avenue to increase usage of the repugnancy clause and thus decrease discrimination would be to raise the education standard required of magistrates. The rationale behind increasing the required education level is the assumption that higher education increases knowledge of statutory law. However, doing so creates a distinct trade-off borne of Zambia's dual legality. On the one hand, a higher education requirement increases the statutory law knowledge the magistrates possess. This may, however, reduce the amount of customary law knowledge that they know. Himonga emphasises that hiring laypersons with no statutory law background "minimizes the distortion of customary law through Western legal concepts and perceptions of law".<sup>80</sup> LCMs who have had legal training or westernised education may interpret customary law through an official, rather than living, lens. Still, choosing LCMs with more statutory than customary knowledge may be preferable since magistrates cannot effectively apply customary law if they do not know the boundaries of their jurisdiction. Assessors could then be used to bridge the gap in knowledge of living customary law.<sup>81</sup>

Zambia's dual legal system necessitates a provision that more clearly delineates when each type of law should be used. The differing values, moralities, and principles embedded in the two systems are reflective of two separate notions of justice. It has been left to the

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<sup>79</sup> Dean of University of Zambia School of Law, interview by Pamela Amaechi and Erica Mildner, July 2013.

<sup>80</sup> Chuma Himonga, "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" *The South African Law Journal* (2000).

<sup>81</sup> Professor at University of Zambia School of Law, interview by Pamela Amaechi and Erica Mildner, July 2013.

LCMs to balance these dual identities in their conveyance of justice. Such a task, while of great consequence in the lives of most Zambians, is conferred to magistrates who are largely untrained and unaware of judicial and constitutional issues impacting the public. Magistrates cannot hope to regulate law in a dual legal society while only possessing knowledge of one set of law. Without knowing the boundaries of one's authority, the boundary itself is immaterial.

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## Appendix A: Limitations

The researchers acknowledge the practical limitations of this study. First, the study was conducted in a short time span of two months, limiting the opportunity for interviews with a large sample of LCMs and all relevant NGOs or stakeholders. Since the research was conducted in Lusaka, we were unable to interview LCMs from rural areas. As a result, this paper relies on secondary source information on the operation of Local Courts in these areas. Moreover, our inability to speak the local languages restricted our observation of local court cases. Case law from the Subordinate Courts is rarely digitised, creating another barrier in our study of cases on appeal from the Local Courts. Another limitation of the study is the unforeseeable future of the current constitutional review process. There is a proposal to remove Article 23(4) of the current constitution, which would end the exemption of discrimination against women in customary law. The future of this proposal being endorsed by the draft committee is uncertain. An important area for further research if this Article is removed from the constitution would be to evaluate the change in usage of the repugnancy clause.

Limitations arose in the analysis of the gender imbalance at the local court level. The number of LCMs was drastically reduced in 2009 by 250 LCMs, which was a confounding variable in our research. This decrease was partly due to the new age requirements that forced many magistrates into retirement. Since most of those forced to retire were men, it is difficult for us to say if the increased percentage of female LCMs in recent years is accounted for by successful gender-based recruiting strategies or merely the retirement of the older LCMs, who were largely male.

Finally, we must acknowledge that many of the issues brought up in our research are indicative of broader societal issues. For instance, the lack of training for LCMs was acknowledged by local court officials and cited as a result of inadequate funding. Although there are programmes in place to increase such training, there are not enough funds to implement them. The underrepresentation of females as LCMs is also influenced by the lower education level they attain compared to men in Zambia. In order to fully address this issue, further research must examine women's level of education as compared to men and how Zambia can develop an educational curriculum that produces well-qualified LCMs.

## Appendix B: Constitution of the Republic of Zambia

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.

(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.

(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Clause (1) shall not apply to any law so far as that law makes provision - Protection from discrimination on the ground of race, etc.

(a) for the appropriation of the 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 the case of other persons; or

(e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society.