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*Zambia's legal system combines unwritten customary law with post-colonial statutory law. However, select traditions clash with statutes promoting gender equality. Though the repugnancy clause promotes the supremacy of written law in discrimination cases, it has not been utilized effectively. This paper raises the sources behind the clause's rare application and explores the possibility of utilizing the equal protection legal strategy employed by Botswana to prevent sex discrimination under customary law. This paper is based on a study of existing literature on the repugnancy clause in Southern Africa. Interviews were held with Boma and Chelstone Local Court Magistrates, as well as senior Local Court officials, women's legal advocacy NGOs, and individual researchers. This research was conducted in Lusaka, Zambia during June and July 2013.*

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## 1. Introduction

On 3 September 2013, the Botswana High Court struck down a customary practice that denies women equal inheritance rights with men. Other Southern African countries have begun to "grapple with the conflict between the rights of women in customary law and the rights granted to women in common law and post-independence constitutions" (Botswana Court Decision a Victory for Women's Rights, 2012). Such conflict is exhibited currently in Zambia, where domestic and international legislation ensuring equal treatment among the sexes has failed to garner equality for women. This problem can be traced back to the failed implementation of the repugnancy clause, the provision of the Zambian constitution that dictates the boundary between customary and statutory law. The repugnancy clause, located in the Local Courts Act (1991) outlaws any customary law that is "repugnant to natural justice or morality or incompatible with the provisions of any written law" (Local Courts Act, §12, cl.1.a). While Zambia's Supreme Court has yet to rule definitively on when the repugnancy standard applies in cases of sex discrimination, the Botswana High Court's ruling on 3 September 2013 definitively pronounces that customary practices denying women equal access to property cannot stand. As Chief Justice Ian Kirby proclaimed: "Any

customary law or rule which discriminates in any case against a woman unfairly, solely on the basis of her gender would not be in accordance with humanity, morality or natural justice" (Mmusi v. Ramantele, 2012). Such a sentiment is the preoccupation of the Zambian courts as well. This paper examines how the structure of the Zambian constitution and judiciary allows for the continued discrimination against women in customary law and explores why the repugnancy clause is rarely used. We then highlight the legal strategy employed by Botswana to prevent women's continued subjugation as a possible way forward for Zambia. Ultimately, we argue that any substantive improvement in the treatment of Zambian women under customary law must involve both a clear decree from government and the education of Local Court Magistrates (LCMs).

## 2. Constitution and International Protocols

Since 1991, Zambia has incorporated anti-gender discrimination provisions into its Constitution. Article 23, Clause 1 of the Constitution (1991) pertains to anti-discrimination, stating that: "a law shall not make any provision that is discriminatory either of itself or in its effect" (Constitution of Zambia, art. XXIII, cl.1). 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" (Constitution of Zambia, art. XXIII, cl.1). However, this anti-discrimination clause is limited in its application by Section 4(d) of the same article, which states that Clause 1 does not apply to the practice of customary law. As a result, Article 23(4)(d) greatly hinders the judiciary's ability to mould customary law to accommodate prevailing gender equality movements.

Internationally, Zambia has signed a variety of treaties that promote women's rights, including the Beijing Platform for Action and African Charter on Human and People's Rights (Ratification of International Human Rights Treaties - Zambia, 2009). Nevertheless, there is a significant problem in enforcing international legislation due to Zambia's following of a dualist common law doctrine. Under this system: "ratified international treaties do not form part of domestic law" (United Nations Entity, 1995). Zambia considers itself unobligated to follow international provisions unless those provisions have been first incorporated into domestic law. Accordingly, individuals cannot bring suit pertaining to a breach of international treaties if that policy 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. As of 2013, none of these treaties have been entered into law (Ratification of International Human Rights Treaties - Zambia, 2009).

### *2.1 Repugnancy Clause*

The repugnancy clause acts to define the boundary between 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 conflict with a section of customary law, customary law is allowed to exist as 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 (Munalula, July 2013). 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 clause's lack of success include its inherent vagueness, the lack of training in clause implementation among LCMs, personal subjectivity from society's perception of women and history's designation of repugnancy as a colonial instrument.

#### 2.1.2 Vagueness in wording of the clause

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. Section 12(1)(a) of the Local Courts Act (1966) contains the repugnancy clause, stating that: "Local Courts 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". 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. The Local Courts Handbook, a guide given to LCMs, defines natural justice as a streamlined and fair means to determine guilt and retribution. The Handbook defines morality as a "sense of rightness or decency", and defines repugnancy to morality as "anything which offends [this] or is contrary to fundamental human rights" (Masupelo, 1996). There are no examples clarifying when the "natural justice or morality" provision of the repugnancy clause should be used. Further contributing to this confusion is the Supreme Court's failure to establish a legal standard for repugnancy. Several LCMs interviewed expressed that they award child custody based on customary law, though Zambia's High Court has awarded custody based on the child's "best interests" in the case *Nkomo vs. Tshili* (1973) (Amaechi & Mildner, 2013). 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.

### 2.1.2 Lack 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 (Muma, July 2013). Rather than focusing on judicial knowledge, LCMs are hired for their diverse life experiences, respect within their local communities and their ability to be impartial. According to the Director of Local Courts, LCMs base their decisions in practical experience and conscience, referring to an assessor when necessary (Muma, July 2013). LCMs undergo two weeks of training, during which they are given a copy of the Local Courts Act as well as the Local Courts Handbook. They are additionally encouraged to attend post-training workshops, many of which are sponsored by NGOs. However, lack of funding often prevents the dissemination of 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 (Amaechi & Mildner, 2013). 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 (Munsaka, July 2013). 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. To address this problem, the Director of the Local Courts stated that the judiciary is organizing a pilot course with 30 LCMs to educate magistrates on human rights issues, which will include usage of the repugnancy clause (Muma, July 2013). Because there are few programs in place to train LCMs on statutory law, many are unsure as to what the boundaries of their jurisdiction are or when to apply the repugnancy clause (Munsaka, July 2013). For example, when interviewed, all LCMs 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. Even though the LCMs' rulings do not conflict with written statutes in this case, their lack of training about statutory law poses dangerous implications if they are unaware of a conflict between their judgment and written law. The effects resulting from LCMs' inadequate training about 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" (Review of Local Court System, 2006). 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.

2.1.3 Gender Imbalance of LCMs

The gender of the Magistrates influences their personal subjectivity. Men, especially in the rural areas, are more encouraged than females to attain education. While there is parity in education until grade one, this equality drops off after grade seven, right before secondary school begins (Mwale, July 2013). To meet the requirements for becoming an LCM, an applicant must have completed at least Grade 12. The disparity in gender ratios 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 (Chipende, July 2013). At the traditional courts or village-level proceedings not formally recognised by the government, a sample of 268 traditional rulers similarly found that over 80% were male (Kerrigan et al., 2012). This finding is especially significant considering that the majority of LCMs indicated deferring to traditional rulers in their decisions (Kerrigan et al., 2012). Ndulo (2011) 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 the living law of communities". Thus, personal subjectivity on the basis of gender inhibits progressivism. Though the overrepresentation of men as LCMs creates a risk of continued discrimination towards women, merely increasing the number of female LCMs would not necessarily decrease this possibility. Our interviews with female LCMs revealed similar gendered attitudes to their male counterparts, rather than advocating for women's expanded rights in customary law. Many LCMs, regardless of gender, were found to 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 manner that would challenge customary norms, resulting in inconsistent interpretations of the repugnancy clause. This inconsistency was revealed in several interviews with LCMs who denounced discrimination but felt as if their "hands were tied" in giving deference to customary law. Despite this ambiguity, the Senior Local Court Officer stated that the clause should always be used to prevent customary practices that discriminate against women (Chipende, July 2013). 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.

*2.2 History of the Repugnancy Clause*

The conservative application of the repugnancy clause dates back to 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 (Ndulo, 2011). In Zimbabwe, English colonial rulers did not give "blanket

recognition" to customary law, which allowed for practices such as the killing of twins, trial by ordeal and non-consensual marriage (Bennett, 1981). Courts found such customs "obviously immoral" and adapted their application of the clause to that standard (Bennett, 1981). 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 taking on extra wives solely for the sake of sexual slavery or forced labour to be repugnant (Longwe, July 2013). 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 customs and tradition" (ZLDC, 2006). LCMs may be reluctant to use the clause if they believe it will "westernize" their traditions (ZLDC, 2006).

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 have been 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" (Ndulo, 2011). Ndulo proposes that this patriarchal approach ironically set a precedent to strike down provisions that empowered women (Ndulo, 2011). This history may explain why the interviewed LCMs who were familiar with the repugnancy clause readily acknowledged that customary law was discriminatory towards women, but insisted it was not the place of the 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. These prevailing issues in the Local Court make it unlikely that the repugnancy clause will be used to invalidate discriminatory customary laws. Zambia is bound to fall behind in the global advancement of women's rights if it does not address these factors, which may require an overhaul of the current judicial structure.

### *2.3 Equal Protection Legal Strategy*

Botswana shows promise in closing the gap between men and women under customary law. Botswana's constitution, similar to Article 23(4) of Zambia's constitution, exempts customary law from review in discriminatory matters while providing for a repugnancy provision (Constitution of Botswana, art. XV, cl.4). However, when confronting a discrimination case based on customary law, the Botswana High Court relied on the equal protection clause, rather than the repugnancy clause, to make the ruling. Specifically, the Botswana High Court struck down a discriminatory customary inheritance law ruling that prevented women from inheriting property in the case *Mmusi v. Ramantele* (2012).

The ruling in *Mmusi* held that women had the right to inherit familial property, regardless of a customary tradition giving male relatives the sole right to property. The judge held that equal protection rights are "independent of the right to non-discrimination", and are therefore not subject to exemption (Customary Law). In this decision, the judge referenced the primacy given to equal protection rights throughout the world, citing decisions in South Africa, India, the United States, and the United Kingdom.

The provision relied upon in *Mumsi* is also present in Zambia's constitution. While Zambia has not yet used the equal protection clause to shield litigants from customary law's discriminatory exemption, it remains a potential legal strategy for Zambia. Equal protection argument, akin to Botswana warrants consideration and analysis in the Zambian context, however, such discussion is beyond the scope of this article.

## 3. Conclusion

Considering the developments in other Southern African countries, it remains to be seen how Zambia's courts will respond to the challenge of providing equal rights for women. Moreover, it remains to be seen if Zambia's current constitutional review process will preserve the customary law exception to discrimination. However, it is critical to emphasize that a response from the statutory courts or elimination of Article 23(4)(d) in the constitution is inconsequential without the training and oversight of LCMs to implement non-discriminatory rulings at the community level. The personal nature and high volume of cases brought before the Local Courts leave LCMs with the heaviest responsibility to ensure gender equality for Zambian women.

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