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# A CRITICAL ANALYSIS OF WOMEN'S CONSTITUTIONAL AND LEGAL RIGHTS IN ZIMBABWE IN RELATION TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

*Amy S. Tsanga*

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# A CRITICAL ANALYSIS OF WOMEN'S CONSTITUTIONAL AND LEGAL RIGHTS IN ZIMBABWE IN RELATION TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Amy S. Tsanga\*

## I. INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) comprehensively outlines the international standards on the rights of women that are to be pursued by State Parties to the Convention. Adopted by the General Assembly in 1979, it entered into force in 1981 and set the scene for a comprehensive approach to the human rights of women by State Parties that have ratified the Convention.<sup>1</sup> The underlying spirit of the Convention is that discrimination against women violates principles of equality and respect for human dignity and presents obstacles to the advancement of women in the political, social, economic, and cultural spheres. The Convention recognizes in its preamble that the complete development of any country and the furtherance of world peace requires the maximum participation of women on equal terms with men in all fields.<sup>2</sup>

As such, State Parties that have ratified the Convention are expected to adopt comprehensive measures for the eradication of discrimination against women at the national level. Additionally, State Parties are also expected to submit periodic reports to the relevant United Nations Committee (Committee) on the measures that they have taken to give effect to the Convention. Specific areas of concern to women on which State Parties are expected to take action are identified in sixteen substantive articles of the Convention.

Part One of the Convention, Articles 1-6, compels State Parties to take legal and administrative measures to advance the situation of women at the national level.<sup>3</sup> In addition, State Parties are expected to adopt special measures such as affirmative action.<sup>4</sup> They are to take active steps to modify social and cultural

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1. *Convention on the Elimination on All Forms of Discrimination Against Women*, Dec. 18, 1979, G.A. Res. 180, U.N. GAOR, 34th Sess. (entered into force Sept. 3, 1981) [hereinafter CEDAW].

2. *Id.* pmbl.

3. *Id.* arts. 1-6.

4. *See id.* art. 11.

patterns that disadvantage women as well as adopt measures to suppress the traffic and the prostitution of women.<sup>5</sup>

Part Two of the Convention, incorporating Articles 7-9, deals with women's rights in political and public life.<sup>6</sup> Key concerns such as women's right to vote, to be elected on the same basis as men, and to participate in government as officials and policy makers are dealt with by these articles. Also canvassed in Part Two is the issue of women's nationality rights.

Part Three of the Convention, comprising Articles 10-14, requires governments to take steps to eliminate discrimination against women in the areas of education, employment, health, economic, social, and cultural life.<sup>7</sup> Particularly noteworthy under in this part is that governments are also bound to take into account the special needs of rural women.<sup>8</sup> Special emphasis is placed on the need for them to benefit from rural development on the same basis as men.<sup>9</sup>

In Part Four, embracing Articles 15-16 of the Convention, State Parties agree to afford women equality before the law in the exercise of legal rights and in marriage and family law.<sup>10</sup>

Zimbabwe ratified the Women's Convention on the 13th of May 1991 without reservations, thereby agreeing to pursue active measures to eliminate discrimination against women by both State and non-state actors.<sup>11</sup> The protection of human rights at the national level is fashioned by the normative and institutional frameworks that exist in a particular country. The major thrust of this paper is to examine the progress, as well as the gaps, from a legislative viewpoint in advancing the rights of women in Zimbabwe. A country-specific analysis allows for a clear understanding of the nature of the constitutional and legal framework under which human rights instruments are expected to materialize.

In Zimbabwe the Constitution is the highest law of the land and any law inconsistent with the Constitution is void to the extent of that inconsistency.<sup>12</sup> As such, under the Constitution, international instruments do not automatically form part of the law unless approved by Parliament or have been incorporated into the law by an Act of Parliament.<sup>13</sup> The Constitution therefore provides the barometer with which to measure all other laws in the country.

In line with the Convention, this Paper is divided into four sections. Taking each operative article as a starting point, Part II of this Paper critically analyses the constitutional and legal measures that impact on women in Zimbabwe in light of the concerns raised by Articles 1-6 of the Convention. Part III of this Paper critiques the measures adopted in the political and public sphere regarding women. Part IV looks at measures that impact on education, employment, health, and rural life. Finally, Part V takes a critical look at measures that impact marriage and family law.

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5. *Id.* art. 6.

6. *Id.* arts. 7-9.

7. *Id.* arts. 10-14.

8. *Id.* art. 14.

9. *Id.* art. 14, sub. 2.

10. *Id.* arts. 15-16.

11. States Parties, Division for the Advancement of Women, available at <http://un.org/women/watch/daw/cedaw/states.htm> (last visited March 14, 2002).

12. ZIMBABWE CONST. ch. I, § 3.

13. *Id.* ch. XII, pt. 1, § 111B(1)(a), (b).

## II. CONSTITUTIONAL AND LEGAL MEASURES AFFECTING WOMEN IN ZIMBABWE: AN ANALYSIS OF STRENGTHS AND WEAKNESSES

### A. Discrimination Against Women

Article 1 of the Women's Convention defines discrimination against women as it applies to all provisions of the Convention. It states as follows:

For the purposes of the . . . Convention the term "discrimination against women" shall means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>14</sup>

The operative clause in Zimbabwe's Constitution which addresses the problem of discrimination against women as envisaged by Article 1 of the Women's Convention is Section 23, in particular subsections (1) and (2).<sup>15</sup> In essence, Section 23(1) protects citizens from discriminatory laws and it also protects people from being treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.<sup>16</sup> This emphasis on public officers and public authorities means that the definition does not include discrimination by private actors. This exclusion has in reality meant having to bend over backwards to ensure that a case of discrimination meets the "public office" and "public authority" criteria. In the case of *Mandizvidza v. Morgenster College*,<sup>17</sup> a private educational institution that sought to expel a pregnant female student was deemed to fall within the ambit of this provision by virtue of the fact the staff at the teachers college were paid by Government.<sup>18</sup> The college, though private, was essentially engaged in an activity of a public nature.<sup>19</sup> Clearly, inclusion of both state and non-state actors would more easily bring to the spotlight discriminatory practices by all sectors of society especially since women tend to suffer discrimination not just in the hands of public officials but more so at the instance of private actors.<sup>20</sup>

Section 23(2) states the grounds upon which one cannot be discriminated against; these include race, tribe, and place of origin, political opinions, color,

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14. CEDAW art. 1.

15. ZIMBABWE CONST. ch. III, § 23(1), (2). Section 23(1) provides that: Subject to the provisions of this section—

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any *public office* or *any public authority*.

*Id.* (emphasis added).

16. *Id.* § 23(1).

17. 1999 HH 236 (SC).

18. *Id.*

19. *Id.*

20. *Id.*

creed, or gender.<sup>21</sup> These grounds are not exhaustive. Other important grounds upon which women are discriminated against such as sex, pregnancy, marital status, culture, and age are excluded.<sup>22</sup> Article 1 of the Convention focuses on sex based discrimination, which means that it emphasizes discrimination based on biological distinctiveness of women as compared to men. Zimbabwe's Constitution is limited to gender-based discrimination, which means that the emphasis is on discrimination that emanates from a cultural definition of behavior that is deemed appropriate to the sexes in a given society.

The incorporation of gender as a prohibited ground of discrimination is a comparatively recent addition having been added to the Constitution by Amendment No. 14 of 1996.<sup>23</sup> The non-inclusion of sex as a prohibited ground for discrimination in Zimbabwe's Constitution emanates from the confusion of gender and sex as synonymous. Notwithstanding, its addition does provide an important platform for arguments against discrimination in a society where cultural roles remain paramount because gender is essentially a set of cultural roles. Because most of the discrimination that women encounter is gender-sex based, ideally both grounds need to be core elements of the non-discriminatory clause. This would be in addition to other important offshoots of these two concepts such as pregnancy (sex-based), marital status (gender-based), and culture (gender-based).

Though recognizing the right to non-discrimination in Section 23(1) and (2), another weakness with the present constitutional provisions is that Section 23(3) takes a giant step backward by listing grounds under customary law that are deemed not to be a contravention of the non-discriminatory clause. The protected provisions of relevance to the issue of women's rights are Section 23(3)(a), (b), and (f), which state that laws relating to the following issues shall not be regarded as discriminatory for laws relating to: (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of customary law between Africans or an African and a non-African if the parties have agreed; or (f) laws, which accord rights and privileges relating to communal land to tribes people, to the exclusion of others.<sup>24</sup> This subsection is discussed more fully under Article 14, which deals with rural women.<sup>25</sup>

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21. ZIMBABWE CONST. ch. III, § 23(2). Section 23(2) states as follows:

For the purposes of subsection (1) a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour creed or gender are prejudiced—

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not being made subject; or

(b) by the according to persons of another such description, of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, color, creed or gender of the persons concerned.

22. Originally, these grounds had been included in the draft Constitution of 2000 that was however rejected by a narrow majority after a public referendum. The lobby for a new constitution has however remained.

23. ZIMBABWE CONST. amend. 14.

24. *Id.* ch. III, § 23(3)(a), (b), (f).

25. *See infra* Part (IV)(E) and accompanying text.

Throughout colonial rule the practice was to retain the application of customary law in personal relations where such laws were not regarded as repugnant to the notions of morality and good conscience. It is this approach to customary law in civil matters that was captured in the 1980 Constitution as a distinguishing aspect of "retention of culture." The recognition of the operation of general law alongside customary law is endorsed by the Constitution.<sup>26</sup> The protection of customary law in the areas of personal law is discriminatory in effect. Customary laws in the matters concerned often permit sex-based differentiation whether during marriage, on divorce, or on death. The net effect of this protection is that women are weakly protected from discrimination in customary law matters by the Constitution.<sup>27</sup>

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26. ZIMBABWE CONST. ch. VIII, § 89. Section 89 provides that:

Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court, and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the 10th June 1891, as modified by subsequent legislation having in Zimbabwe the force of law.

27. The Ministry of Youth Employment Creation and Gender is spearheading an initiative to lobby for the amendment of this section. The aim is to replace it with a much more comprehensive clause that protects women from discrimination in all spheres. Building on the provision against discrimination that was contained in the rejected draft constitution, and those positive aspects of the current Section 23, it is proposed that the new Section 23 reads as follows:

Protection from discrimination

(1) Every person has the right not to be treated in a discriminatory manner on the grounds of race, colour tribe place of birth, ethnic or social origin, language, religious belief, political or other opinion, culture, sex, gender, marital status, pregnancy or disability.

(2) A person is treated in a discriminatory manner for the purposes of section (1)

(a) by being subjected to a condition, restriction or disability to which other people are not subjected

(b) through other persons being accorded a privilege or advantage, which he or she is not, accorded.

(3) Discrimination on one or more grounds listed in subsection (1) is unlawful unless it is established that the discrimination is fair, reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.

(4) Discrimination, which is based solely on the need to recognize physiological differences and different physiological needs between persons of the different sex, shall not be unlawful.

(5) Any law which in itself or in its effects, discriminates between people on one or more of the grounds listed in subsection (1) subject to provisions of subsections (2)

(3) (4) is void.

(6) Subject to subsection (3) legislative and other measures may be taken to promote the achievements of equality by way of affirmative action to protect or advance people or classes of people who have been or are disadvantaged by discrimination or who have special needs.

Taking into account the criticism of the draft constitution that the burden of proving discrimination should not be on the person who is discriminated against, the proposed draft of section 23 shifts the onus in subsection (3) to the person who seeks to discriminate. The non-discriminatory grounds are also much more exhaustive than those that exist under the current provision. Furthermore, sex, and not gender, is suggested as the ground upon which to take into account physiological differences. As such favorable measures such as tax reductions on tampons for example, would not be regarded as discriminatory as they take into account women's physiological differences emanating from their sex. Whether this piecemeal reform of the Constitution will see the light of day remains to be seen in light of the fact that wholesale Constitutional reform is still deemed necessary by civil society.

Section 23(5) permits gender-based discrimination on the grounds of physiological differences.<sup>28</sup> The problems in formulation of this exception around gender are discussed more fully in discussion Article 11 on employment.<sup>29</sup> As such, these subsections go against the spirit of Article 1 of the Convention.

Of particular relevance to the concept of non-discrimination as envisaged by Article 1 is the Legal Age of Majority Act (Majority Act), which was passed in 1982 soon after independence.<sup>30</sup> The Majority Act gave majority status to everyone at the age of 18.<sup>31</sup> This had significant implications for African women who had been previously regarded as minors under customary law. In a context where a woman under customary law did not acquire majority status, falling under the guardianship of her father before marriage and her husband after marriage, the Majority Act had significant implications for women in terms of their rights to acquire property, to sue and be sued and to be appointed legal guardians of their children.<sup>32</sup>

Under the leadership of the late Chief Justice Dumbutshena the Supreme Court of Zimbabwe initially played a crucial role in passing decisions that gave a change oriented interpretation to customary practices under customary law that discriminate against women such as women's rights to inheritance and overall social status. The first case to give positive acclamation to this piece of legislation was the case of *Katekwe v. Muchabaiwa*,<sup>33</sup> a seduction damages case brought by the guardian of an unmarried female.<sup>34</sup> The woman's guardian brought an action for compensation for the reduction in bride price that he would now receive as a result of his daughter having been seduced and engaging in unlawful sexual intercourse before marriage.<sup>35</sup> The Supreme Court held that because women were no longer perpetual minors under the guardianship of men, the father of a woman over 18 years of age no longer had the right to sue for damages on her behalf and the right now fell on the woman herself under the general law.<sup>36</sup>

Also advancing the rights of women was the case of *Chihowa v. Mangwende*.<sup>37</sup> The issue in this case was whether, in the light of the Majority Act, a daughter could inherit in the absence of sons or whether that right fell on the deceased's male relatives.<sup>38</sup> It was held that as a result of women's majority status, African women (in the absence of a son) now had the same rights and duties to succession as those that devolved upon men under customary law.<sup>39</sup> However, it has now become apparent that advancing women's rights through the courts is largely dependent on the composition of the court.

The case of *Magaya v. Magaya*,<sup>40</sup> also an inheritance matter under customary law, rolled back the gains that women had made in previous decisions. The case

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28. ZIMBABWE CONST. ch. III, § 23(5).

29. See *infra* Part (IV)(B) and accompanying text.

30. LEGAL AGE OF MAJORITY ACT 1982. The Majority Act is now the GENERAL LAW AMENDMENT ACT, tit. 8, Ch.7.

31. *Id.*

32. *Id.*

33. 1984 (2) ZLR 112 (SC).

34. *Id.* at 114-15.

35. *Id.*

36. *Id.* at 127-28.

37. 1987 (1) ZLR 28 (SC).

38. *Id.* at 229-30.

39. *Id.* at 234.

40. 1998 ZLR 210 (SC).



essentially involved an older daughter's right to be declared heir ahead of her younger brother.<sup>41</sup> The Supreme Court held that the Majority Act was not intended to give women rights that they never had under customary law<sup>42</sup>—a major blow to the positive development of customary law that had been set by previous decisions.

What is particularly problematic about the *Magaya* decision in relation to Article 1 of the Convention is that it seeks to perpetuate discrimination against women under customary law in matters where there has not been legislative intervention.<sup>43</sup> It also brings confusion to the lives of Zimbabwean-African women who are now minors under customary law and majors under general law.

Because the Convention does not contain a specific clause on violence against women, the CEDAW Monitoring Committee's recommendation is that gender based violence, or violence that affects women, falls under the letter and spirit of Article 1.<sup>44</sup> Zimbabwe does not have an act solely devoted to domestic violence. Presently victims of domestic violence rely on general legal remedies ranging from filing a criminal complaint asking for a peace order in terms of the Criminal Procedure and Evidence Act<sup>45</sup> to divorce and separation. Peace orders in particular are often not effective in deterring violence. However, the Law Development Commission has proposed a draft bill on domestic violence. Particularly noteworthy about the proposal is its recognition of the different forms of domestic violence, which include physical, economic, and emotional abuse.<sup>46</sup> Persons who can apply for protection orders include the complainant as well as any other person acting with leave of the complainant.

However, the proposal does not specifically mention domestic violence as disproportionately directed against women neither does it use the term "gender-violence" in any of its clauses. This is unlike the wording of the Declaration on Violence Against Women that specifically regards gender-based violence as disproportionately directed towards women and also as constituting a human rights violation.<sup>47</sup> Naming the proposed bill itself could be problematic in that the term "domestic violence" undermines the significance of the suffering inflicted on the victim. The word "domestic" implies privacy, which may be likely to perpetuate violence. This is especially so given the less than enthusiastic response that cases of domestic violence have often attracted with authorities such as the police, prin-

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41. *Id.*

42. *Id.*

43. With regard to inheritance matters, however, the Administration of Estates Amendment Act has introduced a more equitable system of inheritance. Problem however is that the Act only applies to deaths that occurred after the 1st of November 1998. The problem is that many people do not register their estates unless they encounter some hurdle that necessitates legal intervention. This means that they are cases that could still come before the courts where the death occurred prior to the stipulated date and which would not benefit from the more equitable inheritance provisions contained in the Amendment. A possible solution is an amendment to the legislation that would put emphasis on the date that the administration process begun. For example, the law could state that any estate brought for administration after the 1st of November 1998 is to be distributed following the guidelines stipulated in the amendment.

44. *General Recommendation No. 19 Violence Against Women*, U.N. Committee on the Elimination of Discrimination Against Women, 11th Sess. (1992).

45. CRIMINAL PROCEDURE AND EVIDENCE ACT tit. 9, ch. 7, § 354.

46. A copy of the draft bill on domestic violence is on file with the author.

47. See generally CEDAW.

cipally because they consider such matters as domestic. On the other hand, the use of the term "domestic" could be positive in that the public may be better able to identify the nature of the problem that is being addressed at the outset. A comprehensive piece of legislation addressing the problem is important although its efficacy will also largely depend on attitudinal change on the part of law enforcement officers, that is assuming that it even passes in Parliament.

### *B. Obligations to Eliminate Discrimination*

Article 2 obliges State Parties to condemn discrimination and to eliminate it through constitutional, legal and other appropriate means.<sup>48</sup> The obligation to eliminate discrimination against women is also extended to public authorities, private persons, organizations, and enterprises.<sup>49</sup> State Parties are also required "[t]o take all appropriate measures, including legislation, to modify or to abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>50</sup> Article 2(g) of the Convention also requires "State Parties to repeal all national penal provisions which constitute discrimination against women."<sup>51</sup>

A considerable amount of the legislation in Zimbabwe impacting on women in one way or another has been on the statute books from colonial times. However, there is also a significant amount of legislation impacting on women's lives that has been passed in the post-independence era starting in 1980. In the post-independence period, pieces of legislation were introduced prior to Zimbabwe's ratification of the Women's Convention, including laws affecting legal status and the division of matrimonial property on divorce.<sup>52</sup> Post-ratification statutes include inheritance laws that saw the introduction of more equitable laws of inheritance under customary law. Zimbabwe does not have a commission to specifically deal with the problems that women encounter in Zimbabwe as envisaged by Article 2. Although there is an Ombudsman, as provided for by the Ombudsman Act, the duties of the Ombudsman are general in nature.<sup>53</sup>

Regarding the need for the State to address penal provisions that discriminate against women, the Infanticide Act, a post-ratification act, is an example of legislation that is in line with the general thrust of Article 2 (g) of the Convention.<sup>54</sup> Its effect has been not so much to repeal but to introduce a special crime of infanticide that takes into account the complex factors at play when women commit this crime. Section 2 (1) of this Act provides as follows:

A woman who within six months of the birth of her child, unlawfully and intentionally causes the death of her child at a time when the balance of her mind is disturbed as a result of giving birth to the child, shall be guilty of the offence of infanticide and liable to imprisonment not exceeding five years.<sup>55</sup>

Section 4 of the Infanticide Act outlines the factors that the courts take into consideration in determining whether there was a disturbance of mind. Regard is had to any pressure arising out of any one or more of the following circumstances or considerations:

48. *Id.* art. 2.

49. *Id.* art. 2(c)(e).

50. *Id.* art. 2(f).

51. *Id.* art. 2(g).

52. MATRIMONIAL CAUSES ACT, tit. 5, ch. 13.

53. OMBUDSMAN ACT, tit. 10, ch. 18.

54. *See generally* INFANTICIDE ACT, tit. 9, ch. 12; CEDAW art. 2(9).

55. INFANTICIDE ACT, tit. 9, ch. 12, § 2(1).

- (a) the effects which the birth had or which she believed it would have on her social financial or marital situation.
- (b) the difficulties which were created, or which she believed would be created, in caring for the child in the social, financial or marital situation in which she was born
- (c) the difficulties which she had, or which she believed she would have in caring for the child due to her inexperience or inability
- (d) any other relevant circumstances whether based on the psychological effects on the women's mind arising from the birth itself, or other wise.<sup>56</sup>

Whilst the criminal law makes special dispensation for the trauma women may suffer resulting in infanticide, recent research by Women and Law in Southern Africa (WLSA) shows that the existence of a number of pieces of legislation that impact gender-generated reproductive crimes of violence is problematic. In addition to the Infanticide Act, other applicable pieces of legislation include the Concealment of Birth Act<sup>57</sup> as well as the crime of baby dumping under the Children's Protection and Adoption Act.<sup>58</sup> In cases where reproductive crimes of violence have been committed problems often arise regarding which act to charge the woman under. Although this can work to the advantage of the woman in the sense that a crime may be treated more leniently under one piece of legislation as compared to another, the net result is confusion in the justice system in the handling of such matters.

There is no specific defense in Zimbabwean criminal law for women who kill their partners as a result of domestic violence. Criminal law, which applies equally to violence within the home and outside, is inadequate in its application because the available defenses do not take into account the situations under which the killings take place. The traditionally accepted defenses of provocation and self-defense are problematic for a number of reasons. First, self-defense generally succeeds if the person acted in response to imminent danger and responded to a degree proportionate to the perceived danger. Therefore, women who wait until there is a "safe moment" do not meet the traditionally accepted requirements of self-defense. Second, provocation also implies a loss of self-control in response to a situation. "Slow burn" or cumulative provocation may not be deemed to fit within this definition of provocation. Although diminished responsibility has also been used as defense, it is problematic because it places emphasis on the women's mental weakness as opposed to the wrong doing of the violent partner. Criminal laws in Zimbabwe need to take into account the social and political background to gender violence as it impacts on women who kill their partners. The battered women syndrome has been used in countries such England and America in support of the traditional defenses of self-defense, provocation and diminished responsibility.

Punitive criminal laws are to be also found in the manner in which Zimbabwean law deals with the problem of prostitution.<sup>59</sup> Dealing with prostitution through penal provision is problematic as it involves repression and censorship—

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56. *Id.* at § 4.

57. CONCEALMENT OF BIRTH ACT, tit. 9, ch. 4.

58. CHILDREN'S PROTECTION AND ADOPTION ACT, tit. 5, ch. 6.

59. Section 4 of the MISCELLANEOUS OFFENCES ACT, tit. 9, ch. 15, makes it an offense for any person to loiter in public for purposes of prostitution or solicitation. Whilst the Act makes it an offense for any person to loiter, in reality it is women who have fallen foul of this provision.

unsatisfactory approaches in the light of human rights standards. Censorship and repression are also deemed problematic from the point of view of the HIV/AIDS pandemic censorship pushes the practice under ground making it difficult to reach prostitutes with preventive information and health care. The preferred approach is for legislation that regulates rather than penalizes prostitution given that the chances of the practice subsiding are slim.

### *C. The Development and Advancement of Women*

Article 3 of CEDWA guarantees women the exercise and enjoyment of fundamental human rights on the same basis as men.<sup>60</sup> This article calls for an examination of constitutional provisions that guarantee fundamental rights and freedoms in so far as they impact on women.<sup>61</sup> A glaring failure of Zimbabwe's Declaration of Rights is not only its limitation in addressing key issues of concern to women, but also its inability to take an integrated approach to human rights which focuses on both political rights as well as social, economic, and cultural rights.<sup>62</sup> The Declaration of Rights is contained in Articles 11-26 of the Constitution and echoes some of the fundamental principles found in the International Covenant on Civil and Political Rights such as the right to life, liberty, freedom of expression, and protection from cruel, inhuman, and degrading treatment among others by private actors in the private sphere (where most women and children encounter violations).<sup>63</sup> In its protection of fundamental rights, the Constitution is statist in nature; that is, protection is accorded to the citizens from violations by the state in the public sphere. The emphasis is on state actors as opposed to also embracing violations.<sup>64</sup>

This approach to the protection of fundamental rights, that concentrates on the protection of rights in the public sphere short changes women.<sup>65</sup> The Constitution as a whole is also generally characterised by the assumption that gender-neutral laws will apply equally to everyone regardless of lived realities. This pervasive belief in the underlying neutrality of core rights prevents the recognition of the fact that neutral laws confront gendered realities. As such, failure to consider gender in fashioning the content of substantive rights neglects the experiences of women. Issues such as underdevelopment, poverty, illiteracy, gender segregation, lack of reproductive choice that are of concern to women, are not covered neither are the forms of violence that contour women's lives. For example, approaching the right to life from a perspective of loss of life in the hands of state actors neglects to address the violence that occurs in the private sphere, which poses a real threat to women's right to life. The issue of how being a woman is itself life threatening due to laws that restrict abortion and endemic violence against women are not captured when constitutions adopt this approach to fundamental rights that is solely

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60. CEDAW art. 3.

61. *Id.*

62. ZIMBABWE CONST. ch. III, § 11-25.

63. *Id.*

64. *Id.* ch. III, § 11.

65. See, e.g., Rebecca J. Cook, *What are Women's International Human Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca J. Cook, ed. 1994); Shelley Wright, *Human Rights and Women's Rights: An Analysis of the United Nations Convention On the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 75 (Mahoney & Mahoney, eds., 1993).

grounded in the public sphere.<sup>66</sup> The right to liberty also does not address the problem of sexual violence that is a feature of women's lives. The overall construction of rights that are to be protected, based on male experiences ignores the fact that the bulk of the women lead their lives away from the public domain and that it is in the private domain that they encounter the most discrimination.

Much of the constitutional litigation that has come before the Zimbabwe Supreme Court has centred on the protection of individual rights: delays in trials, protection of private property. The challenges to violations against torture, inhuman and degrading treatment, liberty, and privacy have not captured women's experiences. The concern with torture has been at the hands of state actors when for women the most acute forms of torture occur in the private realm.

Part of the reason for the low priority accorded to women specific rights within the Constitution as a whole and the Declaration of Rights in particular is centered on the fact that Constitution was largely negotiated from the framework of a narrower focus on the nationalist struggle for independence from white minority rule rather than from the broader framework of liberation at all fronts including the private sphere. Indeed, no women formed the independence negotiation team at Lancaster.

Even though women were indeed part of the liberation struggle, it is important to note that the liberation struggle itself was not premised on achieving equality between the sexes in the broad sense of the concept. Notwithstanding these limitations, the provisions that have attracted litigation, from a gender perspective, include Section 22 on freedom of movement and Section 23, which is the non-discriminatory clause.<sup>67</sup> Section 23 has already been discussed in relation to Article 1, while Section 22 is discussed more fully in Part V of this Paper under the discussion Article 15 (4) of the Convention that deals with freedom of movement of persons and their freedom to choose their residence and domicile.<sup>68</sup>

#### *D. Acceleration of Equality Between Men and Women*

Article 4 permits State Parties to employ special measures such as affirmative action in order to accelerate the equality between men and women.<sup>69</sup> The rationale behind Article 4 is that formal laws themselves are often insufficient in equalizing the rights of women.<sup>70</sup> Under Article 4, special measures in relation to maternity benefits are deemed non-discriminatory.<sup>71</sup> Article 4 also recognizes the important role of men and women in the upbringing of children.<sup>72</sup>

With regard to affirmative action, the existing Zimbabwe Constitution does not contain any specific provisions on this.<sup>73</sup> Affirmative action measures are, however, to be found in the policies of various state related bodies such as the University of Zimbabwe. In reality, because of the increased enrollment of girls in

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66. Cook *supra* note 65.

67. ZIMBABWE CONST. ch. III, §§ 22, 23.

68. See *infra* Part (V)(a); see also CEDWA art. 15(4); ZIMBABWE CONST. ch. III, § 22.

69. CEDAW art. 4.

70. *Id.*

71. *Id.*

72. Zimbabwe's legislation as it impacts on maternity benefits is discussed fully under Article 11 that deals with employment.

73. See generally ZIMBABWE CONST.

schools and the comparatively limited number of Universities, the competition for entering university is generally high and most departments do not have to resort to affirmative action measures. For example, the University of Zimbabwe, a state university, has an affirmative action policy that has resulted in the increase in enrollment of female students at the University.

### *E. Sex Roles and Stereotyping*

Article 5 requires States to address social and cultural patterns that lead to discrimination and to stereotypical roles for men and women.<sup>74</sup> Its primary concern is to eliminate practices based on the idea of the superiority or inferiority of one sex in relation to the other.<sup>75</sup> The common responsibility of men and women in the upbringing and development of their children is also captured under this article.<sup>76</sup>

Stereotypical practices based on the superiority of one sex in relation to another include forced marriage, especially among some religious sects, the payment of *lobola* (bride price), widow inheritance, and the perpetuation of the concept of male headship and the continued existence of polygamy. These stereotypical practices often find expression and protection in legislative provisions such as marriage laws and inheritance laws. Such legislation that perpetuates stereotypical beliefs is discussed more fully Part Five of this Paper that deals with equality in marriage and family life.<sup>77</sup> Stereotypical beliefs concerning men and women are further compounded by the rigid approach to customary law as applied by the higher courts, especially in inheritance matters which have tended to interpret customary law outside its continuously evolving social context characterized by diverse needs and aspirations of a modernizing society.<sup>78</sup>

Another stereotypical practice that impacts on women is the belief in witchcraft as women are more often than not the imputed witches. The Zimbabwe Witchcraft Suppression Act punishes any person who imputes to another the use of non-natural means in causing any disease in a person or an animal or causes injury to such person, animal, or property.<sup>79</sup> However, monetary fines are minimal, although a person can also be sentenced to imprisonment not exceeding three years, or to both the fine and imprisonment.<sup>80</sup> This act has been in force since 1899 and the belief in witchcraft continues to the detriment of women. Active measures in strengthening science education in both formal and non-formal education would go a long way in shaking such beliefs.

With regard to the upbringing of children, existing maintenance legislation imposes obligations on both parents to maintain their children. However, there are no specific measures in force that are designed to ensure that men and women play an equal role in the social and cultural upbringing of children. Child-rearing remains an essentially female activity while men are predominantly seen as the breadwinners. From a legislative perspective, provision for paternity leave would be an important starting point in creating a legal framework for men's participation in

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74. CEDAW art. 5(a).

75. *Id.*

76. *Id.* art. 5(b).

77. CEDAW art. 16; see discussion *infra* Part (V)(C).

78. See, e.g., *Magaya v. Magaya*, 1998 ZLR 210 (SC).

79. WITCHCRAFT SUPPRESSION ACT tit. 9, ch. 19.

80. *Id.*

child rearing although the difficulty would be ensuring that men actually utilize such leave for the intended purposes as opposed to regarding it as a period of rest.

### *F. Suppression of the Exploitation of Women*

Article 6 requires State Parties to "take all appropriate measures including legislation to suppress all forms of traffic in women and the exploitation of prostitution of women."<sup>81</sup>

The closest legislative provision that captures the intended protection under Article 6 is Section 64 of the Criminal Procedure and Evidence Act.<sup>82</sup> The relevant section permits a Magistrate to issue a warrant for the release of any woman who is being detained for immoral purposes upon a complaint on oath made by a parent, husband, relative or guardian of a woman or girl who is acting in the interests of such person.<sup>83</sup> The person so detaining the woman or girl may be arrested through a warrant issued by the Magistrate.<sup>84</sup> A woman or girl is regarded as being detained for immoral purposes if she is under sixteen and has been detained for those purposes whether against her will or not.<sup>85</sup> If she is over sixteen but under eighteen then she is regarded as being detained for immoral purposes either against her will or against the will of her father or mother or any other person who has lawful charge of her.<sup>86</sup> If she is over 18 then she is regarded as being detained for immoral purposes if she is detained against her will.<sup>87</sup> In addition a woman is deemed to be detained for immoral purposes if she is detained for the purposes of unlawful sexual intercourse.<sup>88</sup>

## III. WOMEN'S PARTICIPATION IN POLITICAL AND PUBLIC LIFE

### *A. Elimination of Discrimination in Political and Public Life*

Article 7 of CEDAW reaffirms the right of women to

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.<sup>89</sup>

Women essentially have the same right to vote as men and the right to vote is not dependent on property or literacy requirements. Schedule 3 of the Constitution outlines the qualifications for members of Parliament as well as for voters.<sup>90</sup>

81. CEDAW art. 6.

82. CRIMINAL PROCEDURE AND EVIDENCE ACT, tit. 9, ch. 7, § 64.

83. *Id.*

84. *Id.* § 64(2).

85. *See generally id.* § 64.

86. *Id.*

87. *Id.*

88. *Id.*

89. CEDAW art. 7(a), (b), (c).

90. ZIMBABWE CONST. ch. XII, part 2, § 114, sched. 3.

The requisite qualifications for standing for Parliament as stipulated in section 1 of this schedule are that the person must be a registered voter, have attained the age of twenty-one and have been resident of Zimbabwe for not less than five years during the period of twenty years immediately preceding his nomination.<sup>91</sup> Additionally, under the terms of Section 46 of the Electoral Act,<sup>92</sup> a Member of Parliament is required to be nominated by no fewer than ten persons who are registered voters for the constituency from which the candidate seeks election.<sup>93</sup>

Qualifications for registration as a voter under the common roll as set out in the Constitution are that the person must have attained the age of eighteen and be a citizen of Zimbabwe or permanently resident in Zimbabwe.<sup>94</sup> The Referendums Act also allows any person who is eighteen to vote in any referendum.<sup>95</sup> However, despite the seemingly level playing field, women's participation in politics remains extremely low.<sup>96</sup>

Numerous factors impinge on women's participation such as the hostile political climate characterized by violence, the social climate where men are regarded as leaders, structural barriers such as access to resources and situational factors where most women are mothers and housewives. However, from a legal perspective, the electoral system is one of the contributory factors to the continued low participation of women in politics. Zimbabwe's elections are conducted according to a single member district system where the winner takes all. In determining and declaring the result of a poll for a Member of Parliament, Section 74 of the Electoral Act<sup>97</sup> provides that the constituency registrar shall declare as winner, where there are two candidates, the candidate who has received the greatest number of votes.<sup>98</sup> Where there two or more candidates, the one who has received the greatest number of votes is declared the winner.<sup>99</sup> Few women stand for elections in Zimbabwe and even where they do, in a societal context where men are regarded as decision makers, persuading the electorate to vote for female candidates has yielded little results.

Whilst the major political parties such as both the Zimbabwe African National Union Patriotic Front (ZANU (PF)) and the Movement for Democratic Change (MDC) have quota systems for female candidates within their own party structures, these are not enforced. Quotas, if enforced, would most likely play an important role in accelerating the entry of women into politics. In a system of proportional representation emphasis is placed on the electoral success of party. Whereas under a single member district system the election of one member over another is decisive. An electoral system based on proportional representation and specific quotas is therefore a significant, though not the only necessary, step that could improve the number of women in national politics in Zimbabwe.

Women's ability to hold public office and public functions as outlined in Article 7(b) of the Convention is captured by Sections 12 and 13 of the General Laws

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91. *Id.* sec. 1.

92. ELECTORAL ACT, tit. 2, ch. 1, § 46.

93. *Id.*

94. ZIMBABWE CONST. ch. XII, art 2, § 114, Sched. 3, sec. 3.

95. Referendum Act

96. For example, following the 2000 Parliamentary elections there were only fifteen female Members of Parliament out of a total of 150.

97. ELECTORAL ACT, tit. 2, ch. 1, § 74.

98. *Id.*

99. *Id.*



Amendment Act.<sup>100</sup> Section 12 allows women to hold any public or civil office or appointment subject to the same conditions as men. Section 13 deals with qualifications that render men and women equally eligible for certain public or civil offices.

### *B. International Representation and Participation*

Article 8 of the Convention requires State Parties take measures to ensure that women have equal opportunities with men to represent their governments internationally as well as to participate on a basis of equal opportunity in international organizations.<sup>101</sup>

Constitutionally, the power to appoint diplomats is vested in the President by Section 31H(4)(a) of the Constitution.<sup>102</sup> The section is, however, general in its terms, merely stating that the President "shall have power, subject to . . . the Constitution . . . to appoint, receive, and accredit diplomatic agents and consular officers."<sup>103</sup> Because the obligations regarding women's increased participation in the political and public sphere in general can be met by affirmative action measures, a clause in the Constitution's Bill of Rights allowing for affirmative action across sectors, would go a long way in giving women a constitutional platform upon which to argue for their visible representation at all levels.

### *C. Nationality*

Article 9 of CEDAW grants women "equal rights with men to acquire, change, or retain their nationality."<sup>104</sup> Essentially marriage, its dissolution, nor the change of nationality of the husband should automatically change that of the wife. The Article is not to be construed to compel a women to change her nationality or disadvantage her in any way should she wish to change it.

The general spirit of this article is captured by Section 15 of the Citizenship of Zimbabwe Act that basically provides that the citizenship of the woman shall not be affected by marriage.<sup>105</sup> This section goes on to state that married women have the same rights as unmarried women with regard to their capacity to acquire, lose, divest, or be deprived of the citizenship of Zimbabwe.<sup>106</sup> Marriage to a non-citizen by a Zimbabwean woman does present problems in that in terms of Section 7 of the Constitution, foreign spouses are not guaranteed the right to stay in Zimbabwe, thus forcing women to make decisions that they would otherwise not have made with regard to their residence.<sup>107</sup> The resulting problems on women's freedom of movement are captured more fully in Part V of this Paper discussing Article 15(4), which accords men and women the same rights with regard to the law relating to the movement of persons and freedom to choose their residence and domicile.<sup>108</sup>

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100. CEDAW art 7(b); GENERAL LAWS AMENDMENT ACT, tit. 8, ch. 7.

101. CEDAW art. 8.

102. ZIMBABWE CONST. ch. IV, part 3, § 31H(4)(a).

103. *Id.*

104. CEDAW art. 9(1).

105. CITIZENSHIP OF ZIMBABWE ACT, tit. 4, ch. 1.

106. *Id.*

107. *See* ZIMBABWE CONST. ch. XII, part 2, § (7)(c).

108. CEDAW art. 15(4), *see* discussion *infra* Part (V)(A)(3).

## IV. EDUCATION, HEALTH, ECONOMY, AND CULTURAL LIFE

## A. Education

Article 10 of the Convention requires the State Parties to take appropriate measures to eliminate discrimination against women in education.<sup>109</sup> It also requires the same conditions for women as for men with regard to career and vocational guidance.<sup>110</sup> The equality of women is to be ensured at all levels including pre-school, general, professional, and higher educational institutions.<sup>111</sup> Stereotyped conceptions of men and women's roles are to be also eliminated.<sup>112</sup> States are also required to reduce the problem of drop-out rates for girls and to provide programs for girls and women who have left school before completing their studies.<sup>113</sup>

The right to education is not captured in Zimbabwe's current Constitution, which, as already stated, remains fundamentally weak on matters of social and economic rights. However, Section 15 of the Education Act deals with compulsory education at primary-school level only.<sup>114</sup> Social safety nets, such as the social dimensions fund, designed to assist those who cannot afford the ever-escalating costs of school fees are inadequate in their application because in reality very little money is dispensed under the relevant funds. Policies on government spending have also witnessed a decline in the amount allocated to education in favor of industry and agriculture.<sup>115</sup>

Ministerial directives and policies that permit expulsion of pregnant girls from schools also stand in the path of the realizing the spirit behind Article 10 of the Convention. Until the recent case of *Mandizvidza v. Morgenster College*,<sup>116</sup> trainee teachers who became pregnant were required to interrupt their studies.<sup>117</sup> In the *Mandizvidza* case a female student in her final year at the teacher's college brought a case against the college for expelling her because she had become pregnant.<sup>118</sup> She premised her argument on the grounds that the college's action was a violation of Section 23 of the Constitution, which outlaws discrimination on the grounds of gender.<sup>119</sup> The conduct of the college in expelling her was held to be discriminatory.<sup>120</sup> This case has set a positive precedent for trainee teachers who had hitherto had their education interrupted by this discriminatory requirement.

## B. Employment

Article 11 of the Convention obliges State Parties to take active measures to eliminate discrimination in employment.<sup>121</sup> Women are guaranteed the same em-

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109. *Id.* art. 10.

110. *Id.* art 10(a).

111. *Id.*

112. *Id.* art. 10(c).

113. *Id.* art. 10(f).

114. EDUCATION ACT, tit. 25, ch. 4, 315.

115. *See, e.g.*, Human Development Report of Zimbabwe 1999 36 (Harare: UNDP).

116. 1999 HH 236.

117. *Id.*

118. *Id.*

119. *Id.*; *see also* ZIMBABWE CONST. ch. III, § 23.

120. *Mandizvidza v. Morgenster College*, 1999 HH 236.

121. CEDAW art. 11.

ployment rights, choices, and benefits as men.<sup>122</sup> Women are also guaranteed free choice of employment.<sup>123</sup> Discrimination on the ground of marital status or maternity is prohibited, as is dismissal on the grounds of pregnancy or maternity leave.<sup>124</sup>

Section 23(5) of the Constitution is of relevance to issues of employment, which makes it permissible for a law to take into account physiological differences between persons of different gender without such law being regarded as discriminatory.<sup>125</sup> The problem is with the usage of the word "gender." Because gender generally refers to socially constructed roles as opposed to biological differences, the implication of the provision is to perpetuate gendered roles under the guise of non-discrimination. Given present day reality where gendered divisions in the roles performed by men and women are increasingly being broken down and women are entering professions that were previously male dominated, the provision could in fact work to the disadvantage of both men and women. Women could be prevented from carrying out what is deemed to be essentially male work, such as under-groundwork, while males could also be prevented from making inroads into what are essentially female roles.

Apart from Section 23(5), the Constitution is silent on labor rights, maternity provisions, and equal opportunities at the work place, among others. These issues are largely dealt with by the Labour Relations Act protects employees against discrimination.<sup>126</sup> Basically, no employer is allowed to discriminate against any employee or prospective employee on the grounds of race, tribe, and place of origin, political opinion, color creed, or sex.<sup>127</sup> This is in relation to advertisement, recruitment, creation, or abolishment of posts or jobs, determination of salaries, wages, benefits, or any matters relating to employment, including accommodation and leave. Like the constitutional provision relating to non-discrimination, this section of the Labour Relations Act can be criticized for its failure to exhaust the main grounds under which women are commonly discriminated. For instance, it would enhance the scope of the Labour Relations Act if provisions such as gender, pregnancy, and marital status were specifically included in addition to those that are already there. Contravention of this section is an offense and prejudiced persons can claim for redress. However, outlining more clearly the grievance procedures in such cases as well as the available remedies could strengthen the section.

The provisions for maternity leave presently differ for civil servants and non-civil servants thereby impacting on women's ability to know the applicable legislation. The general provisions for maternity leave benefits are granted under Section 18 of the Labour Relations Act,<sup>128</sup> currently sought to be replaced by a new Labour Bill before Parliament. Women are entitled under the current law to ninety days maternity leave: forty-five days to be taken before the birth of the child and the other forty-five days after.<sup>129</sup> In addition a woman is entitled to 75% of her

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122. *Id.* art. 11(1)(c).

123. *Id.*

124. *Id.* art. 11(2)(a), (b), (d).

125. ZIMBABWE CONST., § 23(5)(b).

126. LABOUR RELATIONS ACT, tit. 28, ch. 1, § 5.

127. *Id.*

128. *Id.* at 18.

129. *Id.*

salary if she forfeits her leave days or 60% if she chooses not to.<sup>130</sup> This reduction of maternity benefits is problematic given that it is generally during this period that a woman needs the extra income.

The section, while appearing benevolent, in fact penalizes working-women for carrying out the biological role of motherhood. Failure to give 100% benefits are motivated by the need to minimize losses because women are regarded as un-productive during this period. The fact that the cost of maternity leave is borne by the employer—as opposed to being a contribution between the employer, the state, and the woman concerned—further compounds the problem in that women are regarded as burdensome employees. Furthermore, provisions relating to maternity benefits do not cover domestic workers who get such leave at the mercy of their employers. This category of workers is already over worked and under paid and would clearly benefit from application of the Labour Relations Act to their situation.

In terms of the current Labour Relations Act, the frequency of maternity leave should not exceed once every twenty-four months or a total of three times with the same employer.<sup>131</sup> It could be argued that this restricts working women's right to choose the number of children that they wish to have. However, on balance the requirement is not so unreasonable as to induce a sense of unfairness especially in view of the double roles working women face and also the increasingly important interests of population control. Suckling-mothers are also granted at least one hour or two half-hour periods during normal working hours for the purpose of nursing the child. In reality many women opt to come an hour later or leave work an hour earlier because of the transportation costs involved. The provision of childcare facilities on work premises would be the ideal.

Section 39 of the Public Service Regulations grants maternity leave on full pay to a woman member who has served for at least one year.<sup>132</sup> A woman is also entitled to a maximum of three maternity leaves under the same employer.<sup>133</sup> A woman who has served for less than a year is entitled to apply for ninety days leave without pay. On resumption of duty a woman assumes the same post that she had prior to her maternity leave. Her eligibility for promotion is not to be affected by maternity leave.

The proposed Labour Bill also seeks to improve the benefits of pregnant women by increasing from 75 to 100 percent maternity leave pay.<sup>134</sup> However, like the Public Service Regulations it undermines this by providing that this shall only be applicable to women who have served for at least a year. The Bill is also weak in its failure to provide for pregnancy related leave due to miscarriage or health problems a woman might have before going on maternity leave.<sup>135</sup> It also contains no provision for paternity leave.<sup>136</sup> Perhaps most significantly it also makes employers individually liable to pay the full maternity leave pay thereby placing women at a disadvantage on the job market where the employer's primary concern is to make profits. Employers are unlikely to employ a large labor force of women of

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130. *Id.*

131. *Id.*

132. PUBLIC SERVICE REGULATIONS § 39 (2000).

133. *Id.*

134. A copy of the draft labour bill is on file with the author.

135. *Id.*

136. *Id.*

childbearing age if they can avoid it. International Labour Organization (ILO) Convention 103 recommends that maternity leave be paid by a social security scheme to which all employers contribute.<sup>137</sup>

Like the Article itself, a major weakness with the legislation in force, is that it is primarily concerned with women who are employed in the public arena. Women's unpaid work is not recognized and there is no social security for such women. The net result is that the work carried out by the vast majority of women in Zimbabwe is simply not acknowledged by the public focus stance inherent in this legislation. The legislation has not been influenced by an adequate theory of the family and women's roles within the family. While it can be argued that a focus on women's unpaid work may reinforce the idea that domestic work is women's work the reality is that most women suffer from the non-recognition of this work.

### *C. Equality in Access to Health Care*

Article 12 essentially provides that State Parties are to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality" with men "access to health care services, including those relating to family planning."<sup>138</sup> Women are to be also ensured appropriate services in relation to pregnancy, confinement, postnatal care, and granted free services where necessary.<sup>139</sup>

The right to health care is increasingly regarded in human rights law as pivotal. It refers to the duty of states within the limits of available resources to ensure the conditions necessary for the health of individuals and populations. It encompasses the right to medical services as well as the right to prevention, health care promotion, protective environment, housing, and social welfare. In Zimbabwe, as is the case in many developing countries, the public health system is generally inadequate and the private health care system is unaffordable. Public hospitals are crowded and affected by staff shortages as well as lack of appropriate medicines. Although both men and women are affected by this reality, the absence of an adequate health care system has a significant impact on women who often suffer from gynecological related diseases and also take on an enormous burden in home care responsibilities brought on by the absence of a viable health care system.

Zimbabwe's Constitution does not contain any provisions that accord health care the enforceable human right status it deserves and that would allow the State to accord health care sufficient priority and urgency in the allocation of resources. The right to life in the Constitution has been confined its interpretation and formulation to the civil and political human rights arena. In view of the seriousness of the problems of accessing health care, debates on constitutional reform emphasize the need for this right to be enforceable.

Apart from access to health care important issues regarding women's control of their sexuality and reproductive rights are also raised by Article 12.<sup>140</sup> The Termination of Pregnancy Act<sup>141</sup> is important in this regard. Under this law, Zim-

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137. Although Zimbabwe does have a public social security scheme (NSSA) this does not cover maternity benefits.

138. CEDAW art. 12(1).

139. *Id.* art. 12(a).

140. *Id.*

141. TERMINATION OF PREGNANCY ACT, tit. 15, ch. 10.

babwe continues to take a middle-of-the-road approach to abortion by permitting it in certain limited situations, namely:

- (a) where continuation of the pregnancy is likely to endanger the life of the woman concerned that the termination of the pregnancy is the only alternative
- (b) where there is risk that the child born will suffer from physical or mental defect of such a nature that he will be permanently handicapped
- (c) where there is reasonable possibility that the fetus was conceived as a result of unlawful intercourse.<sup>142</sup>

In order to effectively carry out the abortion once any of these conditions are satisfied, a medical practitioner needs the permission in writing of the medical superintendent of the hospital concerned. Furthermore the superintendent will not give his permission for an abortion under conditions (a) and (b) unless he is satisfied, on the authority of two medical practitioners that the circumstances outlined exist. Clearly this is cumbersome, especially under Section 5(b) of the Termination of Pregnancy Act, which states that the medical practitioners in question must not be from the same partnership or involved in the same medical practice.<sup>143</sup> The intention is to make it difficult to procure an abortion. Although Section 7 of the Termination of Pregnancy Act permits a medical practitioner to carry out an abortion as a matter of emergency where there is danger to the women's health, and it is not possible to obtain the necessary authority of the superintendent, again there are cumbersome report procedures that are attendant on the medical practitioner thereafter.<sup>144</sup> Furthermore, abortion is not free. In terms of Section 11(2) a fee may be prescribed by reference to any fee charged for any service in a state hospital.<sup>145</sup>

Apart from the fact that abortion is available in very limited circumstances, a glaring weakness in Zimbabwe's abortion law is that it does not place emphasis on the woman's right to terminate her pregnancy but on the medical practitioner's opinion. Abortion is not approached from the perspective of a woman's right to control her reproductive health, but rather from a narrower, morally laden perspective of confining abortion to the life and death situations as determined by a medical practitioner. The net result is that in practical terms abortion remains largely inaccessible. Those who fail to fall into the limited net cast out by the law simply resort to illegal abortions, infanticide, or baby dumping. The control on women's reproductive rights and the glorification of motherhood puts enormous strains on women who may not want to have children and who end up resorting to criminal activities to take care of their predicament often at enormous costs to their freedom. For example, the Concealment of Birth Act imposes a penalty of imprisonment not exceeding five years against any woman who delivers a child and either secretly buries or disposes of the body in an attempt to conceal the birth of such child.<sup>146</sup> Making the procurement of abortion more accessible could significantly reduce cases of concealment of birth.

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142. *Id.* § 4(a), (b), (c).

143. *Id.* § 5(b).

144. *Id.*

145. *Id.* § 11(2).

146. CONCEALMENT OF BIRTH ACT, tit. 9, ch. 4.

In light of the problem of HIV/AIDS some people are of the view that the Termination of Pregnancy Act should also be amended to include infection of the mother with HIV as a medical ground for termination of the pregnancy where the women so desires. There should also be guidelines for speeding up the process of terminating a pregnancy.

With regard to family planning, a key concern of Article 13, the comparable legislation is the Zimbabwe National Family Planning Council Act (ZNFPCA).<sup>147</sup> The ZNFPCA established a National Board of Family Planning.<sup>148</sup> Apart from popularizing and promoting the provision of adequate and suitable facilities for family planning in Zimbabwe, a notable objective is also to provide and manage facilities for performing surgical operations for infertility and sterilization. In a society where motherhood is highly valued, the emphasis is understandable. However, there is also the risk that too much emphasis can also perpetuate the belief in women's role as being that of child-bearer and rearer and that women are incomplete unless they are able to bear children. The ZNFPCA is silent on whether women who wish to access this treatment can get it for free. Issues of a woman's choice and free consent as regards to sterilization are also not canvassed in the ZNFPCA but in medical practice. However, given the significant impact of sterilization on the women's right to reproduce, and allegations of forced or clandestine sterilization, it would be useful for legislation to capture the fundamental concept of consent.

#### *D. Social and Economic Benefits*

Under Article 13, State Parties are to "take all appropriate measures to eliminate discrimination against women in . . . the areas of economic and social life in order to ensure, on a basis of equality" with men, the same rights in relation to "family benefits"; bank loans mortgages and other forms of financial credit; [t]he right to participate in recreational activities, sports and in all aspects of cultural life."<sup>149</sup>

##### *1. Family Benefits*

There are no provisions for family benefits under Zimbabwe law. Section 16 of the Income Tax Act in fact stipulates cases in which no deductions can be made including costs incurred by a tax payer in the maintenance of themselves, their family or establishment, contributions to pensions, rent, and costs of repairs to premises to mention a few.<sup>150</sup> For women who incur expenses in hiring child-minders to enable them to go to work, this legislative provision is particularly disadvantageous. The practice where a married woman's income was previously added to that of her husband's was abolished in 1988.

##### *2. Access to Bank Loan Mortgages*

The Immovable Property Prevention from Discrimination Act (IPPPDA) prevents discrimination in respect of disposal of immovable property.<sup>151</sup> Principally,

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147. ZIMBABWE NATIONAL FAMILY PLANNING COUNCIL ACT, tit. 15, ch. 11.

148. *Id.*

149. CEDAW art. 13.

150. INCOME TAX ACT, tit. 23, ch. 6 § (16).

151. IMMOVABLE PROPERTY PREVENTION FROM DISCRIMINATION ACT, tit. 10, ch. 12, § 3.

discrimination on the grounds of race, tribe, place of origin, political opinions, color, creed, or sex exemplified by refusing to sell, let, or otherwise dispose of property is prohibited.<sup>152</sup> Section 4 of the IPPDA also prohibits financial institutions from discriminating on the above mentioned grounds by refusing to grant loans or other financial assistance for the acquisition, hire, construction, maintenance, or repair of any immovable property.<sup>153</sup> Financial institutions are also prohibited under the same sections from fixing conditions that are less favorable than those fixed in respect of any other person class of persons. However, in a twist, Section 5 then goes to make the very grounds it prohibits such as discrimination on the basis of political opinion, creed, and sex, viable defenses in criminal prosecutions in some cases.<sup>154</sup> Such discrimination is permissible where it can be shown that discrimination on the ground of sex for example, was justified in the interests of decency or morality or that the property was reserved for use by persons of one sex. The morality argument could result in a women's organization that is pro-abortion or pro-lesbian being denied the right to purchase property on the grounds of morality or public decency. The exceptions could therefore unwittingly allow personal biases to be used against women who wish to acquire property for specific purposes that may be deemed to go against the mores of society.

Although financial institutions are prohibited from discriminating in their granting of financial loans for the acquisition of property, many women still continue to be disadvantaged because they lack of collateral. This emanates from their weaker economic position.

There are also other pieces of legislation such as the Building Societies Act and the Post Office Saving Bank Act (POSB) that capture in direct terms women's independent rights as depositors. For instance, Section 18(1) of the Building Societies Act<sup>155</sup> states that:

a minor over the age of sixteen or a married woman . . . may be a member of or a depositor with any society and may without the assistance of his or her guardian or husband execute all necessary documents, give all necessary acquittances, cede, pledge, borrow against, and generally deal with his or her share of deposit as he or she thinks fit.<sup>156</sup>

Furthermore, in terms of section 18(2) a husband is not permitted to demand from the society any particulars regarding the shares she holds in, or deposit she has with that society, unless the woman concerned has provided her written consent.<sup>157</sup>

Section 10 of the POSB Act provides that a married woman, whether married under marital power or not may be a depositor and may without assistance execute all necessary documents, give all necessary acquittances, enjoy all privileges, and be liable to all the obligations attaching to depositors.<sup>158</sup>

### *3. Right to Participate in Recreational Activities*

There are various pieces of legislation that seek to regulate sports and cultural activities such as the Boxing and Wrestling Control Act, the Boy Scout Associa-

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152. *Id.*

153. *Id.* § 4.

154. *Id.* § 5.

155. BUILDING SOCIETIES ACT, tit. 24, ch. 2, § 18(1).

156. *Id.*

157. *Id.* § 18(2).

158. POST OFFICE SAVINGS BANK ACT, tit. 24, ch. 10, § 10.



tion Act, and the Sports and Recreation Commission Act.<sup>159</sup> The Sports and Recreation Act established a Sports Commission whose objectives are to endeavor to ensure that opportunities for sports and recreation are made available to all persons throughout Zimbabwe.<sup>160</sup> The sporting activities listed in the second schedule to the Act, span forty-eight categories and largely capture male activities such as angling, billiards, snooker football, and shooting, to mention a few.<sup>161</sup> However, activities that are popular with women include such as athletics, basketball, netball squash, volleyball, and walking. Aerobics training, which many women engage in, is not included in this schedule, although bodybuilding is. As is the case with virtually all of Zimbabwe's legislation the language used is masculine which further contributes to the marginalization of women who may find it difficult to immediately identify with the legislation as inclusive of them. Although there is a "Wrestling Act" and a "Boy Scouts Act," no specific legislation exists designed to cater to the interest of women's sporting activities, such as netball or Girls Scouts. Although boy scouts badges are protected from abuse the same does not apply to girls scouts. This is discriminatory as it gives the impression that these are not important enough to merit any special treatment. In reality male sporting activities receive much more public attention and there are negative cultural attitudes about women's involvement in sport particularly on full-time basis.

#### *E. Rural Women*

Article 14 of the Convention deals with rural women and recognizes their role in the economic survival of their families and communities.<sup>162</sup> It enjoins State Parties to take a variety of economic, social, political, and legal measures that are designed to improve the lives of rural women.<sup>163</sup> For instance, development programs are expected to meet women's special development needs and expectations. Rural women are also to be ensured access to health care, education and training.<sup>164</sup> Access to markets is also to be facilitated.<sup>165</sup> Article 14 emphasizes modernization of amenities crucial for rural women thereby creating the framework for freeing them to pursue their self-development. Of particular significance from a legal perspective is Article 14(2)(g), which among other things calls for equal treatment of rural women in land and agrarian reform as well as land resettlement schemes.<sup>166</sup>

In terms of the constitutional framework, Section 23(3)(f) of the current Constitution is particularly pertinent in that it allows the operation of customary law and differential treatment in the allocation of land in communal areas.<sup>167</sup> The bulk of the country's population is to be found in the communal areas as compared to those found on other tenure systems namely, commercial, small scale, and large

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159. *See generally* BOXING WRESTLING CONTROL ACT, tit. 25, ch. 2; BOY SCOUT ASSOCIATION ACT, tit. 25, ch. 3; SPORTS & RECREATION COMMISSION ACT, tit. 25, ch. 15.

160. SPORTS & RECREATION COMMISSION ACT, tit. 25, ch. 15, § 19(f).

161. *Id.*

162. CEDAW art. 14.

163. *Id.*

164. *Id.* art. 14(2).

165. *Id.*

166. *Id.* art. 14(2), (8).

167. ZIMBABWE CONST., ch. III, § 23(3)(f).

scale systems. The continued protection of customary law in reality perpetuates discrimination against women.

In addition to this constitutional provision, the operative legislation that deals with allocation of land in the communal areas is the Communal Land Act.<sup>168</sup> Section 7(c) of this Act provides that "no person shall occupy or use any portion of communal land unless he or she is a spouse, dependent relative, guest, or employee of a person who occupies or uses communal land."<sup>169</sup> Section 8 outlines who can be given this right to use or occupy agricultural land by the Rural District Council and the criteria to be considered.<sup>170</sup> In granting this authority, the Rural District council is enjoined to:

(a) have regard to customary law relating to the allocation, occupation and use of land in the area concerned.

(b) grant consent only to persons who according to customary law of the community that has traditionally and continuously occupied and used land in the area concerned, are regarded as forming part of such community or who, according to such customary law may be permitted to use and occupy such land.<sup>171</sup>

In practice, allocation of resources under customary is fundamentally premised on the perpetuation of the male lineage. The allocation of resources under customary law is fashioned from a time when society was still feudal in its management of property relations that were primarily designed to address the dominating interests within such societies. Women are regarded as outsiders both in their family of birth and in their family of marriage and therefore generally enjoy land use rights mediated through males. In their family of origin they are regarded as transient and in their family of marriage they are regarded as being there for the specific purpose of bearing heirs. Land is allocated to the male head of the household, which means that both women and junior males are excluded from control of land. Although for junior males the situation may be transient, for women the exclusion is perpetual.

Although people's lives in rural areas may still largely be fashioned under traditional norms, many factors arise from the dictates of modern society, including women's unrecognized, though significant, contribution to the generation of income, which makes women's control of resources paramount. Because they lack control of the land, subject to variations arising from the "benevolence of the dictator" the income generated belongs to the one who controls the land. By protecting customary law from being regarded as discriminatory in the allocation of land in communal areas, the Constitution, as well as the provisions of the Communal Lands Act, clearly work to the disadvantage of women: although section 8(4) allows any person who has been aggrieved by the refusal of the Rural District Council to grant consent for use of communal land for agricultural or residential purposes to appeal to the President, there appear to be no reported cases of any women having used this provision to challenge their exclusion.<sup>172</sup>

The allocation of land in communal areas in accordance with traditional norms and practices is further echoed in the Traditional Leaders Act in that traditional leaders such as chiefs and village heads are given roles to play in the allocation of

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168. COMMUNAL LAND ACT, tit. 20, ch. 4.

169. *Id.* § 7(c).

170. *Id.* § 8.

171. *Id.* § 8(2)(a), (b).

172. *Id.* § 8(4).

land albeit the primary authority still vests with the Rural District Councils.<sup>173</sup> For instance section 5(1)(g) of the Traditional Leaders Act enjoins chiefs to ensure that they allocate land in accordance with Part 111 of the Communal land whose provisions have been captured above.<sup>174</sup> In terms of section 9(1)(g) of the Traditional Leaders Act, the village head is required to oversee through the ward assembly the disposal of settlement rights in communal land and the admission of new settlers.<sup>175</sup>

A fundamental issue of concern with the legislation relating to access to land for women in rural areas is therefore its implementation within a framework of exclusion based on feudal laws. The legislation governing access to land by women in communal lands ultimately needs to be refashioned to take into account the needs of women in modern day society rather than perpetuating women's exclusion in the name of customary law.

#### *F. Leasehold Land*

The Agricultural Land Settlement Act deals with leases and options to purchase land in general.<sup>176</sup> In Section 7 the Act also allows the Minister of Lands and Water Resources or any other Minister assigned to the administration of the act, to establish schemes for the settlement of persons on agricultural land, as well as to train such persons in farming and to develop the farming industry in general.<sup>177</sup> This is significant in that the act provides a framework under which women, as well as men, may be targeted for skills development and resettlement or leasehold under the Act. Section 10 spells out the criteria that the Board implementing the provisions of the act shall take into account in considering applications for leases and lease holdings.<sup>178</sup> These include, the age of the applicant and legal competence of applicant to hold, acquire, and farm the holding.<sup>179</sup> Possession of qualifications and capital to make proper use of the holding having regard to the purpose for which the land is to be used are also to be considered.<sup>180</sup> Whilst neutral in its approach, it could be argued that because of a variety of cultural and economic factors limiting women's access to education and disposable income, women may have difficulties meeting the criteria established by the Agricultural Land Settlement Act. As such, affirmative action coupled with support measures would increase the chances of women qualifying for lease holdings under this act. A qualitative study of the implementation of this act would be useful in yielding disaggregated data on the practices on the ground as they affect women. Upon death of a lessee, cession of a lessee's rights by the administrator has to be approved by the Minister. Whether women have been able to acquire lessee rights following the death of their husband would be interesting to investigate.

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173. See generally TRADITIONAL LEADERS ACT.

174. *Id.* § 5(1)(g).

175. *Id.* § 9(1)(g).

176. AGRICULTURAL LAND SETTLEMENT ACT, tit. 20, ch. 1.

177. *Id.* § 7.

178. *Id.* § 10.

179. *Id.*

180. *Id.*

*G. Resettlement*

The Rural Land Act provides for the acquisition and disposition of State land for farming or other purposes<sup>181</sup> and the Land Acquisition Act empowers the President and other authorities to acquire rural land excluding communal land.<sup>182</sup> The acts in question, however, do not specifically set out the criteria for resettlement on such land. Administrative policy is relied on for determining the criteria. Widowed and divorced women are reported to be granted land under administrative policies. As result of their marginalization women would however benefit from a clear stipulation in the law governing their right to land in resettlement schemes.

Land rights in large-scale commercial farms are determined by the ability to raise the necessary financial resources. To the extent that the majority of women are poorer as compared to their male counterparts, women's ownership of land under this tenure system is limited. Small-scale commercial farms are a legacy of colonial initiatives to create a middle class of black landowners. In practice women did not access land in this category largely because of inherent perceptions of men as landowners and women as appendages to males. The acquisition of independent resources by African women was also generally limited under colonial government because black women ranked very low in the scale of citizenship.

Women's control of land remains a major concern from a constitutional, legislative, and practical perspective. Enforceable constitutional and legislative provisions that clearly address this problem could enhance the position of rural women regarding control of land.

*V. EQUALITY BEFORE THE LAW AND IN MARRIAGE AND FAMILY LIFE**A. Equality Before the Law and in Civil Matters*

In terms of Article 15, "State Parties shall accord to women, in civil matters, a legal capacity" and the same opportunities to exercise that capacity as men.<sup>183</sup> Emphasis is placed on women's ability to conclude contracts, administer property and to be treated equally in all stages of procedure in courts and tribunals.<sup>184</sup> Private instruments restricting the capacity of women are deemed illegal.<sup>185</sup> This article deals with the right to movement of persons and freedom to choose residence and domicile on an equal basis with men. Any law that limits the capacity of a woman to conclude contracts, limits her rights to deal with property or restricts her capacity to represent her interests in court is deemed problematic and must be amended or repealed.<sup>186</sup>

Section 15 of General Laws Amendment, accords majority status to everyone at the age of 18 thereby impacting on contractual capacity.<sup>187</sup> However, as noted in Section One of this Article, although African women have legal capacity to sue and be sued, they have not, as stated in *Magaya v Magaya*,<sup>188</sup> acquired rights they

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181. RURAL LAND ACT, tit. 20, ch. 18.

182. LAND ACQUISITION ACT, tit. 20, ch. 10.

183. CEDAW art. 15(2).

184. *Id.*

185. *Id.* art. 15(3).

186. *See generally id.*

187. GENERAL LAWS AMENDMENT ACT, tit. 8, ch. 7, § 15.

188. *See supra* Part (II)(E).

did not previously have in matters governed by customary law, unless otherwise stated in specific legislation.<sup>189</sup>

### *1. Own and Deal with Property*

Section 15 of the Deeds Registry Act provides that a married women is only to be assisted by her husband in executing any deed or document required or permitted to be registered in any deeds registry, or produced in connection with any deed, if by virtue of her marriage she has no legal capacity to execute such deed or document without the assistance of her husband.<sup>190</sup>

A situation where a women has no legal authority by virtue of her marriage arises where a woman is married in community of property includes marital power. In Zimbabwe, the Married Persons Property Act excludes community of property, profit and loss, and marital power in relation to all marriages contracted after the 1st of January 1929.<sup>191</sup> However, parties wishing to be exempt from the operations of this Act can register an ante-nuptial contract before their marriage.<sup>192</sup> Deed-records indicate that virtually no couples registers for an ante-nuptial contract in community of property.

### *2. Representation of Interests in Courts or Tribunals*

Section 18 of the Constitution contains the provisions that secure the protection of the law.<sup>193</sup> Section 18(1) states that subject to the provisions of the Constitution, every person is entitled to protection of the law.<sup>194</sup> The right to a fair hearing is also enshrined in this provision. However, because the right to protection of the law is subject to other provisions of the Constitution, the implications for women are that their right to protection is tampered with by the provisions contained in Section (3), which protects customary law.<sup>195</sup> Furthermore, in section 18(15) local courts that administer customary law are excluded from being challenged on the basis of impartiality and non-independence in instances where a member of the court has an interest in the proceedings due to his position in society and traditional, customary tribal practices and procedures.<sup>196</sup> In situations where customary laws excludes women or relegates them to an inferior position, this protection from being regarded as impartial, works to the disadvantage of women as it prevents a thorough interrogation of customary norms. Section 18(15) is therefore another example in the Constitution of the indirect protection of customary law from being regard as discriminatory.

Women's fair representation in court is further hampered by the difficulties in accessing legal representation and the problems posed by an inefficient civil service. Whilst the Legal Assistance and Representation Act provides for the provision of assistance to indigent persons appearing before the courts of Zimbabwe, its

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189. *Magaya v. Magaya*, 1998 ZLR 210 (SC).

190. DEEDS REGISTRIES ACT, tit. 20, ch. 5, § 15.

191. MARRIED PERSONS PROPERTY ACT, tit. 5, ch. 12, § 2.

192. *Id.*

193. ZIMBABWE CONST. ch. III, § 18.

194. *Id.* § 18(1).

195. *Id.* § 23(3).

196. *Id.* § 18(15).

emphasis is on criminal proceedings.<sup>197</sup> In practice, *pro deo* assistance<sup>198</sup> underlying this act is generally only granted in serious crimes and legal assistance rarely granted to those appearing before the Magistrates Court. Legal assistance in civil matters where lawyers take on matters for free is also limited and is generally given in relation divorce cases in the High Court. Although non-governmental organizations play an important role in education and legal assistance they are often confined in terms of their geographical outreach.

The net result is that women continue to appear before the courts as self-actors where they often encounter hostility and insensitivity. Ignorance of the law is also a problem.

### 3. Movement of Persons

Section 22 of the Constitution provides that no person shall be deprived of freedom of movement.<sup>199</sup> Implicit in this provision is the right to move freely through out Zimbabwe, the right to reside in any part of Zimbabwe, the right to leave and enter Zimbabwe and immunity from expulsion from Zimbabwe.

Several cases have been brought before the Supreme Court using this provision to challenge what are deemed to be restrictions to women's freedom of movement. The first of these was the Supreme Court case of *Rattigan v. Chief Immigration Officer*<sup>200</sup>; three women citizens of Zimbabwe, married to foreigners who had been denied permanent residence in Zimbabwe on the grounds that they had no scarce skills, brought suit.<sup>201</sup> The Supreme Court ruled that to prohibit husbands from residing Zimbabwe, and so disable them from living with their wives in the country of which they are citizens, is in effect to undermine and devalue the protection of freedom of movement accorded to each of the wives as a member of the family unit.<sup>202</sup> The Court also emphasized that the Constitution should be interpreted so as to best carry out its objects and promote its purpose generously and purposively and not be given a narrow, artificial and pedantic interpretation.<sup>203</sup>

*Salem v. Chief Immigration Officer*<sup>204</sup> also focused on the freedom of movement and emphasized the fact that the right to reside also includes the right to work.<sup>205</sup> In *Salem*, a female citizen sought a permit for her husband to live and work here.<sup>206</sup> The Immigration Officer insisted that he leave the country and apply from outside.<sup>207</sup> The Court held that the right of a citizen to live here must include a right for him to work here to enable the couple to support each other.<sup>208</sup> The Supreme Court's view was that the word "reside" had to be given a wider

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197. LEGAL ASSISTANCE AND REPRESENTATION ACT, tit. 9, ch. 13, § (3), (4).

198. "For God." In Africa, public legal aid is rooted in the notion of "legal counsel working for God." It is similar to the American concept of *pro bono publico*. —Eds.

199. ZIMBABWE CONST. ch. III, § 22.

200. 103 ILR 224 (1994).

201. *Id.*

202. *Id.*

203. *Id.*

204. 1995 (4) SA 280.

205. *Id.* at 283.

206. *Id.* at 281.

207. *Id.*

208. *Id.* at 283.

meaning and not just a place to work or sleep.<sup>209</sup> As a result the court ordered the Chief Immigration Officer to issue a permit to the husband to live and work here and enjoy all other rights of alien permanent resident without restriction.<sup>210</sup>

Following the decisions of *Rattigan* and *Salem*, constitutional Amendment 14 was brought into effect.<sup>211</sup> Among other things it amended Section 22 to allow for the derogation of freedoms contained therein by excluding or expelling from Zimbabwe, any person who is not a citizen of Zimbabwe, *whether or not that person is married or related to another person who is a citizen of Zimbabwe*.<sup>212</sup> Amendment 14 also introduced a new subsection 5 to Section 23 of the Constitution.<sup>213</sup> The import of subsection 5 is to exclude from being regarded as discriminatory the State's action allowing foreign wives married to Zimbabwean husbands to apply for citizenship in accordance with Section 7(2) of the Constitution even though the same does not apply to foreign husbands married to Zimbabwean wives.<sup>214</sup>

The net result of these constitutional amendments is that the progressive interpretations in the cases of *Rattigan* and *Salem* were overruled and the discriminatory practices restricting women's freedom of movement are perpetuated by the Constitution.

#### 4. *Choice of Residence and Domicile*

According to Roman Dutch Law, a wife assumes her husband's domicile on marriage and does not acquire her own domicile of choice. This has not been altered by any legislation. The husband's domicile therefore generally determines the law applicable in specific cases such as the law applicable on death or dissolution the marriage.

#### B. *Equality in Marriage and Family Law*

Article 16 essentially requires State Parties to take measures to eliminate discrimination against women in all matters relating to marriage and family relations. In addition to the above the betrothal of children is regarded as being of no force or effect.<sup>215</sup>

The right to enter into marriage in Zimbabwe is not the same for man and women. The minimum age for marriage is sixteen for girls, but it is eighteen for boys. Following the decision in *Magaya v. Magaya*, which reversed the implications of the Legal Age of Majority Act in relation to women's ability to enter into a contract of marriage under customary law without the consent of their guardian or bride price being paid the status of women under customary law to independently enter into marriage, is now problematic. With the *Magaya* decision, which stated that women could not be given rights which they never had customary law, women are once again reduced to a legal minority in any matters involving customary law, including marriage.<sup>216</sup>

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209. *Id.* at 282.

210. *Id.* at 281.

211. ZIMBABWE CONST. amend. 14.

212. *Id.* amend. 14, subsect. 5.

213. *Id.*; see also *id.* § 7(2).

214. CEDAW art. 1(b).

215. *Id.*

216. *Magaya v. Magaya*, 1998 ZLR 210 (SC). See also *supra* Part (II)(E) and accompanying text.

The Customary Marriages Act<sup>217</sup> not only recognizes polygamy but also recognizes the practice of widow inheritance as legitimate and worthy of entitlement to registration for instance it states in Section 3, that no marriage contracted according to customary law including the case where a man takes to wife the widow or widows of a deceased relative shall be regarded as a valid marriage unless such marriage is solemnized in accordance with the act.<sup>218</sup> The whole tenure of the act is premised on women as minors. Section 4 requires the guardian of the women to be present at the solemnization of such marriage or some other person appointed by such guardian.<sup>219</sup> However, the presence of the guardians is not necessary where the where the marriage officer is satisfied that the guardian of the woman has given her consent.<sup>220</sup> A magistrate may also grant consent for the solemnization such marriage.<sup>221</sup>

The payment of marriage consideration is also recognized under Section 7 of the Act.<sup>222</sup> Women who wish to marry under the marriage Act are required by Section 12 to obtain an enabling certificate to the effect that there is no bar to such marriage by reason of lack of consent of the guardian.<sup>223</sup> Whilst some of these requirements had been largely tempered by the implications of the legal age of majority, the revival of customary law by the *Magaya* decision highlights the problematic nature of the continued recognition of customary law in matters concerning personal law.

Rather than dealing squarely with the problems posed by polygamy and its perpetuation of the ideology of the otherness of women, Zimbabwe's legislature has given added recognition to such marriages under the Administration of Estates Act passed as recently as 1st November 1997.<sup>224</sup> Men often enter into multiple unions without the knowledge of the first wife, regardless of the fact that they already have a marriage that does not permit polygamy. The legislators' stance in giving recognition to multiple marriages, even where they are illegal, clearly goes against the grain of the Convention, which seeks to whittle down practices founded on the lack of equality between men and women. In recognizing multiple marriages for purposes of inheritance, the argument is that the Act is designed is to protect the proprietary interest of women who find themselves in such situations.

Clearly the challenge facing Zimbabwe, with respect to its marriage laws, is whether there should be a uniform marriage law for everyone as opposed to the continued recognition of three types of marriages, namely the registered customary marriage, the civil marriage, and the increasing recognition accorded to unregistered customary law marriages. The latter are generally deemed invalid, save for purposes relating to status, guardianship, and custody and succession rights of children from such a union. In reality the courts have increasingly expanded the recognition of such marriages, as has the legislature. For instance, the Administration of Estates Amendment Act gives recognition to such marriage for purposes of inheritance.<sup>225</sup> A key problem with unregistered marriages, which impacts on

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217. CUSTOMARY MARRIAGES ACT, tit. 5, ch. 7.

218. *Id.* § 3.

219. *Id.* § 4.

220. *Id.*

221. *Id.*

222. *Id.* § 7.

223. *Id.* § 12.

224. ADMINISTRATION OF ESTATES ACT, tit. 6, ch. 7.

225. *See generally id.*



women's right to equality within marriage, relates to the proprietary consequences emanating from such unions upon its dissolution. Technically speaking, because the marriage is not registered, the parties cannot benefit from the use of the Matrimonial Causes Act, which allows the court to take into account a variety of factors in the distribution of the property between the two parties on the dissolution of a registered marriage.<sup>226</sup> In an unregistered customary marriage the courts have found themselves engaged in legal gymnastics centered on attempts to prove the existence of universal partnership. The sum total of the recognition of three different types of marriages is that it results in differential treatment amongst women.

The right to enter into marriage with a woman's free consent is captured by Sections 11 and 15 of the Customary Marriages Act.<sup>227</sup> Section 11 prohibits the pledging of girls and women in marriage, while Section 15 imposes of fine and imprisonment against any one who by force or intimidation compels a woman to enter into marriage without her consent.<sup>228</sup> The fine, however, is long outdated being stipulated at Z\$100.<sup>229</sup> Imprisonment is for a period of one year and is presented as an option to the fine. Clearly, not even the poorest person will fail to pay the Z\$100 when faced with the option of a one-year prison term. The penalty, therefore, is not a deterrent. However, insistence on registration is problematic as it conveys a message of superiority of received law over customary law. As such one option is to give full recognition to such marriages or more preferably to harmonize marriage laws into a single statute. In this regard the Ministry of Justice is working on a White Paper on harmonization of marriage laws. The Zimbabwe Women Lawyers Association has also produced an advocacy and lobbying paper, which details current weaknesses with the current laws and makes proposals for reform.<sup>230</sup> Issues relating to women's access to guardianship and custody as compared to men are discussed more fully under the Children's Convention.<sup>231</sup>

## VI. CONCLUSION

This paper has analyzed the constitutional and legal rights situation of women in Zimbabwe against the backdrop of the Women's Convention. Part I illustrated that the constitutional provisions relating to non-discrimination remain exceptionally weak under Zimbabwe's present Constitution and need to be addressed as a matter of urgency even pending wholesale amendment of the Constitution. The gist of the problem with the present Constitution is its continued protection of customary law from being regarded as discriminatory as well as the non-exhaustive nature of the grounds against which persons cannot be discriminated against.

The limitations of the traditional defenses available to women who kill their partners as a result of domestic violence have been highlighted. It has been noted that common law defenses such as provocation and self-defense are generally inadequate to cater to the kinds of situations that lead women to kill as an act of defense or provocation. The problems of criminalizing prostitution were also raised

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226. MATRIMONIAL CAUSES ACT, tit. 5, ch. 13.

227. CUSTOMARY MARRIAGES ACT, tit. 5, ch. 7, §§ 11, 15.

228. *Id.*

229. One U.S. dollar equals approximately Z\$55. Therefore, the fine amounts to roughly U.S. \$2.00.

230. A copy of the Zimbabwe Women Lawyers Association Paper is on file with the author.

231. See generally *The Convention on the Rights of the Child*, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess. (entered into force Sept. 2, 1990).

in so far as such an approach has an impact on fundamental human rights and can also result in the activity going under ground with serious consequences for HIV/AIDS prevention initiatives.

Under Part II focusing on women's participation in political and public life, the limitations to women's participation arising from the nature of the electoral system have been pointed out. It was noted that while from the examination of existing legislation the playing field for entry into politics is gender neutral as stipulated in Schedule 3 of the Constitution as well as the Electoral Act, the reality is that there are various factors that impinge on women's participation in politics. These range from the hostile political climate to the social climate where men are regarded as decision makers. The Electoral System itself, based on a "winner takes all," as opposed to proportional representation has also been singled out as problematic for women. It has been argued that the absence of a constitutional clause in support of affirmative action impacts on women's participation in political life. An affirmative action clause and allowing for quotas would also help in the appointment of women as diplomats.

Regarding nationality, it was noted that while the Citizenship Act protects women's against loss of their nationality, women's freedom of movement is affected by the Constitution's failure to guarantee foreign husbands the right to stay in Zimbabwe.

Part VI, dealing with health, education, employment, social, and economic benefits, raises various problems. With regard to education, it was noted that the right to education is not captured as a constitutional right; under the employment analysis, significant limitations were noted with the Labour Relations Act in terms of its failure to grant full maternity benefits. It was also noted that though the act outlines the various grounds upon which an employee cannot be discriminated against these are not exhaustive, grounds such as gender, pregnancy and marital status are not included. However, legislative initiatives to amend the Act were also highlighted including the intention to increase maternity benefits to 100%.

The weak constitutional framework regarding health care has also been noted. Despite the dire need for health care, there is no constitutional provision that deals with the right to health care as a human right. The fundamental limitations of current abortion laws in relation to women's control of their reproductive rights have also been canvassed, noting for instance, that apart from being limited to special circumstances, the present abortion laws place emphasis on the medical practitioner's opinion as to whether the pregnancy should be terminated rather than the woman's right to choose.

The legislative framework impacting on rural women's access to land in communal areas has been analyzed as being fundamentally limited by its continued operational framework within feudal customary norms. The impact of Section 23(f) of the constitution, which permits discrimination and differential treatment in the distribution of communal land, has been highlighted as particularly problematic and in need of reform. Other pieces of legislation such as the Communal Land Act, which take their cue from the Constitution in the manner of distribution, have also been problematized as calling for attention in terms of legislative reform.

Finally, in Part V, issues of women's equality before the law have been raised, noting once again the impact of the continued preservation of customary law as it

affects women. Laws such as the continued recognition of polygamy have been discussed in relation to women's equality in marriage and family. The issue of whether there is a need for a consolidated act on marriage has been raised.

The need for the Constitution as a whole to have broader focus that takes into consideration violations of human rights within both the public and private arena where most women experience violations has also been raised. Similarly, the Declaration of Rights must also be strengthened in terms of an integrated approach that combines both political and economic rights.