REPUBLIC OF ZAMBIA
THE JUDICIARY

ANNUAL JUDICIAL CONFERENCE 2016
14 – 18 NOVEMBER, 2016

"Customary law in the context of the Amended Zambian Constitution from the point of view of the Bill of Rights."

By Hon. Justice Mumba Malila SC.

1. Introduction

I have been requested to make a presentation on customary law in the context of the amended Zambian Constitution from the point of view of the bill of rights. I must from the outset admit that after hearing from all the interesting topics already presented in this conference, this particular topic may well be an anti-climax considering that customary law has never really been a stimulating topic except for those who have had the privilege, or is it the agony, of marrying under customary law, or dying intestate. I could attempt an exhaustive commentary about human rights and customary laws till the hens come home to roost, and yet this would not, in the least, make this seemingly leaden topic any more attention-grabbing. The truth about customary law, however, is that it impacts our lives and our human rights individually and collectively in many ways some of which we may not be very conscious about, particularly in the area of personal law involving matters such as marriage, inheritance, and traditional authority.

It is not my intention to attempt to speak at large about customary law in Zambia or to consider the cultural relativism and universality arguments and their relevance to the Zambian human rights scene. I have already warned you that such an attempt would bore you to tears. I intend to speak briefly on the place of customary law in the Constitution and the bill of rights in Zambia and the opportunities that, we as adjudicators, have to help change the mindset of our people and eradicate customary practices that facilitate human rights violations. I will catalogue some of the human rights violations that occur in Zambia under the guise of engaging in customary practices. I will also briefly examine international human rights norms and customary law. More importantly, I will suggest how we can, as judges, make use in our judgments of international human rights norms so as to ameliorate the impact of bad customary laws and practices on human rights.

It would be remiss of me if I did not acknowledge the general limitation that should afflict this presentation. Because the referendum on the enhanced bill of rights failed, regrettably so in my view, we are for some time at least, stuck with the existing bill of

rights. Any reference that I will make to the proposed bill of rights should be taken for what it is, namely, wishful thinking.

2. The place of customary law in our Constitution and the bill of rights

I think the best starting point in considering the place of customary law in the human rights discourse in this country is to reflect on the constitutional provisions dealing with customary law. Not much of customary law and its place in the Zambian society was provided for in the Constitution prior to its amendment in 2016. The point is that it remained largely unwritten and subject chiefly to the repugnancy test. The bill of rights as it exists currently does not give any explicit recognition to a right for one to practice his or her culture. Article 23 of the Constitution provides for a general guarantee against discrimination on grounds specified in sub-article (3), that is to say, race, tribe, sex, place of origin, marital status, political opinion, colour or creed. Perhaps of significance is sub-article 4 of article 23. It states that the anti-discriminatory provision shall not apply to any law that makes provision:

(a) for the appropriation of the general revenues of the Republic;

(b) with respect to persons who are not citizens of Zambia,

(c) **with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;**

(d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other person; or

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

Rather than sanction the enjoyment of all rights without discrimination, this provision does in effect approve derogation from the protection against discrimination on the basis of private law, premised on customary practices. Besides article 23, the other notable provisions of the pre-amended Constitution that dealt specifically with customary law were in Part XIII which dealt with chiefs and the House of Chiefs. This part related to the installation of chiefs in accordance with the culture, customs and traditions or wishes or aspirations of the people to whom it applies. The

provisions under it also enjoined the House of Chiefs to have a say on bills touching on custom or tradition before they are introduced in the National Assembly and to initiate, discuss and decide on matters that relate to customary law and practice.

The amended Constitution has gone further than the pre-amended constitution in providing for culture and customary law. It appropriately begins by recognising in the preamble that Zambia is multi-cultural in character. Like in post democratisation constitutions in most African jurisdictions, the status of customary law is constitutionally protected. It is part of the general law of the country. In fact, the Constitution (Amendment) Act, No. 2 of 2016, recognises in Article 7(a) customary law as one of the sources of law. This means, therefore, and to borrow the words of the former Chief Justice of South Africa, Justice Pious Langa in *Bhe v. Magistrate, Khayelitsha,*[1] customary law is protected by and subject to the Constitution in its own right and is no longer dependent on rules of repugnancy for its continued validity. Customary law is, therefore, an integral part of the law and an independent source of

[1] 2004 (1) SA 580 (CC) at 1 41 (S. Afr.)

norms within the Zambian legal system. The new approach as reflected in the amended Constitutions does not exempt customary law from compliance with human rights norms. An important proviso to Article 7(a) of the amended Constitution is that such customary law must be consistent with the Constitution. Article 1(1) of the amended Constitution states that:

> This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and practice that is inconsistent with its provisions is void to the extent of the inconsistency.

Article 1(5) declares that a matter relating to the Constitution shall be heard by the Constitutional Court. Article 120 of the Constitution identifies local courts as part of the Judiciary. The powers and jurisdiction of these courts are, however, a subject of regulation by an Act of Parliament, in this case the Local Courts Act, chapter 29 of the Laws of Zambia. In terms of Section12(1)(a) of the Local Courts Act, a Local Court shall administer African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible

with the provisions of any written law. This makes it clear that the bill of rights clauses which are part of the Constitution trump customary law norms that conflict with any of them.

It is equally clear that any customary law duly recognised and administered by the Local Courts is qualified in three respects; first, consistency with the Constitution, second, non-repugnancy with natural justice or morality, and third conformity with the provisions of the written law. Given that the provisions of article 128 of the amended Constitution reposes exclusive power in the Constitutional Court to determine questions of the consistency of laws and actions with the Constitution, and considering also the effect of non-conformity as stated in article 1(5), it follows that determination of the consistency of customary law with the Constitution can only be by the Constitutional Court, while that of determining repugnancy with natural justice or morality or incompatibility with written law is vested in all the other courts.

There is also Part XII of the amended Constitution dealing with chieftaincy and the House of Chiefs. It empowers chiefs to *inter alia*,

initiate, discuss and decide on matters relating to customary law and practice, and make recommendations on customary laws that require codification. This, in my view, provides an ugly window through which repugnant customs and traditions may be perpetrated.

3. Customary law at the international level

At the international plane Zambia is a party to numerous international and regional human rights instruments. Unlike in monist States where the provisions of treaties ratified by a state apply without more, Zambia follows a dualist approach. In the system of law that obtains in this country, international treaties including international human rights instruments, do not apply in the absence of domestication. Among the key human rights treaties Zambia has ratified are the International Covenant on Civil and Political Rights (ICCPR),[2] the International Covenant on Economic Social and Cultural Rights (ICESCR),[3] International Convention on

[2]International Covenant on Civil and Political Rights (ICCPR) was adopted December 16, 1966. Zambia acceded to it on April 10, 1984.
[3] International Covenant on Economic, Social and Cultural rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR supp. (No. 16) at 49, U.N. Doc. A/6316 (1966),

the Elimination of All Forms of Racial Discrimination,[4] the Convention on the Elimination of All Forms of Discrimination against Women[5](CEDAW), the Convention on the Rights of the Child[6], the African Charter on Human and People' s Rights,[7] and the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa.[8] In addition some of the sub regional organisations of which Zambia is part have adopted regional instruments. For example, in 2008, the Southern African Development Community (SADC) adopted the Protocol on Gender and Development.[9] The provisions of these instruments do not

---

993 United Nations *Treaty Series* 3, entered into force January 3, 1976, acceded to by Zambia on April 10, 1984.

[4] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 United Nations *Treaty Series* 195, entered into force January 5, 1969, ratified by Zambia on February 4, 1972.

[5] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc A/34/46, entered into force September 3, 1981, acceded to by Zambia on June 21, 1985.

[6] Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc A/44/49 (1989), entered into force September 2, 1990, acceded to by Zambia on December 6, 1991.

[7] African [Banjul] Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. Zambia ratified the Charter in 1987.

[8] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 200); entered into force Nov. 25, 2005. Zambia ratified this protocol on 5th September, 2005.

[9]Press Release, Southern African Development Community (SADC), SADC Heads of State and Government Sign the SADC Protocol on Gender and Development (August 2008), available at http://www.safaids.net/content/sade-heads-state-and-government-signsadc-protocol-gender-and-development (click "Mediate Release on the SADC Gender Protocol.doc"); SADC, Protocol on Gender and Development, Aug. 17, 2008, available at www.sadc.int/attachment/download/file/247.

become part of enforceable local law unless they are specifically domesticated. Yet, being a party to international treaties is not without legal consequences. By ascribing to international and regional instruments, Zambia has assumed obligations of varying degrees to ensure that the commitments undertaken in those instruments are observed, otherwise there would be no purpose served in the country voluntarily ascribing to those international instrument.

International human rights standards have differing legal status. Some are treaties which are legally binding on those states which have agreed to be bound by them. Others (non-treaty standards) represent the consensus of the international community on standards to which states should aspire. Together they constitute an international framework of fundamental safeguards against denials of human rights. They have been developed over the second half of the twentieth century as a common standard of achievement for all peoples and all nations. To fully appreciate the seriousness of Zambia's international human rights obligations, a word about the nature of these instruments is necessary.

International legal instruments take the form of treaties (also called agreements, conventions and protocols) which may be binding on the contracting states. The wording of the instrument ought to be examined carefully to understand the nature of the obligations assumed by the contracting state. The process for concluding a treaty is simple; it begins with negotiations. When negotiations are completed, the text of a treaty is established as authentic and definitive and is "signed" to that effect by the representatives of the states. It can be equated to a contract that becomes binding on the parties to it. Signature is, however, not the sole means by which a country becomes bound by a treaty. There are various other means by which a state expresses its consent to be bound by a treaty. The most common are ratification or accession. A new treaty is "ratified" by those states, which have negotiated the instrument. A state, which has not participated in the negotiations, may later "accede" to the treaty. The treaty enters into force when a pre-determined number of states have ratified or acceded to it. When a state ratifies or accedes to a treaty, that state may make reservations to one or more articles of the treaty, unless reservations are prohibited by the

treaty. Reservations may normally be withdrawn at any time. In some countries, called monists states, international treaties take precedence over national law so that once a treaty is signed, ratified or acceded to it has immediate domestic application. In other countries such as Zambia with a dualist system, a specific law may be required to give an international treaty, although ratified or acceded to, the force of a national law. Practically all states that have ratified or acceded to an international treaty must issue decrees, amend existing laws or introduce new legislation in order for the treaty to be fully effective on the national territory. This is called domestication of treaties.

Bearing in mind all the steps necessary to enter into an international treaty, considering also the consequences, Zambia, voluntarily and without reservations become a party to key instruments and treaties dealing with human rights some of which have been alluded to already. Zambia is also a signatory to a number of global declarations, including *Education for All Declaration* (Word Education Forum Dakar, 2000) and the ten commitments of the World Summit on Social Development in

Copenhagen (*Copenhagen Declaration*, 1995). These ten commitments include, among others, the eradication of poverty and the promotion of full employment, social integration, human rights, gender equality and equity, adequate education for all, and access to universal primary health care.

At the international level there are many instruments that recognize the application and relevance of indigenous culture and by extension, customary law. Article 22 of the Universal Declaration of Human Rights states that:

> [e]veryone, as a member of society…is entitled to the realization of the economic, social and cultural rights indispensable for his dignity and free development of his personality.

Article 27(1) goes further to state that everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Article 15(1)(a) of the (ICCPR) and Article 27 of the (ICESCR) provide for the protection of cultural rights. Equally the African Charter requires

that every individual participates in, and contribute to, the promotion and protection of cultural values and traditions. People have a duty to the family and to the community to maintain relations aimed at promoting mutual respect and tolerance, to preserve the harmonious development of the family and to strengthen social cohesion.

The position of these international instruments on the issue of observing and preserving tradition and culture is capable of sending mixed signals as to their real intention at face value. Taken to extremes, their insistence on people observing and participating in their culture and traditions can cause serious disharmony to the universality of human rights, and may be used to propagate values that may malign human dignity. It could also cause undue contradictions between some human rights and cultural practices. The protection of cultural rights at the international level is not, however, intended to justify the violation of human rights. Indeed, international human rights documents reveal that culture must necessarily cede to universal human rights standards. Cultures are protected so that they may enhance human rights and not to

facilitate their abrogation. Furthermore, human rights are not dependent on a specific culture and they should be respected without distinction on the basis of cultural life, sex, religion etc.

4. Human rights violations in the name of custom and culture

On the cultural front, many Zambians societies still embrace internalised value systems of their traditions and culture. Many principles, rules and practices of African customary law conflict with provisions of the Zambian bill of rights and a plethora of international and regional human rights standards to which Zambia has subscribed. Some of our people resist change to accommodate human rights norms. This is a challenge for all, as it requires thoughtful psychological readjustment. Unless the reality of culture and its impact on human right to its fullest extent is internalised and admitted, neither the existence of a perfect bill of rights, nor a full corpus of international human rights law and standards will do much to stop the practice of contesting some human rights on the basis of tradition and culture.

Considerable human rights violations continue to be perpetrated under the façade of observing custom and tradition. What is beyond argument is that some of these customary and traditional practices are archaic and they undermine the quality and dignity of the human person. Defilement justified under traditional beliefs and customs, child labour, marrying off of underage children, marriage and cleansing practices, polygamy, ill treatment and dehumanisation of suspected witchcraft practitioners and failure to observe due process requirements by traditional authorities and courts that administer customary law, are but part of a long catalogue of customary law related human rights violations. More significantly in their everyday application, customary practices and norms are often discriminatory in such areas as marriage (consent to marry, payment of the bride price), guardianship, inheritance, appointment to traditional authority positions, exercise of traditional authority, etc. Customary society often tends to see women and girls as adjuncts to society rather than as equals. Discrimination of women and girls, therefore, tends to be the norm. Such discrimination is embedded in inequality, male domination,

poverty, aggression, misogyny, and entrenched customs and myths. The real solution to the problem lies in the eradication of customs that undermine the dignity of women. Regrettably the most ardent perpetrators and beneficiaries of traditional practices that violate women and girls' human rights tend to be adult males.

The fact that our Constitutions does not shield customary law against scrutiny based on human rights norms is very important for women's rights, particularly. International conventions impose positive obligations on states to eradicate customs and traditions that undermine the dignity and rights of women. CEDAW, for example, imposes positive obligations on states to pursue policies of eliminating discrimination against women by adopting legislative and other measures which prohibit discrimination against women.[10] Similar are called for through non treaty standards of a soft law kind. The Beijing Declaration, for example, called on state parties to ensure that:

[10] For example CEDAW, art. 2(b)-(c).

> [a]ny harmful aspect of certain traditional, customary or modern practices that violates the rights of women **. . .** [is] prohibited and eliminated.

On their own, governments make these commitments but often never implement them. This can, in many instances be assisted if we judges take up the challenge and interpret both the constitutional provisions and the conventions in a manner that takes into account the expressed intentions of the states and shows sensitivity to the objectives of the norms contained in those documents.

5. Examples of culturally based violations and the use of international treaty law and treaty body jurisprudence

If there are two cases that really stand out in regard to discrimination against women which had some customary law underpinnings as they relate to the place of a woman in the Zambian customary setting, they are the cases of *Sara Longwe v. Inter-Continental Hotel*[11], and *Edith Nawakwi v. Attorney General*[12].

[11] [1992/HP/765]

The Longwe case involved discrimination of women by the Hotel's policy which excluded single ladies unaccompanied by men from entering the Luangwa Bar of the hotel. The underlying reason for the policy was that socialising in bars was not culturally a womanly thing for Zambian women unless the woman was of incredulous virtue. Justice Musumali held that the policy was clearly discriminatory against women. In *Nawakwi v. Attorney General*[13] Nawakwi, a single mother, was required to submit forms to the passport office signed by the father of her children before the passport office could endorse the children in her passport. She successfully challenged the requirement because no such requirement existed in the case of men who were single parents. Again Justice Musumali of the High Court held that a single parent family head by a male or female constituted a recognised family unit in Zambian society. He declined to uphold the patriarchal stereotyping implicit in the practice that women were less responsible parents than men. He found discrimination on the basis of sex.

---

[12] [1990/HP/1724]
[13] [1990/HP/1724]

The approach taken by the Judge in both cases furthered rather than stifle human rights under a bill of rights that could have been interpreted as giving no rights to women in the circumstances of the petitioners in those cases. The *Longwe v. Inter-Continental Hotel* judgment is particularly important because it promotes the recognition of international human rights law and its relevance in adjudicating disputes in domestic courts. The Judge found solace in international human rights treaties to seal gaps or buttress his finding that there was violation of rights. He stated as follows:

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

And the judge's approach is not without precedent. There is value in resorting to international human rights treaties and to the jurisprudence of treaty bodies such as the African Commission of Human and Peoples' Rights and the Human Rights Committee of the United Nations. The interpretive guidance of human rights norms by these bodies can, at the very least, serve as an important aid to interpretation and to clarifying uncertainties and ambiguities. Furthermore, their jurisprudence could be usefully invoked to fill in the gaps or lacunae in domestic law. These international treaties have domestic value and relevance in national legal systems of state parties to them. A few examples from African jurisdictions can be cited to illustrate this position. In Tanzania, for example, in the case of *Peter Ngomongo v Mwangwa and Attorney General*[14] the High Court relied on international and regional human rights law including the European Convention on Human Rights and a judgment of the European Court[15] to determine the question whether the right of access to the courts which was not expressly provided for in the Tanzanian Constitution could be, nonetheless,

[14] Civil Case No. 22 of 1992, High Court at Dodoma
[15]Golder v UK (1975) ECHR judgment of 21 February, 1975

inferred from other provisions of the Constitution. The Court observed that:

> It is a general principle of law that the interpretation of the provisions in our Constitution has to be made in the light of jurisprudence which has developed on similar provisions in other international and regional systems of law. That was the view taken by Nyalali CJ in the case of *AG v Lesinoi Ndainai & Another* (1980) TLR 214 where he said. 'On a matter of this nature it is always very helpful to consider what solutions to the problems other courts in other countries have found, since basically human rights are the same though they may live under different conditions.' The same view was repeated by the Tanzanian Court of Appeal in the case of DPP v Ally Ahmed and 10 Others (criminal Appeal Nos. 44 and 45 of 1985 [unreported]) where the court emphasized that in interpreting the Constitution the courts have to take into account the provisions of the Universal Declaration of Human Rights (1948) and other treaties which Tanzania has ratified. That view is also in line with the Harare Declaration of Human Rights issued at the end of a high level judicial colloquium of Commonwealth Judges on the topic of the Domestic Application of International Human Rights Norms, convened in Harare, Zimbabwe. . . .In their declaration they endorsed the Bangalore Principles (1988) to the effect that it is within the proper nature of the judicial process for national courts to have regard to international

> human rights norms(whether or not incorporated in domestic law) for the purpose resolving ambiguity or uncertainty in national constitutions and legislation . . . .

Ultimately the Court relied on the right to unimpeded access to the courts provided for under Article 8 of the Universal Declaration on Human Rights, Article 7 of the African Charter on Human and Peoples' Rights and Article 2(3) of the International Covenant on Civil and Political Rights.

In Ghana, the Supreme Court equally has relied on international and regional human rights instruments to interpret domestic provisions where these were unclear. The question that the Court had to determine in the case of *NPP v Inspector General of Police and Others*[16]was whether the requirement under the Public Order Act (1961) (Act No. 58) to obtain police permits for meetings and processions in public places contravened Article 21 of the Constitution of Ghana which guaranteed freedom of assembly, procession and demonstration. The Court relied on Article 11 of the African Charter which states that

[16] Supreme Court of Ghana 1996

every individual shall have the right to assemble freely with others. The exercise of this right should be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

The Court invoked the provisions of the African Charter notwithstanding that Ghana had not incorporated the provisions of the Charter in domestic law. And in justifying the position, the court went further and observed that:

> Ghana is a signatory to this African Charter and member states of the Orgainsation of African Unity and parties to the Charter are expected to recognize the rights and duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to the rights and duties. I do not think that the fact that Ghana has not passed specific legislation to give effect to the Charter, the Charter cannot be relied upon. On the contrary, article 21 of our Constitution has recognized the right of assembly mentioned in article 11 of the African Charter.
>
> It follows that section 7 of the Public Order decree 1972 (NRCD.68) is not only inconsistent with Article 21(1)9d) of our Constitution but also in contravention of Article 11 of the African Charter on Human and Peoples' Rights adopted by the Assembly of African Heads of state and Government in 1981 in Nairobi, Kenya.

In much the same way, the Court of Appeal of Botswana relied on the provisions of the African Charter to fill the lacunae that existed in domestic legislation. The issue in the case of *Attorney General v Unity Dow*[17]was whether the provisions of the Botswana law on citizenship which allowed citizenship rights in some cases to descendants of Botswana males and not females amounted to discriminatory treatment permitted by the Constitution since 'sex' distinction was omitted from the Constitution as one of the distinctions which could in law amount to discrimination.[18] The trial Court invoked international instruments to come to the conclusion that in spite of the omission, distinction on the basis of sex was discriminatory and, therefore, contrary to the Constitution. The Court referred to articles 2 and 12 of the African Charter and declared that:

> Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned Judge *a quo* made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable

[17] Court of Appeal, Botswana, 1992
[18] HB Jallow, Opcit p.81

rights on individuals within the State until parliament has legislated its provision into the law of the land, so far as relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in the manner in the interpretation of what no doubt are some difficult provisions of the Constitution. The reference made by the learned judge *a quo* to these materials amounted to nothing more than that. . . . That does not seem to me to be saying that the O.A.U. Convention, or by its proper name the African Charter on Human and Peoples' Rights, is binding within Botswana as legislation passed by its Parliament. The learned judge said that we should, so far as possible, so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations. . . it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken . . . .

Similarly, in *Sata v. Post Newspapers Limited and Another*[19] Ngulube CJ, sitting as High Court judge has the following to say:

I make reference to the international instruments because I am aware of a growing movement toward acceptance of the domestic application of

[19] [1995/ZMHC/1]

> international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic legislation but also because the opinions of other senior courts in the various jurisdiction dealing with a similar problem tend to have a persuasive value. At the very least, consideration of such decisions may help us to formulate our own preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent. What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in various jurisdictions can have or have had a uniform approach…

In *Kangaipe and Another v. Attorney General*[20], Muyovwe J, as she then was noted that:

> This court is a large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision made by other courts on any aspect of the law is worth considering.

The foregoing examples, though by no means exhaustive, speak volumes as to the value that domestic courts could and should

[20] [2009/HL/86]

attach to international human rights instruments and the jurisprudence of treaty bodies.

Perhaps the broader question remains: to what extent should cultural practices be subordinate to acclaimed human rights which are themselves contested as being culturally aligned to the West? How does one reconcile practices deeply founded in tradition and culture such as child work or child labour, obedience and submission of women to their husbands and the subordination of women's voices in reproductive health rights, on one hand and human rights to ensure a harmonious and orderly society, on the other? In short, how can cultural practices be reconciled with universal human rights? These are some of the issues, concerns and questions underlying the debate over universalism and cultural relativism which require to be addressed. This will be left for another occasion.

6. The bill of rights in the amended Zambian Constitution

The proposed expanded bill of rights was published as Statutory Instrument No. 35 of 2016. There was much promise in that

proposed expanded bill of rights which collapsed together with the Referendum. That bill of rights would have addressed directly many of the common human rights violations undertaken in the name of culture and tradition. The bill of rights recognised cultural rights in its article 43, which allowed a person to use a language of that person's choice and to enjoy that person's culture. More importantly, the proposed bill of rights categorically intended to guarantee against people being compelled to perform, observe or participate in cultural practices or rites etc.

Article 47(2) of the proposed bill of rights entitles a person who is 19 years or older to choose a spouse of the opposite sex and marry. Article 48, guarantees a child's equality before the law. It also contains special and further rights for children such as the right to protection from all forms of sexual exploitation and abuse and not to be subjected to harmful cultural rites and practices; the right not to be forced into marriage; the right against child exploitative labour, etc. these and other seemingly progressive provisions would have a useful addition to the efforts to eliminate or at least lessen violations of human rights sanctioned by customary law.

The failure of the referendum on the bill of rights means that we have to continue to interpret human rights under a bill of rights which is laconic on the interplay of culture and human rights. It will be recalled that among the national values and principles set out in article 8 of the amended Constitution are human dignity, equity, social justice, equality and non-discrimination. By article 9, these values and principles shall apply to the interpretation of the Constitution. We must purposefully and progressively interpret the bill of right in a manner that enhances human rights rather than defeat them. The best basis is to appreciate that there is a remarkable consensus on many values that human rights seek to protect, especially when those values are expressed in relatively general terms such as dignity, freedom, justice, equality, life, social order, the family, protection from arbitrarily rule, prohibition of inhuman and degrading treatment, the guarantee of a place in a life of the community and access to an equitable share of the means of subsistence. These are moral aspirations in virtually all cultures. As loyalty to these values transcends loyalty to particular cultures and traditions, literally no one will want to abrogate them on the basis

of culture and tradition. In any case, the mistaken claim that certain things are African or Zambian customary law ordained and others are not, may well be based on an essentialist assumption that African or Zambian culture and tradition are homogeneous and static. The reality, however, is that African customary law as it applies in this country, is an elaborate mosaic of traditions and cultures which are forever changing. Specific human rights issues such the general improvement of the rights and status of women and girl children, may be addressed under human rights concerns without impeaching cultural and traditional norms and beliefs, or implying in any way that an entire cultural heritage is to be overthrown.

7. Conclusion

I think we have as a judiciary a perfect opportunity to develop new, well-grounded and properly rationalised home grown human rights jurisprudence. A reading of the constitutional provisions setting out our values as a country, reveals that we are require as judges to develop the law in a way that responds to the needs of the people of

Zambia as well as national interests. I think that the provisions of the amended Constitution do give us the opportunity to discard the myth and illusion that a judge in the common law system does not make law. It allows us to depart from judicial restraint and lethargy. And, when one says developing indigenous human rights jurisprudence, one does not suggest as judges we should be insular and inward looking. To the contrary, the values of our constitution are anything but insular. The quality of any broad-minded jurisprudence can only help the judiciary to be a truly dependable ally and sanctuary for the vindication of the rights of the Zambian people and will enhance its respectability.

I thank you for listening.