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GENDER-BASED VIOLENCE IN ZAMBIA:
A POST-COLONIAL FEMINIST CRITIQUE

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A thesis submitted for the degree of
Doctor of Philosophy

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University of Sussex

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Declaration

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Misozi Lwatula

26th March, 2018.

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UNIVERSITY OF SUSSEX

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Title: Gender-Based Violence in Zambia: A Post-Colonial Feminist Critique

Abstract

Gender-based violence is one of the most pervasive human rights abuses in the world yet one of the most elusive when it comes to attributing responsibility. It is a worldwide phenomenon although the prevalence and pattern differ from country to country and from region to region.

This thesis provides a critical analysis of gender-based violence in Zambia using a postcolonial feminist lens. Drawing upon an investigation of the relationship between law and culture, the thesis demonstrates how the law in Zambia, in both statute and customary forms, has facilitated the subordination of women and allowed gender-based violence to persist. The thesis shows how the subordination of women has been compounded by prevailing norms in customary law and how the practices of local elites in postcolonial Zambia, relying on customary law in a static and unchanging form, perpetuate gender injustice and gender harms. While there is a vast array of literature showing how women are affected by patriarchal culture and gender, this thesis argues that violence against women in Zambia is compounded by an intersection of colonialism, culture and socio-economic conditions, but not necessarily by patriarchy as commonly understood, because historically the majority of groups in Zambia are matrilineal.

The thesis begins by analysing the legal framework in which gender-based violence in Zambia is addressed. Taking a doctrinal approach and drawing upon primary and secondary sources, the development of the law is critically evaluated in order to show the diversity of constitutional, civil and criminal provisions which have been used to tackle violence against women, often with only very limited success. The thesis goes on to explore recent legal developments, including the introduction of the Anti-Gender Based Violence Act 2011 which is also critiqued for its inadequacies in failing to provide sufficiently for criminal sanctions and punishments against perpetrators.

The thesis then draws upon original qualitative research data gathered from interviews and focus groups conducted by the candidate with women survivors of violence, elites and NGOs in Zambia. The findings of the research are thematically investigated and analysed alongside the existing legal provisions to evaluate the extent to which individuals have experienced gender-based violence, the reasons for, and consequences of, this and their awareness of the legal rules around violence. The research suggests that the law cannot work in isolation since the subordination of women is institutionalized and deep-rooted and, in order for greater progress to be made towards gender justice in Zambia, there must be a change in social attitudes together with a review of existing legal provisions with a view to improving the law.

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Glossary of Abbreviations

AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CPC	Criminal Procedure Code
FDG	Focus Group Discussion
GBV	Gender-Based Violence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
PC	Penal Code
UK	United Kingdom
UNICEF	United Nations International Children's Fund
UNDP	United Nations Development Programme
UN	United Nations
UDHR	Universal Declaration on Human Rights
VSU	Victim Support Unit
WILSA	Women in Law and Development in Southern Africa
WHO	World Health Organisation
YWCA	Young Women's Christian Association

Table of Legislation and Cases

International and Regional Instruments

African Charter on Human and Peoples' Rights 1981.

Convention on the Elimination of All Forms of Discrimination Against Women 1979.

Human Rights Committee, General Comment 18, Non-Discrimination (Thirty-Seven Session, 1989), Compilation of General Comments and General Recommendations Adapted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 (1994).

The International Covenant on Civil and Political Rights (ICCPR) 1966.

The Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

The United Nations Committee on the Elimination of Discrimination against Women, General Recommendations No. 19 (1992).

The United Nations Committee on the Elimination of Discrimination against Women, General Recommendations No. 35 (2017).

Southern Africa Development Community Protocol on Gender and Development (SADC) 2008.

Decisions by the African Commission on Human and Peoples' Rights

Egyptian Initiative for Personal Rights and Interights v Egypt Merits No 323/06, ACHPR 2011.

Legal Resource Foundation v Zambia, No. 211/98 (2001) AHRLR 84, 2001.

Purohit and Moore v The Gambia, No 241/01 (2003) AHRLR 96, ACHPR 2003.

Social and Economic Right Action Centre and Another v Nigeria, No 155/96, (2001) AARLR 60 (ACHPR 2001).

Legislation in Zambia

Constitution of Zambia (Amendment) No. 2 of 2016.

Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia of 1996.

Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

Gender Equity and Equality Act No. 22 of 2015.

Local Court Act 1968.

Penal Code (Amendment) Act No. 15 of 2005.

Penal Code of Zambia Chapter 88 of the Laws of Zambia.

Police Act No. 43 of 1965.

Police Amendment Act No. 14 of 1999.

Subordinate Court Act, Chapter 28 of 1964.

The Anti-Gender Based Violence Act No.1 of 2011.

The Anti Gender-Based Violence (Court) Rules Statutory Instrument No. 8 of 2016.

The High Court Act, No. 27 of 1966.

Case Law in Zambia

Chibwe v Chibwe SCZ Judgment No. 38 of 2000.

Elizabeth Mwanza v Holiday Inn 1997/HP/2054.

Isaac Tantameni C. Chali (Executor of the Will of the Late Mwalla Mwalla) v Liseli Mwalla (single woman) S.C.Z. Judgment No. 6 of 1997.

Mwiya v Mwiya (1977) ZR 113.

Sarah Longwe v Intercontinental Hotels 1992/HP/765.

Sibande v The People (1975) Z.R 101 (S.C).

The People v Chinjamba 5N.R.L.R 384.

The People v Godden Bola Lusaka Subordinate Court case of 2002 (unreported).

The Presidential Election Petition for the Presidential Elections held on the 11th August, 2016, The Constitutional Court of Zambia 2016/CC/0031.

Zambia National Holding Limited and United National Independence Party (UNIP) v The Attorney-General (1991) S.J 22 (S.C).

Chapter 1:

Gender-Based Violence in Zambia: An Introduction

In early October 2017, Lusaka woke up to the news of a man shooting his girlfriend dead after an argument and in the process wounding their two-year-old daughter. In a statement to the Zambia National Broadcasting Corporation, Zambia Police Service spokesperson, Esther Mwaata Katongo, confirmed that Shinka Kaputo shot dead his girlfriend Precious, who had gone to his residence in Ibex Hill Lusaka to pick up their daughter.¹

Zambia is situated in southern Africa, with a population of 17, 734, 935 based on the estimates of 2012 census.² The country is made up of approximately 73 ethnic tribes which are mostly Bantu-speaking. Although it has 73 ethnic tribes, almost 90% of the population belongs to the nine ethnolinguistic groups which are Bemba, Luvale, Lozi, Nyanga-Chewa, Tonga, Luvale, Lunda, Kaonde and Nkhoya. Most of these ethnic groups are matrilineal with only a few patrilineal. Within the matrilineal groups, succession to the throne or inheritance is through the mother's side and any children born of such unions are said to belong to the mother's clan. And the aunt is the most important person because she is the one who bears the heirs to the clan. However, because of the socio-economic factors, this distinction between the matrilineal and patrilineal groups is becoming blurred. Of the 17 million people, 7.2 million of the population are in urban areas and mainly concentrated in Lusaka, the capital city and towns on the Copperbelt province.

Gender-Based Violence (GBV) continues to be a problem world-wide and Zambia is no exception.³ According to article 1 of the Declaration on the Elimination of Violence Against Women,

¹ 'Lusaka Man Shoots Dead Girlfriend' (6th October, 2017), <www.znbc.co.zm/man-shoots-dead-girlfriend/>, accessed on 19th October, 2017.

² Zambia Population <www.worldpopulationreview.com/countries/zambia-population> accessed on 30th November, 2018.

³ Global and Regional Estimates of Violence Against Women: Prevalence and Health Effect of Intimate Partner Violence and non-Partner Sexual Violence, <www.app.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf>, accessed on 28th January, 2017. This 2013 analysis conducted by the WHO (World Health Organisation) with the London School of Hygiene and Tropical Medicine and the Medical Research Council is based on existing data from over 80 countries. The study found that world-wide, almost one third (30%) of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner. The prevalence estimates range from 23.2% in high-income countries and 24.6% in the Western Pacific region to 37% in the Eastern Mediterranean region, and 37.7% in the South-East Asia region. While the academic literature on GBV world-wide is extensive, there is relatively little written about the phenomenon in developing countries. See, however, Sarah Bott, Andrew Morrison and

violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.⁴

Violence Against Women (VAW) is one of the most pervasive and epidemic forms of GBV.⁵ According to estimates, women all over the globe experience violence although the extent of the problem varies from one region to another.⁶ Global estimates published by the World Health Organisation (WHO) indicate that about 1 in 3 (35%) women world-wide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their life-time.⁷ It is a pandemic that takes place in both developing and developed countries and happens in both private and public spaces.⁸

While the figures do vary somewhat, WHO reports that as many as 38% of all female homicides are committed by intimate partners and that globally 7% of women report having been sexually assaulted by someone other than a partner.⁹ These statistics show that women are more likely to suffer violence at the hands of their partners or someone known to them.¹⁰ A United Nations (UN) report estimates that one in three women world-wide has experienced physical or sexual violence by an intimate partner¹¹ while another UN report suggests that in 2012 ‘one in two

Mary Ellsberg, *Preventing and Responding to Gender-Based Violence in Middle and Low-income Countries: A Global Review and Analysis* (World Bank Policy Research Working Paper 3618, June 2005); Tia Palermo, Jennifer Bleck, Amber Peterman, ‘Tip of the Iceberg: Reporting and Gender-Based Violence in Developing Countries’ (2014) 179 (5) *American Journal of Epidemiology* 602. The extent of GBV in Zambia and the number of incidents of physical abuse against women is discussed further at pp.3-5 below.

⁴ www.un.org/documents/ga/re/48/a48r194.htm accessed on 23rd September, 2018.

⁵ Although the thesis is about *gender-based violence* given that this is the orientation and the language of the law in Zambia, the thesis nevertheless takes *women*, and violence against women, as its focus. This is because the incidences of GBV which are directed against women are particularly high (see n10 below) and also because, as a feminist researcher, my interest in protecting women from violence was a particular motivation behind the research (see further chapter 4 below for an explanation of the feminist epistemology which grounds the study).

⁶ Global and Regional Estimates of Violence Against Women: Prevalence and Health Effect of Intimate Partner Violence and non-Partner Sexual Violence (n2).

⁷ WHO, Violence Against Women Fact Sheet. Updated November, 2016, <www.who.int/mediacentre/factsheet/fs239/en/>, accessed on 4th September, 2017.

⁸ The nature of the public/private divide in issues of GBV is well documented. See, for example, Caroline Moser, *Gender-Based Violence in the Private and Public Sphere: Results from Recent Research*, Gender and Development Seminar Series. World Bank, Washington DC February 21, 2013; Tracy E. Higgins, ‘Reviving the Public/Private Distinction in Feminist Theorizing Symposium on Unfinished Feminist Business’ (2000) 75 (3) *Chi-Kent L Rev* 857, 852; Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1999) 184-94; Heather Monasky, ‘What’s Law Got to do With It? : An Overview of CEDAW’s Treatment of Violence Against Women and Girls Through Case Studies’ (2014) *Mich.St.L.Rev.* 327, 332.

⁹ WHO, Violence Against Women Fact Sheet (n5).

¹⁰ Tia Palermo, Jennifer Bleck, Amber Peterman, ‘Tip of the Iceberg: Reporting and Gender-Based Violence in Developing Countries’ (2014) 179 (5) *American Journal of Epidemiology* 602,604.

¹¹ The World’s Women 2015: Violence Against Women 2015, <www.unstats.un.org/unsd/gender/chapter6.html> , accessed on 21st January, 2018.

women killed world-wide were killed by their partner or family. Only one in twenty of all men killed were killed in such circumstances.’¹²

Gender-based violence is the general term used to capture violence that occurs as a result of the normative role expectations associated with each gender, along with the unequal power relationships between the two genders, within the context of a specific society.¹³ More specifically, VAW is understood in the thesis in accordance with the explanation given in General Recommendation 18¹⁴ and the more recent General Recommendation 35¹⁵ made by the Committee on the Convention Against the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶ Hence, CEDAW Committee defines VAW as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.¹⁷ CEDAW, and its associated case law, also view VAW as a form of discrimination.¹⁸ Importantly though, VAW is often an invisible crime in that it happens in private and many victims are unwilling to report to the authorities.¹⁹ It often happens in the comfort of one’s home and surroundings, therefore making it difficult to see.²⁰ Yet, crimes of violence against women are far more likely to be committed by someone known and trusted by the woman than

¹² Violence Against Women, <www.unwomen.org/en/digital-library/multimedia/2015/11/infographic-violence-against-women> , accessed on 4th September, 2017.

¹³ Shelah Bloom, Violence Against Women and Girls: A Compendium of Monitoring and Evaluation Indicators. United States Agency for International Development USAID East Africa 2008 14.

¹⁴ General Recommendations made by Committee on the Elimination of all Forms of Discrimination Against Women, <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>, accessed on 28th February, 2018.

¹⁵ General Recommendation 35, adopted 14th July 2017, recognises that the prohibition of gender based violence has become a part of international law and defines different levels of liability of states for acts and omissions committed by their agents or those acting under their authority.

¹⁶ CEDAW (see <www.un.org/womenwatch/daw/cedaw>, accessed 28th November, 2016). Note that according to the definition given in CEDAW, both men and women can be victims of GBV. This thesis, as explained in n3 above, focuses on *women* as victims of GBV.

¹⁷ General Recommendation No.19, 11th Session, 1992, <www.un.org/womenwatch/daw/cedaw/recomm.htm>, accessed on the 10th March 2015; Shelah Bloom, Violence Against Women and Girls: A Compendium of Monitoring and Evaluation Indicators. United States Agency for International Development USAID East Africa 2008 14; Heather Monasky, ‘What’s Law Got to do With It? : An Overview of CEDAW’s Treatment of Violence Against Women and Girls Through Case Studies’ (2014) Mich St L Rev, 327, 331; Meiraf Girma, ‘Violence against Women: Inadequate Remedies Under the CEDAW’ (2009) 3 (2) Mizan L Rev 351.

¹⁸ Ibid; *Opuz and Interights (Intervening) v Turkey*, Application No. 33401/02, [2009] ECHR 870; *Egyptian Initiative for Personal Rights and Interights v Egypt* Merits No. 323/06, ACHPR 2011.

¹⁹ Morrison Torrey, ‘Feminist Legal Scholarship on Rape: A mandatory look at one form of violence against women’ (1995) 2 William & Mary J. *Women & Law* 35, 40 this is mostly with regards to women; Elizabeth Reed, Anita Raj, Elizabeth Miller and Jay G. Silverman, ‘Losing the “Gender” in Gender Based Violence: The Missteps of Research on Dating and Intimate Partner Violence’ (2010) 16 (3) *Violence Against Women* 348, 347. See also the findings of the thesis, explained below in chapter 6.

²⁰ Ibid, Morrison Torrey 36.

by a stranger.²¹ VAW is, therefore, a particularly difficult crime to identify, investigate and sanction.

In Zambia, as in most countries, GBV is made especially invisible because of the public/private divide.²² In Zambia, the private sphere is seen as a place where ‘culture’ should be preserved at all costs.²³ Those who are concerned to protect the status quo around gender relations (particularly men) feel that culture is predefined and should not be open to challenge.²⁴ Therefore, anyone who questions patriarchal hierarchies and seeks to probe the prevalence of violence in the private sphere is seen as challenging Zambian culture itself and, in so doing, could be said to be unpatriotic to Africa.

There are, therefore, a number of factors, such as patriarchy, the public/private divide and culture, which can contribute to VAW²⁵ although many countries do not address the causes directly but rather concentrate on law reform.²⁶ While legal reforms do, to a certain extent, help in the fight against VAW, it is important to look at social norms, institutions and socio-economic factors that exacerbate VAW.²⁷ Certain social norms are so embedded in society that communities begin to accept them as part of the culture. In addition, while legal reforms are necessary, they often hide the extent to which GBV disadvantages women on a continuing and every day basis. Feminist researchers now largely agree that law reform can only partially help

²¹ Morrison Torrey, ‘Feminist Legal Scholarship on Rape: A Mandatory Look at One Form of Violence Against Women,’ (1995) 2 William & Mary J. Women & Law 35, 36.

²² Alice Evans, ‘History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990’ (2015) 22(3) Gender, Place and Culture: A Journal of Feminist Geography 344, 350; Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1999) 191; Mulela Margaret Munalula, *Women, Gender Discrimination and the Law: Cases and Materials* (University of Zambia Press, 2005); See further the discussion in chapter 2 below.

²³ See chapter 4 below and its discussion of Zambian law in the context of culture.

²⁴ See Karen Tranberg Hansen, ‘Dressing Dangerously: Miniskirts, Gender Relations, and Sexuality in Zambia’ Jean Allman (ed), *Fashioning Africa: Power and the Politics of Dress* (Indiana University Press 2004) 17; Karen Tranberg Hasen, ‘Negotiating Sex and Gender in Urban Zambia’ (1984) 10 (2) Journal of Southern African Studies 219, 234.

²⁵ Roger Y. Klomegah, ‘Intimate Partner Violence (IPV) in Zambia: An Examination of Risk Factors and Gender Perceptions’ (2008) 39(4) Journal of Comparative Family Studies 557, 562; Sarah Bott, Andrew Morrison and Mary Ellsberg, *Preventing and Responding to Gender-Based Violence in Middle and Low-income Countries: A Global Review and Analysis* (World Bank Policy Research Working Paper 3618, June 2005) 10; Avocats Sans Frontières Asbl, Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia (Sep 21, 2017).

²⁶ Avocats Sans Frontières Asbl, *ibid*, 24.

²⁷ Susan Millns and Charlotte Skeet, ‘Gender Equality and Legal Mobilization in the United Kingdom: Using Rights for Litigation, Defense and Attack’ (2013) 28(3) Canadian Journal of Law and Society 169, 188. These authors argue that rights are indeed both swords and shields and require skilful and strategic deployment in the courts, this is done best alongside, lobbying, campaigning, and efforts to raise political awareness and public attention.

women because the law itself is structured in a way that perpetuates discrimination and that extra-legal solutions may often be needed.²⁸

Despite having a law specifically on GBV which came into effect in 2011 (The Anti-Gender-Based Violence Act²⁹) and newly enacted rules (The Anti-Gender-Based Violence Rules 2016³⁰), GBV seems to be on the increase in Zambia.³¹ According to a ministerial statement on GBV, a recently released report by the Victim Support Unit (VSU) of the Zambia Police Service revealed that in 2016, the country recorded 18,540 cases as compared to 18,088 cases in the previous year; showing an increase of 452 cases in a 12 month period.³² The fact that women make up a significant number of these victims is not just peculiar to Zambia as indicated above.³³ It is estimated that in Zambia 43% of women aged 15-49 have experienced physical violence, 17% have experienced sexual violence, and 10% of women have experienced violence during pregnancy.³⁴

Existing research into GBV in Africa attributes the discrimination that women face to gender relations and patriarchal culture in African nations.³⁵ The inter-relationship between gender, culture and nationhood is evidently complex. It is, though, this interface that the thesis aims to investigate, providing an original critical analysis of the current law on GBV in Zambia and its

²⁸ Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (SAGE Publications 1995) 125 argues that law, or the social context in which law operates, may transform feminist policies into very inadequate interventions on behalf of women. See further chapter 3 (on feminist legal theory) and chapter 6 (on the real life experiences of VAW in Zambia) below.

²⁹ The Anti-Gender-Based Violence Act, No. 1 of 2011. This Act is discussed extensively in chapters 3 and 4 below.

³⁰ The Anti-Gender-Based Violence Rules, No. 8 of 2016.

³¹ See Chapter 6 below where different explanations are put forward to explain the increase in numbers, including both a real increase in the incidences of violence and an increase in awareness and reporting.

³² Ministerial Statement on Gender-Based Violence in Zambia given by Ms. Victoria Kalima, The Hon. Minister of Gender, 28th March 2017.

³³ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (Oxford and Portland 2012) 550; Home Office, Violence Against Women and Girls Services: Supporting Local Commissioning (December 2016),

<www.gov.uk/governments/uploads/system/uploads/attachment_data/file/576>, accessed 18th January, 2018; Office of National Statistics, Domestic Abuse, Sexual Assault and Stalking, <www.ons.gov.uk/.../focusonviolencecrimeandsexualoffences/...domesticabuse>, accessed 18th January, 2018; National Research Council, *Understanding Violence Against Women* (Washington, DC: The National Academies Press, 1996) 8; UN Women: Facts and Figures: Ending Violence Against Women <www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> accessed 18th January, 2018.

³⁴ Co-operating Partners in Zambia Commit to ending Gender-Based Violence, <www.gov.uk/governments/.../cooperating-partners-in-zambia-commit-to-ending-gender-based-violence> accessed 7th April 2017.

³⁵ Louise De Toit, 'In the Name of What? Defusing the Rights-Culture Debate by Revisiting the Universals of Both Rights and Culture' (2013) 40 (1) *Politikan: South African Journal of Political Science* 15; Leti Volpp, 'Blaming Culture for Bad Behaviour' (2000) 12 *Yale J.L. & Human* 89; Anne Phillips, *Gender and Culture* (Polity Press 2010) 5; Aisha K. Gill and Avtar Brah, 'Interrogating Cultural Narratives about 'Honour' –Based Violence' (2014) 21 (1) *European Journal of Women's Studies* 72.

intersection with culture, gender and patriarchy. The thesis argues that while gender relations are mediated through patriarchy, law and culture leading to a perpetuation of GBV, the concept of gender in Africa and specifically in Zambia is a fluid concept and is not historically static. Although gender-based discrimination may have existed in Zambia before Western contact, the administrators and missionaries who came to Zambia as a result of colonialism³⁶ brought with them their own understandings of gender and intensified gender stereotypes by favouring men in administrative duties and education.³⁷

The thesis, therefore seeks to find answers to a series of research questions which are aimed at investigating the present legal protections offered to women victims of GBV in Zambia. At the heart of the thesis is the key question of whether or not Zambian law provides sufficient protection for women survivors of violence. Sufficient here means not just enacting laws but also providing strong institutions where women can report violations of such laws. This primary question is addressed through asking a series of sub-questions, notably: what is the extent of the problem of VAW in Zambia and is GBV inherent in Zambian culture or has it been exacerbated by the experiences of colonialism in Africa? How have legal institutions and law reform sought to tackle the problem of GBV in Zambia and how effective have the legal reforms been? What is the practical experience of women who experience GBV in Zambia today and to what extent do Zambian women know about, and make use of, the legal remedies available to them? Does the real life experience of women reveal gaps between the ambition of the law to tackle violence and the lived reality of women's everyday lives? And, finally, what might be done to ameliorate responses to GBV in Zambia?

The thesis offers original insights into the relationship between law, culture and gender in Zambia in seeking to challenge dominant theories which too often offer a Western perspective on African life and law,³⁸ and to challenge the view that customary law is static and is practiced

³⁶ Frantz Fanon, *The Wretched of the Earth* (Grove Weidenfeld New York 1963) at 41 argues 'that the Church in the colonies is the white people's Church, the foreigner's Church. The Church does not call the native to God's ways but to the ways of the white man, of the master, of the oppressor'.

³⁷ See Hugo F. Hinfelaar, *Bemba –Speaking Women of Zambia in a Century of Religious Change (1892-1992)* (Brill Leiden: New York 1994) on how Bemba women played a significant role in religion; Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) *Gender, Place and Culture: A Journal of Feminist Geography* 344; See Maria Lugones, 'Towards a Decolonial Feminism' (2010) 25 (4) *Hypatia* 745 in chapter 3 who states that as Christianity became the most powerful instrument in the mission of transformation, the normativity that connected gender and civilization became intent on erasing community.

³⁸ The reference to dominant theories encompasses theories from the global north that do not take into consideration the views of women of the global south. See Chandra Talpade Mohanty, 'Under Western Eyes Revisited: Feminist Solidarity through Anti-capitalist Struggles' (2003) 28 (2) *Signs: Journal of Women in Culture and Society* 499, who states that traditional liberal and liberal feminist pedagogies disallow historical and comparative thinking, radical feminist pedagogies often singularize gender; See, for example, the discussion of

today in much the same form as before colonisation.³⁹ The thesis rejects the idea that customary law is stagnant and argues instead that it is dynamic and adapts to the socio-economic conditions surrounding it.⁴⁰ While research pertaining to GBV in Zambia has hitherto concentrated on the potential of law reform in dealing with GBV,⁴¹ this thesis moves the debate forward in looking at the structural and underlying causes of GBV. In doing so, it analyses the law (both statute and customary law) in the context of culture and customary relations and argues that the law *does* reinforce the perpetuation of discrimination against women. In order to fight GBV, it is important to deconstruct the law and the institutions that support and perpetuate discrimination in society. This is because legal reforms will not change the status quo where discrimination is institutionalised.

The thesis argues that although customary law is not written down in Zambia, the ‘official version’ of customary law is not the authentic version of the customs practiced before colonisation. Rather, it is suggested that after independence, male elites and those who benefitted from the status quo capitalised on the ‘official version’ and anybody who criticised this orthodoxy was said to be importing Western culture into customary law.⁴² Paradoxically, the local elites, whilst insisting on the revised, official version of customary law, also adopted the former administrator’s way of life because they equated it with modernity.⁴³ This was compounded by the fact that during colonisation the administrators mainly consulted male members of Zambian society to validate their understanding of customs. In addition, because of the patriarchal nature of the Victorian times and the teachings of the church, men were more favoured to be enrolled in schools than women.⁴⁴ After independence, the higher status of men

liberal and radical feminist theories in chapter 3. These do not take into consideration the effect of colonisation on gender.

³⁹ J. Bekker and G.J Van Niekerk, ‘Broadening the Divide Between Official and Living Customary Law’ (2010) 73 *Journal of Contemporary Roman Dutch Law* 676; C.N. Himonga and C. Bosch, ‘The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning’ (2000) 17 *South African Law Journal* 306.

⁴⁰ Chuma Himonga, *Family Law in Zambia* (Kluwer Law International 2011) 38.

⁴¹ Sarah Bott, Andrew Morrison and Mary Ellsberg, *Preventing and Responding to Gender-Based Violence in Middle and Low-income Countries: A Global Review and Analysis* (World Bank Policy Research Working Paper 3618, June 2005) 20.

⁴² Fanon (n34) argues that ‘the violence which has ruled over the ordering of the colonial world, which has ceaselessly ‘drummed the rhythm’ for the destruction of native social forms and broken up without reserve the systems of reference of the economy, the customs of dress and external life, that that same violence will be claimed and taken over by the native at the moment when, deciding to embody history in his own person, he surges into the forbidden quarters.’

⁴³ Alice Evans, ‘History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990’ (2015) 22(3) *Gender, Place & Culture: A Journal of Feminist Geography* 344.

⁴⁴ A Adu Boahen, *African Perspective on Colonialism* (The John Hopkins University Press, 1992) at 107, states that one of the negative social impacts of colonialism was the down-grading of the status of women in Africa and

in Zambia was elevated further because they occupied the most important positions in society and controlled the economy.⁴⁵ As a result, patriarchy was consolidated in customary law and anybody who challenged it was seen as challenging customary law itself. The result is a situation where, although most tribes in Zambia are historically matrilineal,⁴⁶ they now have strong characteristics of patriarchy.

It is not only *customary* law and its legacy, however, that is problematic in disadvantaging women in postcolonial Zambia. Critics of law and law reform suggest that for disadvantaged members of postcolonial societies the law *in general* is not helpful. Kapur, for example, criticizes ‘the law’s lack of emancipatory and transformative potential, as well as its discursive function’ especially as these elements apply in a postcolonial context.⁴⁷

Where the legislature acts ostensibly to eliminate through law those practices which discriminate against women, or which disable women – physically, emotionally or psychologically – the ironic consequence is that the law is too often framed either in male language, or cast in terms which ignore the effects of such practices on women by introducing legal standards which deny women’s subjectivities.⁴⁸

The law often fails to recognise the systematic and institutionalised nature of discrimination and treats the symptoms of subordination but does not deal with the underlying problem.

The weapon that most post-colonial countries respond with, when confronted with allegations of gender injustice, is to say that ‘they are trying to preserve their culture.’⁴⁹ The argument is that law, like language, was imposed upon the indigenous population and that they have a right to preserve their indigenous culture.⁵⁰ Therefore, a particular issue which this research

that the colonial world was definitely a man’s world, and women were not allowed to play any meaningful role in it except as petty traders and farmers.

⁴⁵ Evans (n43) 354.

⁴⁶ Simon Coldham, Customary Marriage and Urban Local Courts in Zambia’ (1990) 34 J. Afr.L 67, at 72, states that the matrilineal societies are predominant in Zambia; Alice Evans, ‘History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990’ (2015) 22(3) Gender, Place & Culture: A Journal of Feminist Geography 344.

⁴⁷ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (The Glass House 2005) 8.

⁴⁸ Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Limited. London: Sydney 1998) 72.

⁴⁹ Ratna Kapur, in ‘Precarious Desires and Ungrievable Lives: Human Rights and Postcolonial Critique of Legal Justice 8 argues that for the native subject, resisting reform was linked to protecting their autonomy in the private sphere of the family and crafting a cultural project that was distinct from the west, western women, and western notions of sexuality.

⁵⁰ Sally Engle Merry, ‘Legal Pluralism’ 1988 (22) 5 Law & Society Review 869.

addresses, through the use of feminist legal theory, is whether or not GBV is justified because of culture or, to put it in another way, whether culture can be a significant cause of GBV.

More generally, a key aim of the research is to examine the impact of colonialism on both the law and gender in Zambia and how these have contributed to gender-based violence. In doing so, the thesis investigates the relationships between law, culture, gender and socio-economic conditions and explores the impact that these relationships have had on GBV historically and in the present day. Through an analysis of the law on GBV in Zambia, and using original data collected from interviews in the field, the thesis aims to evaluate from a critical perspective the legacy of colonialism on GBV and the inadequacies of the law in recognising this. Moving forward, the thesis seeks to inform policy makers and to raise awareness of the hurdles that women who are exposed to GBV in Zambia face in accessing justice.

The thesis suggests that despite well-intentioned reforms, the law itself can sometimes be the problem when it comes to the transformation of societies.⁵¹ The thesis will demonstrate how constitutional law, the common law and statute law are all problematic in their responses to GBV in Zambia. In addition, it will be demonstrated that the legal system is influenced by its institutional surroundings which are highly patriarchal. In accordance with the conclusions of feminist legal theory, it will be argued that law and masculinity overlap and share mutual resonances in this sensitive area.⁵²

Carol Smart is one of many feminist writers who suggest that the law on GBV is not neutral⁵³ and that it is gendered, patriarchal and perpetuates the subordination of women. This is because the law does not adequately provide for the social services that are required by victims of GBV as it is blind to the context within which discrimination happens and applies an apparent neutrality in its treatment of individuals while masking great inequalities. In examining the theoretical foundation of the law, feminists have suggested that the mechanisms of legal reform are self-limiting, allowing change only to a certain point, and even strengthening the roots of gender hierarchy that feminists seek to challenge.⁵⁴ The apparent neutrality of law successfully

⁵¹ Kapur (n47) 30 argues that legal justice as an intervention is claimed from a structure that is already always in place, where power relations are already deeply embedded and normalised. It serves primarily as an intervention rather than something that is transformative or facilitative of the desire for freedom.

⁵² Carol Smart, *Feminism and the power of Law* (London: Routledge 1987) 86.

⁵³ Ibid. See chapter 2 below for a discussion of feminist legal theory in the context of VAW.

⁵⁴ Katherine T. Barlett and Rosanne Kennedy, *Feminist legal Theory: Reading in Gender and the Law* (Westview Press Oxford 1991) 2.

disguises the fact that it is the product of fallible (male) human beings who designed it in their own interests.⁵⁵

Law as an institution - its procedures, structures, dominate concepts, and norms - was constructed at a time when women were systematically excluded from participation. In so far as women's lives and experiences become the subject of the law, they were of necessity translated into law by the men. Even social and cultural institutions that women occupy exclusively, such as 'motherhood', were legally significant categories initially what I call 'colonized categories' - defined, controlled, and given legal content by men.⁵⁶

Applying a body of feminist literature which is critical of the law's relationship with women, the thesis will assess the limits of the law⁵⁷ in relation to GBV in Zambia and will propose concrete suggestions for reform.

Having set out the basic contours and aims of the thesis, the remainder of this introduction will explain the motivation for my study, the contextual background of the legal system in Zambia, the theoretical framework and the methodology which underpin the research and will then conclude with a roadmap through the subsequent chapters.

1.1 The Motivation for the Study

A key reason for wishing to undertake research into GBV in Zambia is that while there has been some previous research into this subject, these studies have not significantly explored the effects of the law on women.⁵⁸ Although I have always been interested in women's rights, my interest in VAW started when I began teaching a course on gender, law and discrimination at the University of Zambia in 2010. This prompted me to research the various kinds of

⁵⁵ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 Austl.J.L. & Soc'y 5 (n37).

⁵⁶ Martha Fineman, 'Feminist Theory and the Law' (1994) 18 Harv.J.L.&Pub.Pol'y 351.

⁵⁷ Catherine Albertyn, in 'Law, Gender and Inequality in South Africa' 39(2) Oxford Development Studies 2011, 144 states that ' [w]hether law contributes to the social or economic inclusion of women within the status quo, or to the transformation of that status quo, is crucial to understanding the extent to and manner in which law reduces gender inequalities. In doing so, it is important to have regard to the content and interpretation of the law, as well as its implementation and enforcement. Given the gap that often exists between the letter of the law and its implementation, it is the impact of the law on different groups of women that is often decisive. We should not only ask what the law says about gender, but also ask what practical changes it brings to women's lives and what opportunities it offers for greater social or economic equality, for greater recognition or redistribution.'

⁵⁸ See exceptionally, Kagiso Pusa, 'The Question of Culture in the Socio-Economic Violence and Abuse Against Women in Zambia: 1980s – 1990s' (Masters, Trent University 2014); Lorraine Shipeka Chibanda, 'A Cry to be Heard; Community Radio Amplifying Voices of Rural Women in Zambia and its Role in Fighting Gender Based Violence (Masters, University of Oslo 2015).

stereotypes and discriminatory practices that affect women on a daily basis in Zambian society. I was also prompted to start questioning the social norms or cultural beliefs with regard to women such as the fact that women can at one and the same time, be accorded the status of motherhood while still being seen as minors who are irrational and in need of control. In addition, research on VAW by prominent human rights scholars and feminists has tended to portray the African woman as ignorant and in need of rescue.⁵⁹ The existing research on VAW also frequently attributes the subordination of African women to culture.⁶⁰ In most cases, commentators do not take into consideration the intersection of the law with gender, culture and socio-economic conditions. I wanted to develop the research into GBV in Zambia through critically analysing the development of the law in this area together with examining its effects on gender relations in the country.

Equally, I was curious to understand why women were not utilising the new law on GBV. I was motivated to find out how the law worked for victims of GBV and to investigate what impact the law had in terms of securing gender justice and tackling abuse for them. It is, I think, important to explain and acknowledge my interest in the subject, since one's own standpoint is an important factor in carrying out research. Inevitably, as Sandra Harding suggests, the researcher is not an invisible, anonymous voice of authority, but is a real, historical individual with concrete, specific desires and interests.⁶¹ As a Zambian woman, my interest is in improving justice for women in my country who have suffered violence and have been let down by a legal system which is deeply rooted in history, culture and patriarchy.

1.2 The Gendered Context of the Zambian Legal System

In order to understand the relationship between gender, culture and law in Zambia, it is necessary to explain, by way of introduction, a little bit of the development of the legal system there.⁶² This explanation is important because it shows how the received, or colonial, law has had an impact on the current law (both common law and customary law) and how this affects cases of GBV. Additionally, it is necessary to show how the institutions of law enforcement with which victims of GBV come into contact, such as the police and the courts, can also add

⁵⁹ Chandra Talpade Mohanty, 'Under Western Eyes Revisited: Feminist Solidarity through Anti-capitalist Struggles' (2003) 28 (2) *Signs: Journal of Women in Culture and Society* 499.

⁶⁰ Sally Engle Merry, 'Human Rights and the Demonization of Culture (and Anthropology along the Way)' 2003 (26) 1 *PoLAR* 55.

⁶¹ Sandra Harding (ed), *Introduction: Is there a Feminist Method? In Feminism and Methodology* (Open University Press 1987) 9. See further chapter 4 below which explains in more detail the methodology for the study.

⁶² For a fuller discussion, please refer to chapter 3 below.

to the discriminatory treatment that victims may experience. As suggested above, law and its institutions represent a powerful mechanism of social control but also a powerful conduit for the transmission and reproduction of the dominant ideology.⁶³ Therefore, while on the one hand the thesis does acknowledge how powerful the law can be in validating women's claim for rights, it is also noted how the law may be used as a tool to control people and behaviours.⁶⁴ Put another way, law has been used to liberate people but also to deny their rights.⁶⁵

This is particularly the case in Africa. Law was central to colonialism in Africa as conceived and implemented by Europeans and as understood, experienced, and used by Africans.⁶⁶ During the colonial period, the colonial administrators marginalised the local population by creating two systems of laws.⁶⁷ Wherever English law was introduced into a colony, the traditional British policy was to give recognition to such aspects of customary law as were found to be well established and not contrary to morality and justice.⁶⁸ The law that was said to be rational, civilised and objective was applicable to the administrators and applied in aspects of life not involving customary law. There was then customary law which was applicable to the local population. Colonial administrators would typically see the local population as in need of civilisation⁶⁹ and, therefore, they, together with the local male elite, decided what would be considered as rules of customary law.

Analysis of the 'making of customary law' has shown how colonial authorities, missionaries and African elders cobbled together local customs, colonial law, Christian morality and administrative regulations; codified them; gave them penal and corporal sanctions; and made them enforceable by authoritarian chiefs, contrary to negotiated pre-colonial practices.⁷⁰

⁶³ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Austl.J.L. & Soc'y* 5; see also Eric A. Posner, *Law and Social Norms* (Harvard University Press 2001) at 4, who argues that law is always imposed against a background stream of non legal regulation – enforced by gossip, disapproval, ostracism and violence – which itself produces important collective goods. The system of non legal cooperation is always in some ways superior and in other ways inferior to the legal solution, and legal intervention will undermine or enhance the background norms of non legal cooperation in complex ways.

⁶⁴ Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage 1995) 154.

⁶⁵ *Ibid.* Smart argues that law can be a means of 'liberation' and, at the same time, a means for the reproduction of an oppressive social order.

⁶⁶ Richard Roberts and Kristin Mann (ed), *Law in Colonial Africa* (Heinemann Portsmouth 1991) 3.

⁶⁷ *Ibid.*

⁶⁸ T.O Elias, 'Customary Law: The Limits of its Validity in Colonial Law' (1954) 13 (3) *African Studies* 7.

⁶⁹ See Edward W. Said, *Orientalism* (Penguin Books 1978); Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Rosalind Morris *Reflection on the History of an Idea: Can the Subaltern Speak?* (Columbia University Press 2010); Aimé Césaire, *Discourse on Colonialism* (MR New York 1955).

⁷⁰ Thomas Spear, 'Neo-Traditionalism and the Limits of Invention in British Colonial Africa' (2003) 44 *Journal of African Studies* 3.

Like many African states, Zambia has a dual system of laws, also known as a plural legal system.⁷¹ It applies customary law, statute law and the common law. The plural systems of laws operating in Southern and Eastern Africa are composed of imported European substantive and procedural law and African customary laws.⁷² This is particularly important when looking at the legal system in Zambia since it is the result of the mixture of the indigenous law practised by the local population and the laws of British colonialists which were based on the English Common Law. Most colonial regimes, through legislation, established criteria which directed courts on the choice between general law or customary law to be applied in a particular case.⁷³ It is also important to note that, although the two systems of law are applicable, customary law has always been considered inferior to statute law.⁷⁴ Customary law is measured against the standards of statute law and if it does live up to these standards, it is considered to be inapplicable.⁷⁵ Additionally, customary law is defined and given legal content by statute law. Customary law or the customs and practices of the indigenous people are only applied within the formal legal system when specifically recognised by that system.⁷⁶

Therefore, what is known as ‘customary law’ has been affected by socio-economic and political factors. Far from the legal system being created by alien rulers, tradition was reinterpreted, reformed and reconstructed by subjects and rulers alike.⁷⁷

⁷¹ See Margaret Munalula, ‘Family Law in Zambia’ 1997 Int’l Surv. Fam.L. 507, 508 who states that although English law is not as directly applicable in other areas of family law, Zambia is a common law jurisdiction. Under the English Law (Extent of Application) Act, Cap. 11 of the Laws of Zambia, English common law, the doctrines of equity and English statutes enacted before 1911 are applicable in addition to local enactments. As such local enactments are replicas of English statutes. They are also viewed as a part of the English legacy. English cases are the primary source of precedents where local case law is inadequate. This combination of English law and local statutes may be referred to as the general law. See further Agnete Weis Bentzon et al, *Pursing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (Tano Aschehoug 1988) 30 who states that the plural systems of laws operating in Southern and Eastern Africa were composed of imported European substantive and procedural law and African customary law. The imported components of these imposed systems reflect the coloniser’s legal system, English common law and imported statutory law. Bentzon et al also argues that such are not plural because a plural legal system entails that the two legal systems are at the same level.

⁷² Anthony C. Diala, ‘The Concept of Living Customary Law: A Critique’ (2017) 49(2) *The Journal of Legal Pluralism and Unofficial Law* 143, 145; Agnete Weis Bentzon et al, *Pursing Grounded Theory in Law: South-North Experiences in Developing Women’s Law*.

⁷³ See Diala *ibid*; Agnete Weis Bentzon et al *ibid*; section 16 of the Subordinate Courts Act, Cap.54 of the Laws of Zambia sets out the application of customary law.

⁷⁴ Agnete Weis Bentzon et al, *Pursing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (Tano Aschehoug 1988) 33.

⁷⁵ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience of Malawi and Zambia* (Cambridge University Press 1995).

⁷⁶ Agnete Weiss Bentzon et al (n73).

⁷⁷ Thomas Spear, ‘Neo-Traditionalism and the Limits of Invention in British Colonial Africa’ (2003) 44 *Journal of African Studies* 4.

That ‘mode of warfare’ - rather than lawfare, the effort to conquer and control indigenous peoples by the coercive use of legal means - had many theatres, many dramatis personae, many scripts. Most commonly noted among them was the creation of so-called customary law, a particular subspecies of the genus historical practice that has come to be known, as ‘the invention of tradition’.⁷⁸

Given these early colonial beginnings to the legal system in Zambia, the thesis is concerned with the plurality of laws - common law, statute law and customary law - as it applies in Zambia today and in looking for solutions it is important to infuse new knowledge into the common law in order to take account of the values of society in its African context.⁷⁹ Addressing Zambian values does not mean that we should insist on going back to the time before the colonial administrators came to Zambia but it involves taking into consideration the values that uphold the equality and dignity of everybody.

Before the British came to what was known as Northern Rhodesia, the people there administered their own customs. It was only when the British South Africa (BSA) Company, under Cecil Rhodes, came to Zambia that official courts were established.⁸⁰ Northern Rhodesia was then split into two territories by the BSA Company, with the approval of the British Government. This led to the formation of North-Eastern Rhodesia and North-Western Rhodesia and required two Orders in Council.⁸¹ By 1911, it became increasingly apparent that the two territories – both under the BSA Company control and both following a quite similar pattern of development - could be more efficiently administered as a single territory.⁸² The two territories were brought together in the Northern Rhodesia Order in Council 1911. With respect to the court system, the Northern Rhodesia Order in Council followed closely the pattern of the North-Eastern Rhodesia Order in Council 1900.⁸³

⁷⁸ John L. Comaroff, ‘Colonialism, Culture and the Law: A forward’ (2001) 26 (2) *Law and Soc. Inquiry* 305, 306.

⁷⁹ John Andrew Faris, ‘African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems’ 2015 (10) 2 *International Journal African Renaissance Studies – Multi -, Inter-and Transdisciplinary* 171, 177; see Edward W. Said, *Orientalism* (Penguin Books 1978); Aime` Ce`saire, *Discourse on Colonialism* (MR New York 1955).

⁸⁰ Muna Ndulo, ‘African Customary Law, Customs and Women’s Rights’ (winter 2011) 18 (1) *Indian Journal of Global Studies* 94.

⁸¹ Christof Heyns (ed), *Human Rights Law in Africa vol. 2* (Kluwer Law International: The Hague Netherlands 1997) 298.

⁸² Earl L. Hoover, et al, ‘The Evolution of the Zambian Court System’, <saipar.org/wp-content/uploads/2013/10/CHP_02_Law_in_Zambia_pdf> accessed 21st October, 2014.

⁸³ *Ibid* 49.

In 1924, the British government took over Northern Rhodesia. The 1911 Order in Council was revoked, and a governor was appointed for the territory.⁸⁴

The laws of England were to be applied so far as circumstances permitted: provided that no Act passed by the Parliament of the United Kingdom after the commencement of the Northern Rhodesia Order in Council, 1911, should be deemed to apply to the said territory, unless it had been applied thereto since the commencement for the time being in force in the said territory.⁸⁵

A High Court was established under the Order in Council with jurisdiction over all matters in the territory. This judicial system worked well for a while. However, when the mines were discovered and people started to migrate to the Copperbelt, it proved ineffective.⁸⁶ Men from different areas came to work in one area and these men found it difficult to bring their cases before native courts on which their own chiefs did not sit and which applied customary law differently from their own.⁸⁷ This meant that the Crown had to find a new way of dealing with disputes.

The burden of law enforcement was taken up by the district officers and in some places an unofficial system of adjudication emerged where tribal elders would hear a case, reach a decision and if the parties disagreed, the district officer would hear the case himself.⁸⁸ There was, therefore, a need for the introduction of native courts in urban areas. As Clough comments, '[t]he Native Courts Ordinance 1936, was drafted for the purpose of providing a more adequate structure for the rural native courts. Its language was sufficiently broad to make it unnecessary to enact special legislation pertaining to urban native courts'.⁸⁹ This made it easier for the Ordinance to be applied to the urban courts when they were introduced.

The jurisdiction and powers of native courts were to be specified in warrants issued by the governor; provincial and district commissioners were empowered to revise all native court decisions, with appeal from any revision lying to the provisional commissioner or High Court; appeal from a native court decision would be taken first to a native court of appeal, or, if none existed, to the district

⁸⁴ Ibid 50.

⁸⁵ Ibid.

⁸⁶ G.D. Clough, 'The Constitutional Changes in Northern Rhodesia and Matters Incidental to the Transition' (1924) 6 (4) *Journal of Comparative Legislation and International Law* 280.

⁸⁷ Ibid 51.

⁸⁸ G.D. Clough 52.

⁸⁹ Ibid.

commissioner's court, from there to the provincial commissioners' court, and finally to the High Court.⁹⁰

Having this appeal process meant that the law that was applied by these courts was not wholly indigenous and even at this point there was a gender dimension to the process. Evans states that: '[t]hese courts with the influence of men from the mines, traditional leaders, employers at the mine and the church, imposed laws to regulate women which were not part of customary law with the aim of preventing women from being too assertive'.⁹¹ This was done because the British thought that in order for them to consolidate their rule, they needed the help of the chiefs. As the dynamics of the African population changed, most people did not agree with the native courts. As Ault points out: '[t]he High Court Ordinance of 1960, concerned mainly with modernizing court rules and procedures, and the Native Courts Ordinance of 1960 extending the limits of native court jurisdiction, were the final major statutory enactments prior to independence'.⁹²

The native courts were problematic because of the composition of the people who were appointed to them. Almost all the people who were appointed to serve were male and in most cases related to chiefs. In developing customary law, they effectively selected laws that suited them.⁹³ Furthermore, the law that was brought by the administrators was itself not gender neutral, meaning that customary law could easily evolve in a way that was discriminatory towards women. This is not to say that all the customs of the indigenous people prioritised the rights of women, but rather that the received law at the time served to reinforce and magnify any existing stereotypes of women.

'The prescriptive stereotypes of male breadwinner and female housewife were encouraged by colonial-capitalist ambitions, as well as Zambian aspirations for middle-class status-secured by emulating white people. These class markers were increasingly copied because they were perceived and promoted as fashionable displays of modernity.'⁹⁴

⁹⁰ Ibid.

⁹¹ Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) *Gender, Place & Culture: A Journal of Feminist Geography* 344.

⁹² James M. Ault, JR, 'Making Modern Marriage Traditional: State Power and the Regulation of Marriage in Colonial Zambia' (1983) 12(2) *Springer: Theory and Society* 188.

⁹³ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985).

⁹⁴ Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) *Gender, Place & Culture: A Journal of Feminist Geography* 344; Homi Bhabha, 'Of Mimicry and Man: The

During the colonial period, the British regime expected women to be dependent housewives. Gender divisions of labour were thus prescribed as part of the moral-colonial-capitalist mission. This led to women's domestic roles becoming devalued in the market based economy.⁹⁵

The regime collaborated with the male elites who gave accounts in favour of patriarchy. 'While the early magistrates spent much of their time on cases of marital dispute in the Boma courts, they had to rely on the accounts of chiefs and other - "native advisors" to determine what customary law they were entrusted to apply, subject of course, to the "repugnancy clause".⁹⁶

As a result, indigenous law became incorporated with the laws of the colonial government and, as different groups became increasingly linked together in the colonial society and economy under a single administration forcing people to settle many of their disputes in its courts and according to its forms, claims about custom became more rigid.⁹⁷

This especially happened when the mines were discovered and there was a migration of people from their places of origin to mining areas. Thus, what was applied by the colonial courts was not exactly customary law but a mixture of customary law, the views of the people who sat as justices, and also the laws and reasoning of the administrators.⁹⁸ As people came from different places to work in the mines and were no longer under the jurisdiction of their chiefs, customs were adjusted to fit prevailing and local conditions.

'At one end were the courts of chiefs and headmen, courts of the first instance to which natives had ready and easy access, courts that dispensed justice according to customary law. At the other end was a hierarchy of courts cast in the metropolitan mould, courts designed to solve disputes involving non-natives. The intermediate category consisted of tribunals staffed by white officials, called commissioners in British colonies and commanders in French ones, who listened to appeals from chiefs' courts and who were charged with

Ambivalence of Colonial Discourse' (1984) 28, *Discipleship: A Special Issue on Psychoanalysis* 126 ; See also Mahmood Mamdani, 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism' (Princeton University 1996) 109.

⁹⁵ Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990'.

⁹⁶ Daniel F. Fullan ('Customary Law and Gender Relations in Zambia: The case of Serenje District' (Phd, University of Sussex 1992) 28.

⁹⁷ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985) 9.

⁹⁸ See Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Tano Aschehoug 1998) 34, this interpretation has also created customary law which is seen as static and therefore hinders the advance of women's rights in Africa.

the general administration of the native population. In this bipolar scheme, customary justice was dispensed to natives by chiefs and commissioners, black and white; modern justice to the non-natives by white magistrates.⁹⁹

Therefore, the customary law that was developed was not pure customary law, or even the customary law as practised by different tribes in Zambia, but a mixture of some customs and received common law. It is important to note in this context that the received English common law was not gender neutral but came with a strong bias towards male privilege and patriarchal attitudes towards women and their place in society. This theme will be explored further below in Chapter 2 when the current legal system in Zambia is interrogated for its gender bias in the context of GBV issues.

1.3 The Theoretical Framework

GBV is a result of unequal power relations between men and women and a reflection of negative attitudes towards women.¹⁰⁰ Particularly, domestic violence is inherently and inseparably connected to male power and female powerlessness; male dominance and female subordination.¹⁰¹ The themes of dominance and subordination, power and powerlessness are prevalent in both feminist and post-colonial literature and, thus, this thesis draws heavily on theoretical writing in both areas. Indeed, post-colonial feminism will be used to explain the relationship between law and the subordination of women in the context of Zambian society.

While feminists have taken different approaches to the position of women in society (for example, liberal feminists argue that women and men are the same and that they should be treated equally;¹⁰² radical feminists suggest that men and women are not equal and should not be treated as such¹⁰³), the perspective of the proposed research, rather than focusing on equality and/or difference, is on intersectionality, and notably the intersection between race and gender.

⁹⁹ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University 1996) 109.

¹⁰⁰ National Action Plan on Violence against Women and Children in Zambia 2008-2012 April 2008 (accessed on 2nd October 2014).

¹⁰¹ Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Limited. London: Sydney 1998) 72.

¹⁰² Danise Schaeffer, 'Feminism and Liberalism Considered. The case of Catherine MacKinnon' (2001) 95(3) *American Political Science Review* 699-708.

¹⁰³ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press 1987) 216.

Postcolonial feminism provides an alternative critique to that of other (Western) feminists, of the subordination of women in African societies. As Kapur suggests:

Postcolonial feminism provides a critical and necessary challenge to explanations of women's subordination that have been furnished from liberal and Western feminist positions, especially those that have come to occupy the international human rights arena in their understanding and articulation of concerns for third world women.¹⁰⁴

Hence, the thesis seeks to explain how colonialism has had an effect on socio-economic conditions in Zambia and how, in turn, this has affected gender relations and contributed to the subordination of women. The thesis draws upon the writings of authors such as Homi Bhabha, Spivak, Said, and Césaire to explain how colonialists used violence to subdue the men of the colonies and how in turn native men in postcolonial states used violence as a way to control women.¹⁰⁵ Postcolonial theory is used to explain how the colonial enterprise looked down upon all aspects of African life and culture and instead used the knowledge of the global north to explain events in the global south.

Once colonisation ended, feminists from the global north continued to portray African women as in need of rescue and continued to speak on behalf of the women from the global south, imposing their own views upon them. Women from the global south are often presented as unable to articulate their needs and as in need of representation from Western feminists. This can result in the concerns of women from the global south being taken out of context and being subsumed in the concerns of women from the global north. The thesis suggests that legal science, like other disciplines such as history and geography, has tended to collaborate with the views of the enlightenment period and to support the notion that people from the global south are backward and in need of patronage.

The thesis argues that, while feminists (both liberal and radical) have to some extent contributed to the advancement of women in Zambia, there is need nowadays to adopt a feminist approach that is more accommodating of the views of women from the global south. Postcolonial feminism, it is suggested, takes into account the history of Zambia and analyses how colonialism has not only impacted on the law and the way of the life of the people of Zambia but has also been productive of gender relations that exacerbate the

¹⁰⁴ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (The Glass House 2005) 4.

¹⁰⁵ See further the discussion in chapter 2 below.

inequalities of former times. Adopting a postcolonial theoretical framework for the thesis has facilitated an in-depth exploration of how the law intersects with gender and socio-economic conditions in Zambia today.

As will be explored further in Chapter 2, postcolonial feminist theory helps to unpack the tense relationship between gender, race and colonialism and helps us to better understand the development of the law as it applies to GBV in Africa and to imagine solutions that fit the context of Zambian society.

1.4 The Methodology for the Study

The thesis adopts a number of methodological techniques beginning with a doctrinal analysis of the law and then proceeding to a more socio-legal approach.¹⁰⁶ The doctrinal part of the thesis comprises a detailed analysis of primary and secondary legal sources, such as statutes, law reports and associated literature on GBV in Zambia. This is notably the approach taken in chapter 3 of the thesis which sets out the legal framework surrounding GBV in Zambia.

Then taking a socio-legal approach, the thesis examines the law, its implementation and how effectively it responds in the fight against GBV. It investigates how socio-economic factors and social norms intersect with the law to produce the subordination of the women in society. In taking this approach, the thesis is keen to illustrate how law is affected by its social context and how it, in turn, affects social context.¹⁰⁷

Socio-legal research considers the law and the process of the law (law-making, legal procedure) beyond legal texts. [...]n studying the context and result of the law, socio-legal research moves beyond the academic, the judicial and legislative office, chamber, library and the committee room to gather data wherever appropriate to the problem.¹⁰⁸

In order to complete a more in-depth socio-legal enquiry, the thesis used empirical research, notably Focus Group Discussions (FGDs) and one-on-one interviews with survivors/victims

¹⁰⁶ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, at 130, state that socio-legal studies differ markedly from doctrinal approaches by studying law in action, including possibly the impact of specific legal measures, and this will require drawing upon methods and methodologies of one or more of the social sciences.

¹⁰⁷ Anna Carline and Hellen Barker, 'Socio-legal Studies in Liverpool Law School Introduction' (2008) 29 *Liverpool Law Rev* 117, at 118, state that to understand the law is to understand how it operates in society, how it has an impact on people's lives and how it is shaped in response to certain social and political factors and events

¹⁰⁸ A Bradshaw, 'Sense and Sensibility: Debates in the Development in Socio-Legal Research Methods' in P Thomas(ed) , *Socio-Legal Studies* (Dartmouth 1997) 99.

of GBV and also representatives of institutions which deal with victims of GBV in Zambia. The methodology for the empirical study is explained in more detail in Chapter 4 below. Briefly, though, the interviews and FGDs with survivors/victims involved groups composed of women only. Two FGDs were held - one in Lwimba and the other one in Mfuwe in the Eastern province of Zambia. Each consisted of about twelve participants. After each session of the FGD, one-on-one interviews were conducted with some of the women who volunteered to participate.

Additionally, semi-structured interviews were conducted with the following: Judge in Charge of GBV in Zambia, Legal Aid Clinic for Women, magistrates dealing with cases of victims of GBV, supporting partners of programmes against GBV such as the United Nations Development Programme (UNDP) International Labour Organisation (ILO), Women in Law in Southern Africa (WILSA),⁽¹⁾ and the Victim Support Unit (VSU). Since the subject nature of the thesis is evidently very sensitive, it was important that all ethical considerations were put into place by going through the processes required by the University of Sussex Ethics Committee.¹⁰⁹ The findings of the empirical part of the research are discussed in greater detail in Chapter 6 below. These are important in demonstrating how the law on GBV is working (or not) in practice and what gaps remain between the lived experiences of GBV survivors in Zambia and the promises of the legal system.

1.5 The Structure of the Thesis

The research which underpins the thesis broadly comprises three key elements: a theoretical analysis which employs both feminist and postcolonial approaches; a legal analysis which encompasses a critique of the adequacy of the law on GBV in Zambia; and finally, an original, empirical case study.

Following on from the present chapter's introduction to the subject, the context and the main research questions, Chapter 2 provides the theoretical framework for this study of GBV in Zambia. The theoretical framework is important because it provides a lens through which this thesis interrogates GBV in Zambia. The postcolonial framework not only investigates the impact of colonialism on GBV in Zambia but also interrogates how local elites perpetuate GBV. It explores feminist legal theories to demonstrate the shortcomings of liberal and radical feminist approaches when applied to the context of Zambia. While acknowledging that radical

¹⁰⁹ Application reference ER/ML428/1; approved on 17th February 2016.

and liberal feminism have contributed in many respects to the promotion of women's rights, these theories have a weakness in that they highlight individual anatomy (in the case of liberal feminism) and gender and patriarchy (in the case of radical feminism) without sufficiently taking into consideration the historical and local context.

The thesis moves on to consider postcolonial theory since this perspective not only addresses the historical context but also takes into consideration the intersectionality of law, gender and culture and how these perpetuate the subordination of women in Zambia. In addition, it addresses gender relations in Zambia today. It considers why VAW is tolerated in Zambia and the impact of the law on this type of abuse. It argues that customary law was created by colonial administrators, local elites and prevailing socio-economic conditions and goes on to address how this form of customary law has been used by the local elites to continue the subordination of women.

Chapter 3 provides an overview of the legal system and law on GBV in Zambia. The chapter examines the structure of the court system in Zambia and why this matters in cases of GBV. It also discusses the response of the police to instances of GBV and then goes on to set out the constitutional, legislative and criminal law applicable. The chapter further examines the barriers in the fight against GBV in Zambia and highlights the role of the specialised GBV courts that have recently been created. This chapter proposes that in order to address the subordination of women in Zambia, culture should not be seen as the enemy but should be addressed, reconstructed and incorporated in the fight against gender inequality. It concludes with a section on the influence of international and regional instruments seeking to protect women from discrimination upon domestic Zambian law.

Following on from the legal analysis in Chapter 3, Chapter 4 moves the discussion on to a more practical footing and sets out the methodology used in the empirical part of the study. The chapter discusses the impact of methodology on the methods of data collection and also addresses feminist epistemology and the question of why, in a study such as this, feminist methods should be used. The chapter sets out how the study was conducted using interviews and focus groups and why these methods were important in gathering original data. The chapter highlights the importance of gathering different perspectives on GBV (such as those of the judiciary, policy makers and women themselves) and explores the significance of context

and how women in particular, as knowers of their lived experience,¹¹⁰ are important in the fight against GBV in Zambia

Having set out the methodology used in the empirical research in Chapter 4, Chapter 5 uses a thematic approach to analyse different aspects of the data explaining the legal response to GBV in Zambia. The analysis explores, in particular, two distinct perspectives: one from the women victims and survivors of GBV, and the other from policy makers and the judiciary. These perspectives provide evidence of what might well have been expected, that the judiciary and policy makers have different views on the impact of the law on GBV compared to women survivors. In short, while most women had a vague idea of the law on GBV, they did not make use of it because of their perception of the judiciary as corrupt and not gender-friendly, and because they were fearful of the consequences in the family context/home of reporting violence to authorities such as the police. The policymakers, on the other hand, were of the view that the law was adequate and that it was up to women to make better use of it. What is apparent in this chapter is the gap between law and practice and the need for legal actors to be more inclusive in taking into consideration the lived reality of the women of Zambia. The findings of the thesis are summarised in this chapter which suggests that for the law on GBV in Zambia to work more effectively for victims, it should be accompanied by a change in social norms as the law cannot work in isolation. Violence against women in Zambia intersects with culture, colonisation and socio-economic conditions and the law cannot ignore these powerful influences. While there is legislation to tackle GBV in Zambia, it is not yet fit for purpose. Although legal reforms have brought about some positive changes, there is still a lot that needs to be done for the law to be effective in the fight against GBV. Law in itself cannot provide gender justice without a transformation of society.

Finally, the conclusion and recommendations are in Chapter 6 which suggests that GBV is not inherent in the Zambian culture but has been instilled in the culture because of colonisation, the policies of the missionaries and socio-economic conditions. In addition, it was concluded that despite the existence of the law, the way women experience GBV is very different from what the law envisaged.

¹¹⁰ Agnete Weis Bentzon et al, *Pursing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Tano Aschehoug 1988) 26.

Chapter 2:

Gender Theory, Colonisation and the Postcolonial Condition

2. 1 Introduction

This chapter sets out the theoretical framework for my analysis of GBV in Zambia. It employs both postcolonial and gender theory in order to understand GBV in Zambia. It analyses the law's historical framework and how colonialism has an effect on the State and upon gender relations.

In order to understand gender relations in Zambia, this research is looking at GBV from the perspective of Zambian women and as such it needs to be mindful of the socio-economic factors, together with issues of colonisation, culture and class which affect Zambian women and entrench subordination and gender injustice.

GBV in Zambia cannot be examined without understanding how colonialism impacts upon, and intersects with, class, gender, culture and socio-economic conditions prevailing today. It is also important to understand that colonisation used violence to subdue the colonised people.¹

Stereotypes of female sexualities developed during the colonial period and some of these stereotypes have found their way into postcolonial states. 'The Black woman is seen as a highly erotic being whose primary function is fulfilling sexual desire and reproduction.'² Just as colonisation used violence to subdue people, the postcolonial state uses and condones violence to perpetuate the subordination of women.

Coloniality of being captures the central question of the effects of colonisation on lived experiences of the colonised people that were mediated by the master-slave and colonizer-colonised dialectic where violence was naturalized and routinized as a key feature of the colonial government.³

¹ Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18(1) *Indian Journal of Global Studies* 89, 93. Ndulo argues that colonisation itself was premised on the violations of human rights.

² Nelson Maldonado-Torres, 'On the Coloniality of Being' (2007) 21 *Cultural studies* 240.

³ Sabelo J. Ndlovu-Gatsheni, *Coloniality of Power in Postcolonial Africa: Myths of Decolonization* (CODESRIA, Dakar, 2013) 132.

Postcolonial theory⁴ in this thesis will be used to analyse the legal system in order to assess the impact of colonialism on the people of Zambia and in particular its impact on gender and the law.

‘It follows that the prefix in postcoloniality is not meant to signal the end of the previous period but to stand for the sign of an emancipatory project, that is, it announces a goal yet to be realised: that of dismantling the economic, political and social structures and values, the attitudes and ideas that appeared with European colonialism and its complex combination with capitalism and Western modernity, and it is important to add, with pre-existing forms of exploitation.’⁵

The theory will be used to deconstruct the knowledge that people have about gender and GBV and how such knowledge perpetuated and continues to perpetuate the subordination of women. There is need to question the knowledge that people have come to acquire and challenge it.⁶

It is important to note that in discussing the negative effects of colonialism, this chapter is not arguing that we should return to the period before colonisation. Rather, the chapter seeks to show how colonisation affected the present day Africa and specifically Zambia and how its effects are felt today. Therefore, the chapter will first look at the definition of postcolonial theory, then look at influential writers with regards to the theory, and discuss how the law has been impacted by its colonial past. Theories such as the liberal and radical theories will be analysed briefly. This is because we have formal equality in the Constitution and the statute books and according to the liberal theory equality has been achieved. However, according to the radical theorists the system is still biased because the system has been set up in the colonised setting. Lastly this chapter will show the effect of colonisation on gender relations and how this has had an impact on GBV.

⁴ Philipp Dann and Felix Hanschmann in ‘Post-colonial Theories and Law’ (2012) 45 (2) Law and Politics in Africa, Asia and Latin America 123, state ‘that post-colonial theories analyse the discourses which have accompanied, structured, and legitimized colonial expansion. These discourses are not seen as mere narrative accompaniment to economic, political, military or legal structures, but independent, constitutive elements of colonial power.’

⁵ Couze Venn, *The Postcolonial Challenge: Towards Alternative Worlds* (Sage 2006) 4.

⁶ See Philipp Dann and Felix Hanschmann 124 who state that ‘postcolonial approaches investigate the generation and implication of colonial knowledge, and also the role sciences played in colonial expansion. Specifically, analysis focuses on epistemology, philosophy, ethnology, geography, anthropology, linguistics and the jurisprudence which has developed around the colonial centre and which formed an integral part of colonial conquest and rule.’

Postcolonial theory explains how colonisation and the idea that Africa is always backward has affected the African population and more specifically the women.⁷ It explains how colonisation not only make people question their own belief system but also made them question themselves as a people. The first British commentators on customary law evidently saw Western society as the pinnacle of ‘civilisation’, and other societies as somewhat backward.⁸ People from the south were told that all their knowledge and everything about them was backward. In order to feel human they imitated the colonial masters or a culture that has been said to be more ‘civilised’.⁹

This chapter introduces the theoretical framework by exploring the work of writers such as Bhabha¹⁰, Said¹¹, Ce`saire¹² and Spivak¹³ in order to demonstrate how the colonial experience has had an effect on postcolonial states. These are influential in the writings on postcolonial theory although most of them do not allude to gender apart from Spivak. However, their work is important since it analyses the impact and effect of the colonial state on the postcolonial people.

Particularly influential in his contribution to postcolonial theory has been Bhabha who uses the language of mimicry¹⁴, to describe the postcolonial subject as an object whose knowledge has been replaced by the colonial state. In the postcolonial state, it is argued, the elite try to imitate everything western.¹⁵ Even the kind of violence and corruption exhibited by the postcolonial elites resembles the violence that was inflicted on the colonised by the colonisers. The elites use the laws inherited at independence which targeted the colonised against their political

⁷ John McBratney, ‘Images of Indian Women in Rudyard Kipling: A case of Doubling Discourse’ in Deborah Gordan (ed) *Feminism and the Critique of Colonial Discourse* 54 who states that women were doubly othered during colonisation because they were female and black and because of this the colonial administer would successful side with men than women.

⁸ Daniel Fullan, ‘Customary Law and Gender Relations in Zambia: The Case of Serenje District’ (PhD, University of Sussex 1992) 13.

⁹ Homi Bhabha in ‘Of Mimicry and Man: The Ambivalence of Colonial Discourse’ (1984) 28, *Discipleship: A Special Issue on Psychoanalysis* 126.

¹⁰ Ibid.

¹¹ Edward Said, *Orientalism* (Penguin Books 1978).

¹² Aime` Ce`saire, *Discourse on Colonialism* (MR New York 1955).

¹³ Gayatri Chakravorty Spivak, ‘Culture Alive Conference’ (1995) 5 *Austl. Feminist. L.J* 3; Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in Rosalind Morris, *Reflection on the History of an Idea: Can the Subaltern Speak?* (Columbia University Press 2010).

¹⁴ Homi Bhabha in ‘Of Mimicry and Man: The Ambivalence of Colonial Discourse’ (1984) 28, *Discipleship: A Special Issue on Psychoanalysis* 125 at 126 defines mimicry as ‘the sign of double articulation; a complex strategy of reform, regulation, and discipline, which “appropriates” the Other as it visualises power.’

¹⁵ Ibid; see Jane L. Parpart, ‘The Household and the Mine Shaft: Gender and Class Struggles on the Zambian Copperbelt, 1926-64’ 13(1) *Journal of Southern Africa* 36, at 44 where it is suggested that with regards to Zambia, the struggle to obtain material goods dominated the lives of African men and women on the Copperbelt, a struggle made worse by ready comparisons with neighbouring white miners’ cars, large houses and ostentatious leisure-time pursuits.

opponents and against the population in general. Mimicry has now become part of the operation of the postcolonial elites and in carrying it out they justify their actions as part of their culture. 'The effect of mimicry on the authority of colonial discourse is profound and disturbing. For in "normalising" the colonial state or subject, the dream of post-Enlightenment civility alienates its own language of liberty and produces another knowledge of its norms.'¹⁶ For example, when it comes to women being subordinated, the men in Zambia will usually give culture as the reason stating that women have always had a lower status in society and in addition quote the Bible to justify their statements.¹⁷ However, it is important to note that gender is a fluid concept in Zambia and that most tribes are traditionally matrilineal with women generally enjoying a higher status than men.¹⁸

Bhabha, in addition, highlights the effect of misrepresentation in the colonial discourse. He explains how the colonised have often been misrepresented in the global north and how people of the global south are marginalised by the discourses of the West. Colonial discourses produces knowledge which leads to the creation of stereotypes.¹⁹ This is supported by Spivak who states that Colonial discourse shows its power by appropriating or involving itself in all spheres of lives of the colonised.²⁰ Bhabha²¹ states that the 'fixity that is used on the colonial subject is needed in order to perpetuate stereotypes about the 'other''. In the narrative from the global north, culture is always fixed and so are people from the global south.

Like the work of Bhabha, that of Said is also influential in demonstrating the effects of colonialism. In his book, *Orientalism*, Said states that the Orient is 'part of the European civilisation and culture. It represents and expresses the global north culturally and ideologically with supporting institutions, vocabulary, scholarship, doctrines, colonial bureaucracies and styles.'²² He argues that one cannot understand orientalism as a discourse without

¹⁶ Ibid.

¹⁷ Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) *Gender, Place and Culture: A Journal of Feminist Geography* 344.

¹⁸ See Hugo F. Hinfelaar, *Bemba –Speaking Women of Zambia in a Century of Religious Change (1892-1992)* (Brill Leiden: New York 1994) on how bemba women played an important role in religion.

¹⁹ Homi Bhabha, 'The Other Question...Homi Bhabha Reconsiders The Stereotype and Colonial Discourse' (1983) 24 (6) *Screen* 18 'defines stereotype as a form of knowledge and identification that vacillates between what is always 'in place', already known, and something that must be anxiously repeated'.

²⁰ Gayatri Chakravorty Spivak, 'Culture Alive Conference' (1995) 5 *Austl. Feminist. L.J.* 3.

²¹ Homi Bhabha in 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28, *Discipleship: A Special Issue on Psychoanalysis* 126.

²² Edward Said, *Orientalism* (Penguin Books 1978) 2.

understanding how European culture was able to manage and produce the orient politically, sociologically, militarily, ideologically and scientifically during the enlighten period.²³

In addition, Said demonstrates how people from the global north ‘other’ people from the global south.²⁴ He argues that the ‘other’ and the global north are produced by human beings and not divine beings, therefore both must be studied in order to understand them.²⁵ The argument is that there can be no global south without the global north. In addition, Said considers how knowledge is transmitted, who speaks for marginalised peoples and which lens their problems are seen through.²⁶ Said argues that in the reading of postcolonial subjects by people from the global north, the global south is always seen as fixed and not changing with time. Therefore, people of the global south are easily misrepresented.

Although Said’s writings do not include a gender perspective, people from the global south are misrepresented not only by science, but also by feminists from the global north and by Western human rights discourse.²⁷ Said talks in terms of silencing the colonial subject and this concept applies equally to women in Zambia. When the non-Western woman speaks, ‘she is wrenched out of the context of her society and inscribed within the concerns of Western feminist scholars.’²⁸

Knowledge and way of life of the colonised people was appropriated and made to look as if it belongs to the global north.²⁹ According to Said, whatever knowledge there is now about the ‘other’ is not recent knowledge but it is the knowledge that has been passed from one generation to another.³⁰ ‘Orientalism, therefore is not an airy European fantasy about the orient, but a created body of theory and practice in which, for many generations, there has been a considerable material investment.’³¹ Said uses an illustration of how sometimes a book can describe a place but people who have been there cannot relate to such an experience.³² This still applies to how hegemonic theories describe others. For the ‘other’, they do not see their life in the way it is described by hegemonic theories but these theories will be believed over

²³ Edward Said, *Orientalism* (Penguin Books 1978) 3.

²⁴ *ibid* 3.

²⁵ *Ibid*.

²⁶ *Ibid* 202.

²⁷ Kimberle Crenshaw ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989 U Chi Legal F 139.

²⁸ Aihwa Ong, ‘Colonialism and Modernity: Feminist Representations of Women in Non-Western Societies’ in Deborah Gordon, *Feminism and the Critique of Colonial Discourse* (1988) 86.

²⁹ Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarships and Colonial Discourses* 70.

³⁰ Edward Said, *Orientalism* (Penguin Books 1978).

³¹ *ibid* 6.

³² *Ibid* 92.

experience because it is assumed that knowledge from the West is objective and authentic.³³ ‘Expertise is attributed to it such as the authority of academics, institutions, and governments can accrue to it, surrounding it with greater prestige than its practical successes warrant.’³⁴ Said talks about the use of language, science and geographical books and how these have contributed to how the global north sees the global south. He also states that knowledge can never be neutral or objective – again a point that is particularly relevant to the question of legal knowledge and its application to female subjects.

The work of Spivak needs to be considered also alongside that of Bhabha and Said because they share certain narratives. Spivak states that the third world person is always seen as fixed while people from the global north have a past, present and future. She too discusses colonialism in the language of misrepresentation and uses the example of sati to illustrate how it was altogether misrepresented and misunderstood by the British.³⁵ The framing of sati by the British can be also applied to the Zambian context. When the missionaries and eventually the BSA company³⁶ came to Zambia, they came with their Victorian views on women and they could not understand the status that most women held in Zambia. They, therefore, imposed their own views of gender and subverted a matrilineal society with patriarchal tendencies. This account is supported by both Spivak³⁷ and Said in their writing.

According to Spivak, the subaltern cannot speak although he can attempt to speak. This is because he is seen as an object to be studied or overcome. ‘Orientals were rarely seen or looked at; they were seen through, analysed not as citizens, or even people, but as problems to be solved or confined or-as the colonial powers openly coveted their territory-taken over.’³⁸ People from the third world are not usually involved in research, it is people from the global north who carry out the research and in most circumstances do not involve people from the global south because they assume they know their circumstances.³⁹ Said explains how people

³³ Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarships and Colonial Discourses’ 70.

³⁴ Edward Said, *Orientalism* (Penguin Books 1978) 94 most important, such texts can create not only knowledge but also the very reality they appear to describe. In time such knowledge and reality produce a tradition, or what Michel Foucault calls a discourse, whose material presence or weight, not the originality of a given author, is really responsible for the texts produced by it.

³⁵ Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in Rosalind Morris, *Reflection on the History of an Idea: Can the Subaltern Speak?* (Columbia University Press 2010) 61.

³⁶ See above, the discussion of the history of Zambia in Chapter 1.

³⁷ Gayatri Chakravorty Spivak, ‘Culture Alive Conference’ (1995) 5 *Austl. Feminist. L.J.* 3.

³⁸ Edward Said, *Orientalism* (Penguin Books 1978) 200.

³⁹ Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in Rosalind Morris, *Reflection on the History of an Idea: Can the Subaltern Speak?* (Columbia University Press 2010).

from the global south are always seen as backward and states that this originates early in the nineteenth century with ideas about the biological bases of racial inequality.⁴⁰

Equally the issue of language is important in demonstrating the power of colonialism. Language has been used to silence the subaltern because since s/he cannot speak, others will speak on his or her behalf.⁴¹ ‘Orientalism objective discoveries-are and always have been conditioned by the fact that its truths, like any truths delivered by language, are embodied in language.’⁴² Just like Spivak, Said also mentions how science, history, biology and language all collude to support the idea that the orient is inferior. ‘Professional contributors to Oriental knowledge were anxious to couch their formulations and ideas, their scholarly work, their considered contemporary observations, in language and terminology whose cultural validity derived from other sciences and systems of thought.’⁴³ This shows how important language is with regard to gender terminology. As stated by Ce`saire,

‘from the psychologists, sociologists et al., their views on “primitivism,” their rigged investigations, their self-serving generalization, their tendentious speculations, their insistence on the marginal, “separate” character of non-whites, and – although each of these gentlemen, in order to impugn on higher authority the weakness of primitive thought, claims that his own is based on the firmest rationalism...’.⁴⁴

Therefore when research is being produced, with the researcher’s knowledge and language excluding the context in which it happens, it does lose its original meaning. Research void of context in most cases loses its meaning. Spivak argues that when some feminists from the global north speak about women, they assume that all women are the same.⁴⁵ However, since women are different affected by factors such as race, socio-economic standing etc, feminism needs to be mindful of these differences and not expect women from the global south necessarily to embrace the ideas of the global north. Women from the global south are being overshadowed by ideas from Western feminism or feminists and this does create a conflict. Even if the women of the global south speak out, the global north will apply their own interpretation of what is being said. This is because it is presumed that whatever knowledge

⁴⁰ Edward Said, *Orientalism* (Penguin Books 1978) 206.

⁴¹ Gayatri Chakravorty Spivak, ‘Culture Alive Conference’ (1995) 5 *Austl. Feminist. L.J.* 3.

⁴² Edward Said, *Orientalism* (Penguin Books 1978) 203.

⁴³ Ibid 206.

⁴⁴ Aimé Césaire, *Discourse on Colonialism* (MR New York 1955) 35.

⁴⁵ Spivak, ‘Culture Alive Conference’ (1995) 5 *Austl. Feminist. L.J.* 3.

people from the global south have, it has to be interpreted through the knowledge from the north. This is because Westerners perceive themselves as knowers and keepers of knowledge. Spivak illustrates this by an example of how students at Colombia University are encouraged to think they are there to lead the rest of the world and that to be from the north is to be global.⁴⁶

In addition, because certain feminists from the global north do not understand the culture of the global south, they are always attacking it. 'In the same way, postcolonial elites have been known to attribute certain acts to culture which are not at all about culture.'⁴⁷ Culture – as we will see below - is always contested and negotiated on women's bodies. 'Women and women's bodies are the items in terms of which this complex strategic situation is manoeuvred and manipulated.'⁴⁸

2.2 The Postcolonial Condition

In using a postcolonial framework, this chapter sets out to examine how colonisation has had an effect on law, gender and the socio-economic conditions of Zambia and how postcolonial states can use the past (colonial era) to uphold the status quo of gender subordination.⁴⁹

Thus, as Christianity became the most powerful instrument in the mission of transformation, the normativity that connected gender and civilisation became intent on erasing community, ecological practices, knowledge of planting, of weaving, of the cosmos, and not only on changing and controlling reproductive and sexual practices.⁵⁰

The coming of colonisation brought with it a gender system that is based on the differences between men and women.⁵¹ It also assigned roles to what men and women could do. This in turn affected the way of life of the people and exacerbated the subordination of women. The ensuing gendered binary with its assumptions about masculinity, femininity and sexuality

⁴⁶ Jenny Sharpe and Gayatri Chakravorty Spivak, 'A Conversation with Gayatri Chakravorty Spivak: Politics of Imagination' (2003) 28(2) *Signs, Journal of Women in Culture and Society* 1.

⁴⁷ For example the view that beating a wife is part of culture.

⁴⁸ Gayatri Chakravorty Spivak, 'Culture Alive Conference' (1995) 5 *Austl. Feminist. L.J.* 3, 8.

⁴⁹ Freya Schiwy, 'Decolonization and the Question of Subjectivity: Gender, Race, and Binary thinking' (2007) 21(2) *Cultural Studies* 271 who argues that the 'notions of femininity and masculinity are themselves colonial constructs that have pressed more complex notions of gender, sexuality, and desire into a binary'.

⁵⁰ Maria Lugones, 'Towards a Decolonial Feminism' (2010) 25(4) *Hypatia* 745.

⁵¹ See David Penna and J. Patricia Campbell, 'Human Rights and Culture: Beyond Universality and Relativism' (2010) 19 (1) *Third World Quarterly* 7 who argues 'that the community structures women once used to express themselves and play a role in decision making were replaced with western institutions which had no public role for women. These institutions worked to reinforce Victorian-era western concepts of gender division with regards to employment, education and women's place in society in general and within the family specifically'.

allow for the existence and progression of violence, domination and forms of oppression such as sexual and marital violence against women.⁵²

As stated in the introduction, the chapter analyses GBV through the lens of Zambian women and challenges the dominant theories.⁵³ It interrogates the liberal and radical theories and their impact on GBV arguing that in most cases dominant theories do not take into consideration the plight of women living in postcolonial states. 'Feminist critique out to explore the totalizing claims of a masculinist signifying economy, but also remain self-critical with respect to the totalizing gestures of feminism.'⁵⁴ In most cases, these theories attribute GBV to the patriarchal nature of African countries but fail to take into consideration the fact that some ethnic groups in Africa are matrilineal. Zambia is one of the countries which has a number of ethnic groups who are matriarchal, however because of the historical context these communities are now displaying patriarchal tendencies. It is important to note that this thesis is not saying that there was no patriarchy at that time, however, women used to make important decisions for the clans and in most cases were looked upon as performers of certain rites. Therefore, respect was accorded to them. And because respect was accorded to the women, the power relations were not as bad as they are now. In addition, since power relations were not so unequal, GBV was not as exacerbated as it is now. According to Evans⁵⁵, women enjoyed a higher status in the Zambian society and communities usually welcomed the birth of girls.

This chapter argues, therefore, that the construction of women from the global south as noted by Mohanty as ignorant, backward, uneducated and traditional is a creation of dominant theories⁵⁶ and is framed by Christianity and the coloniser's justifications for coming to Africa.

⁵²Kimalee M.V Phillip, 'Coloniality, sexuality & Violence: An interrogation into the Colonial patterns of Violence Against Women in Grenada' (Master, Carleton University 2011) 4.

⁵³ Note that while I acknowledge that there are different types of feminists in the global north their views on African women and culture have the same effect. Also see Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarships and Colonial Discourses' (1988) 30 *Feminist Review* 61, at 62 who argues 'that western feminist discourse and political practice is neither singular nor homogenous in its goals, interests or analysis. However, it is possible to trace a coherence of effects resulting from the implicit assumption of 'the west' (in all its complexities and contradictions) as the primary referent in theory and praxis.'

⁵⁴ Judith Butler, *Gender Trouble: Feminism on the Subversion of Identity* (Routledge 1990).

⁵⁵ Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) *Gender, Place and Culture: A Journal of Feminist Geography* 344; see also David Penna and J. Patricia Campbell (n49)

⁵⁶ Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarships and Colonial Discourses' (1988) 30 *Feminist Review* 61 states 'this average third-world woman leads an essentially truncated life based on her feminine gender (read: sexually constrained) and being 'third world' (read: ignorant, poor, uneducated, tradition-bound, religious, domesticated, family-oriented, victimized. This is in contrast to the (implicit) self-representation of western women as educated, modern, as having control over their bodies and sexualities, and the 'freedom' to make their own decisions.'

‘The civilising mission, including conversion to Christianity, was present in the ideological conception of conquest and colonisation.’⁵⁷ ‘The orient existed as a place isolated from the mainstream of European progress in the sciences, arts and commerce. Thus, whatever good or bad values were imputed to the Orient appeared to be functions of some highly specialised Western interest in the Orient’.⁵⁸ Colonialism claimed to bring civilisation to a continent where it saw life – borrowing a phrase from a context not entirely unrelated – as ‘nasty, brutish, and short’.⁵⁹ Equally, during this same period as European colonial domination was consolidated, the cultural complex known as European modernity/rationality was constituted:⁶⁰

The economic and political injustices that characterise the world order today result in, and are sustained by, the cognitive injustice that exists and the core of production of knowledge since the beginnings of modern colonisation. The injustices are intertwined, and constitute and feed each other.⁶¹

The European modernity period also known as the age of the enlightenment therefore justified the narrative of civilisation and backwardness and resulted in people from the global north seeing themselves as saviours of the impoverished and backward south.

Although, as will be seen below, gender has been used by dominant feminist theories to explain the causes of the subordination in women, in other parts of the world, Zambia included, other aspects of a person’s identity (such as their seniority) may have more significance in defining their place in society.⁶² Although it is difficult to make generalisations, at the very least we can note that the gender rigidities and binaries which became a feature of European modernity were not a feature in much of precolonial Africa. Gender divisions existed but were fluid.⁶³ In addition, most Zambian languages are genderless; gendered language only came to be known in Zambia with the introduction of English.⁶⁴

⁵⁷ Maria Lugones, ‘Towards a Decolonial Feminism’ (2010) 25(4) *Hypatia* 745, 744.

⁵⁸ Edward Said, *Orientalism* (Penguin Books 1978) 206.

⁵⁹ Mahmood Mamdani, quoting Thomas Hobbes in *Citizen and Subject: Contemporary African and the Legacy of Late Colonialism* (Princeton University Press 1996) 109.

⁶⁰ Anibal Quijano, ‘Coloniality and Modernity/Rationality’ (2007) 21 *Cultural Studies* 168.

⁶¹ Jose-Manuel Barreto, ‘Epistemologies of the South and Human Rights: Santos and the Quest for Global and cognitive Justice’ (2004) 21 *Ind.J.Global Legal Stud* 395.

⁶² Breny Mendoza, ‘Coloniality of Gender and Power: From Post Coloniality to Decoloniality’ in Lisa Disch and Mary Hawkesworth (eds) *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016) 116; see also Oyeronke Oyewumi, ‘Family Bonds/ Conceptual Binds: African Notes on Feminist Epistemologies’ 25(4) *Signs: Feminism at a Millenium* 1093.

⁶³ Deevia Bhana, Robert Morrel, Jeff Hearn and Relebohile Moletsane (ed), *Power and Identity: An Introduction to Sexualities in Southern Africa in Sexualities* (Sage London 2007).

⁶⁴ According to Jennifer L. Prewitt-Freilino, T. Andrew Caswell and Emmi K. Laakso, ‘The Gendering of Language: A Comparison of Gender Equality in Countries with Gendered, Natural and Genderless Language’ (2012) 66 *Sex Roles* 268, 272 Zambia has a genderless language. Genderless languages do not always allow for adopting gender symmetric terminology (“he/she”).

It is important to note that although colonialism ended, its effects are still felt today.⁶⁵ The institutions and the structures that were introduced during the colonial period are still part of the postcolonial state and pervade all areas of life while sitting uncomfortably alongside African traditions and customs: As the colonality infiltrates every aspect of living through the circulation of power at the levels of the body, labour, law, imposition of tribute, and the introduction of property and land dispossession.⁶⁶

There is, therefore, a need for an approach that takes into consideration the fact that identities intersect and that gender, while one undoubted cause of inequality, is not the only cause. 'Equally, gender and postcolonial theory are helpful in that they demonstrate the radical potential of theory to alter social practices—to free individuals and social groups from the normative fix of a hegemonic order and to enable a politics that is at once more complex and inclusive.'⁶⁷

Undoubtedly, colonialism in Zambia played a huge impact in increasing women's vulnerability. It changed the way the family operated and, with the coming into effect of the mines, affected the mode of production, leading to a disruption of the relatively powerful position held by women to that point.⁶⁸ The Zambian female was constructed through a Victorian/Western lens and became more vulnerable and less powerful in the process.

In the new post-independent Zambia, the gender divide which was introduced during the colonial period has persisted. Although women were generally active in the independence movements in Africa, the position of women afterwards differed according to the different ideologies of the liberation movement.⁶⁹ At that time, the misconceptions created about women both by the colonisers and Christianity continued to reinforce prevailing Western views about women. Just as colonial history is dominated by men (generals, admirals, viceroys, governors, district officers and so forth), anti-colonial history and the history of the liberation struggles are also dominated by political theorists, communist activists and national party leaders who are largely (though by no means exclusively) male.⁷⁰ This argument is supported by Beyene,

⁶⁵ Anibal Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 *Cultural Studies* 168.

⁶⁶ Maria Lugones, 'Towards a Decolonial Feminism' (2010) 25(4) *Hypatia* 745, 754.

⁶⁷ Leslie McCall, 'The Complexity of Intersectionality' (2005) 30(3) *Signs: Journal of Women and in Culture and Society* 1771.

⁶⁸ Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) *Gender, Place and Culture: A Journal of Feminist Geography* 344-362.

⁶⁹ Robert J. C. Young, *Women, Gender and Anti-Colonialism in Postcolonialism: An Historic Introduction* (Blackwell Publishing, 2003) 371.

⁷⁰ *Ibid* 360.

in the context of colonialism in Rwanda which increased Rwandan women's vulnerability to violence by restructuring the local mode of production.⁷¹

The new postcolonial nation is historically a male-constructed space, narrated into modern self-consciousness by male leaders, activists and writers, in which women are more often than not cast as symbols or totems, as the bearers of tradition.⁷² In such a space, women – and often mothers – *stand for* the national territory and for certain national values: symbolically women/mothers are revered above men, yet in reality they are kept subordinated to them.⁷³

The above is part of the ideology that was taken up by the national government in Zambia just after independence and it has continued to exist. In the present day Zambia, women are seen as keepers of peace and they are meant to uphold the values of the family and the nation as a whole but, on the other hand, they are seen as weak members of the community who are unable to make decisions.⁷⁴ Just as colonisation treated the colonies as site of exploitation, the postcolonial male elites continue to treat women as sites of exploitation.⁷⁵ The way that women are presented in postcolonial Zambia replicates the way in which the global north presented people from the global south (discussed above).

As with colonial power, the most successful forms of national power worked through exploiting pre-existing power relations of hierarchy and subordination.⁷⁶ The post-independence state realised that the gender divide⁷⁷ and the ideology instilled by the colonial state on upholding values from the global north created advantages for national leaders who adhered to these values. In holding these values, they also held on to 'invented traditions' that advantaged them. According to Elvy (in the context of Caribbean colonialism);

⁷¹ Helina Agmelash Beyene, 'Gender-Based Violence and Submerge Histories: A Colonial Genealogy of Violence Against Tutsi Women in the 1994 Rwanda Genocide' (PhD, University of California 2014).

⁷² Elleke Boehmer, *Stories of Women: Gender and Narrative in the Postcolonial nation* (Manchester University Press 2005).

⁷³ Ibid 29.

⁷⁴ Darlene Rude, 'Reasonable Men and Provocative Women: An Analysis of Gendered Domestic Homicide in Zambia' (1999) 25 (1) *Journal of Southern African Studies* 12.

⁷⁵ John McBratney, 'Images of Indian Women in Rudyard Kipling: A case of Doubling Discourse' in Deborah Gordan (ed) *Feminism and the Critique of Colonial Discourse* (1988) 54.

⁷⁶ Elleke Boehmer, *Stories of Women: Gender and Narrative in the Postcolonial nation* (Manchester University Press 2005) ; see also Edward W Said, *Orientalism* 2006 who states that 'the orient was seen as a locale requiring Western attention, reconstruction, and even redemption. The same approach was adopted by the postcolonial elites towards women.'

⁷⁷ Maria Lugones, 'Towards a Decolonial Feminism' (2010) 25(4) *Hypatia* 745,749 states that gender is a colonial imposition.

‘labelling such values as ‘traditional’ may simply be a political move to defend values and identities that Caribbean men insist on preserving in order to impede the changes to colonial laws and structures that favour a masculine identity which were retained after independence rather than a true widespread belief that such values are authentically ‘traditional’.’⁷⁸

As local elites from the colonised society seek to justify their displacement of colonial authorities, they must persuade themselves and others of their ability to create a productive, enlightened, and progressive society. They do so from within the very discourses used by the colonial states against which they have traditionally struggled. ‘Many of the credentials used to exclude them from the class of colonial rulers are also adopted.’⁷⁹ Because colonial discourses have instilled in the people from the global south a belief that there are not good enough, they always want to uphold anything Western in order to feel complete. As Bhabha argues, ‘... in “normalising” the colonial state or subject, the dream of post-Enlightenment civility alienates its own language of liberty and produces another knowledge of its norms.’⁸⁰

Colonial governments argued that the motive for coming to Africa, Zambia included was to rescue the people of Africa.⁸¹ This framing has continued in postcolonial Africa and more specifically Zambia especially with regards to women where they are still seen as minors and in need of rescue.⁸² Christianity also had a great influence on the subordination of women. Girls schools in Zambia were created specifically to train girls to be better wives.⁸³ Christianity also preached that men were the head of the family and looked down upon traditional African knowledge. The colonial administrators and their allies, the European missionaries, condemned everything African in culture – African names, music, dance, art, religion,

⁷⁸ Ann-Stacy Elvy, ‘A Postcolonial Theory of Spousal Rape: The Caribbean and beyond’ (2015) 22 (1) *Mich.J.Gender & L.* 89, 133.

⁷⁹ Elizabeth Chanley Rainey, ‘Multicultural Politics of Women’s Activism: When do Race and Nation enter Women’s Frames?’ (PhD, University of Alabama 2016) 18; see also Frantz Fanon, *The Wretched of the Earth* (Grove Weidenfeld New York 1963) 39.

⁸⁰ Homi Bhabha, ‘on Mimicry and Man: The Ambivalence of Colonial Discourse’ (1984) 28 *Discipleship: A Special Issue on Psychoanalysis* 125, 126.

⁸¹ Homi Bhabha, ‘The Other Question... Homi K. Bhabha Reconsiders the Stereotype and Colonial Discourse’ (1983) 24(6) *Screen* 18, 35 states that ‘colonisation is justified by those moralistic and normative ideologies of amelioration recognised as the Civilising Mission or the White Man’s Burden’.

⁸² Sharene H. Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism* 2004, 63 in Sally Engle Merry, ‘Race, Inequality, and Colonialism in the New World Order’ (2006) 40(1) *Law & Society Review*.

⁸³ Lillian Cheelo Siwila, ‘Feminist Critique of the Education Model of Mabel Show Girls’ Boarding Mission Schools in Zambia 1915-1940 and its Effect on the Education of Girls’ (2011) 116 *Scripture* 1, 3.

marriage, the system of inheritance – and discouraged the teaching of all these things in their schools and colleges⁸⁴. As stated by Fanon⁸⁵, ‘the customs of the colonized people, their traditions, their myths -- above all, their beliefs -- are the very sign of that poverty of spirit and of their constitutional depravity’. Hence, in order to be seen as modern, most women who had knowledge of traditional medicines or had authority in one way or another had to give up this knowledge and authority. Equally during the colonial period, there were fewer facilities in education made available for girls than the boys.⁸⁶

This postcolonial background is highly relevant to understanding GBV in Zambia since we need to be mindful of the context in which it happens. Violence against women is so often decontextualised or justified in the name of culture and customary law. In postcolonial Zambia, this is manifested even today by men feeling the urge to control women’s bodies and sometimes even to strip women naked on the street where they feel they are not dressed appropriately, claiming that these women are going against the Zambian culture.⁸⁷ This can partly be explained by the violence exhibited during the colonial rule and the fixity that it attached to everything African including culture. ‘Men were pulled into the hegemonic masculinity of imperialism in which violence serves to confer power. Thus, they are behaving as real men, men in control, who are defending the values of their nation and resisting their oppression.’⁸⁸ The framing of women as keepers of tradition by the postcolonial state has had an influence on this. The colonial world was definitely a man’s world, and women were not allowed to play any meaningful role in it except perhaps as petty traders and farmers.⁸⁹ Hence, women were seen instead as keepers or unifiers of family and would be ostracised if they were to report acts of GBV especially if these happened in the home:

⁸⁴ A. Adu Boahen, *African Perspectives on Colonialism* (The John Hopkins University Press 1992) 107; see also Anibal Quijano, ‘Coloniality and Modernity/Rationality’ (2007) 21 *Cultural studies* 177; See Bhabha ‘The Other Question...35 there co-exist within the same apparatus of colonial power, modern systems and sciences of government, progressive ‘Western’ forms of social and economic organisation which provide the manifest justification of the project of colonialism.

⁸⁵ Frantz Fanon, *The Wretched of the Earth* (Grove Weidenfeld New York 1963) 41.

⁸⁶ A. Adu Boahen, *African Perspectives on Colonialism* (The John Hopkins University Press 1992); Lillian Cheelo Siwila, ‘Feminist Critique of the Education Model of Mabel Show Girls’ Boarding Mission Schools in Zambia 1915-1940 and its Effect on the Education of Girls’ (2011) 116 *Scripture* 1, 3.

⁸⁷ Karen Tranberg Hansen, ‘Dressing Dangerously: Miniskirts, Gender Relations, and Sexuality in Zambia’ Jean Allman (ed), *Fashioning Africa: Power and the Politics of Dress* (Indiana University Press 2004) 179.

⁸⁸ Sharene H. Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism* 2004, 63 in Sally Engle Merry, ‘Race, Inequality, and Colonialism in the New World Order’ (2006) 40(1) *Law & Society Review*.

⁸⁹ A. Adu Boahen, *African Perspectives on Colonialism* (The John Hopkins University Press 1992) 107.

‘Nations are distinguished from one another by the cultivated appearance (such perceptions produced to a large extent through the attempted regulation) of internal conformity of customs and exterior separation, physically as well as culturally, from out-group members. This internal conformity and exterior separation are symbolically and literally enacted through women: in their manner of dress, the way they “keep house,” their cultivation of virtue—especially their sexual mores—their marriages, the manner in which they raise their children, etc’.⁹⁰

The framing of gender relations in colonial states led also to customary law becoming a contested site of struggle for meaning and influence. The colonial administration’s view of customary law distorted its origins and values with the result that women were stripped of most of the power that they had under customary norms and the postcolonial state continued with the ideology of placing women in an inferior position.⁹¹

It is important to note at this early point that the argument being developed in the thesis is not that the entirety of female subordination in Zambia results from colonialism. This is far from the case because individual women do exercise agency.⁹² The argument is rather that colonialism, with its highly gendered and Victorian assumptions about the place of women in society, had a huge impact on the law, the economy and the social life of people in Zambia and still continues to have such an influence today. As such it is recognised that:

Postcolonial theory does not contend that all ills currently faced by postcolonial countries can be laid at the feet of the coloniser; rather it recognises postcolonial agency while contemporaneously seeking to expose the ongoing role played by colonialism in postcolonial political, legal, and cultural studies.⁹³

As we will see below, the search for a feminist jurisprudence to explain law’s inadequacies in tackling gender inequality and GBV, has been only partially successful. ‘Adding women’ into fundamental issues such as legal logic, legal values, justice, neutrality, and objectivity, has not

⁹⁰ Elizabeth Chanley Rainey, ‘Multicultural Politics of Women’s Activism: When do Race and Nation enter Women’s Frame?’ (PhD, University of Alabama 2016) 16.

⁹¹ Alice Evans, ‘History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990’ (2015) 22(3) *Gender, Place and Culture: A Journal of Feminist Geography* 344-362; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (David Philip Cape Town) 20.

⁹² For example, in the bamba tradition, the aunt (bana senge) plays a significant role in the clan and has a final say in most issues.

⁹³ Stacy Ann Elvy, ‘A Postcolonial theory of Spousal Rape: The Caribbean and beyond’ (2015) 22 *Mich.J.Gender &L.* 89, 98.

necessarily been beneficial to women in the global south who may not experience discrimination in the same way as women in the West.’⁹⁴ It is important, now, therefore, to turn to a consideration of GBV in the Zambian context, drawing on postcolonial feminism in order to expose the gaps that have been found in both liberal and radical feminist theory given their grounding in Western (and middle class) knowledge and experience.

Put another way, while GBV has created a lot of debate among feminists and this has led to the development of a number of dominant theories about violence against women, these have in most cases neglected the experiences of women from the global south.

2.3 The Limits of Liberal Feminism in the Postcolonial State

Liberal theory, upon which most human rights instruments and indeed national Constitutions⁹⁵ (such as that of Zambia) are premised, naturally places a great deal of emphasis on individual autonomy and free choice. However, the notions of autonomy and free choice are deeply problematic with regards to women and GBV. People can and do exercise individual choices, however these choices are influenced by the environment in which they live including social, economic and political factors.⁹⁶ Evidently, women in postcolonial states will experience GBV differently from those in the West because colonialism has had an impact upon their thinking and the way in which they view life. To say to a woman that she has entitlements which may then bring her into conflict with her family, her community or the rights of others is to present her with a seemingly intractable problem.⁹⁷

It has, thus, been argued that the concept of free choice has distinct male characteristics. The male legal system reads ‘individual’ as ‘man’, meaning that liberal feminist claims for equality mean treating women as if they were men.⁹⁸ The point is that law takes men as the standard against which women are measured and that this is a fundamental assumption of the legal system:

⁹⁴ Ibid 66.

⁹⁵ Joel E. Oestreich, ‘Liberal Theory and Minority Group Rights’ (1999) 21Hum.Rts.Q. 108

⁹⁶ See Carol Smart, *Feminism and the Power of Law* (London: Routledge 1989) 180 and Zillah R. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press 1988) 235 who both argue that the law reproduces patriarchy.

⁹⁷ Fareda Banda, ‘Global Standards, Local Values’ (2003) 17(1) International Journal of Law, Policy and Family’ 42.

⁹⁸ Christine A. Littleton, ‘Feminist Jurisprudence: The Difference Method Makes’ (1989) 41 Sanford Law Review 752.

Law's principal failing is not so much the inappropriate intrusion into legal decisions of the values shared by those particular persons who dispense justice, that is, the men of the Bench. Rather, the problem is of a more impersonal, more indirect but nevertheless deep-seated kind in that it resides in the fundamental priorities and orientation of the law and the legal system.⁹⁹

Liberal feminism developed initially because women *were* treated differently from men and, therefore, reforms, it was hoped, would produce equality. However, liberal feminists make liberal theory respond to women's situation, but only on liberalism's terms.¹⁰⁰ Consequently, feminists have subsequently argued that the focus on abstract, rational and isolated individuals as the basis of rights for human beings devalues the (female) body.¹⁰¹ This devaluation is said to turn attention away from bodily-related differences among individuals like sex and gender. Usually when human rights practitioners' talk about rights, these rights apply to the male population.¹⁰² Rights fail to take account of women's experiences because these rights are modelled upon male experiences. 'It is argued that women's experiences and concerns are not easily translatable into the discourse or language of rights which lends itself to male lives and is based on men's experiences.'¹⁰³ Moreover, these rights are derived from Western knowledge of women's needs. As explained by Said, the people from the global north purport to know so much about people from the global south because of what has been written not just by history, but corroborated by science and other literature. "These are the lenses through which the Orient is experienced, and they shape the language, perception, and form of the encounter between the East and the West."¹⁰⁴ This is absolutely the case with law's regulation of gender relations.

The argument is that when we talk of women, the context under which they live is different from that which liberal feminism envisions. Therefore, applying liberal abstract principles and decontextualised rights only serves to limit the capacity of law to improve women's lives. 'Since liberal theory talks about autonomy, it guards jealously the autonomy of the individual,

⁹⁹ Ngaire Naffine, *Law and the Sexes: Explorations in the feminist Jurisprudence* (Allen & Unwin 1990) 54

¹⁰⁰ Christine A. Littleton, 'Feminism Unmodified by Catharine A. MacKinnon' *Stanford Law Review* (1989) 41(4) 751.

¹⁰¹ Jill Marshall, 'Feminist Reconstructions of Universalism and the Discourse of Human Rights' *International Journal of Law in Context* (2009) 5(1) 87.

¹⁰² Joanne Conaghan and Susan Millns, 'Gender, Sexuality and Human Rights' (2005) 13 *Feminist Legal Studies* 1, argue that 'Indeed, to a not inconsiderable extent, rights may be said to contribute to the further entrenchment of that disadvantage by reaffirming as universal and abstract norms which are made in man's image and which reflect his particular concerns.'

¹⁰³ Jill Marshall, 'Feminist Reconstructions of Universalism and the Discourse of Human Rights' *International Journal of Law in Context* (2009) 5(1) 87.

¹⁰⁴ Edward Said, *Orientalism* 58.

watching out for encroachments of the private sphere.’¹⁰⁵ The problem this creates is that by guarding the private sphere free from state interference, it better protects the rights of men at the expense of women.¹⁰⁶ The concept of individual autonomy is particularly problematic with regards to women in the global south. They live in a community as mothers, grandmothers, sisters etc. Usually when making decisions, they take all aspects of their lives into consideration and will not just consider themselves but will reflect on how their decisions affect them and their families socially and economically. Women will use the circumstances that surround them and navigate around those to exercise agency.

The private/public¹⁰⁷ dichotomy which has resulted in women being confined to the private sphere does disadvantage women and exacerbate GBV. This divide in itself may not be a problem, however it does mean that many aspects of the private sphere remain unregulated. Liberalism emphasises that the public sphere, and the principles that govern it, are separate from, independent of, relationships in the private sphere.¹⁰⁸ This has exacerbated the abuse and infringements of women’s rights. In the private sphere, women are disadvantaged because many violations of their rights, particularly those that only, or usually only, happen to women, are invisible.¹⁰⁹ Because of the dominant positions that men occupy in societies, men are rarely the victims of domestic violence compared to women and because of this domestic violence is never taken seriously.¹¹⁰

This non-regulation of the private sphere in addition affects how women are able to perform in the public sphere. Feminists argue that liberalism is structured by patriarchal as well as class relations, and that the dichotomy between the private and the public obscures the subjection of women to men within the apparently universal, egalitarian and individualist order.¹¹¹

That said, within most postcolonial commonwealth states, the private sphere is in fact regulated – not by constitutional law but by customary law:

¹⁰⁵ Anne Phillips(ed) *Feminism and Equality* (London: Basil Blackwell 1987) 12.

¹⁰⁶ Jill Marshall, ‘Feminist Reconstructions of Universalism and the Discourse of Human Rights’ *International Journal of Law in Context* (2009) 5(1) 87, 89.

¹⁰⁷ Carole Pateman, ‘Feminist Critiques of Public/Private Dichotomy’ in Anne Phillips (ed) *Feminism and Equality* (New York University Press 1987) 104.

¹⁰⁸ *Ibid* 104.

¹⁰⁹ Jill Marshall, ‘Feminist Reconstructions of Universalism and the Discourse of Human Rights’ *International Journal of Law in Context* (2009) 5(1) 87.

¹¹⁰ See the figures explaining the incidences of violence against women in chapter 1 above.

¹¹¹ Carole Pateman, ‘Feminist Critiques of Public/Private Dichotomy’ in Anne Phillips (ed) *Feminism and Equality* (New York University Press 1987)105.

Because of the pluralistic nature of these states, customary law regulates the private sphere with most of the Constitutions of African states having a clause that states that the Constitution shall not be applicable with regards to customary law matters and most of these matters happen in the private sphere.¹¹²

This has further limitations for women and their rights, as will be seen below.

While striking a negative tone, it is not the argument of the thesis that liberal feminism has not made any difference to women and this is true in Zambia just as it is in the West. Formal equality has allowed women to vote, to enter employment, to enter universities and to be granted custody of children. However, liberalism has typically ignored the context and operation of women's equal rights and failed to provide for a more substantive form of equality which adequately takes account of social and economic factors affecting women.¹¹³

While individual choice is a laudable aim,¹¹⁴ it is problematic for subordinated members of society because choice comes with privilege. A subordinated group or individuals rarely has the privilege to exercise choice. This is so because subordination creates dependency and if somebody is dependent on another person, it is usually very difficult for them to exercise free choice. In Zambia, just as in the West, men and women will not usually exercise the same choice because of the inequalities in society that already set the two genders apart. Thus, although legal rights seem to present humans as equal rights holders, because of the inequalities of power already existing in societies, including gender based ones, this presents an unrealistic, and indeed non-existent, equality.¹¹⁵ There cannot, therefore, be a universal legal subject just as there cannot be a universal female subject. Both are tinged by Western imperialism and patriarchy.¹¹⁶

¹¹² The Constitution of Zambia, Article 23 states that the Constitution shall not affect matters of a private nature in customary law. The problem with a provision like this is that although it applies to both men and women, women are the ones who are mostly affected.

¹¹³ Joanne Conaghan and Susan Millns, 'Gender, Sexuality and Human Rights' (2005) 13 *Feminist Legal Studies* 1, state that 'even in so far as it can be said that a rights approach eventually triumphed-manifest in application to women in most liberal democratic jurisdictions of the formal equality principle- there is common agreement among feminists that the gains thus obtained proved woefully insufficient to dislodge the structural entrenchment of gender-based socio-economic, culture and political disadvantage.'

¹¹⁴ *Ibid* 40.

¹¹⁵ Jill Marshall, 'Feminist Reconstructions of Universalism' *International Journal of Law in Context* (2009) 5(1) 87.

¹¹⁶ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Towards a History of Vanishing Present* (Harvard University Press 1999) 372.

2.4 The Limits of Radical Feminism in the Postcolonial State

Radical feminism, like liberal feminism, has distinct limitations in terms of its capacity to explain GBV in African society. Like first wave liberal feminism, second wave radical feminism also arose as a result of the inadequacies of the law in achieving women's equality. Unlike liberal feminism, however, radical feminism explains women's inequality as the product of *domination* of women by men. In this guise, inequality is presented as political and sexual in nature.¹¹⁷

Radical feminism as a theory is a movement of mind which addresses the most basic questions of politics: the constitution of the person in society; social as against natural determinations of relative status; the relationship between morality, justice, and power; the meaning and possibility of willed action; the role of thought and the theorist in politics; the nature of power and its distribution; the nature of community; the definition of political itself.¹¹⁸

Radical feminism differs from liberal feminism in that it sees women's oppression as at the epicentre of women's subordination. 'Radical feminism saw women's oppression as the first, the oldest, and the primary form of oppression to which all other forms of oppression are related and connected'.¹¹⁹ Other forms of discrimination are subordinate to gender discrimination. Gender contributes to the social embodiment of race and class inequalities, however race and class are also deeply imbedded in gender.¹²⁰ The argument is that gender roles are imposed by force. 'Gender roles hide that force behind a static description of gender as a biological or social or mythic or sematic partition, engraved or inscribed or inculcated by god, nature, society (agents unspecified), the unconscious, or the cosmos.'¹²¹ This argument supports the current narrative on gender in Zambia where the gender differences are attributed to nature and God

¹¹⁷ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 42.

¹¹⁸ Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989) 41. As MacKinnon explains further '[t]o radical feminism, sex is a systematic division of social power, a social principle inseparable from the gender of individuals, enforced to women's detriment because it serves the interest of the powerful, that is, men.'

¹¹⁹ Barbara A. Crow, *Radical Feminism: A Documentary Reader* (New York University Press 2000) 2.

¹²⁰ Catharine MacKinnon, *Feminism Unmodified: Discourse on Life and Law* (Harvard University Press) 2.

¹²¹ Ibid 2.

and when people question them, they are seen as going against Christianity.¹²² Such narratives forget that in Zambia, there were societies where women played an important role in religion.¹²³

Radical feminists, such as MacKinnon, argue that the law has always been seen as objective and applying equally to all sexes, however it is not objective in that it usually disadvantages women compared to men. 'Much of what has passed for feminism in law has been the attempt to get for men what little has been reserved for women or to get from some women some of the plunder that some men have previously divided (unequally) among themselves.'¹²⁴ Although liberal theory relies upon the law to improve upon women's position and sees it as crucial in the advancement of women's rights, radical feminism suggests that the law needs to be more aware of the socially-constructed nature of gender.¹²⁵

Radical feminism is particularly pertinent to our discussion of GBV, in that it points out that 'acts of sexual abuse and violence against individual women act as a form of terror against all women in society'.¹²⁶ This argument applies to Zambia, in that in order to avoid being victims of GBV in their homes and on the streets women will conform to societal norms with regard to how women should conduct themselves. Whenever women hear that a woman has been assaulted, the effect is felt by all women within that community, they become conscious of how they carry on their everyday lives, conscious that they may be the next victim.¹²⁷

Liberals insist on equality but radical theorists do not believe that equality is of any help to women who are violated. Abstract equality undermines substantive inequality, but it reinforces it at the same time.¹²⁸ MacKinnon is of the view that abstract equality actually reinforces inequality by arguing that gender is a system of power, and it is women who have less power compared to men.¹²⁹ Because inequalities are found in society and these intersect with other inequalities, women are usually at the receiving end of these inequalities. Women are the group most victimised by sexist oppression. 'As with other forms of group oppression, sexism is perpetuated by institutional and social structures; and by the victims themselves who are

¹²² Alice Evans, 'Gender Sensitisation in the Zambian Copperbelt' (2015) 59 *Geoforum* 12.

¹²³ See Hugo F. Hinfelaar, *Bemba –Speaking Women of Zambia in a Century of Religious Change (1892-1992)* (Brill Leiden: New York 1994) on the role of Bemba women.

¹²⁴ Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989) 4.

¹²⁵ Judith Butler, *Gender Trouble: Feminism on the Subversion of Identity* (Routledge 1990) who argues that gender is socially constructed.

¹²⁶ Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989) 7.

¹²⁷ See the discussion in chapter 6 below of the findings from the interviews and focus groups on women's perceptions of violence in Zambia.

¹²⁸ Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989) 14.

¹²⁹ *Ibid.*

socialised to behave in ways that make them act in complicity with the status quo.’¹³⁰ This means that some women will join in the discrimination of other women so as to comply with the status quo. A good example is where women will take part in the stripping of a fellow woman because according to society, she is not ‘appropriately dressed’.

The radical feminist claim that the law is not neutral and that the oppression of women is built into the very structure of our society is of relevance in our examination of the way in which GBV is handled in Zambia. While there has been an attempt to address GBV and to improve women’s formal equal rights, this has been deficient in practice. bell hooks explains why this might be the case: ‘The positive impact of liberal reforms on women’s lives should not lead to the assumption that they eradicate systems of domination...

‘The lack of any emphasis on domination is consistent with the liberal feminist belief that woman can achieve equality with men of their class without challenging and changing the cultural basis of group oppression and it is this belief that negates the likelihood that the potential radicalism of liberal feminism will ever be realised.’¹³¹

That said, while radical feminism is helpful to our study in that it challenges the law and the liberal way of thinking, it again puts an emphasis on the position of women in the global north. While it brings women together in an acknowledgement that all women are subordinated to men, it fails to address how colonisation, law and culture intersect in perpetuating the subordination of women.¹³² It is important to note that feminism is fractured and totalising theories are subject to sustained critique. In addition, because of its being fractured there are certain components which are discredited but some have been added to the new feminisms. For this reason, we turn now to a consideration of postcolonial feminism which has the advantage of combining a radical feminist appreciation of female subordination based on patriarchal values with a more subtle understanding of the intersection between gender, race and culture. It is ultimately postcolonial feminism which, it is suggested, offers the possibility for a more

¹³⁰ bell hooks, ‘Sisterhood: Political Solidarity Between Women’ in Sneja Gunew (ed) *A Reader in Feminist Knowledge* (London 1991) 27.

¹³¹ *ibid* 65.

¹³² See Chandra Talpade Mohanty, ‘Under Western Eyes Revisited: Feminist Solidarity through Anti-capitalist Struggles’ (2003) 28 (2) *Signs: Journal of Women in Culture and Society* 499 who ‘states that traditional liberal and liberal feminist pedagogies disallow historical and comparative thinking, radical feminist pedagogies often singularize gender’; see Margaret Davies, ‘Ethics and Methodology in Legal Theory A (personal) Research anti-Manifesto’ (2002) 6 *Law, Text, Culture* 7, 14 who states ‘that to divide the world into male and female neglects the fact that white women share the privilege of our race with white men. The notion of female subjectivity which replaced the universal male was exclusive, patterned as it was upon the white, middle class, heterosexual female.’

nuanced and more accurate theoretical evaluation of why GBV in Zambia occurs and how best the law might tackle it.

2.5 Postcolonial Feminism: A Useful Theoretical Lens Through Which to View GBV

Third World and postcolonial feminism, arose as a result of the manner in which dominant Western feminist theorists portrayed the cause of women in the global south.¹³³ Many third world feminists have become increasingly critical of the attempted wholesale application of Western feminist theories to their communities and societies and in particular to the liberal feminist emphasis on the removal of sex discrimination.¹³⁴ ‘Feminists from the global north tend to write their subjectively-defined world onto the other that lies outside it.’¹³⁵ ‘The Postcolonial view not only queries the base from which liberal positivist law unthinkingly functions; it also provides a different forum in which the law’s taxonomic structures and ontological foundations may be understood from the ‘Other’s’ perspective.’¹³⁶ Postcolonial feminism offers a narrative of gender subordination from the other whose voice is usually silenced in the liberal and radical narratives.

‘Postcolonial feminism provides a critical and necessary challenge to explanations of women’s subordination that have been furnished from liberal and Western positions, especially those that have come to occupy the international human rights arena in their understanding and articulation of concerns of third world women.’¹³⁷

The theory aims to explain the present from the perspective of colonisation and in doing so to better understand the particular disadvantage of women in the global south.

Postcolonial theory is not merely a counter to ‘Western Feminism’ but is in part a challenge to the systems of knowledge that continue to inform feminist understandings of women and the subaltern subject in the postcolonial world,

¹³³ See Mohanty *ibid*, 66 who states that western feminist discourse construct ‘third-world women’ as a homogenous ‘powerless’ group often located as implicit victims of particular cultural and socio-economic systems.

¹³⁴ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 46.

¹³⁵ Aihwa Ong, ‘Colonialism and Modernity: Feminist Representations of Women in Non-Western Societies’ in Deborah Gordon, *Feminism and the Critique of Colonial Discourse* (1988) 85.

¹³⁶ Alpana Roy, ‘Postcolonial Theory and Law: A Critical Introduction’ (2008) 29 *Adel.L. Rev* 315-357.

¹³⁷ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House Press 2005) 4.

and seeks to create a project of inquiry and interrogation that will better inform feminist projects that speak to and for these subjects.¹³⁸

‘Just as ‘white feminism’ has argued that men should become aware that they are gendered beings who benefit from the gendered order, so ‘black feminism’ argues that white women and men should become aware of the privileges that accrue to them arising from being ‘white’ and should be mindful of the historic oppression of black people.’¹³⁹

As we will see in more depth in the next chapter, law was central to colonisation and the legal system in Zambia represents a particular vision of Victorian life. Postcolonial discourses help provide a new way of understanding the system and structures of the law in postcolonial states. Indeed, a postcolonial analysis of law reveals a different reality, allowing a more contextual and expanded understanding of the concept of the law.¹⁴⁰ While colonialism has ended, postcolonial theory explains how the discursive effects of colonialism still affect postcolonial states. These effects can be seen in almost all aspects of the lives of those who were colonised.

‘While the colonial era typically implied a relatively clear demarcation between the colonisers and the colonised, post colonialism refers to a more discursive condition, where the discourse and culture of the former imperial powers has left an undeniable scar on the psyche of the colonised.’¹⁴¹

In Zambia and in most colonised states, colonialism did, and still does, have an effect on education, the law, culture and gender relations.¹⁴² By using postcolonial theory in this study of GBV, we can unveil the influence that colonialism had on the laws around gender relations, violence against women and the position of women in society more generally. This is important as it helps demonstrate that while GBV is seen as part of ‘Zambian culture’ by both Zambian and international actors,¹⁴³ it is clearly not simply a cultural issue. GBV is found everywhere and the particular forms that it takes in Zambia are linked to the colonial past just as much as they are to gender inequality.

¹³⁸ Spivak in Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House Press 2005) 4.

¹³⁹ Carol Smart, *Feminism and the Power of the Law* (London Routledge 1989) 2.

¹⁴⁰ Alpana Roy, ‘Postcolonial Theory and Law: A Critical Introduction’ (2008) 29 *Adel.L.Rev* 315.

¹⁴¹ *Ibid.*

¹⁴² Edward Said, *Orientalism* (Penguin Books 1978).

¹⁴³ Avocats Sans Frontières Asbl, ‘Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia’ < www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN > accessed on 12th March, 2018.

In addition, when dominant theories talk about women from third world countries, they portray them as lacking agency and as victims of their culture. Culture has always been used as a way to explain violations of female bodies, be it by postcolonial elites or by dominant narratives.¹⁴⁴ When dealing with third world women or cultures, as noted above, Western feminists tend to 'other' the women from different societies. Even when women from the global south speak about their culture, they are not believed unless they are validating the stance of dominant theories.¹⁴⁵

'Of course, this myth is highly detrimental in that it portrays non-Western women as passive victims of their 'cultures' misogyny, and in a self-fulfilling way helps to enforce this as reality; it divides women along cultural and global (also often racial) power fault lines; it impoverishes understanding of the feminist aims and reduces the variety of forms that women's resistance may take; and most detrimentally, it inadvertently serves the agendas of those cultural elites who cynically violate women's humanity in the name of cultural expression and allegiance-both 'Western' and 'non-Western' cultural elites alike.'¹⁴⁶

The fact that Western feminism fails to acknowledge or relate to the experiences of all women makes women from the global south see it as foreign and not applying to their situations.

'One of the critiques of universalism is that it looks to a common core of humanity behind all the (supposedly contingent) differences of class, gender, ethnicity, religion or race, and that in doing so it tends to equate equality with sameness, and thereby leaves untouched systematic inequalities in power.'¹⁴⁷

This creates a problem especially for people from the global south and in minority groups.

'When feminism is defined in such a way that it calls attention to the diversity of women's social and political reality, it centralizes the experiences of all women, especially the women whose social conditions has been least written about, studied, or changed by political movements.'¹⁴⁸

¹⁴⁴ Gayatri Chakravorty Spivak, 'Culture Alive Conference' (1995) 5 *Austl. Feminist.L.J.* 3.

¹⁴⁵ Trinh T. Minh-ha, 'Not you/Like you: Post-Colonial Women and the Interlocking Questions of Identity and Difference' in Deborah Gordon, *Feminism and the Critique of Colonial Discourse* (1988) 75.

¹⁴⁶ Louise De Toit, 'In the Name of What? Defusing the Rights-Culture Debate by Revisiting the Universals of Both Rights and Culture' *Politikan*: (2013) 40(1) *South African Journal of Political Science* 15.

¹⁴⁷ Anne Phillips, *Gender and Culture* (Cambridge Polity Press 2010) 18.

¹⁴⁸ bell hooks, 'Feminism: A Movement to End Sexist Oppression in Feminism and Equality' in Anne Phillips (ed), *Feminism and Equality* (Oxford: Basil Blackwell Ltd 1987) 70.

It is important to note that both liberal and radical theories of feminism grew out of a consideration of the situation of women at a specific point in time and in a particular social, political and economic context.¹⁴⁹ As a result, Western feminists have transplanted their experiences and their achievements to other countries without looking at the social, economic and political contexts of these countries. Western standards and goals - rationality and individualism - are thereby used to evaluate the cultures and histories of non-Western societies.¹⁵⁰ This has created a barrier that has closed the movement off most women especially in the global south because feminisms from developed countries tend to show a patronising attitude towards their female counterparts from third world countries and treat them as if they cannot and do not exercise agency.¹⁵¹ Given the colonial context of Zambia described above, it is important to draw upon the ideas of postcolonial feminism in order to explain more fully the impact of GBV on Zambian women and how this might be in some ways different from the experiences of women in the global north.

2.6 Culture, Custom and the Making of Contemporary Law on GBV in Zambia

In the work above, a theoretical framework for the thesis was set out which sought to argue that a postcolonial analysis is the best way to approach a critical evaluation of the law on GBV in Zambia. In particular, postcolonial feminist theory was introduced as a useful lens for analysis because of its insightful explanation of the intersections of colonialism and neo-colonialism with gender, nation, class and sexuality in Zambia.¹⁵² We now move on to consider the law on GBV in Zambia and how this is gendered in quite specific ways. In looking at the law, the chapter seeks to analyse the law through the lens of postcolonialism in order to show the impact of colonialism and neo-colonialism upon the law's response to GBV.

It will take a longitudinal approach beginning with an examination of gender relations in Zambia before contact with the colonial administrators. In this initial section, the thesis will investigate the role played by gender during this early period and will question the ways in which customary law was distorted by both the colonial administrators and postcolonial elites

¹⁴⁹ See hooks *ibid* who argues that the 'feminist movement has been known to be usually of white western women and representing their views. Lack of definition made it easy for bourgeois women, whether liberal or radical in perspective, to maintain their dominance over the leadership of the movement and its direction.'

¹⁵⁰ Trinh T. Minh-ha, 'Not you/Like you: Post-Colonial Women and the Interlocking Questions of Identity and Difference' in Deborah Gordon, *Feminism and the Critique of Colonial Discourse* (1988) 75.

¹⁵¹ See Chandra Talpade Mohanty who 'states that the way western feminist frame other women serve to distort western feminist practices, and limit the possibility of coalitions among (usually white) western feminist and working-class and feminist women of colour around the world.'

¹⁵² Refer to Chapter 3, See Rajeswari Sunder Rajan and You-me Park, *Postcolonial Feminist/Postcolonialism and Feminism in A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers 2000) 53.

to maintain the status quo.¹⁵³ The section will also question some of the more dominant theories about culture and in particular the way in which feminists from the global north sometimes talk about African culture as being patriarchal and encouraging the subordination of women.¹⁵⁴ This historical narrative is ‘important as colonialism as a cultural project, has not only shaped women’s identities and material conditions in the past, but structures them unevenly with the present context.’¹⁵⁵ The section argues that customary law is a creation and a result of external contact just as much as it is a pre-colonial phenomenon¹⁵⁶

The chapter then moves on to look at the making of the contemporary law on GBV in Zambia and how the colonial influence lingers in modern day legislation and attitudes to violence against women. The chapter argues that the impact of culture and custom on the development of law is significant and that a more culturally sensitive approach needs to be taken to understand fully the dynamics of the relationship between gender, colonialism and GBV in Zambia today. The chapter further explores some of the difficulties surrounding the implementation of the current law on GBV both in terms of the operations of the police and the courts.

2.7 Customary Law and Gender in Zambia: An Historical Perspective

In Africa, historically, there have existed community structures in most societies through which women could express themselves and play a role in decision-making.¹⁵⁷ In some societies, women were valued more than men and Zambia is not an exception.¹⁵⁸ In agriculture, labour was shared by family members and the concept of gendered labour division was as not firmly entrenched as it would become with the onset of colonisation.¹⁵⁹ Women’s labour was also considered to be an important part of the household. While it is important not to generalize

¹⁵³ Gayatri Chakravorty Spivak, ‘Culture Alive Conference’ (1995) 5 Austl. Feminist. L.J. 3.

¹⁵⁴ Chandra Talpade Mohanty, ‘Under Western Eyes Revisited: Feminist Solidarity through Anti-capitalist Struggles’ (2003) 28 (2) Signs: Journal of Women in Culture and Society 499; Kimberle Crenshaw ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989 U Chi Legal F 139, 156.

¹⁵⁵ See above chapter 3; Also see Poonam Pillai, ‘Postmodern Feminism and Post Colonial Criticism’ (1996) 3 (1) The Journal of International Communication 42, 43.

¹⁵⁶ Edward Said, *Orientalism* (Penguin Books 1978) 205.

¹⁵⁷ David R. Penna and Patricia J. Campbell, ‘Human Rights and Culture: Beyond Universality and Relativism’ (1998) 19(1) Third World Quarterly 7-27.

¹⁵⁸ Alice Evans, ‘History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990’ (2015) 22(3) Gender, Place and Culture: A Journal of Feminist Geography 344-362.

¹⁵⁹ David R. Penna and Patricia J. Campbell, ‘Human Rights and Culture: Beyond Universality and Relativism’ (1998) 19(1) Third World Quarterly 7-27.

across African societies, there is strong evidence that women's position in society worsened under colonisation.¹⁶⁰

Most Zambian societies are matrilineal although there are a few patrilineal societies such as the Ngoni and the Tumbuka.¹⁶¹ 'Male breadwinner and female housewife stereotypes appear to have emerged as a product of imported Christian ideologies, colonial-capitalist concerns and an economic climate that largely enabled men to financially provide for their families.'¹⁶² In the Bemba tradition, for example, a man would move to his wife's village upon marriage and was required to work for his in-laws in the field. There was no exchange of money because working in his in-laws' field was seen as a form of bride service. Thus, 'relative to patrilineal ethnic groups, Bemba women enjoyed high status, with parents welcoming the birth of girls, as potentially able to bring male labour to their village and reproduce the lineage.'¹⁶³

With the rise in capitalism when the mines were discovered, most men migrated to the Copperbelt to work in the mines. This resulted in a disruption of the existing social order.

'By the 1930s, ... labour migration meant that in areas such as Bemba land there was a shortage of labour and the elders could not find men to provide the bride service. This challenge to the political economy run by the elders was intensified when young women started to follow the men to the towns.'¹⁶⁴

The rise of capitalism intensified the division of labour and, consequently, the private/public divide. The women who were left behind had to work in the fields while the men went to work in the mines. These factors worked together to reinforce Victorian-era, Western concepts of gender divisions with regards to employment, education and women's place in society in

¹⁶⁰ Ibid; note that the position deteriorated in post-independence.

¹⁶¹ See Simon Coldham, 'Customary Marriages and Urban Local Courts in Zambia' (1990) 34 J.Afr.Law 67,72 who states that in the matrilineal societies which predominate Zambia, a child belongs to his mother's kinship group whereas in the patrilineal societies he belongs to the father's group, at least as long as bridewealth has been paid; see also Mwelwa C Musambachime, *One Zambia, One Nation, One Country* (xlibris 2016); S D Taylor, *Culture and Customs in Zambia* (1965 Greenwood Press) 92; Sitawa R. Kimuna and Yanyi K. Djamba, 'Wealth and Extramarital Sex among Men in Zambia' (2005) 31 (2) International Family Planning Perspectives 87.

¹⁶² Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22(3) Gender, Place and Culture: A Journal of Feminist Geography 344-362; See Maria Lugones, 'Towards a Decolonial Feminism' (2010) 25(4) Hypatia 744, in chapter 3 who states that 'as Christianity became the most powerful instrument in the mission of transformation, the normativity that connected gender and civilization became intent on erasing community'.

¹⁶³ Audrey Richards, *Chisungu: A Girl's Initiation Ceremony Among the Bemba of Zambia* (Abingdon: Routledge 1995 in Alice Evans 'History Lessons for Gender Equality from the Zambian Copperbelt.

¹⁶⁴ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience of Malawi and Zambia* (Cambridge University Press 1995) 15.

general and with the family specifically.¹⁶⁵ Since mine labour was paid, it created a situation where working in the farms or field was seen as unproductive. Since women were not employed to work in the mines, they had very little choice but to work in the fields.

As if the destabilisation of the social order was not enough to subordinate women, when women started going to the mines there was a fear among the colonial powers¹⁶⁶ and religious leaders that women were becoming too assertive. This fear led the chiefs to introduce a system where a higher rate of bride wealth would be required.¹⁶⁷ The introduction of bride price was multi-purpose; first it served to prevent women from going to the mines thus over populating the mine areas and, secondly, it acted as a source of income for the elders in the village.¹⁶⁸ This contributed to the subordination of women in Zambian society.

The above were ways in which the elders could turn the monetisation of bride wealth to their advantage. And as more of the young than the elders became involved in the commercial economy, so the balance of expectations between the generations was changing. Instead of the young men looking to their elders for benefits, the elders sought to share in the rising fortunes of their children.¹⁶⁹

The subordination of women in third countries is, therefore, not just about culture (as some Western feminists may suggest), but colonisation and other factors.¹⁷⁰

Equally, European (mis-)understandings of precolonial African systems of law and authority, together with African collaboration with colonial systems of law and government, led to the invention of tradition in Africa and consolidated its

¹⁶⁵ David R. Penna and Patricia J. Campbell 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19(1) *Third World Quarterly* 7

¹⁶⁶ Jane Parpart, *The Household and the Mine Shaft: Gender and Class Struggle on the Zambian Copperbelt, 1926-64* 13 (1) *Journal of Southern Africa* 36; Amina Mama, 'Sheroes and Villains: Conceptualizing Colonial and Contemporary Violence Against Women in Africa' in M. Jacqui Alexander and Chandra Talpade Mohanty (ed) *Feminist Genealogies, Colonial Legacies, and Democratic Futures* (Routledge 1997) 50 state 'that colonial states cast all African women in urban areas as 'prostitutes' and subjected them to periodic waves of victimization and harassment, while, at the same time, creating conditions that made the numerous services provided by women indispensable to the colonized male workforce.'

¹⁶⁷ David R. Penna and Patricia J. Campbell 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19(1) *Third World Quarterly* 7.

¹⁶⁸ James M Ault, Jr, 'Making "Modern" Marriage "Traditional": State Power and the Regulation of Marriage in Colonial Zambia' (1983) 12 (2) *Theory and Society* 181, 188.

¹⁶⁹ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience of Malawi and Zambia* (Cambridge University Press 1995) 16.

¹⁷⁰ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Towards a History of Vanishing Present* (Harvard University Press 1999) 378.

foundational position in customary law and local institutions such as chieftaincy and the courts.¹⁷¹

For women this was bad news: '[t]he community structures women once used to express themselves and play a role in decision-making were replaced with Western institutions which had no public role for women.'¹⁷² For example, in the Bemba tradition women were considered a vital part of society in that they were believed to communicate with gods and they were also keepers of shrines. The coming of missionaries introduced Christianity and condemned African religions and this, compounded with industrialisation, meant that the status of women diminished. The encounter with the missionaries undoubtedly changed some aspects of life for women since '[s]ome traditions were discouraged as they were thought to go against Christian values.'¹⁷³

Of particular importance is the fact that under colonial rule, the codification of customary law effectively shifted power from communities to traditional leaders or chiefs, which made it easier for colonial powers to govern. This distorted and augmented the power of traditional leaders and the complex relationships they have with their subjects.¹⁷⁴ Equally important is the fact that the colonial discourses that have been constructed around customary law are profoundly gendered. Codified customary law was an official version of African customs that arose as a result of destabilizing social and political changes, and also in response to them.¹⁷⁵ Codified customary law represented an alliance between colonial authorities and African male elders who controlled land and cattle, as well as women and children.¹⁷⁶ Identifying chiefs

¹⁷¹ Kirstin Mann and Richard Roberts, *Law in Colonial Africa* (Heinemann Educational Books 1991).

¹⁷² David R. Penna and Patricia J. Campbell 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19(1) *Third World Quarterly* 7; James M Ault, Jr, 'Making "Modern" Marriage "Traditional": State Power and the Regulation of Marriage in Colonial Zambia' (1983) 12 (2) *Theory and Society* 181, 184.

¹⁷³ See A. Adu Boahen, *African Perspectives on Colonialism* (The John Hopkins Press 1992). See also chapter 3 above.

¹⁷⁴ James M Ault, Jr, 'Making "Modern" Marriage "Traditional": State Power and the Regulation of Marriage in Colonial Zambia' (1983) 12 (2) *Theory and Society* 181, 188; Amanda Gouws 'Multiculturalism in South Africa: Dislodging the Binary between Universal Human Rights and Culture/Tradition' (2013) 40(1) *Politikon* 35. See Lord Hailey, *Native Administration in the British African Territories: Central Africa; Zanzibar, Nyasaland, Northern Rhodesia* (Majesty Stationery Office 1950) 82 who states 'that Chiefs who received recognition at the outset of British occupation were at the time little more than headmen, picked out for some special reason, but they have been gradually replaced by persons having a more acknowledged authority.'

¹⁷⁵ T. Nhlapo, 'African Customary Law in the Interim Constitution' In S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (Cape Town: David 1995) 157.

¹⁷⁶ Ibid. See also Thomas Spear, 'Neo-Traditionalism and the Limits of Invention in British Colonial Africa' (2003) 44(1) *Journal of African History* 3. Lord Hailey, *Native Administration in the British African Territories* (London: His Majesty's Stationery Office 1950) 83 states that 'under the Chartered Company the policy was in the main one of direct rule, the Chiefs being used as agencies of Government and their authority and privileges upheld so far as these were not incompatible with the rule of the Company'.

and incorporating them into colonial law and government meant supporting one claimant (usually male) over others and privileging one form of gendered authority over many alternative forms.¹⁷⁷

Hence, when the colonialists came to Africa, they privileged their knowledge and mixed their laws with the laws that they found in the colonies.¹⁷⁸ ‘Customary rights of many groups, especially women, through the channelling of disputes into the court hierarchy become buried under the weight of ossified precedents, which then became instruments of oppression through legal interpretation of local customs.’¹⁷⁹

In the case of South Africa, ‘one could probably show that the excessively patriarchal nature claimed for a supposedly ‘pure’, pre-colonial past of ‘African tradition’ is in fact a later creation of the collaboration between colonial forces (from Victorian England, for example) and co-opted local chiefs who gained more power and a new style of autocratic and patriarchal governing as a result of colonial interference.’¹⁸⁰

Because women were excluded from this collaboration, it led to the gendered organisation of power which became so pervasive to the point that it became invisible. The colonial powers used male chiefs in order to consolidate their rule and to win the loyalty of the chiefs. The result was the creation of ‘customs’ or ‘traditions’ which fitted the narratives of colonial rule and which imposed Western, Victorian-style concepts of gender relations upon Zambian

¹⁷⁷ Kristin Mann and Richard Roberts, *Law in Colonial Africa* 4; see also Thomas Spear, ‘Neo-Traditionalism and the Limits of Invention in British Colonial Africa’ who states ‘colonial chiefs were inventions in two senses: first, the men colonial authorities appointed often lacked traditional legitimacy and second, the positions to which they were appointed were either created by the colonial administration or had been so corrupted by its demands to collect tax, raise labour and regulate agriculture that they no longer represented legitimate patterns of authority’; see also Lord Hailey, *Native Administration in the British African Territories: Central Africa; Zanzibar, Nyasaland, Northern Rhodesia* 83 who argues that ‘the relations between the Government and the Native Authority were more closely defined by the Administration of Natives Proclamation of 1916, which made provisions for the appointment and dismissal of recognised Chiefs and defined their duties’.

¹⁷⁸ See Chapter 3, Edward Said, on *Orientalism*.

¹⁷⁹ Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (Tano Aschehoug 1998) 54.

¹⁸⁰ Louise De Toit, ‘In the name of What? Diffusing the Rights-Culture Debate by Revisiting the Universals of Both Rights and Culture 2013 40(1) *Politikon: South African Journal of Political Studies* 15.

society, while at the same time paying lip service to long-standing customary laws.¹⁸¹ This as a result affected the way African peoples perceived and understood law.¹⁸²

Changes to law and legal institutions in Zambia in the colonial and post-colonial periods demonstrate the challenges that are to be found in attempts to reconcile culture and tradition with growing expectations that laws should be universal and neutral in their application. Just as feminists in the West have been quick to blame culture for women's subordination,¹⁸³ so too does international human rights discourse which tends to portray African women as a product of culture and as submissive, ignorant and in need of rescue.¹⁸⁴ Law, and human rights law in particular, 'is animated by a fundamental tension between, on the one hand, the desire to establish universal rights and, on the other, the awareness of cultural differences, which are seen to negate the possibility of finding common ground on which to base such rights.'¹⁸⁵ The suggestion appears to be that culture infringes upon the human rights of women and that in order for women to have equal rights then culture should be overcome.¹⁸⁶

The concern about traditional harmful practices and the role of culture in subordinating women is enshrined in the major documents concerning women's rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁸⁷ Equally, transnational elites have located culture 'out there' in villages and rural areas rather than 'in here' in their own offices and conference rooms.¹⁸⁸ In short, the universality of human rights has been promoted at the expense of culture diversity.

A growing number of scholars argue that human rights itself is 'a neo-colonial discourse, incorporating conceptions of paternalism and infantilization and

¹⁸¹ David R. Penna and Patricia J. Campbell, 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19(1) Third World Quarterly 7.

¹⁸² Kirstin Mann and Richard Roberts, *Law in Colonial Africa* (Heinemann Educational Books 1991) 5; Mahmood Mamdani, *Contemporary Africa and the Legacy of Late Colonialism* in Chapter 3; Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1998) 30(1) Feminist Review 61.

¹⁸³ See the discussion in chapter 2 above.

¹⁸⁴ Leti Volpp, 'Blaming Culture for Bad Behaviour' (2000) 12 Yale J.L. & Human 89.

¹⁸⁵ Jane K. Cowan, 'Introduction' in Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson (ed) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 4.

¹⁸⁶ Gayatri Chakravorty Spivak, 'Culture Alive Conference' (1995) 5 Austl. Feminist. L.J. 3.

¹⁸⁷ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006) 12; See above, chapter One, for a discussion of the place of CEDAW in Zambian law.

¹⁸⁸ Ibid 11.

entitling large and powerful nations to intervene in the affairs of small and vulnerable countries, much as ‘mother’ countries did during colonialism.’¹⁸⁹

Furthermore, the infringements of human rights that happen in non-liberal states are attributed to the patriarchal cultures of those states. Culture is portrayed as something that is stagnant, that does not evolve with time.

It has been argued that actions of people from non-liberal states are also rarely attributed to such individuals but are more often attributed to a group.¹⁹⁰ So, instead of attributing fault to an individual person, the actions will be blamed upon the culture of that person. However, when a person from a liberal state has committed a wrong, the action will be attributed to that person as an individual and he (or she) bears the blame. Volpp comments that ‘[u]nder this schema, white people are individual actors; people of color are members of a group.’¹⁹¹ Hence, when somebody from a different culture and background carries out an unlawful act, nothing else matters except that this person is from a culture that allows violence and treats women as subordinate. ‘Cultural practice’ and ‘cultural tradition’ tend to be applied exclusively to people from minority or non-Western cultural groups.¹⁹² However, the discourse around human rights fails to explain that just as culture is evolving and dynamic so are human rights. In its early beginnings after World War II, the human rights movement did not take into consideration rights such as women’s rights, gay rights, cultural rights and so forth.

However, nowadays, human rights discourse has developed to include a broad range of new rights which go beyond the original articulations of international and European human rights instruments.¹⁹³ Undoubtedly, therefore, over the past fifty years, the concept of human rights has shifted from its original meaning, rooted in liberal theory, of civil and political rights to an expanded notion of collective, cultural, and social and economic rights.¹⁹⁴ In addition, the 1948 Universal Declaration of Human Rights was drafted almost entirely by Westerners or Western-trained representatives from Africa and Asia. The Covenants on Economic, Social, and Cultural Rights, and on Civil and Political Rights, although agreed in 1966, were largely drafted before

¹⁸⁹ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006) 35; see also Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Towards a History of Vanishing Present* (Harvard University Press 1999) 366.

¹⁹⁰ Gayatri Chakravorty Spivak, ‘Culture Alive Conference’ (1995) 5 *Austl. Feminist. L.J.* 3.

¹⁹¹ Leti Volpp, ‘Blaming Culture for Bad Behaviour’ (2000) 12 *Yale J.L. & Human* 86.

¹⁹² Anne Phillips, *Gender and Culture* (Polity Press 2010) 5; Spivak, ‘Culture Alive Conference’ (1995) 5 *Austl. Feminist. L.J.* 3.

¹⁹³ Sally Engle Merry, ‘Changing rights, changing culture’ in Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson (ed) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 31.

¹⁹⁴ *Ibid* 38.

decolonization and the admission of many African States into the UN.¹⁹⁵ But it is important to note that new States have ratified these rights and have made them part of their national legal systems. In addition, human rights discourse has, over time, been influenced by other more left-leaning ideas drawn from socialism and communism leading to the greater inclusion of economic and social rights to work and healthcare.¹⁹⁶

The development of legal provisions to tackle GBV dramatically demonstrates the creation of new rights which may depend upon the State's failure to protect women rather than its active violation of rights.¹⁹⁷ Also, it is apparent that when dealing with the issue of GBV, while some human rights activists from the global north may insist on dispensing with the specificities of culture and imposing concepts that work in the global north,¹⁹⁸ the drawback of such an approach is that human rights concepts are unlikely to work well if they do not integrate traditional or cultural concepts from a particular society. As stated by Abrahmowitz and Meron, in order to succeed in the fight against GBV, 'NGOs must integrate more complex ideas of 'culture' into their programmatic operations than currently circulate in humanitarian discourse in order to build locally relevant frameworks for intervention.'¹⁹⁹ GBV initiatives 'must be 'living initiatives that can 'hear' local problems, 'see' local strategies for resolution, and 'think' actively about the best forms of engagement for the local context before committing to specific tactics for intervention.'²⁰⁰ When the local context is used in the implementation of human rights, stakeholders will feel some kind of ownership and therefore will be more accepting of such ideas. In so far as human rights rely on an essentialized model of culture, they do not take advantage of the potential of local cultural practices for change.²⁰¹ It is, therefore important that gender and culture should be seen to work in harmony. This is so because culture is important to marginalized women seeking to challenge laws generated by those who do not speak for, or represent them or their interests.²⁰²

¹⁹⁵ A. An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in A. A. An-Na'im and F. Deng (ed) *Human Rights in Africa: Cross-Cultural Perspectives* (University of Washington Press) 349.

¹⁹⁶ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006) 33.

¹⁹⁷ Ibid 36.

¹⁹⁸ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Towards a History of Vanishing Present* (Harvard University Press 1999) 384.

¹⁹⁹ Sharon Abrahmowitz and Mary H. Meron, 'International Human Rights, Gender Based Violence, and local Discourses of Abuse in Post Conflict Liberia: A Problem of Culture?' (2012) 55 (2) *African Studies Review* 119.

²⁰⁰ Ibid.

²⁰¹ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006) 11.

²⁰² Deckha Mannesha, 'Is Culture Taboo- Feminism, Intersectionality and Culture Talk in Law' (2004) 16 *Can. Women & Law* 14.

It is also important that culture be taken into account in the implementation of laws on GBV. The implementation of laws to tackle GBV is notoriously weak,²⁰³ however research on law and everyday social life shows that law's power to shape society depends not on punishment alone but on becoming embedded in everyday social practices.²⁰⁴ For example, under customary law in Zambia, there were institutions for resolving cases of domestic violence including traditional courts made of village elders.²⁰⁵ When the missionaries and colonialists came, those institutions were disrupted and instead official courts were introduced. The new court system, however, was too formal and official for most local people to accept and the concepts employed by these courts were foreign to them.²⁰⁶ Although the local courts applied customary law, this was not indigenous customary law but a mixture of several local customs and imported law as brought by the colonial settlers.²⁰⁷

Hence, the law on GBV in Zambia has developed in a way which fails to take into consideration existing social structures, making the application of the law inevitably more difficult. Relying on the formal court system is not enough because the very structure of this formalized system disadvantages women. The setting of the courts supports patriarchal attitudes and foreign concepts which are unfamiliar to women. While under the traditional setting, there were mechanisms in place which offered counselling to couples without causing conflict between them²⁰⁸ and differences could be resolved amicably, this has disappeared with the more formal structures of the courts. Conflicts are hardened between couples and this may result in divorce or hardship if the male breadwinner is incarcerated. Regardless of how the formal law deals with customary rights and entitlements, and even where it denies recognition

²⁰³ Avocats Sans Frontieres Asbl, 'Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia' < www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN > accessed on 12th March, 2018.

²⁰⁴ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006) 3.

²⁰⁵ David R. Penna and Patricia J. Campbell, 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19(1) *Third World Quarterly* 7.

²⁰⁶ See Penna and Campbell, *ibid* who state that the 'community structures women once used to express themselves and pay a role in decision making were replaced with western institutions which had no public role for women. These institutions worked to reinforce Victorian-era western concepts of gender division with regards to employment, education and women's place in society in general and within the family specifically.'

²⁰⁷ Kirstin Mann and Richard Roberts, *Law in Colonial Africa* 8.

²⁰⁸ See Simon Coldham, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects' (2000) 44 *Journal of African Law* 218, who argues that in spite of the stress that many governments place on African values, African traditions, African socialism and the like, there has been little attempt to incorporate these values in the penal system. 'Penal policies continue to be characterized by their harshness, by their emphasis on retribution and general deterrence rather than on the individualization of penalty and rehabilitation of offenders'; see David R. Penna and Patricia J. Campbell, 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19(1) *Third World Quarterly* 7.

to customary law, ordinary people may still prefer to regulate their lives in accordance with the customs and practices applied by their tribal groups.²⁰⁹

The argument is, therefore, that culture should not serve as a barrier to human rights mobilization but as a context that defines relationships and meanings and constructs the possibilities of action.²¹⁰ In this way, culture might instead be used to the advantage of women since there is no pure culture that exists and culture is dynamic, shifting and fluid.²¹¹ Rather than seeing a singular culture with a set of fixed meanings that are incompatible with women's rights, 'it is more illuminating to think of culture as a field of creative interchange and contestation, often around certain shared symbols, propositions or practices, and continuous transformation.'²¹²

It is in this respect that culture can be blended with human rights discourse offering a more integrated and contextualised approach to violations of rights.²¹³

This is explained neatly by Sally Engle Merry: In examining how grassroots individuals take on human rights ideas, I argue that the rights framework does not displace other frameworks but adds a new dimension to the way individuals think about problems.²¹⁴ Individuals whose rights have been infringed can use the human rights framework to obtain their rights within their culture or tradition. 'In adopting this framework, victims do not abandon their earlier perspective but layer the rights framework over that of kinship obligations.'²¹⁵ This point is particularly important in the context of violence against women in Zambia and in countries in the global south in general. Women should be allowed to work within their cultural setting to obtain redress and should be encouraged to use human rights law within this context to identify instances of harm and to articulate these in a localized environment.

²⁰⁹ Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Tano Aschehoug 1998) 54; Avocats Sans Frontières Asbl, 'Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia' < www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN > accessed on 12th March, 2018.

²¹⁰ Sally Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006) 9, who states that the culture that we are talking about in this regard is not the received culture but living customary law.

²¹¹ Ratna Kapur, *Erotic Justice: Law and the New Politics of Post colonialism* (Taylor and Francis 2005) 88.

²¹² Jane K. Cowan, 'Introduction' in Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson (ed) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 5.

²¹³ Ibid.

²¹⁴ Sally Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press: Chicago 2006)

²¹⁵ Ibid.

2.8 Conclusion

In conclusion, this chapter has sought to provide a theoretical framework of analysis for the thesis and to draw together the insights of postcolonial and feminist theory. While acknowledging that both liberal and radical feminism provide a basis for inquiry into women's inequality, the chapter argues that the context in which women find themselves and navigate their lives entails the adoption of a theory that recognises that context and gives it due weight and attention. Since gender is a cross-cutting issue that intersects with other inequalities and other aspects of identity, the postcolonial approach, it is suggested, offers the best way to interrogate GBV in a postcolonial state like Zambia.

In addition, this chapter has sought to demonstrate how the colonial discourse has affected the development of the law in Zambia and how the colonial legacy is still felt today. While the colonial changes to the legal system led to the importation of Western ideas and values, it is important to note that they also led to a reinterpretation of customary law which was influenced by social and economic factors prevailing at the time. The interactions between the colonial administrators and the local elite brought about changes which had an additional negative effect on gender relations and these changes have affected how women are viewed in postcolonial Zambia.

The legacy of colonialism is seen in the newly adopted law on Anti-Gender Based Violence. While this law has some positive aspects, notably its sensitivity to gender-specific crimes, it is predicated upon the assertion of individual rights in a legal system that is not necessarily reconcilable with customary and traditional roles played by women within their communities. This may mean that women are too fearful of upsetting their families and communities to take action against the perpetrators of violence. The creation of specific courts to deal with instances of gendered harms may help in overcoming some of these difficulties and it will be important to monitor the evolution of these jurisdictions to see how effective they are in future.

Having outlined the theoretical framework, the next chapter examines the legal framework of the Zambian system. It also examines gender relations as they existed in Zambia before colonisation and goes on to show how the intersection of gender with colonialism, culture and other socio-economic factors has gone on to exacerbate the subordination of women in Zambia using the particular example of the development of the law on GBV.

Chapter 3:

The Legal Framework Surrounding the Law on GBV in Zambia

Having introduced the thesis and the theoretical framework, this Chapter outlines the legal system and the organisation of the different courts in Zambia. While looking at the legal system, the chapter will examine the constitutional and criminal framework and in addition, the laws on gender-based violence in Zambia and under the international legal framework. Examining the law is crucial because it provides an understanding of the law in the local context and whether it meets the international standards. In addition, the thesis interrogates international human rights law using a post-colonial lens and how effective it is in the fight against GBV in the local context. The examination of the different courts is important as it attempts to explain which courts deal with GBV, at what level, and the extent of their jurisdiction. This chapter will first examine the local courts, then the subordinate courts, the High Court and its divisions, the Supreme Court and then the Constitutional court. As with the British legal system which the legal framework in Zambia is based on, there is a hierarchy within the organisation of the jurisdictions although in Zambia the picture is coloured by the application of both common law and customary law.¹

3.1 The Organisation of the Courts in Zambia

The legacy of colonial history in Zambia has left a court system that is complex and comprises different courts at different levels including the local courts, the subordinate courts, the High Court, industrial relations courts and the Supreme Court. In 2016, new changes were introduced to the court structure. Article 120 of the amended Constitution² brings into effect the new court structure. It creates a more specialised court system rather than the one that the country had before which were mostly general. According to Article 120 (3)(b) of the Constitution, the following shall be prescribed; jurisdiction, powers and sitting, of the Industrial Relations Court, Commercial Court, Family Court, Children's Court and other specialist courts.³ Having the family and children's courts is important when dealing with GBV as these courts will be

¹ Chuma Himonga, *Family Law in Zambia* (Kluwer Law International 2011) 32.

² Article 120 No. 2 of 2016 Constitution of Zambia (Amendment).

³ Ibid Article 120(3)(b).

specialised and will therefore be more familiar with such cases and know how to handle them in an appropriate manner. In addition, the amended Constitution brought into effect the Constitutional court.

Local Courts were created under the Local Court Act, Cap 29 of the Laws of Zambia.⁴ Before independence the colonial government introduced what were called Native Courts and these courts administered African Customary Law. Customary law is basically a hybrid of some of the customs practices and what the colonial settlers imposed on the local population. Customary law in Zambia is unwritten.⁵ After independence, however, it was acknowledged that the Native courts were highly discriminatory against the Africans, especially women, and administered the laws that suited the settlers.⁶ Therefore the newly independent parliament passed the Local Courts Act, but the customary law created then still applies in postcolonial Zambia. By the end of 2014 Zambia had a total of 522 courts.⁷

Although the local court officers administer customary law, this type of law can differ from one place to another. However, there are certain aspects of customary law that are similar throughout Zambia.⁸ The local courts apply customary law as long as the custom is not repugnant to natural justice. A local court may administer the customary law applicable to any matter before it in so far as such law is not repugnant to natural justice and morality or incompatible with any provisions of any written law.⁹

Local courts normally deal with civil cases of a domestic nature. Like their predecessors, the local courts have a limited criminal jurisdiction, but the bulk of their business is civil.¹⁰ Some of the cases that the local courts deal with are actions for defamation of character (most frequently, accusations of witchcraft), but the majority of cases could be broadly categorised as ‘family’ cases, including divorce, adultery, seduction and inheritance claims.¹¹ Looking at

⁴ Local Court Act 1968.

⁵ Chuma Himonga, *Family Law in Zambia* 38 states that there are two versions of customary law. The official version and living customary law. Living customary law is more flexible than the official one.

⁶ Earl L. Hoover et al, ‘The Evolution of the Zambian Court System’ in Muna Ndulo (ed) *Law in Zambia* (East Africa Publishing House Ltd, 1984); Muna Ndulo, ‘African Customary Law, Customs, and Women’s Rights’ (2011) 18(1) *Indian Journal of Global Studies* 89.

⁷ Interview with ARP1, High Court (Lusaka, Zambia, 30th March, 2016).

⁸ CMN White, *Matrimonial Cases in the Local Courts of Zambia* (1970) 15 *Journal of African Law* 251.

⁹ Article 12(1) of the Local Courts Act.

¹⁰ Simon Coldham, ‘Customary Marriages and the Urban Local Courts in Zambia’ (1990) 34 *Journal of African Law* 67.

¹¹ *Ibid.*

this court is important because women in most cases take their cases to these courts.¹² Although most women take their cases to local courts, these courts only apply customary law and in most cases the official version of customary law. The local courts deal with the bulk of cases that affect women and their lives within families, thus it is important to be able to investigate how these different sources are merged by such courts if an holistic understanding of the status and position of women is to be obtained.¹³

Legal practitioners' are not allowed in the local courts, however litigants before the courts can appeal to the magistrate court and up to the final court of appeal.¹⁴

Although it is said that the local court does not deal with issues of GBV, it does deal with family cases and when there is an aspect of GBV, these courts may deal with issues of GBV. When the local court does deal with issues of GBV, it is unfortunate that neither the constitution nor statutory law is applicable to the cases before it. However, with the amended Constitution, a matter can be referred from the local court to the Constitutional court by way of referral and not by way of appeal. This is according to Article 128(1) which states that the Constitutional court has original and final jurisdiction to hear matters.¹⁵

Section 3 of the Subordinate Court Act¹⁶ established the different classes of courts which are subordinate to the High court. These are the Subordinate Court of the First Class, Subordinate Court of the Second Class and Subordinate Court of the Third Class.¹⁷ Magistrates in Zambia are appointed by the Judicial Service Commission.¹⁸

The subordinate courts operate in the district in which they are situated. According to s.7 of the Subordinate Court Act¹⁹ all magistrates have equal powers, autonomy and jurisdiction. This means that there can be no appeal from one magistrate court to another or between magistrates of different classes. Each district in Zambia has a subordinate court and at the moment there

¹² Avocats Sans Frontieres Asbl, Challenges of Implementation of the Anti-Gender Based Violence Act 2011 in Zambia (Sep 21, 2017) <https://issuu.com/avocatssanfrontieres/doc/asf_zam_studyantigbvact_201708_eng> accessed on 16th February, 2018 14, 'the report states that the courts are usually cheaper, provide a form of compensation (although very minimal) and dispenses justice quicker than the other courts'.

¹³ Agnete Weis Bentzon et al, *Pursing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Tano Aschehoug 1988) 56.

¹⁴ Ibid.

¹⁵ Amended Constitution No. 2 of 2016.

¹⁶ Subordinate Court No. 28 of 1964.

¹⁷ Subordinate Court Act.

¹⁸ S5 of the Subordinate Court Act; The Judicial Service Commission acting in the name of and on behalf of the President may appoint persons to hold or act in the office of Principal Resident Magistrate, Senior Resident Magistrate, Resident Magistrate or Magistrate of any other class.

¹⁹ Subordinate Court Act, CAP 28.

are about 64 subordinate courts.²⁰ Although the jurisdiction of the magistrate court is limited to the district where the act took place or where the impact was felt, in GBV matters a victim can file a complaint at any place that is conducive for him or her.²¹

The Anti-Gender-Based Violence Act gives the Subordinate Courts jurisdiction to deal with cases of gender-based violence.²² In 2014, 170 cases of GBV were handled by the Lusaka Subordinate Court and of these cases, 72% of the victims were female, while 28% were males.²³ Out of this number, the Court made 44 convictions, representing about 28% of the total while a cumulative percentage of about 50% were acquittals and withdrawals.²⁴ It is important to note, however, that the court system, currently, has no specific categorization or classification for recording GBV (or violence that is directed against a person on the basis of gender) cases. These cases are instead mostly recorded under the broad category of “assault”.²⁵ It is hoped that with the coming into effect of the GBV Rules and the Court, cases of GBV against women will be given priority because of the complications that arise from them.

Although subordinate courts have the power to hear matters within their jurisdiction, their sentencing powers are limited.²⁶ In offences where the offence carries a sentence higher than that mandated by the Act, the Magistrate Courts will usually refer the case for sentencing to the High Court.

The magistrates’ courts in Zambia do apply customary law so long as it is not repugnant to natural justice,²⁷ but it is important to note that they do not hear matters of customary law as a court of first instance. Cases dealing with customary law come to the magistrates’ courts by way of appeal from the local courts. Therefore in cases of GBV that start from the local courts, the magistrate courts will only hear the case if the aggrieved party decides to appeal. Appeals go from the subordinate court to the High Court, in addition subordinate courts can refer cases

²⁰ Interview with ARP1, High Court (Lusaka, Zambia, 30th March, 2016).

²¹ S 6(4) of the Anti-Gender Based Violence Act.

²² S 3 of the Anti-Gender Based Violence Act No.1 of 2011.

²³ Interview with ARP1, High Court (Lusaka, Zambia, 30th March, 2016).

²⁴ Ibid.

²⁵ Ibid.

²⁶ S 7 of the Criminal Procedure Code stipulates that a subordinate court of the first, second and third class may try any offence under any written laws of Zambia and pass any sentence but a subordinate court presided over by the Principal Resident Magistrate and Senior Resident Magistrate cannot pass a sentence of imprisonment of more than nine years; a Resident Magistrate cannot pass a sentence of imprisonment of more than seven years; a Magistrate of Class one cannot pass a sentence of imprisonment of more than five years and a subordinate court presided over by a Magistrate of the second and third class cannot pass a sentence of imprisonment of more than three years.

²⁷ S 16 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia.

to the High Court for sentencing. The High Court Act²⁸ is the Act that brings into existence the High Court. In the High Court, all the judges have equal powers.²⁹ The High Court has both original jurisdiction and appellant jurisdiction. Its jurisdiction is unlimited. Original jurisdiction means that some matters may commence in the High Court. Therefore, where somebody is killed because of their gender or as a result of GBV the case will commence in the High Court. According to the case of *Zambia National Holding Limited and United National Independence Party (UNIP) v The Attorney-General*, unlimited jurisdiction does not mean limitless jurisdiction.³⁰ The jurisdiction is limited by the Constitution and other laws.³¹

The amended Constitution³² under Article 133 brought into effect the divisions of the High Court. The divisions of the High Court are new to the Zambian system. According to Article 133(2) there are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.³³ Although the Industrial Relations Court was already in operation, it was not a division of the High Court until 2016. The amended Constitution in addition allows the Chief Justice to constitute specialised court of the High Court to hear specific matters.³⁴ The specialised court especially the Family and Children's Court are an important development in the fight against GBV. As of May 2017, the specialised courts were not yet in operation apart from the Industrial Relations Court.

Cases of assault or GBV come to the High Court through the appeal process from the subordinate courts as the High Court does not hear assault cases or cases of GBV as the court of first instance. Although the High Court can also hear any matter pertaining to customary law, such matters can only come by way of appeal to the High Court. According to s.34 of the High Court Act, the court may make use of Chiefs, or persons it considers to have special knowledge in customary law or consult any book or publication on issues of African Customary law.³⁵ It shall be the duty of assessors called under the provisions of subsection (1) to advise the court on all matters of African Customary Law which may arise in the cause or matter

²⁸ No. 27 of 1966.

²⁹ High Court Act, No. 27 of 1966, this means that if a local court is sitting but there appear to be issues relating to the Constitution in the matter before it then the Presiding Justice can refer the matter to the Constitutional court. A matter can be referred to the Constitutional court by any court so long as a constitutional issue is likely to arise or has arisen.

³⁰ (1991) S.J 22 (S.C).

³¹ Ibid.

³² Constitution of The Republic of Zambia, No. 2 of 2016 (Amendment).

³³ Amended Constitution 2016.

³⁴ Ibid, Article 133(3).

³⁵ The High Court Act No. 27 of 1966.

concerned, and to tender their opinions to the courts on such cause or matter generally, but in reaching its decision the court shall not be bound to conform to such opinions.³⁶ The provisions of s.34 are problematic in that it relies on the static customary law as developed during the colonial period instead of living customary law which is fluid.³⁷

The above is illustrated by The High Court in a case regarding the distribution of property after divorce. In the case of *Mwiya v Mwiya*,³⁸ it was held that a Lozi man was not compelled to share matrimonial property with his wife after their divorce. This case started from a local court and when it reached the High Court on appeal, the judges did not apply their mind as to whether the custom infringed upon women's rights but simply agreed with the assessors.³⁹

The above case was heard before the coming into effect of the Anti-Gender-Based Violence Act, it is anticipated that the coming into effect of specialised courts will ensure that women's rights are taken into consideration.

The appeal court was introduced by the amended Constitution 2016⁴⁰, Article 131. According to article 131, it hears appeals from the High Court, quasi-judicial bodies and from other courts apart from Constitutional matters. However, it cannot hear matters from the local government elections tribunal.

The Supreme Court is provided for under the Constitution.⁴¹ It has appellant jurisdiction in all legal matters. Unlike the High Court and the Constitutional Court, it has no original jurisdiction. This means that it cannot hear cases as a court of first instance apart from cases involving Presidential election petitions. It is the final court of appeal in Zambia, but not with regards constitutional matters. It also hears matters of gender and customary law. In the case of *Chibwe v Chibwe*⁴² the Supreme Court dealt with the issue of whether the Ushi tribe in Zambia allowed the wife a share in the matrimonial property. The court held that it is incumbent for all the courts (applying customary or ordinary law) to uphold the Constitution.

³⁶ S34 (2) of the High Court Act.

³⁷ Chuma Himonga, *Family Law in Zambia* (Kluwer Law International 2011) 38.

³⁸ (1977) ZR 113.

³⁹ Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 89, 102 states that Judges took a static view of customary law after independence permitting the application of provisions of customary law that discriminated against women. Courts failed to take into consideration the fact that customary law is dynamic and ignored the living law that was being practised by the communities.

⁴⁰ Constitution of The Republic of Zambia, No. 2 of 2016 (Amendment).

⁴¹ S 124 of The Constitution of the Republic of Zambia, No. 2 Of 2016.

⁴² *Chibwe v Chibwe* SCZ Judgment No. 38 of 2000.

The Constitutional court is a new court created by the amended Constitution of 2016.

The Constitutional court ranks at par with the Supreme court and although there is a very thin dividing line between the two courts, the nature of matters that will come before the Constitutional court are not the same as those that will go to the Supreme Court.⁴³

The court has two pronged jurisdiction. It will deal with matters of a constitutional nature as court of first and last instance and also hear constitutional matters as appeals. This means that if a matter regarding gender arises with regard to the constitution, such a matter can be dealt with by the Constitutional court as a court of first instance.

The first case that came before the court was an election petition in 2016 against the re-election of the current President Edgar Lungu.⁴⁴ The petition was dismissed by the court stating that the stipulated fourteen (14) days laid down by the Constitution had expired.

Although a gender case is yet to come before the Constitution, it would be interesting to see how the court will deal with such cases.

3.2 Gender in the Courts

A final point to note in setting out the court system in Zambia is the composition of the judiciary which is striking for its gender balance. The number of judges in the Constitution Court, Supreme Court, Court of Appeal and High Court at the moment in Zambia is sixty-nine.⁴⁵ The gender composition is as follows: in the Constitutional Court there are four lady justices and two male justices; in the Supreme Court there are four lady justices and seven male justices; in the court of appeal there are four female judges and four male judges and in the High Court there are twenty-three female judges and twenty-one male judges.

‘To date, the primary rationale for promoting gender equality has been that women will bring a unique contribution to the bench as a result of their different life experiences, values and attitudes. Such arguments derived from

⁴³ S 121 of The Amended Constitution 2016 see also Interview with JP1, Judge of the Supreme Court of Zambia, Supreme Court (Lusaka, Zambia, 16th August 2016).

⁴⁴ The Presidential Election Petition for the Presidential Elections held on the 11th August, 2016. The Constitutional Court of Zambia 2016/CC/0031.

⁴⁵ The Judiciary of Zambia. The Public Relations Office. Updated List of Hon. Judges for the Supreme Court, Constitutional Court, Court of Appeal and the High Court as at 24th September, 2017. Note that these statistics were for the higher courts.

difference theory have had a strong appeal since they appear to give legitimacy to the undervalued attributes traditionally associated as feminine while also promoting the merit principle by claiming to improve the quality of justice.’⁴⁶

While having women’s perspective or outlook at life is important, it is not always a given that when women are in the majority then the decision are more likely to promote gender equality. This has to do with a number of factors, firstly gender inequality is institutionalised and the courts usually reflect the values of the society under which they operate.⁴⁷ Zambian courts are not an exception, the cases of *Chali v Mwalla*⁴⁸ and *Bola*⁴⁹ are examples of how courts do reflect the values of the societies in which they operate. Also since the law is usually based on precedent, judges have to justify their decisions based on precedent. And the fact that the law is rigid and serves males interests does not help with regards to following precedent.⁵⁰ It is therefore unrealistic to expect differences to be reflected in court decisions, since the legal profession dictates that decisions be supported in principled, hierarchical terms.⁵¹ The other element that comes in is that gender is not the only cause of inequality.⁵² Therefore, since most female judges do not fall in the bracket of the average woman (drawn from the narrow background), their interests may differ from that of the majority of women. ‘The recognition that a woman cannot necessarily represent the interests of other women simply on the basis of her gender has particularly acute implications for the judiciary because of the unusually narrow background from which judges are drawn compared to other institutions of power.’⁵³ In addition, males make up the majority in the legal profession. This means that they usually set up standards of what is acceptable in the profession. Therefore the few women who end up being judges usually adhere to those standards unconsciously resulting in their judgments sometimes being gender insensitive.

⁴⁶ Kate Malleson, ‘Justifying Gender Equality on the Bench: Why Difference Won’t Do’ (2003) 11 (1) Feminist Legal Studies 1; Jilda M. Aliotta, Justice O’Connor and the Equal Protection Clause: A Feminine Voice’ (1995) 78(5) Judicature 238.

⁴⁷ Ibid.

⁴⁸ S.C.Z. Judgment No. 6 of 1997; refer to s2.5 of this chapter.

⁴⁹ Lusaka Subordinate Court case of 2002 (unreported).

⁵⁰ Refer to Chapter 2, Catharine MacKinnon ‘Feminism Unmodified: Discourses on Life and Law (Harvard University Press 1987) 2

⁵¹ Jilda M. Aliotta, Justice O’Connor and the Equal Protection Clause: A Feminine Voice’ (1995) 78(5) Judicature 238.

⁵² Refer to chapter 2, Ngaire Naffine, *Law & the Sexes: Explorations in Feminist Jurisprudence*.

⁵³ Malleson, Justifying Gender Equality on the Bench: Why Difference Won’t Do’ (2003) 11 (1) Feminist Legal Studies, 12 calls this the problem of essentialism.

It is noteworthy that the High Court which deals with appeals from the subordinate courts on cases of GBV, has a majority of female judges. It is perhaps even more worrying, therefore, that the case law which has developed around women's rights is not more progressive.

3.3 GBV and the Police in Zambia

As noted above, before the courts become involved in any case of GBV, it is the police who are usually the first people that victims of GBV go to for assistance. For this reason, it is necessary to look briefly at the police force in Zambia and its powers in relation to GBV matters.

The Zambia Police Force (now termed the Police Service) was established by s.103 of the Constitution.⁵⁴ The Constitution also outlines the function of the police service. The functions of the Zambia Police Force shall include the following; to protect life and property, to preserve law and order, to detect and prevent crime and to co-operate with the civilian authority and other security organs established under this constitution and with the population generally.⁵⁵

Additionally, there is legislation that provides for the Police Force which is the Police Act 1965.⁵⁶ The Community Services Directorate (CSD) was established following the Zambia Police reform programme of 1994 and is legally recognised by the Zambia Police Amendment Act of 1999.⁵⁷ The Zambia police endeavours to fight GBV and to bring offenders to book, through the Community Services Directorate (CSD).⁵⁸ The CSD is made up of a number of units; Victim Support Unit (VSU), Schools' Liaison Unit, Community Safety Unit, Child Protection Unit and Chaplaincy Unit. It was reported that in 2016, the highest number of reports received by the VSU was in relation to cases of assault occasioning actual bodily harm (at 6,769).⁵⁹ This shows that there has been an increase in the number of assault cases but what is interesting in this report is that it does not show which of the 6,769 cases were of violence against women.

⁵⁴ Constitution of the Republic of Law Chapter 1 of 1996.

⁵⁵ Ibid Article 104.

⁵⁶ Act No. 43 of 1965.

⁵⁷ Betty Mwewa Timba Ngulube, 'Multi Sectoral Services and Responses for Women and Girls Subject to Violence: Establishing Coordinated Multi Sectoral Responses-the Case of Zambia' 3.<www.un.org/womenwatch/dew/csw57/panel2-paper.betty-mewewa>accessed on 25th April 2015.

⁵⁸ Ibid.

⁵⁹ Ministerial Statement on Gender-Based Violence in Zambia given by Hon. Minister of Gender Ms. Kalima on 28th March, 2017.

The VSU itself was established in 1995 and is regulated by s.53 of the Police Act 1999. This section states that there shall be a VSU in all police stations and posts to be administered by police officers appointed by the Inspector-General.⁶⁰ The provision also provide for the functions of the VSU and these are to provide professional counselling to victims of crime and to offenders and to protect citizens from various forms of abuse. At the VSU, the victim of GBV should obtain a police report which is to be taken to the hospital if the victim has suffered any injuries. The VSU is supposed to help the victim file a complaint, give the victim a medical report and also assist the victim to obtain medical help.⁶¹ The Anti-Gender-Based Violence Act states that the police may co-ordinate with other professionals in carrying out their duties. This would involve working, for example, with civil society organisations and professional bodies.⁶² At the moment, the VSU gets a lot of support from organisations such as the Young Women Christian Association (YWCA) and the United Nations International Children's Fund (UNICEF)⁶³ etc.

Despite the creation of the VSU by an Act of parliament, victims of GBV still face many challenges. Some victims, instead of being encouraged to open dockets on GBV, may be asked by officers to go back home and reconcile⁶⁴ with their spouses especially if it is an issue involving domestic violence.

Having considered the court system and the role of the police in addressing issues of GBV, this chapter will now turn to an evaluation of the substantive law in Zambia which covers various aspects of GBV. The aim of the following section is to demonstrate the variety of primary legal sources that work together in tackling GBV, particularly in the context of discrimination against women, but equally to show the gaps in protection and the lack of coordination between the different types of legislation.

3.4 The Law on GBV in Zambia

There is a multiplicity of different legal provisions which cover GBV within Zambian Law. These range from the Constitution itself to the Penal Code and more specific gender-related

⁶⁰ S 53 of the Zambia Police Act 1999.

⁶¹ S 8(3) of the Anti-Gender Based Violence Act.

⁶² Article 53(3) of the Police Amendment Act No. 14 of 1999.

⁶³ See Chapter 5 of the thesis.

⁶⁴ See Jo Fidget, 'Zambia's Celebrity Couple Reveal Wife-beating Past' (BBC News 30th November, 2009) <<http://news.bbc.co.uk/1/hi/world/Africa/8375291.stm>> accessed 31 July 2017 where one of Zambian female musician Saboi Imboela narrated how the police and the medical personnel persuaded her to drop the charge of assault against her then husband.

Acts of Parliament. Each will be considered in turn in order to give an overview of the law and an assessment of adequacy in tackling GBV. While looking at the law, it is important to question the law itself as a powerful discourse with certain claims to knowledge.⁶⁵

3.4.1 The Constitution

The Constitution is the supreme law of Zambia and if any other law is inconsistent with it, then that other law shall, to the extent of the inconsistency, be void.⁶⁶ Importantly in the context of GBV, the Constitution gives every person in Zambia the right to enjoy their fundamental freedoms. The protection of fundamental rights and freedoms are found under Part III of the Constitution. This is also known as the Bill of Rights. Part III contains the fundamental rights to be enjoyed by citizens although it is subject to substantial limitations.⁶⁷

The above right like most rights under Part III of the Constitution are subject to limitations but although there are limitations, these rights are justiciable under the law. Part III of the Constitution contains Article 23 which grants protection from discrimination. It states that no law shall make any provision that is discriminatory either of itself or in its effect.⁶⁸ At first glance, this provision does seem to apply substantive equality because it talks about the effect of the law on an individual. In addition, the Constitution states that no person may be treated in a discriminatory way by any one by virtue of the written law or in performance of the functions of any public officer or any public authority.⁶⁹ The Constitution under Article 23 also provides the meaning of discrimination.

‘Discrimination means affording different treatment to different persons attributable, wholly or mainly to their respective description by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded

⁶⁵ Ngaire Naffine, *Law & the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin 1990) 21.

⁶⁶ Article 3 of the Constitution of the Republic of Law Chapter 1 of 1996.

⁶⁷ Ibid Article 11.

⁶⁸ Ibid Article 23 which states that clause (1) prohibiting discrimination shall *not* apply to any law so far as that law makes provisions:

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 another person.

⁶⁹ Ibid 23(2).

privileges or advantages which are not accorded to persons of another such description.’⁷⁰

From the above provision, it is clear that the Constitution provides for the private/public divide when it comes to issues of discrimination. The anticipated reach of the Constitutional provisions, or the way Constitutions divide power may reinforce the public/private divide.⁷¹ It means that private entities or private individuals may discriminate against others. In Africa, the process of separating the public-private spheres preceded colonisation but was precipitated, consolidated and reinforced by colonial policies and practices. ‘Where there had been a blurred distinction between public and private life, colonial structures (law, religion) and policies (for example, educational) focused on delineating a clear distinction guided by an ideology that perceived men as public actors and women as private performers.’⁷²

Article 23 allows for other statutes or laws to have provisions that are discriminatory. This provision has been known to be problematic especially for women.⁷³ The Constitution excludes the discriminatory clause to be applicable to family matters under customary law. However, it should be noted that discrimination is not entirely prohibited under international law. In certain instances, discrimination is allowed if it serves a reasonable and justiciable purpose. Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.⁷⁴

Article 23 was highly contested in the case of *Sarah Longwe v Intercontinental Hotels*.⁷⁵ In this case, a woman had been refused entrance into a hotel premises because she was not accompanied by a man. When she took legal action, the argument against her was that she could not rely on discrimination because the hotel was not a public entity but was a private entity and that the discrimination clause was not applicable to her. Judge Musumali was

⁷⁰ Ibid 23(3).

⁷¹ Charlotte Skeet, ‘Gender and Modern Constitutionalism: The Treaty Establishing Constitution for Europe’ (2007) 58 N. Ir. Legal Q 142, 145.

⁷² Sylvia Tamale, ‘Exploring the Contours of African Sexualities: Religion, Law and Power’ (2014) 1 AHRLJ 150-170.

⁷³ See Charlotte Skeet, ‘Gender and Modern Constitutionalism: The Treaty Establishing Constitution for Europe’ (2007) 58 N. Ir. Legal Q 142 who argues that constitutions are gendered and impact differently on men and women.

⁷⁴ Human Rights Committee, General Comment 18, Non-Discrimination (Thirty-Seven Session, 1989), Compilation of General Comments and General Recommendations Adapted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 26 (1994) . Para 13.

⁷⁵ 1992/HP/765.

creative in his ruling in that having acknowledged that there was a private/public divide in the Constitution and that the hotel was a private entity, he however stated that the hotel was open to the public and therefore the discrimination clause should apply. He used provisions under international law to rule that Ms. Longwe was discriminated against. However, in a subsequent case of *Elizabeth Mwanza v Holiday Inn*⁷⁶ (unreported) where the facts are similar to the *Longwe* case (in that she was refused entrance to a hotel because she was unaccompanied by a male person), it was held that the hotel was a private entity and therefore it was entitled to a restrictive policy.

A central claim of this thesis is that it is unjustifiable for the Constitution to allow discrimination in certain aspects of life. At first glance, there appears to be nothing discriminatory about the provision because it seems to apply to both men and women but when looking at the effects of such a provision, women are more likely to be affected than men.⁷⁷ In other words, the provision has more negative effects on women than on men. This is because when we talk about issues of private matters, they are usually regulated by men and also by customary law. Therefore, under customary law and in the private arena women's subordination is apparent.

The principle of 'equal protection' places all men and women on an equal footing before the law. Furthermore, it indicates that all men and women are entitled to equal protection against any discrimination and incitement to such discrimination. The African Commission notes that, parties can only establish that they have not been treated equally by the law, if it is proved that the treatment received was discriminatory, or selective.⁷⁸ In reality the Constitutional provision is selective and infringes upon the rights of women. The provision that allows for discrimination entrenches GBV since GBV is a form and result of discrimination. It is the discrimination against women that perpetuates GBV because the perpetrators view women as inferior to them and therefore want control over them.

'Most colonial regimes in Southern and Eastern African regions imposed legal segregation in the area of family and related matters between the indigenous colonized population and the colonizer. In the political, law and order,

⁷⁶ 1997/HP/2054.

⁷⁷ See chapter 2, Anne Phillips(ed) *Feminism and Equality* (London: Basil Blackwell 1987) 5.

⁷⁸ Egyptian Initiative for Personal Rights and Interights v Egypt Merits No 323/06, ACHPR 2011.

commercial, property and criminal arenas the general or received law was, and still remains as, the dominant legal normative order in these states.⁷⁹

Furthermore, the Bill of Rights only has a vertical application in Zambia but women are more likely to experience discrimination on a horizontal basis especially in this era of globalisation and free market. This is so because the State has delegated most of its functions to private entities. In recent times it is not seen as strange for private entities to be carrying out functions of states. Zambia is not an exception. With the coming into play of the free market economy, there are a number of private entities that are now involved in the provisions of services that were initially provided by the State. Therefore, the law cannot turn a blind eye to such developments. The horizontal application of the Bill of Rights would enable courts to declare as unconstitutional and void any discriminatory rules of customary law, the common law and legislation in the area of law under discussion.⁸⁰

GBV is a symptom of the unequal structures that exist in society. And as it has been rightly put by the CEDAW General Recommendation on GBV, GBV is a form of discrimination.⁸¹ The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affect women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivation of discrimination.⁸²

It has been argued above that within the Constitution, protection against gender discrimination is not a primary concern and that gender is not one of the grounds on which a person can claim discrimination. However, we will now turn to other pieces of legislation which specifically address aspects of GBV to see whether they offer a better prospect to improve gender justice and tackle GBV.

⁷⁹ Bentzon et al, *Pursing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Tano Aschehoug 1988) 32.

⁸⁰ Chuma Himonga, *Family Law in Zambia* (Kluwer International 2011) 29.

⁸¹ The United Nations Committee on the Elimination of Discrimination against Women, General Recommendations No. 19 (1992), para.6; see new General Recommendation No. 35(9) which uses the expression 'gender-based violence against women', as a more precise term that makes explicit the gendered causes and impacts of the violence .

⁸² The United Nations Committee on the Elimination of Discrimination against Women, General Recommendations No. 19 (1992), para.6.

3.4.2 The Penal Code

The Zambian Penal Code (PC), as may be expected, contains general provisions on violence. There are provisions in the Penal Code that prohibit rape,⁸³ common assault⁸⁴, assault occasioning actual bodily harm⁸⁵ and unlawful wounding.⁸⁶ Although these provisions have been used to address GBV, the penal framework has proven inadequate to respond to GBV. This is so because the provisions in the Penal Code are too general and do not address the impact of GBV on women.⁸⁷ The Code does not provide a comprehensive system of support for victims of GBV, but just ensures the possibility of criminal proceedings being brought against the perpetrator and nothing more. It does not provide any form of assistance for the victim and it does not take into consideration the complexity of gender-based violence.

A number of amendments were made to the law relating to sexual violence in 2005. For example, boy children were included as victims of defilement, the sentence for defilement was extended, sexual harassment was included as a sexual offence and the sentence for rape was increased.⁸⁸ These show some commitment towards the attainment of gender equality although as this thesis has explained having the law is not enough, it requires change in social norms.

It is important to note that certain laws in Zambia do perpetuate GBV. For example, the traditional common law principle which exempts husbands from the offence of marital rape still applies in Zambia. This obviously has far reaching implications on the law and society in general. Apparently the state has no business legislating for the home which is a private arena and everything that happens in the home is of no interest to the state⁸⁹, however, most acts of GBV are perpetrated by people known to victims. This is confirmed by a report by World Health Organisation (WHO), which states that across regions, there are consistently higher rates of intimate partner violence than non-partner sexual violence.⁹⁰ The public/private dichotomy is problematic for a number of reasons. Catherine MacKinnon states that ‘the

⁸³ S 138 of the Penal Code of Zambia CAP 88.

⁸⁴ S 247 of the Penal Code of Zambia CAP 88.

⁸⁵ Ibid s 248.

⁸⁶ Ibid s 232.

⁸⁷ See Catherine MacKinnon in Chapter 2.

⁸⁸ Penal Code Amendment Act 2005.

⁸⁹ See Catharine MacKinnon in chapter 2, Carole Pateman, ‘Feminist Critiques of Public/Private Dichotomy’ in Anne Phillips (ed) *Feminism and Equality* (New York University Press 1987) 104

⁹⁰ *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate partner violence and non-partner sexual violence*, WHO 2013 32.

culture of law is male, that legal institutions and legal methods display essential masculinity.’⁹¹ Because the state is masculine it chooses when and how it wants to interfere in the private arena.

‘The criminalisation of some activities-such as rape, adultery, and sodomy-and the non-criminalisation of other activities-such as the rape of woman by her husband-are marked by the idea that there are certain forms of sexuality that are private, culturally accepted, and exercised legitimately within the family.’⁹²

Feminism argues that law is a reflection of male interests or values, or that law is part of the patriarchal state.⁹³ The law will interfere in private lives of the citizen when it suits the male standard of what is reasonable. For example when it comes to domestic violence, the law will stay away basing the argument on the law not wanting to interfere but in cases such as abortion although it is equally a private matter the law will interfere.⁹⁴

In addition, those who claim to be cultural keepers do not want to change the private sphere because it consolidates their power and status quo. “The cultural arguments are partly informed by the public/private distinction, which continues to shape the way in which the law intervenes in familial and sexual relationships.”⁹⁵

When it comes to defilement, ‘unlawful’⁹⁶ is part of the *actus reus* of the offence. What this means is that a person can only be charged or convicted of defilement if the act was ‘unlawful’. According to the interpretation of the provision by the courts, a person cannot be charged or convicted if that person has married the victim. The argument is that Zambia has a dual legal system that applies both customary law and received law, and customary law will be applicable so long as it is not repugnant to natural justice.⁹⁷ However in Zambia, there is no test on deciding what is repugnant to natural justice, therefore the decision lies with the person

⁹¹ Catharine A. MacKinnon, *Towards a Feminist Theory of the State* Cambridge (Harvard University Press 1989) 160; Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen and Unwin 1990) 10.

⁹² Catherine A. MacKinnon *ibid*; Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (The Glass House Press 2005) 32.

⁹³ Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications 1995) 72.

⁹⁴ See the assertions by Ryan Charles Gaglio, ‘Book Review: Ratna Kapur’s *Erotic Justice: Law and the Politics of Post colonialism*’ (2005) 17 *Yale J.L. & Feminism* 517 who argues ‘that where the law has been permitted entry into the private realm of the family, such as the criminalization of adultery, it has done so only to reinforce the moral regulation of women and sexuality according to the dominant sexual ideology and conservative norms.’

⁹⁵ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* 32.

⁹⁶ S 138 (1) of the Penal Code Amendment 2005 Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.

⁹⁷ Note that Zambia is in the process of changing the law to make 21 years as the age of marriage.

presiding over the case. In South Africa, there is an equality test that needs to be applied on a case by case basis. That said, while the intention of the drafters was to subject the equality provision to a general limitation clause, following the case of *Harksen v Lane NO*,⁹⁸ the Constitutional Court adopted certain stages of enquiry that apply to the equality provision. This test helps the presiding officer decide whether the provision of the law can be applied. In addition, in Zambia the presiding officers or judges will rarely look at the impact of the meaning that they have attributed to the provision or the law. This often results in continuing with provisions that infringe upon the rights of certain members of the society.⁹⁹ For example, in the *Chinjamba* case,¹⁰⁰ it was held that it was not unlawful for a man to have carnal knowledge of a girl to whom he was lawfully married even if the girl was below the age of sixteen. In addition the case of *Sibande*,¹⁰¹ held that in Zambia, it is not generally unlawful for a man to have carnal knowledge of a girl under the prescribed age if he is lawfully married to her. The definition of 'lawful' according to the court means that both the parents and the girl have consented to the marriage. Under customary law, proof of marriage is usually shown by giving evidence that bride price was paid.¹⁰² This law infringes upon the rights of a girl child and perpetuates GBV. It is important to note that rights are interrelated. Therefore, in such cases, the law infringes upon the rights to health, education and also the right of the child to have a say in matters that affect her. Because of the effects that this has on girl children, stakeholders and NGO's are now advocating for a law that will set the age of consent for marriage regardless of which law is applicable.

3.4.3 The Anti-Gender-Based Violence Act 2011

Gender activists were of the view that the Penal Code and other available laws were not adequate to deal with GBV.¹⁰³ In 2011, the Anti-Gender-Based Violence Act¹⁰⁴ became law. The Act¹⁰⁵ does specifically states that both male and females can be victims of GBV. It goes on to give a broad definition of GBV. Gender means female or male and the role individuals

⁹⁸ Anne Smith, 'Equality Constitutional Adjudication in South Africa' 14 (2) (2014) AHRLJ 609-632.

⁹⁹ See Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) who states that courts took a static view of customary law.

¹⁰⁰ *The People v Chinjamba* 5N.R.L.R 384.

¹⁰¹ *Sibande v The People* (1975) Z.R 101 (S.C).

¹⁰² S. Coldham, 'Customary Marriage and the Urban Local Court' (1990) 34(1) Journal of African Law 67,70.

¹⁰³ Avocats Sans Frontieres Asbl, Challenges of Implementation of the Anti-Gender Based Violence Act 2011 in Zambia (Sep 21, 2017) <https://issuu.com/avocatssanfrontieres/doc/asf_zam_studyantigbvact_201708_eng> accessed on 16th February, 2018 14.

¹⁰⁴ Anti-Gender Based Violence Act No.1 of 2011.

¹⁰⁵ Ibid.

play in society as a result of their sex and status. According to the Act, GBV means any physical, mental, social or economic abuse against a person because of that person's gender, and includes¹⁰⁶:

- a) Violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and
- b) Actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship.

The Act pertains to the acts of a domestic nature and it has given a broad definition to such acts. In the definition sections, a domestic relation includes people who are married whether under the Act or under any law or religion, people who have a child or children together, people who share the same residence or co-tenants, where the victim is a house-help, where the victim is in the care of the respondent and also where the victim can be said to be in a domestic relationship by the courts. The Act specifies that GBV shall be dealt with in accordance with the existing laws. An act of GBV shall be inquired into, tried, and otherwise dealt with in accordance with the Criminal Procedure Code (CPC), the Penal Code (PC) and any other written law.¹⁰⁷ There is a possibility that this provision is the reason why most cases of GBV are brought under the Penal Code. The wording of the Act is problematic because other laws such as the Penal Code and the CPC do not exactly give adequate protection to victims of GBV. The Act¹⁰⁸ also states that subject to the Constitution, where there is any inconsistency between the provisions of this Act and the provisions of any other written law the provisions of this Act shall prevail to the extent of the inconsistency.

The Act gives a broad interpretation of abuse; physical, mental, social and economic abuse.¹⁰⁹ GBV means any physical, mental, social or economic abuse against a person because of their gender.¹¹⁰ The Act also states that any person may assist a victim of GBV in reporting acts of GBV to the relevant authority and in addition assistance may be given to the victim in obtaining medical help, counselling, legal services, shelter etc.¹¹¹

¹⁰⁶ S 3 of The Anti-Gender Based Violence Act 2011.

¹⁰⁷ S 2(1) of the Anti-Gender-Based Violence Act No. 1 of 2011.

¹⁰⁸ S 2(2) of the Anti-Gender-Based Violence Act.

¹⁰⁹ Ibid.

¹¹⁰ Ibid (definitions section).

¹¹¹ S 5 of the Anti-Gender-Based Violence Act, according to the Act, it is not just the victim of GBV who can report such an act, any person or institution may report an act of GBV if the intervention is in the interest of the victim.

The Act is significant in that even though religious marriages are not recognised under Zambian laws, it does recognise religious marriages.¹¹² The fact that other marriages are now recognised under the Act makes it easier for victims of GBV to use the law to seek redress. It is important to note that it is not just other marriages that are recognised but also co-habitation and other forms of arrangements are recognised.¹¹³

Furthermore, the Act addresses issues of jurisdiction in reporting acts of GBV. A complaint of GBV to the police can be made where the violence occurred, where the perpetrator lives, where the victim lives or any place that is convenient for the victim.¹¹⁴ This is contrary to ordinary jurisdiction that is accorded when dealing with ordinary matters, however with regards to GBV it is essential in that it takes into consideration the dynamics of GBV. The Act also takes into consideration the role of the police in dealing with GBV. Section 7 provides that a police officer shall respond promptly to a request by any person for assistance from GBV and shall offer such protection as the circumstances of the case or the person who made the report requires even when the person reporting is not the victim of GBV.¹¹⁵ In addition, it compels the police officer to assist the victim get medical treatment if needed, retrieve his/her property and assist the victim to a place of safety. Section 8 provides that the police officer shall issue the victim with the medical form which shall be taken to a medical facility.¹¹⁶

The Act gives the police officers a mandate to arrest without a police warrant in cases where there is a likelihood of GBV. This is important considering the rise in numbers or incidents of GBV coupled with the fact that incidents of GBV have been ignored in the past. This will help in the fight against GBV. In addition, the provision prevents escalation of violence and allows the police to make arrests before the victim is seriously wounded. However, it is important for the police to move with caution when they are exercising such powers because it may lead to exacerbation of violence against the victim.¹¹⁷

¹¹² Ibid.

¹¹³ See s 3 of the Act.

¹¹⁴ S 6 (4) of the Anti-Gender-Based Violence Act.

¹¹⁵ Ibid.

¹¹⁶ S 9 of the Anti-Gender-Based Violence Act, The police officer may, without a warrant, arrest a person where the officer has reasonable grounds to believe that the person-

- a) Is committing, or has committed, an offence under this Act;
- b) Is about to commit an offence under this Act and there is no other way to prevent the commission of the offences;
- c) Unless arrested, will..

¹¹⁷ Sandra Walklate, 'What is to be Done About Violence Against Women?: Gender Violence, Cosmopolitan and the Law' (2008) 48(1) *The British Journal of criminology* 39.

The Act does not just look at GBV but it also addresses the impact of such kind of violence. For example it has provisions in place for protection¹¹⁸ and occupation orders. With protection orders, the victim is entitled not just to get a protection order against the main perpetrator of GBV, but s/he can also get an order against an associate respondent or both. This is so because it has been acknowledged that the victim is sometimes not just targeted by the perpetrator but that the perpetrator may influence other people to try and harm the victim. The Act in addition states that other persons may approach the court to get the order on behalf of the victim of GBV. The proceedings for the protection order are in chambers and the court has a discretion, where it feels that the respondent will have a negative effect on the victim or the witnesses, to separate the respondent from the victim or the witness. The court may also grant an *ex parte* interim protection order if it is in the best interest of the applicant.¹¹⁹

The protection order may prohibit the respondent from physically assaulting or using physical force against the applicant or any legal representative or any person associated with the applicant, depriving the applicant access to adequate food, water, clothing, shelter or rest, forcing the applicant to engage in any sexual contact whether married or not, engaging in any sexual conduct that abuses, humiliates or degrades the complainant or otherwise violates the applicant's integrity, whether married or not.¹²⁰

The Act does acknowledge that sometimes people are unable to report acts of GBV because the perpetrator may be the bread winner and the victim may be economically dependent upon the perpetrator. Therefore, the occupation order entails that the perpetrator leaves the marital home or the house if the perpetrator and the victim share a home. If the perpetrator is the sole provider, the Act stipulates that s/he shall continue paying rentals or the mortgage if that applies. This is the case even where the victim is not party to the lease agreement. The Act places an obligation on the landlord not to vacate the victim from the house if the occupation order is in place even when the perpetrator fails to pay the rentals. The Act also talks about providing shelter for the victim of GBV and if there are children involved then the children should be in schools. Basically, it states that shelters should have schools where the children can go to.

¹¹⁸ S 10 of The Anti-Gender-Based Violence Act.

¹¹⁹ S 12 (1) *ibid*.

¹²⁰ S 14 *ibid*.

The occupation and protection orders do not bar the victim from asserting his or her rights under other provisions of the law. The grant of the protection order under subsection 8 of section 10 does not exclude a person's criminal liability under the Penal Code or any other law.¹²¹ What this entails is that whilst the occupation and protection orders are under civil liability the victim can also institute criminal proceedings at the same time.

3.4.4 Law, Culture and the Contemporary Law on GBV in Zambia: A Critical Perspective

The recognition of the need to tackle GBV at the international level (through instruments such as CEDAW) has fed down to the continent of Africa and individual nation states in a visible and public way.¹²² As explained above in chapter 2, Zambia now has in place laws that deal with GBV with the most recent legislation, the Anti-Gender Based Violence Act, being adopted in 2011.¹²³ This law operates alongside other statutes such as the Penal Code (PC)¹²⁴ and the Criminal Procedure Code (CPC).¹²⁵ There are also in place institutions that help in the fight against GBV such as the Police Service, the Victim Support Unit and the court system. In this next section, we will investigate the contemporary law on GBV in Zambia and will critically evaluate its capacity to tackle GBV given the above discussion of gender relations, colonialism and customary influences. It may be thought that the introduction of a specific law to address GBV is a welcome advance and in many respects, this is true. However, as we will see below, the new law has a number of drawbacks which mean that the experiences of victims of GBV are in many ways no better than before the Act was introduced.¹²⁶

As noted in this chapter, the Penal Code has general provisions which can be used with regard to incidents of GBV (such as rape, defilement, assault and sexual harassment). The Criminal Procedure Code (CPC) similarly has provisions that can be used by victims of GBV. However, the limitation with both the PC and the CPC is that the provisions are not specific enough for the victims of GBV.¹²⁷ On the contrary, the introduction of the Anti-Gender-Based Violence

¹²¹ S 19 of the Anti-Gender-Based Violence Act.

¹²² Protocol to the African Charter on Human and Peoples' Rights of Women in Africa 2008 also known as the Maputo Protocol <www.achpr.org/instruments/women-protocol> accessed 9th March, 2018; SADC Protocol on Gender and Development 2008 <www.sadc.int/files/8713/5292/8364/protocaol> accessed on 9th March, 2018.

¹²³ Anti –Gender Based Violence Act, No.1 of 2011.

¹²⁴ Penal Code (Amendment) Act No. 15 of 2005.

¹²⁵ Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

¹²⁶ Avocats Sans Frontieres Asbl, 'Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia' (Sep 21, 2017) <www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN> accessed on 12th March, 2018.

¹²⁷ See the discussion in chapter two.

Act has been seen as a great achievement for victims of GBV and for women in general because of its specificity. The Act provides for a reporting procedure from beginning to end. It also provides women with protection in terms of occupation and protection orders.¹²⁸

But does the law really offer protection that is required by victims of GBV, especially women? Bentzon et al are sceptical:

‘It is... evident that the increasingly gender-neutral and unified general law does not adequately address the needs of large groups of women. There are a variety of reasons for this, it may be inaccessible because of the ignorance of its provisions or because of financial constraints faced by women who might seek to use it.’¹²⁹

It is, therefore important to take into consideration the effect of a law on victims. In Zambia a particular issue is that the law, in all its generality, is supposed to be equally accessible to all - including both the urban and rural population. However, some people in rural areas live very far away from police stations and have to walk long distances to report matters to the police. Therefore, when a crime happens, these people are reluctant to go and report to the authorities.¹³⁰ There may also be times when there is a police station nearby but the victim may be told that there is no fuel to take them to the hospital, thereby resulting in the destruction of evidence. To address this problem, the United Nations Development Programme (UNDP) has provided motor vehicles to most Victim Support Units (VSU) in Lusaka. However, the reality is that sometimes stations do not have money for fuel and may ask victims to provide for fuel in order for hospital treatment to be administered.

In addition GBV in Zambia is often seen as a private affair that can be easily resolved within the family.¹³¹ This is so especially with regards to domestic violence where victims are sometimes told by the police and relatives to sort out their problems without involving

¹²⁸ See the Anti-Gender-Based Violence Act, protection orders are not just against the perpetrator of GBV but also his associates whereas the occupation order allows victim of GBV to stay in the house even if s/he was not part of the lease agreement.

¹²⁹ Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Tano Aschehoug 1998) 61.

¹³⁰ See Aiden Sidebottom, ‘On Correlates of Reporting Assault in Malawi’ *Br. J Criminology* (2005) 55 (2) 381-398.

¹³¹ Avocats Sans Frontieres Asbl, ‘Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia’ < www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN > accessed on 12th March, 2018; Alison Diduck and Felicity Kaganas (3rd ed), *Family Law, Gender and the State: Text, Cases and Materials* (Hart Publishing 2012) 549.

outsiders.¹³² Notwithstanding the factor that the GBV Act was well intended to help victims of GBV, the majority of the victims are women and they may be intimidated by the use of official language and may not be able to articulately express themselves - which may be misunderstood by the court as meaning a lack of clarity around the nature of the incident. This may frustrate the victims and prevent them from reporting acts of violence.

In addition, there is a lot of red tape involved in the reporting structure and the court system. Many people in Zambia view the police and the court system with a lot of suspicion. There is a view that police officers are corrupt and so are some of the court officials.¹³³ Therefore, victims do not easily trust the system. They are aware that the police or court officials may demand money from them and if they do not give in, their case will not proceed to the next level. In addition, the system of investigation can be very patriarchal, entrenching some of the stereotypes¹³⁴ about victims, therefore proving to be very intimidating for the victim.

Furthermore court cases usually take a long time and this may act as a deterrent for victims because they will have to attend court a number of times in order to give evidence. This may disrupt the victim's way of life and also prove costly in a way that was not the case with customary justice.

‘The customary criminal justice system is part of the traditional dispute resolution system and according to the members of the public interviewed, as such it is much more elaborate, efficient and effective because it takes a short time in terms of administration of justice, there are fewer adjournments, and the

¹³² See Jo Fidget, ‘Zambia’s Celebrity Couple Reveal Wife-beating Past’ (BBC News 30th November, 2009) <<http://news.bbc.co.uk/1/hi/world/Africa/8375291.stm>> accessed 31 July 2017 where one of Zambian female musician Saboi Imboela narrated how the police and the medical personnel persuaded her to drop the charge of assault against her then husband; Avocats Sans Frontieres Asbl, ‘Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia’ < www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN> accessed on 12th March, 2018.

¹³³ See the discussion in chapter 6 on the focus group discussions in Mfuwe.; see also Gretchen Bauer and Josephine Dawuni (ed), *Gender and the Judiciary in Africa : From Obscurity to Parity* (Routledge, 2015) where it is stated that ‘perceptions of judicial corruption remain endemic in most judicial institutions across the continent. Perceptions of judicial corruption play into legitimacy, public confidence and trust in judicial institutions’.

¹³⁴ Simone Cusack, Eliminating Judicial Stereotypes: Equal Access to Justice for Women in Gender-Based Violence Cases (Office of the High Commissioner for Human Rights 9 June, 2014) <www.ohchr.org/Document/Issues/Women?WRGS/StudyGenderStereotypes.doc> accessed on 16th July, 2017 who defines judicial stereotypes as the practice of judges ‘ascribing to an individual specific attributes, characteristic or roles by reason only of her or his membership to a particular social group or perpetuating harmful stereotypes through the failure to challenge the stereotypes. This is not only with regards to the judiciary but also the police; see the case of Chali v Mwalla discussed in chapter 2 above.

procedure is known to the people. Similarly, it is conducted within a familiar environment and so less intimidating to the parties.’¹³⁵

Therefore, sometimes the victim may not show up at court because of the cost and time constraints. This again may result in the courts not pursuing the case against the accused.

Although the Act does provide a variety of avenues that the victim of GBV may like to pursue,¹³⁶ sometimes victims do not want to have the perpetrator on trial.¹³⁷ Sometimes the intention of reporting is to stop the violent behaviour because victims know that the perpetrator is the bread-winner and if he is in custody the whole family will bear the consequences.¹³⁸

According to the CEDAW report of the Committee on the Elimination of Discrimination Against Women 11-29th July, 2011 on Zambia, although there have been some improvements in the fight against GBV, there is a lot more that needs to be covered. Under paragraph 10, it was stated that although some efforts have been made to translate the Convention into local languages, in most areas especially the rural areas, there is inadequate knowledge of the rights of women in general throughout the country.¹³⁹

In addition, the Committee also referred to article 23(4) of constitution, which permits certain customary laws which are discriminatory against women in the area of personal law and customary law. It was of the view that such a law should be repealed because of the effect that it has on women.

Furthermore, the Committee commended the government of the Republic of Zambia for the effort in enacting the Anti-Gender Based Violence Act 2011 and the amendments to the Penal Code which provide for stiffer punishment for certain sexual offences. However, there was concern by the Committee about the high prevalence of violence against women and girls, including domestic violence and other forms of sexual violence in both the private and public spheres, including while in detention.¹⁴⁰ As shown by the interview with the judiciary, the

¹³⁵ Customary Justice: A Criminal Justice System in Zambia: Enhancing the Delivery of Security in Africa. African Human Security Initiative. Monography No 159, April 2009. Institute for Security Studies.

¹³⁶ The Anti-Gender Based Violence Act 2011.

¹³⁷ Alison Diduck and Felicity Kaganas (3rd ed), *Family Law, Gender and the State: Text, Cases and Materials* (Hart Publishing 2012) 549.

¹³⁸ See chapter 6 of the thesis; Interview with MP1, Magistrates Complex (Lusaka, Zambia 25th August 2016).

¹³⁹ Concluding Observations of the Committee on the Elimination of Discrimination against Women, Zambia, Forty-ninth session 11-29 July 2011 < www2.ohchr.org/English/bodies/cedaw/docs/co/CEDAW-C-ZMB-CO-5-6.Pdf > accessed on the 2nd October, 2018.

¹⁴⁰ Ibid.

Committee also noted that there was a low rate of convictions for reported incidents of rape and defilement.¹⁴¹

The recommendation on GBV was for the government to prioritise and ensure that there are adequate resources for the full implementation of the Act. Since marital rape is not an offence under the Zambian law, the Committee in its report argues Zambia to expeditiously criminalise marital rape.¹⁴² Having such laws is a confirmation of the views expressed by feminist theories in chapter two¹⁴³ which state that the law is usually patriarchal and tend to serve male interests. Such a law has remained in place because of patriarchal attitudes of the society, which reflect in the law.

It is also the case that because abuse is wide-spread, people (men) may not see certain actions as abuse. Equally, sometimes medical personnel and the police will say that the incident was very minor and it should just be resolved between the parties.¹⁴⁴ Therefore, in order for the Act to work effectively, there needs to be better awareness not only within communities but also with the relevant authorities that come into contact with the victims of GBV.

Undoubtedly, GBV in Zambia is on the increase¹⁴⁵ and this is due to a number of factors. One particular factor that has contributed to the increase is simply that GBV was not recognised as a crime in the past.¹⁴⁶ This has led people (both victims and the perpetrators) to believe that violence is normal or part of the ‘culture’ and that perpetrators can get away with it. Another interesting facet of the problem, though, is that it is not only men who are perpetrators of GBV in Zambia but also women.¹⁴⁷ For example, women may commit acts of violence against fellow women. The abuse can be condoned and the victims encouraged not to involve outsiders in what are family affairs.¹⁴⁸ Therefore, women are, in some cases, actually at the fore-front in

¹⁴¹ Ibid paragraph 21.

¹⁴² Ibid para 22 (b).

¹⁴³ See Catharine MacKinnon.

¹⁴⁴ See Jo Fidgen, ‘Zambia’s Celebrity Couple Reveal Wife-beating Past’ (BBC News 30th November, 2009) <<http://news.bbc.co.uk/1/hi/world/Africa/8375291.stm>> accessed 31 July 2017; see also Simone Cusack, *Eliminating Judicial Stereotypes: Equal Access to Justice for Women in Gender-Based Violence Cases* (Office of the High Commissioner for Human Rights 9 June, 2014) <www.ohchr.org/Document/Issues/Women?WRGS/StudyGenderStereotypes.doc> accessed on 16th July, 2017.

¹⁴⁵ See the discussion above in chapter 1.

¹⁴⁶ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (Hart Publishing 2012) 564.

¹⁴⁷ ‘Police nab Suspect in Viral Stripping Video’ < www.qfm.com/2017/06/27> accessed on 1 October, 2017 involved a video recording of a young women being beaten by fellow women for allegedly having sex with another woman’s husband.

¹⁴⁸ Elleke Boehmer, *Stories of Women: Gender and Narrative in the Postcolonial Nation* (Manchester University Press 2005) 29.

ensuring that violent traditions continue. For example, women may tell other women and girls not to wear revealing clothes, not to answer back to their husbands or partners and to be submissive to their spouses.¹⁴⁹ This has created a culture where victims are blamed for their situation and perpetrators receive sympathy. These attitudes are so embedded in Zambian society that they are found in communities and institutions such as the police and the courts.¹⁵⁰ In cases of defilement, for example, people would usually ask where the girl was and how she was dressed notwithstanding the fact that the victim is underage and that in most cases of rape, women or girls will be violated by someone they know.¹⁵¹ An incident of rape or defilement is likely to be believed if the perpetrator is a stranger. A plausible correlation can be drawn between the degree of acquaintance, public perception of the legitimacy of the rape charge, and the response of the criminal justice system.¹⁵²

In cases of domestic violence where women are beaten, society may see the victims as failures, as ‘fallen women, who have failed in their “feminine” role to sensitise and civilise the beast in the man.’¹⁵³ In some cases, women would even be asked why they were beaten and, depending on the answer, people would justify the beating and support the perpetrator.¹⁵⁴ Therefore in such cases, the victim does not come out in the open to say what is happening to her for fear of re-victimisation. Moreover, when a woman involved in domestic violence takes her husband to court, she has to redefine herself and her identity. As we saw in the discussion in the previous chapter, legal claims require individuals to be viewed as autonomous rights holders and this may be very much at odds with a Zambian woman’s traditional identity and place in society. As such, taking on a rights-defined self in relation to a partner requires a substantial identity change both for the woman and for the man she is accusing.¹⁵⁵ ‘Instead of seeing herself defined by family, kin, and work relationships, she is invited to take on a more autonomous self-

¹⁴⁹ Darlene Rude, ‘Reasonable Men and Provocative Women: An Analysis of Gendered Domestic Homicide in Zambia’ (1999) 25 (1) *Journal of Southern African Studies* 12.

¹⁵⁰ See Simone Cusack, *Eliminating Judicial Stereotypes: Equal Access to Justice for Women in Gender-Based Violence Cases* (72); *Chali v Mwalla* case, S.C.Z. Judgment No. 6 of 1997; refer to s2.5 of this chapter; *Bola* case, Lusaka Subordinate Court case of 2002 (unreported).

¹⁵¹ See Jennifer Truman and Lyn Langton, *Criminal Victimization*, 2015 (U.S Department of Justice) and also Office of Justice Programs: *Victims and Perpetrators of Violence* <www.nji.gov/topics/crime/rape-sexual-violence/pages/victims-perpetrators> accessed on 31 July, 2017.

¹⁵² Laura L. O’Toole, Jessica R. Schiffman et al (ed), *Gender Violence: Interdisciplinary Perspectives* (New York University Press 2007) 199.

¹⁵³ bell hooks, ‘Violence in Intimate Relationships’ in Laura L. O’Toole, Jessica R. Schiffman et al (ed), *Gender Violence: Interdisciplinary Perspectives* (New York University Press 2007) 273.

¹⁵⁴ This was mentioned in both focus group discussions in Mfuwe and Lwiimba.

¹⁵⁵ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justices* (University of Chicago 2009) 181.

protected by the state.’¹⁵⁶ This proves difficult for the victim because the State may not be willing or able to offer the victim the same protection as her family and community will offer. Within the family or the community, the victim is able to talk to people and have a sense of belonging, connection and support, but when she takes on a more autonomous role, the State as an institution rarely offers a similar kind of support.

This point will be made in more depth in chapter 5 below when I discuss the findings of the focus group discussions. Suffice to say at this point that these discussions placed great emphasis on the role that the family plays in issues of GBV involving spouses.¹⁵⁷ Taking the matter to court is particularly difficult in a country like Zambia where couples see family and community as an important component of their marriage. ‘A battered woman may be pressured by kin to feel she is a bad woman, while her partner may claim she is taking away his masculinity.’¹⁵⁸ This makes it difficult for Zambian women to report their spouses to the authorities and as a result may prompt the victim to withdraw the case. The withdrawal of the case does not usually sit well with either the police or the courts and results in a situation where the authorities do not pay attention to the plight of victims should they go back to court. ‘Such women appear to be difficult or “bad” victims since they typically file charges, then try to drop them, or fail to appear for restraining order hearings.’¹⁵⁹

When it comes to GBV, women find it difficult to start court proceedings and engage with the legal process. Taking into consideration that the community does not exactly encourage women to take recourse to the legal system, their initial encounter with the system is very important. Interactions with police officers, prosecutors, probation officers, judges, shelter workers, feminist advocates and even bailiffs affect the extent to which an individual victim is willing to take on a new legal/rights-based, identity.¹⁶⁰ A victim’s ability to continue with the case also has a lot to do with the legal system as a whole and how attentive it is to the victim’s cause. Thus, an individual’s willingness to take on rights depends on her experience in asserting them.¹⁶¹

A further form of GBV which is common in Zambia is sexual harassment on the streets. In most cases this is not viewed as a crime. Women may be subjected to undressing on the streets

¹⁵⁶ Ibid; see also Elizabeth Chanley Rainey, ‘Multicultural Politics of Women’s Activism: When do Race and Nation enter Women’s Frames?’ (PhD, University of Alabama 2016).

¹⁵⁷ See below chapter 6.

¹⁵⁸ Sally Engle Merry 181.

¹⁵⁹ Ibid 182.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

where they are perceived to be dressed inappropriately and this may be done by boys but also other women.¹⁶² When women who are thought to be inappropriately dressed walk in streets they may also face rude comments from women and men alike. Even when these women are stripped naked, it is very rare for them to be given any support.¹⁶³ People will blame the victim stating that she ought to have known better than to go out in such clothing in public.¹⁶⁴ Even the police sometimes will not help because they will see the perpetrators as enforcing culture and blame the victim for not abiding by norms of Zambian society.¹⁶⁵ In these cases 'culture' is used as a scapegoat, since according to Zambian norms, it is unheard of to strip women as they are revered as mothers and, therefore, respected in society. It is important to note that such sentiments are part of the ideology to continue the subordination of women. In reality, Zambian women are not treated with such respect but are instead more often seen as minors to be controlled and taken care of by men. This is one of those situations in which culture is appropriated and used by all sides to justify their actions. In situations where it suits men, they will accord the mother role to women but this role is also easily taken away from women once the goal is achieved.¹⁶⁶ The real reason why women who are said to go outside the culture norms are targeted is because they are a challenge to the status quo and in this regard male power. Patriarchy as a system has thrived because of the violence that it exhibits to those who dare to challenge the system.¹⁶⁷

¹⁶² Nkandu Luo who is now the minister of Chiefs and Traditional Affairs was in 1992 forced to leave Parliament when a male parliamentarian raised a point of order with regard to her dress. She was wearing a black skirt which was a few inches above the knees with a slit. Her outfit received public outrage and some women even suggested that she was a bad role model for girls; See Karen Tranberg Hansen, 'Dressing Dangerously: Miniskirts, Gender Relations, and Sexuality in Zambia' Jean Allman (ed), *Fashioning Africa: Power and the Politics of Dress* (Indiana University Press 2004) 179.

¹⁶³ Stripping of Women 27th April, 2015 <www.daily-mail.co.zm/readers-react-stripping-Lusaka-women_> accessed 31 July, 2017, Zambian women stripped for Wearing a Mini-skirt, 20 June, 2002 <www.telegraph.co.uk/news/1381558/zambia-womenstripped-for-wearing-min> Accessed on 31 July, 2017.

¹⁶⁴ See Stacy-Ann Elvy, 'A Postcolonial Theory of Spousal Rape: The Caribbean and beyond' (2015) 22 (1) *Mich.J.Gender & L.* 89, 133; see also Louise Vincent, 'Women's Rights Get a Dressing Down: Mini Skirts Attacks in South Africa' (2008) *International Journal of Humanities* 6 at 6 who states that in 'a reversal of colonialism's branding of many African practices such as polygamy, virginity testing, circumcision rites and traditional medicine as uncivilised, contenders for power and influence who style themselves 'traditionalists' call for a return to 'African values' which, for many, include prescribed gender roles and generational hierarchies.'

¹⁶⁵ See Chapter 3 on how postcolonial elites have perpetuated the idea that women are the protectors of culture; See also Simone Cusack, *Eliminating Judicial Stereotypes: Equal Access to Justice for Women in Gender-Based Violence Cases*; see also Louise Vincent, 'Women's Rights Get a Dressing Down: Mini skirts attacks in South Africa' states that 'in the context of these tensions the (black) wearer of a mini skirt is constructed as embracing a form of identity regarded as 'unAfrican' and thus to be positioning herself actively in opposition to traditional African cultural mores.'

¹⁶⁶ See chapter 2 and the discussion of the work of Homi Bhabha, 'The Other Question..' at 34 who states that 'the orient is seen as a savage but yet the most dignified servant.'

¹⁶⁷ Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989).

This can also be explained as a backlash against women. It is a fact that women are now occupying important positions in Zambian society.¹⁶⁸ The increased violence against women may be a backlash where men feel that women are taking over their roles.¹⁶⁹ The fact that women are increasingly providing for their families and becoming bread-winners themselves, makes men feel that they are losing the control they thought they had over women.

It is a sad fact that the Anti-Gender-Based Violence Act 2011 missed a very important opportunity to engage culture in the fight against GBV. Culture is used in Zambia as a scapegoat for child marriages, violence against women and sexual harassment. It is important to note that, while all these aspects of culture are contested, people still use them to justify GBV. The law is not enough if people still hold on to certain beliefs. Instead of adopting provisions that seem to work well in the global north and other settings, the Act would have worked better if it had taken into consideration the local context in which it would operate. Therefore, although there is now a specific law, for most women it seems inaccessible, and even the courts rarely use the Act instead relying on the PC and CPC to decide cases on GBV.¹⁷⁰

A further aspect of the difficulties facing victims of GBV in obtaining redress in Zambia is the operation of the courts and the maleness of these institutions. This demonstrates how the maleness of law and legal structures can also operate against women's interests in a way which can be difficult to unmask given the apparent neutrality of law. As mentioned previously, when the colonial administrators created the new Zambian legal system, the people chosen to sit in the courts were usually male and they applied the law that suited the people that appointed them, that is their chiefs and colonial masters.¹⁷¹ When the mines were discovered, the colonial masters had an interest in ensuring that their business run smoothly and that relied on the local people that they employed. Consequently, the British reinvention of the indigenous judicial system in Africa is described as being 'fundamentally hypocritical' in that the British wanted to preserve some vestiges of customary institutions while at the same time moulding the native system into a more efficient, business-friendly model of justice.¹⁷²

¹⁶⁸ At the moment Zambia has the first female vice president and also the first female Chief Justice.

¹⁶⁹ Louise Vincent, 'Women's Rights Get a Dressing Down: Miniskirts Attacks in South Africa' 2008 International Journal of Humanities 6.

¹⁷⁰ See below chapter 6.

¹⁷¹ Lord Hailey, *Native Administration in the British African Territories: Central Africa: Zanzibar, Nyasaland, Northern Rhodesia* (His Majesty's Stationery Office 1950) 83 who states that Native Commissioners were made responsible for the general control of their Districts and Chiefs, and the headmen could be punished for failing to carry out reasonable orders or requests either of the Chief or the Native Commissioner.

¹⁷² Louise De Toit, 'In the Name of What? Defusing the Rights-Culture Debate by Revisiting the Universals of Both Rights and Culture' (2013) *Politikan: South African Journal of Political Science*.

The new law on Gender-Based Violence, however, provided the basis for a rethinking of the courts that would deal with cases of GBV. Hence, in 2016 the new Gender Fast Track courts came into operation alongside the Anti-Gender-Based Violence (Court) Rules 2016 which set out the way in which the 2011 legislation should operate.¹⁷³

The purpose of the Gender Fast Track courts is to speed up the handling of cases of GBV, to provide specialisation with regards to GBV and to ensure that remedies are provided for within the shortest period of time. The creation of the courts was assisted by the United Nations Development Programme as part of a joint programme supported by the UN with funding from other nations such as Sweden and Ireland.¹⁷⁴

Since 2016 two Gender fast track courts have been established - one based in the capital, Lusaka and one in Kabwe. These have had a positive reception by officials:

‘The UNDP also supported the establishment of the fast track courts in order to have GBV cases heard at a quicker pace. When these cases have been heard in the regular court system it has taken long and justice has been delayed and denied to victims and survivors of GBV. This is because if a person takes the case to court the process is usually long therefore other factors come in (families come in and influence them) and cases end up being withdrawn. This was supported by the judiciary and also the civic organisations.’¹⁷⁵

The creation of the new gender sensitive courts is significant in the fight against GBV. They respond to a recognition that domestic violence cases may often be assigned a lower priority for prosecution and punishment when placed alongside other criminal cases.¹⁷⁶ The coming into effect of these courts should in principle result in more cases of GBV being brought before them since they were created to expedite such cases and both national and international stakeholders, as well as the general public, have high expectations.

In a push towards modernisation of the legal system, the coming into effect of the new Gender Fast Track courts has also brought with it new technological advances resulting in the courts having new CCTV cameras and video links in the proceedings. This is so that witnesses and the victims are ‘not exposed directly to the perpetrator’.¹⁷⁷ A witness room has also been

¹⁷³ Statutory Instrument No. 8 of 2016.

¹⁷⁴ Interview with IOP1 (Lusaka, Zambia, 25th August, 2016).

¹⁷⁵ Ibid.

¹⁷⁶ Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* <www.ncjrs.aspen.com:8/catalog.html> accessed on 9th March, 2017.

¹⁷⁷ Interview with MP1, Magistrates Complex (Lusaka, Zambia 25th August 2016).

installed with a screen and PA system and there are screens in the court rooms and on the wall for the accused and gallery to view. The defence can cross-examine the witnesses and communicate through video link.¹⁷⁸

Screen shields have also been introduced to shield survivors of GBV, child victims of crime and also witnesses in cases where they would not want to be identified. These developments have also had a positive reception:

‘Video links have been beneficial with regards to minors who have been victims of defilement not to have contact with the accused. We used to have problems where minors could fail to give evidence, so far we have used the video link twice and children gave evidence without fear.’¹⁷⁹

There are, therefore, a number of reasons to be optimistic about the creation of these specialised jurisdictions with particular competence in dealing with GBV. It is early days but improvements in the legal process will undoubtedly go some way to ameliorating the experiences of victims of violence in Zambia.

3.5 The Interpretation of GBV Acts by the Courts

While The Anti-Gender Based Violence Act is one of the most comprehensive pieces of legislation in the fight against GBV,¹⁸⁰ this Act is rarely used by police or the courts. Most cases of GBV still rely on the provisions of the Penal Code.¹⁸¹ Therefore, most of the cases still come to the courts under the provisions of assault and not under the Anti-Gender-Based Violence Act.¹⁸² The problem generates from the wording of the Act itself since it allows for the use of other laws. A law is as good as the system designed to deliver its promises, and the failure of the courts and related institutions to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence.¹⁸³ However, it seems that the problem is not entirely with the law makers but the courts also shy away from interpreting

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Avocats Sans Frontieres Asbl, Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia (Sep 21, 2017) <https://issuu.com/avocatssanfrontieres/doc/asf_zam_studyantigbvact_201708_eng> accessed on 16th February, 2018 14.

¹⁸¹ See chapter 5, the interviews with the judiciary.

¹⁸² Interview with MP2, Magistrate Court Complex (Lusaka, Zambia 14th May, 2016);

¹⁸³ Deborah Epstein, ‘Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court system’ (1999) 11 (1) Yale J.L. & Feminist 3, 50.

the law broadly. The courts usually interpret the law without taking into consideration the effects that such interpretation will have.

The courts have also been affected by stereotypes when it comes to matters of GBV. It is important to note that the courts are not immune to the perceptions that society has on GBV. For example in the case of *The People v Godden Bola*,¹⁸⁴ where it was alleged that the accused forced the defendant who was his secretary, to have sexual relations with him on three occasions. He was charged with indecent assault. In his ruling, the Justice held that ‘it was highly questionable for an old woman to be forced into having sex on several occasions without revealing the fact to anybody’¹⁸⁵. The Justice further stated that the complainant’s silence raised concerns and showed consent and the accused was acquitted.

In the case of *Chali v Mwalla*,¹⁸⁶ the testator had two children and fathered a child with one of his children who was the appellant in this case. The testator left everything to his mother and left out his children in the will. The daughter contested the will. The trial court Judge varied the will and included the daughter and the son allegedly fathered by the testator and the daughter’s brother. The Supreme Court reversed the decision although there was evidence that the testator had had sexual relations with the daughter and instead blamed the victim for having three children out of wedlock and in addition stated that the trial judge being a woman must have decided in favour of the appellant because the judge was emotional.

The above cases show the stereotypes that judges come with when looking at cases of GBV. It also shows the importance of having female judges because they are able to bring out the underlying stereotypes with regards to gender issues. In addition, it shows that even when the law is there sometimes it fails to change the mores of society. These two cases were decided before the Act came into effect.

3.6 The Gender Equity and Equality Act 2015¹⁸⁷

In 2015 a further important legislative step was taken towards the objective of gender justice in Zambia. The Gender Equity and Equality Act 2015 gives a mandate for the creation of a new Commission to deal with gender inequality.¹⁸⁸ The aim is to ensure that there is equality

¹⁸⁴ Lusaka Subordinate Court case of 2002 (unreported).

¹⁸⁵ Ibid.

¹⁸⁶ S.C.Z. Judgment No. 6 of 1997.

¹⁸⁷ Gender Equity and Equality Act No. 22 of 2015 (note that it is not yet into force).

¹⁸⁸ S 6, Gender Equity and Equality Act No. 22 of 2015.

between men and women and that women's rights are not infringed upon. The Act is important because in addition to the existing prohibition of discrimination by public bodies in the Constitution, the new measure prohibits discrimination by private bodies. To that end, the law provides that no person, public or private body shall discriminate against any person.¹⁸⁹ In particular, the legislation places an obligation on all private and public bodies to ensure that there is no discrimination of any sort in their organisations.

The enactment of this Act shows a continued broad commitment by the government to improve gender equality in Zambia which can only aid the fight against GBV. The law draws strength from references to regional instruments such as the African Charter on Human and Peoples' Rights¹⁹⁰ and the Maputo Protocol¹⁹¹ and bolsters the legal provisions aimed at ensuring equality between men and women.

3.7 International and Regional Instruments

Alongside the application of domestic law to GBV, Zambia is in addition a party to international law Conventions that gives rights to women. In the sphere of gender equality these international instruments are the Convention on the Elimination of All Forms of Discrimination against women (CEDAW)¹⁹², the International Covenant on Civil and Political Rights (ICCPR)¹⁹³, The African Charter on Human and Peoples' Rights¹⁹⁴ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women¹⁹⁵, SADC Protocol on Gender and Development¹⁹⁶ among others. Zambia actually borrows much of the provisions in the Anti-Gender Based Violence Act from CEDAW and also the Maputo Protocol.

According to Article 1 of CEDAW, the term

‘discrimination against women’ shall mean any discrimination, exclusion or restrictions made on the basis of sex which has the effect or purpose of

¹⁸⁹ Ibid s 15(1).

¹⁹⁰ 1981 <www.achpr.org/instruments/achpr/> accessed 25 October, 2017.

¹⁹¹ The Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa

¹⁹² Convention on the Elimination of Discrimination Against Women 1979 accessed on the 24th November, 2014 at < www.un.org/womenwatch/daw/cedaw/text/convention.html>.

¹⁹³ International Covenant on Civil and Political Rights 1966 < www.rights.info.org/international-covenant-civil-political-rights/> accessed 24 October, 2017.

¹⁹⁴ African Charter on Peoples' and Human Rights 1981 <www.achpr.org/instruments/achpr/> accessed 25 October, 2017.

¹⁹⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2003 <www.achpr.org/instruments/women-protocol> accessed 25 October, 2017.

¹⁹⁶ Southern African Development Community Protocol on Gender and Development 2008 <www.sadc.int> accessed on 10th December, 2017.

impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, or any other field.’¹⁹⁷

This Convention talks about the equality between men and women and emphasises that state parties should use whatever means available to achieve equality. The Convention does acknowledge that culture and traditions play a significant part in promoting inequality and that there must be a change in these culture and traditions to ensure equality. It also places an obligation on the governments to change Constitutions and laws that discriminate against women. The Convention places an obligation on the state to eliminate discrimination in all spheres, be it political, educational, health, economically and socially. However, the problem with CEDAW is that it does not provide any sanctions apart from shaming. It mandates massive social and institutional change without providing greater incentives, resources or sanctions than any of the other human rights treaties.¹⁹⁸ CEDAW does not mention violence against women but the General Recommendation does mention it. ‘CEDAW adopted a detailed general recommendation on violence against women (General Recommendation No. 19) at its eleventh session in January 1992; this made it clear that violence against women in all its forms was covered by the Convention and identified the obligations of the state in relation to different forms of violence’.¹⁹⁹

Zambia being a party to both international and regional Conventions, has undertaken a number of obligations, however the question is whether Zambia is fulfilling the obligations. GBV infringes upon women’s rights and dignity and as such, under CEDAW, it is a form of discrimination. Article 2 and Article 5 of CEDAW are of particular interest because these provisions place an obligation on member states to take appropriate measures to end discrimination in all aspects of life. Article 5 provides that state parties should take all measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and other practices which are based on

¹⁹⁷ Article 1 of the Convention on the Elimination of Discrimination Against Women 1979

<www.un.org/womenwatch/daw/cedaw/text/convention.html> Accessed on 24th November 2014.

¹⁹⁸ Neil A. Englehart and Melissa K. Miller, ‘The CEDAW Effect: International Law’s Impact on Women’s Rights’ 2014 13(1) Journal of Human Rights 22, 23; see also General Recommendation No. 35, July 2017.

¹⁹⁹ Andrew Byrnes and Eleanor Bath, ‘Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women-Recent Developments’ (2008) 8(3) Human Rights Law Review 517, 518; see also General Recommendation No. 35, July 2017 which now adds on to General Recommendation 19.

the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles of men and women.

In addition, General Recommendation 19 of CEDAW discusses discrimination and GBV demonstrating that GBV is a form of discrimination that affects women adversely and nullifies the enjoyment of their rights and fundamental freedoms under international law. GBV also infringes upon other human rights such as: the right to life, the right not to be subject to cruel and inhuman punishment, the right to equal protection under the law and the right to equality within the family.²⁰⁰ The General Recommendation provides that states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.²⁰¹

Zambia is a state party to the African Charter and Article 2 of the Charter states that everyone shall be entitled to the rights in the Charter without any distinctions. The Charter states that ‘the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the children as stipulated in international declarations and conventions’.²⁰² While Zambia is making an effort in the implementation of these provisions by enacting laws and putting in place measures to curb GBV, the implementation of the law alone is not adequate, social and culture norms also need to change. In addition, there should be stringent measures taken by the government for violence whether it happens in private or public.

The Charter does not expressly mention GBV but the prohibition of discrimination is very important because it is discrimination that brings about GBV. Although the Charter²⁰³ does not mention GBV, the Protocol²⁰⁴ to the Charter does extensively discuss GBV. The Protocol, also known as the Maputo Protocol, states that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal right.²⁰⁵ According to Article 4, state parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from

²⁰⁰ General Recommendation 19(7) of CEDAW.

²⁰¹ Ibid 19(9); see new General Recommendation 35 updating General Recommendation 19.

²⁰² Article 18(2) of the African Charter on Human and People’s Rights accessed at < www.achpr.or/instruments/achpr/> on 11th February, 2015.

²⁰³ Ibid.

²⁰⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa accessed at < www.achpr.org/instruments/women-protocol/> on 11th February, 2015.

²⁰⁵ Article 3, *ibid*.

all forms of violence, particularly sexual and verbal violence.²⁰⁶ In addition, it puts an obligation on State parties to come up with laws to adopt measures such as legislative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women.²⁰⁷

The African Commission which is an institution created under the African Charter, receives communications from member states on the infringement of human rights. It can receive communications from non-governmental organisations and individuals. It has made a number of rulings on the communications that it has received. The cases below shows how the Commission has interpreted discrimination and gender-based violence. Although they are all not related to gender, they show the obligations that governments have towards their citizens and these also include women.

In the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,²⁰⁸ it was held that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This case is important with regards to GBV in that the government can be held liable for acts committed by private parties. Furthermore, in the case of *Legal Resource Foundation v Zambia*,²⁰⁹ it was held that Article 1 of the African Charter requires that the state not only recognise rights, but requires that it shall undertake measures to give effect to them. In the case of GBV, it entails that laws alone are not enough, the state must put in place structures to make it conducive for women to report acts of GBV.²¹⁰

The duty to protect the citizens also includes the duty to protect them against discrimination. The non-discrimination principle within the context of Article 2 and 18(3) of the African Charter ensures the protection from discrimination against women by state parties to the African Charter.²¹¹ The case of *Egyptian Initiative for Personal Rights and Interights v Egypt*²¹² involved violence against women. The Commission stated that violence against women was discrimination and that state parties have an obligation to protect women whether

²⁰⁶ Ibid.

²⁰⁷ Ibid Article 4.

²⁰⁸ *Social and Economic Right Action Centre and Another v Nigeria*, No 155/96, (2001) AHRLR 60 (ACHPR 2001).

²⁰⁹ *Legal Resource Foundation v Zambia*, No 211/98 (2001) AHRLR 84, 2001.

²¹⁰ Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 89, 92 states that we need to improve access to courts so that women can bring claims based on discrimination, thereby giving opportunities to the courts to reform the law.

²¹¹ *Egyptian Initiative for Personal Rights and Interights v Egypt*, Merits No 323/06, ACHPR 2011.

²¹² Ibid.

violence is committed by private individuals or by state agents. This is the first case where the Commission had to deal specifically with violence against women.

The African Commission in the case of *Purohit and Moore v The Gambia*,²¹³ held that human dignity is an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right. The above cases illustrate that Zambia is not doing enough under its obligations when it comes to GBV.

3.8 Conclusion

This chapter has provided a discussion of the Zambian legal system in so far as it applies to, and impacts upon, GBV. It has shown how the court system and the criminal justice system operate in Zambia with regards to cases of GBV. It has then discussed the inadequacies of the substantive law when dealing with GBV. In particular, the chapter shows a number of shortfalls in the way in which the law addresses discrimination against women and that the courts often shy away from interpreting the law boldly. Finally, the chapter has looked at international and regional instruments on GBV and has come to the conclusion that Zambia lags behind its obligations under international law just as much as under national law.

Having considered both the theoretical and legal frameworks in which GBV can be viewed in Zambia, the thesis now moves on to discuss the lived experiences of survivors of GBV and also the views of elites who work with survivors and within the legal system. In discussing the practical aspects of tackling GBV, the thesis seeks to measure the consistency between the doctrinal law on GBV and the reality of its operation in Zambia today

²¹³ *Purohit and Moore v The Gambia*, No 241/01 (2003) AHRLR 96, ACHPR 2003.

Chapter 4:

Listening to the Voices and Experiences of GBV Survivors in Zambia: The Methodology for the Empirical Study

4.1 Introduction

This chapter sets out the methodology that was used to collect the data that informs the empirical research findings of the thesis. It seeks to explain the importance of adopting a feminist methodology¹ and how this has had an impact upon the data collected, its analysis and interpretation. Adopting a feminist methodology has been a central aspect of the study since the research is about women and how they experience the law as female victims and survivors of GBV.

The chapter begins by exploring some of the ethical issues that came about when doing the research and then goes on to what it means to have knowledge from a feminist perspective and how adopting a feminist epistemology can help us to better understand women's experiences. The chapter discusses intersectionality and highlights the importance of conducting the present research with the intersection of culture and gender at the forefront of inquiry. Finally, the chapter sets out the particular methodology used in the organisation of the focus groups and interviews which have provided the raw primary data that is analysed in the following chapter.

4.2 Ethical Issues

Before embarking on field work, i had to get ethical approval from the University of Sussex. Since the research involved dealing with women in vulnerable positions, it was considered as a high risk research.

One of the main issues that was of concern to the committee was the security of the women who participated in the research. Considering the nature of the research (asking women about violence that they experience), it was cardinal to ensure that the women were protected. Therefore i decided that the research was not to be advertised as 'gender-based-violence' but

¹ Sandra Harding (ed), *Feminism and Methodology* (Open University Press 1987) 3 defines methodology as a 'theory and analysis of how research does or should proceed. It includes accounts of how 'the general structure of theory finds its application in particular scientific disciplines' and has been extensively applied to gender studies to probe more fully women's disadvantage.'

research on women in general. It was anticipated that if the research was advertised as it was, women would be discouraged by their spouses to attend the focus group discussions. Looking at the nature of gender-based-violence², such controlling behaviour is quite common and therefore needed to be avoided in order for the research to proceed. Although the research was advertised as 'research on women' in general, the women were informed of the nature of the research as soon as they came for the focus group and they were also told that they could leave any time they wanted to.

In addition to the above, during the ethical approval application i resolved not to leave any paper work with the women to ensure that nothing can be traced back to them. Therefore even though i had consent forms for the women to sign, which they did sign i did not leave any copies with them. I took all the material with me.

Another ethical issue that arose was doing individual interviews with survivals/victims of GBV. It was going to be difficult for survivals/victims to come up to the researcher (as a stranger) and talk about GBV. Therefore i thought that starting with general questions on GBV in the focus group setting was going to serve as an ice breaker. It was decided that field work dealing with victims and survivals would start with focus group discussions and from the focus groups if there were women who wanted to volunteer to talk about their individual experiences then they would do that.

Considering that GBV is such a traumatic experience, issues of counselling came up. Since formal counselling as it is known in the global north is not so common in Zambia (and considering that most of the field work was done in rural areas), it was resolved that if someone needed some counselling, they could approach a trusted friend and relative or traditional counsellors to talk about their experiences.

Another ethical consideration had to do with the sensitive of the research, approaching women about GBV. It is such a sensitive area and considering that i as a researcher did not live in those areas and was of middle age, i thought of getting a gate keeper to introduce me to the women. I had to get somebody whom the women trusted and respected._ In Mfuwe, i got someone through an NGO known as Care International while in Lwiimba i approached the Ministry of Community Development and Social Services.

During field work, some government employee from a certain ministry do not want to give an interview on GBV. After i had arranged for the interview, this employee kept on giving excuses (apparently she did not want to get in trouble since it was almost election time) therefore i had

² Refer to chapter 2.

to find someone at that ministry who would agree to the interview. I finally got some one a week after the arranged interview was supposed to have taken place.

4.3 Feminist Epistemology

To be objective the researcher's findings must be impartial, general and free from personal and political biases.³ Equally, scientific claims to knowledge have been held to be valid because of the characteristics, of rationality, universality and freedom from bias.⁴ However, social science and feminist knowledge cannot be validated in the same way as scientific knowledge and, therefore, it is essential to ensure that the methods of social inquiry used are valid in order to arrive at a meaningful conclusion.⁵ It is true that feminism borrows a great deal from science⁶ but also departs from it in that feminists' claim to authoritative knowledge has come to acknowledge that scientific methods can be male-centred and patriarchal.⁷ Since the scientific field was and is still male-dominated, the knowledge that has been produced has tended to favour males over females and consequently portrayed women as inferior beings.⁸ Therefore, in conducting research, feminists have to challenge the male-centred view of knowledge and concentrate on bringing in a female perspective (in a similar way to that advocated by the

³ Caroline Ramazanoglu and Janet Holland, *Feminist Methodology: Challenges and Choices* (London: Sage Publications 2004) 48.

⁴ Caroline Ramazanoglu and Janet Holland, *Feminist Methodology: Challenges and Choices* (London: Sage Publications 2004) 'since the enlightenment, rationality and scientific method have come to be greatly valued as keys to unlocking the secrets of both social and natural worlds: the proliferation of knowledge and technology continues'; See Mary Maynard, 'Methods, Practice and Epistemology' in Mary Maynard and June Purvis (ed), *Researching Women's Lives from a Feminist Perspective* (Taylor and Francis 1994)12 who states that 'the existence of an independent and objective test (as is supposed to occur in laboratory experiments, for example), is crucial. It is this which ensures the facticity and reliability of the knowledge produced because it is uncontaminated by the subjective bias of the researcher. Science is thus characterised in terms of the objectivity of its method and the value-neutrality of the scientist'.

⁵ Mary Maynard and June Purvis (ed), *Researching Women's Lives from a Feminist Perspective* (Taylor and Francis 1994) 49 argues that the 'supposed objectivity, neutrality and rationality of scientific method allow the production of patriarchal knowledge and work against knowledge of the realities of gender relations'.

⁶ Caroline Ramazanoglu and Janet Holland, in *Feminist Methodology: Challenges and Choices* (London: Sage Publications 2004) 25 argue that 'the enlightenment debates on scientific method, in which discoveries about the nature of the world by individuals constitute progress, have profoundly influenced how feminists have thought about producing knowledge'.

⁷ Ibid 28. However, feminists have challenged dualistic or binary thinking by identifying unreason, emotion and injustice in how the separation of mind from the body and reason from passion has come to position women.

⁸ Ramazanoglu and Holland Ibid at 37, argue that 'as modern scientific professions developed into specialist, male-dominated areas, they operated with patriarchal ideas and exclusionary practices that positioned women at worst as naturally subordinate to, at best as complementary to, men'; Feminist argue that the institutionalization of expertise also institutionalises the legitimization of what counts as authoritative knowledge, and the exclusion of certain categories of human subject from the hierarchical institutions that confer such authority; Mary Maynard, 'Methods, Practice and Epistemology' states that although science emphasizes on objective, it is in fact gendered and partial 18; see also Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Towards a History of Vanishing Present* (Harvard University Press 1999) who argues that while science is regarded as patriarchal most dominant feminist regard their knowledge as valid truths.

radical feminists discussed in chapter 2 above). However, it is important to note that when challenging male-centred knowledge in both science and social sciences, feminists use the same methods but situate female methodologies within such research.⁹ Therefore it is important to acknowledge that feminists have not invented new methods of research, they simply place their emphasis on women's experience.

Consequently, this study, with its focus on women and how they experience the world, adopts a feminist epistemology.¹⁰

An epistemology is a theory of knowledge. It answers questions about who can be a "knower" (can women?); what tests beliefs must pass in order to be legitimated as knowledge (only tests against men's experiences and observations?); what kinds of things can be known (can "subjective truths" count as knowledge?), and so forth.¹¹

Initially the only knowledge about women was what men knew to be the experiences of women. However;

'[f]eminists have argued that traditional epistemologies, whether intentionally or unintentionally, systematically exclude the possibility that women could be "knowers" or agents of knowledge; they claim that the voice of science is a masculine one; that history is written from only the point of view of men (of the dominant class and race); that the subject of a traditional sociological sentence is always assumed to be a man.'¹²

Since knowledge is power, having the 'knower' tell their experiences from their own perspective is essential. With knowledge based on the lived experiences of women, feminist

⁹ See Mary Maynard *ibid.* who states that methodology involves the theory and analysis of how research should proceed, how research questions might be addressed and the criteria against which research findings might be evaluated.

¹⁰ In Sandra Harding's view, as discussed in *Epistemological Questions in Feminism and Methodology* (Indiana University Press 1987), there are stages in the development of feminist epistemology. These include feminist empiricism and feminist standpoint analysis. Feminist empiricism suggests that it is possible to remove sexist and other biases from the processes of research, particularly when problems are initially being identified and defined, in the belief that, once these have been eliminated, value neutral work will have been produced. Feminist standpoint analysis suggests that understanding women's lives from a committed feminist exploration of their experiences of oppression produces more complete and less distorted knowledge than that produced by men.

¹¹ Sandra Harding (ed), *Feminism and Methodology* (Open University Press 1987) 2.

¹² *Ibid.* See also the discussion of Edward Said's work in chapter 3 above.

claims can be scientifically preferable in that they originate in, and are tested against, a more complete and less distorting version of truth.¹³

The exclusion of women's knowledge and experience has had a negative effect in matters concerning African women because their voices have been silenced and they have been rendered invisible. Women were not significant in terms of the ways societies developed because they were not present in bureaucracies or hierarchies where changes in social or political life were being determined.¹⁴ In a postcolonial state like Zambia, knowledge that was imparted by the colonial state is seen as *the* measure of truth. This mostly had to do with the fact that the colonial administrators saw their knowledge as superior and the local knowledge as inferior and, therefore, needed to civilize and educate the local people.¹⁵ The project of enlightenment is often referred to as 'modernity' and it is that project which is claimed to have provided the stimulus for industrial revolution, the philosophy of liberalism, the development of disciplines in sciences and the development of public education.¹⁶ In the postcolonial state, the patriarchal nature of knowledge has continued in the sense that men consider themselves to be 'knowers' and the people who 'made' history were the people who developed the underpinnings of the state - the economists, scientists, bureaucrats and philosophers.¹⁷

Having women tell their story is important because it enables us to see the world through their experience. Additionally, while feminism in its early incarnations tended to see all women as a group and did not differentiate between different classes or racial background, the approach now is to be more inclusive – recognising that not all women are the same. Hence, having acknowledged the importance of feminist research it is essential when doing research in a postcolonial state like Zambia, to take into consideration the gender power relations at play and how they affect women.

While objectivity is important in research, there are a number of factors that may, and do, influence the researcher in carrying out their activities. It is important to treat those who are the subjects of research as people and not as mere mines of information to be exploited by the

¹³ Sandra Harding (ed), *Epistemological Questions in Feminism and Methodology* (Indiana University Press 1987) 184.

¹⁴ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Ltd 2001) 31.

¹⁵ Edward Said, *Orientalism* (Penguin Books 1978; Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *Rosalind Morris Reflection on the History of an Idea: Can the Subaltern Speak?* (Columbia University Press 2010).

¹⁶ Ibid 58.

¹⁷ Ibid 32.

researcher as the neutral collector of 'facts'.¹⁸ Hence when doing research, it is essential to ensure that one positions oneself in a way that does not portray the myth of total objectivity.

Reflexivity starts by identifying preconceptions brought into the project by the researcher, representing previous personal and professional experiences, pre-study beliefs about how things are and what is to be investigated, motivation and qualifications for exploration of the field, and perspectives and theoretical foundations related to education and interests.¹⁹

Reflexivity – or writing the personal into research - is important in feminist social sciences as a strategy for debunking the myth of total objectivity.²⁰

As much as objectivity is important, it is important to acknowledge that knowledge is partial and the researcher's perspective will be affected by his or her background.²¹ In fully acknowledging the researcher's position in relation to the research subjects, 'the researcher should be aware of any biases that come with doing the research in question. The use of the first person voice (e.g., "I said," or "They reacted to me by . . .") effectively and appropriately reminds readers of the researcher's presence and influence in participating and interpreting the scene.'²²

I, as the researcher in this project, had a shared position with the women with whom I conducted focus group discussions because I am female and because we speak the same language and we have the same nationality. Because of these shared experiences, the participants were able to be more open in our exchanges. Coming from the 'shared experience' position, I was better equipped with insights and the ability to understand implied content, and was more sensitized to certain aspects of the data.²³

However, most of the women with whom I was dealing, had very little formal education, while I am, on the other hand, a lawyer by profession. This may have had an impact on power relations. I could not help but go into the research project with preconceived ideas because of

¹⁸ Kimk V.L. England, 'Getting Personal: Reflexivity, Positionality and Feminist Research' (1994) 46 (1) *The Professional Geographer* 80; See also Edward Said, *Orientalism* (Penguin Books 1978).

¹⁹ Kirsti Malterud, 'Qualitative Research: Standards, Challenges, and Guidelines' (2001) 358 *The Lancet* 483, 484.

²⁰ Karen Henwood and Nick Pidgeon, 'Remaking the Link: Qualitative Research and Feminist Stand Point Theory' (1995) 5 (1) *Feminism and Psychology* 7-30.

²¹ Gayatri Chakravorty Spivak, 'Culture Alive Conference' (1995) 5 *Austl. Feminist. L.J.* 3.

²² Sarah J. Tracy, 'Qualitative Quality: Eight 'Big-Tent' Criteria for Excellent Qualitative Research' (2010) 16 (10) *Qualitative Inquiry* 837-851.

²³ Roni Berger, 'Now I See it, Now I don't: Researcher's Position and Reflexivity in Qualitative Research' (2015) 15(2) *Qualitative Research* 219-239.

my background and education. Therefore, it is important to note that when one is conducting research, one is usually influenced by one's own beliefs. In research reports, one frequently finds the argument that the sexist and androcentric claims to which the researcher objects are caused by social biases.²⁴ This will indeed apply whether the research is done by female or male researchers. There is a recognition that the cultural beliefs and behaviours of feminist researchers shape the results of their analyses no less than do those of sexist and androcentric researchers.²⁵ As noted above, that is when reflexivity should come in.

It is 'understood that by listening to the voices of women (in their context) and others oppressed and made 'other', and taking full account of their experiences in their struggles against oppression, the 'truth', or at least a form of truth, can be revealed and action taken.'²⁶ When it comes to GBV, women will experience it differently compared to men. In addition, as much as the standpoint position is important in feminist research, it is important to be conscious of the fact that women will experience discrimination differently and, therefore, there is always more than one standpoint position.²⁷ While discrimination is institutionalised and almost all women do experience discrimination, the kind of discrimination may differ according to race, ethnicity, socio-economic background and status in society.

This leads us in particular to the necessity to explore fully and in particular the intersections of gender and culture as they affect incidences of GBV in Zambia. It is vital to have a theory that explains the relationship between race and gender in order to make the findings of the study more credible.

If feminism is to fully confront racism and heterosexism, if it is to be able to analyse the interrelationships between class, race, gender and other forms of oppression, then it cannot let its focus of research remain with experience alone. One way of going beyond this is to use theoretical knowledge to address some of the silences in our empirical work.²⁸

²⁴ Sandra Harding, *Whose Science? Whose Knowledge?: Thinking From Women's Lives* (Cornell University Press 1991) 112.

²⁵ Sandra Harding, *Epistemological Questions in Feminism and Methodology* (Indiana University Press 1987) 9.

²⁶ Barbara Fawcett and Jeff Hearn, 'Researching Others: Epistemology, Experience, Standpoints and Participation' (2004) 7(3) *International Journal of Social Research* 201-218.

²⁷ Mary Maynard, 'Methods, Practice and Epistemology: The Debate about Feminism and Research' argues that 'although it may be tempting to regard each standpoint as equally valid, this may be difficult when the power relations between women themselves differ. This is can also refer to research that is carried in one country because women's position do differ.'

²⁸ Mary Maynard, 'Methods, Practice and Epistemology: The Debate about Feminism and Research' in Mary Maynard and June Purvis (eds), *Researching Women's Lives from A Feminist Perspective* (Taylor and Francis 2005) 24.

The deafening silence of some Western feminists in addressing issues of racial inequality for women is important to acknowledge and is now starting to be redressed.

‘Feminist analysis has moved beyond the longstanding critique of the focus on class in classical sociology, beyond the construction of a special set of studies of gender parallel to sub-fields of ethnicity, disability, age, sexual orientation and religion and towards the theoretical recognition of the importance of the intersection of multiple inequalities, although there remain significant differences as to how this should proceed.’²⁹

When looking at a post-colonial state like Zambia, intersectionality as a tool of analysis is extremely important.³⁰ As argued in the preceding chapter, GBV in Zambia is not only a result of male dominance, but is also a product of colonialism and undoubtedly is affected by other factors such as class, corruption and poverty. This is important to acknowledge since women are affected differently by different types of discrimination and many feminist researchers are now acutely aware of the limitations of gender as a single analytical category.³¹

I too, even before embarking on my thesis, was very much aware of this limitation and had to choose an approach that would ensure that the problem of GBV would be looked at in its entirety. A consideration of intersectionality helps to demonstrate the different effects of GBV in a postcolonial state such as Zambia compared with its effects in a country that has not experienced colonialism.

4.4 The Methods Employed in Carrying out the Empirical Research

I decided to choose qualitative research methods to carry out the empirical aspects of my research because I was of the view that a topic like mine required a flexible and, perhaps, broader approach than traditional doctrinal legal scholarship and that adopting qualitative research methods may improve the overall quality of the results.³² Qualitative research responds well to social settings and chimed with my ambition to investigate the settings and context of incidences of GBV in Zambia. I am persuaded, therefore, of the merits of the ‘broad

²⁹ Sylvia Walby, Jo Armstrong and Sofia Strid, ‘Intersectionality: Multiple Inequalities in Social Theory’ (2012) 46 (2) *Sociology* 224.

³⁰ Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989 *U Chi Legal F* 139, 155.

³¹ Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30(3) *Signs* 1771.

³² Clive Seale, ‘Quality in Qualitative Research’ (1999) 5(4) *Qualitative Inquiry* 465.

view that to understand human affairs it is insufficient to rely on quantitative survey and statistics, and necessary instead to delve deep into the subjective qualities that govern behaviour.³³

Developing qualitative research questions, however, needs careful thought about how the direction of the inquiry will position the researcher in relation to participants and what the implications are for the participants' lives.³⁴ Knowing that I was to be interviewing victims of GBV meant that I had to think through the ethical issues of the project very carefully since during the process of planning and designing a qualitative study, researchers need to consider what types of ethical issues might surface and how to respond to these.³⁵ Coming from Zambia, I am also aware of the cultural implications of women talking about issues around men and sexuality. As noted by Denzin and Lincoln:

‘Qualitative research involves the studied use and collection of a variety of empirical materials-case study; personal experiences; introspection; life story; interview; artifacts; cultural texts and productions; observational, historical, interactional, and visual texts, and visual texts – that describe routine and problematic moments and meanings in individuals’ lives.’³⁶

Due to the sensitivity of the topic, therefore, I had to enlist the help of local women who acted as gate keepers within their communities in order to carry out my focus group discussions and interviews in rural areas.

Qualitative methods also accommodate an approach to the total process of research which fully recognises the critical, and indeed necessary, inter-relationship between the subjectivities of both researcher and her participants in the social construction of knowledge.³⁷ Since my topic is very sensitive, and knowledge surrounding it may be disturbing to those involved, I felt that there was a need to make sure that the survivors and those dealing with survivors felt safe to talk about their experiences through the medium of focus groups and interviews. The method

³³ Adrian Holliday, *Doing and Writing Qualitative Research* (2nd ed, Sage 2007) 7.

³⁴ Jane Agee, ‘Developing Qualitative Research Question: A Reflective Process’ (2009) 22(4) *International Journal of Qualitative Studies in Education* 431.

³⁵ John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (3rd edn, SAGE 2013)56; My project was approved by the Social Sciences Ethics Committee of the University of Sussex on 17th February, 2016. Application No. ER/ML428/1.

³⁶ Norman K. Denzin and Yvonna S. Lincoln, *Introduction: The Discipline and Practice of Qualitative Research* (Sage Publications 2011) 3.

³⁷ Karen Henwood and Nick Pidgeon, ‘Remaking the Link: Qualitative Research and Feminist Stand Point Theory’ (1995) 5(1) *Feminism and Psychology* 7.

of talking to victims is particularly useful in allowing participants to generate their own questions, frames and concepts and to pursue their own priorities on their own terms and in their own vocabulary.³⁸ Focus group discussions, in particular, enable people, especially as a social group, to express their views more clearly in their own voices. I was constantly mindful that, as a researcher, I should not impose my definition of reality on those researched, for to do so would undermine my research and my findings.³⁹ Talking directly to the survivors of abuse, however, would enable me obtain first-hand information from the women who are the 'knowers' in this field. Thus, my choice of methodology enabled me to hear different voices describing the reality of GBV in Zambia today and the impact of the legal system on the experiences of survivors.

Part of the process of developing questions in qualitative research is being reflective about how the questions will affect participants' lives and how the questions will position the researcher in relation to participants.⁴⁰ While qualitative research was used, it is very important to bear in mind that it can also be biased if wrong questions are asked. This bias can sometimes be the result of the unequal power relations between the researcher and the researched. It would be naive to assume that qualitative methods are free of the problems of unequal power relations in a field work context.⁴¹ Therefore, I endeavoured to ensure that the women in the focus groups discussions were as comfortable as possible with me and that they understood my background and motivations. I made the women comfortable by having a gate keeper introduce me and explaining to them what the research was all about. After the introductions, I made it clear that GBV affects all of us and proceeded to talk about politics for about 10-15 minutes since Zambia was holding presidential and parliamentary elections that year.

As mentioned above, the two main methods that were used for the empirical part of my research were focus group discussions and individual interviews. Interviews are more effective for tapping into individual biographies, but focus groups are invaluable for examining how knowledge, ideas, story-telling, self-presentation and linguistic exchanges operate within a given cultural context.⁴² 'The focus group is a broader and collectivistic exercise rather than an

³⁸ Rosaline S. Barbour and Jenny Kitzinger (ed), *Developing Focus Group Research: Politics, Theory and practice* (Sage 1999)5.

³⁹ Joan Acker, Kate Barry and Joke Esseveld, 'Objectivity and Truth: Problems in Doing Feminist Research,' (1983) 6(4) Women's Studies International Forum 423.

⁴⁰ Jane Agee, 'Developing Qualitative Research Questions: A Reflective Process' (2009) 22(4) International Journal of Qualitative Studies in Education 431.

⁴¹ Karen Henwood and Nick Pidgeon, 'Remaking the Link: Qualitative Research and Feminist Stand Point Theory' (1995) 5(1) Feminism and Psychology 7.

⁴² Ibid 5.

individualistic research method since it focuses on the multi-vocality of participants' attitudes, experiences and beliefs and produces conversations and exchanges between participants.'⁴³ In this regard, I believe that focus groups can be an important element in the advancement of an agenda of social justice for women, because they can serve to expose and validate women's everyday experiences of subjugation and their individual and *collective* survival and resistance strategies.⁴⁴

4.4.1 The Selection of Participants and Questions

In total I carried out sixteen (16) interviews (12 elite and 4 interviews with the victims/survivors of GBV) and held two focus groups in Zambia between April and August, 2016. The interviews and focus group discussions were conducted in the capital Lusaka, Lwiimba (a district near Lusaka), Chipata the provincial capital of the Eastern Province of Zambia, and Mfuwe in Mambwe district in the outskirts of Chipata. In the focus groups there were thirteen (13) women participants in the Mfuwe group and nine (9) in Lwiimba. However, during the field work, I had to anticipate that I may have needed to recruit more participants than I actually wanted which would allow for the possibility that some people might change their minds at the last minute.⁴⁵ I felt that ultimately I had a satisfactory number of participants in each of the focus group in order to yield a fruitful discussion and to validate my findings. The reason why I chose this number was because I thought it was sufficient to get a good idea of what was being discussed. A bigger number would entail that some of the views are not heard and a smaller number would also result in having limited views of the discussion at hand. This chimes with the views of other researchers carrying out gender-related projects:

The rationale for this range of focus group size stems from the goal that focus groups should include enough participants to yield diversity in information provided, yet they should not include too many participants because large groups can create an environment where participants do not feel comfortable sharing their thoughts, opinions, beliefs, and experiences.⁴⁶

⁴³Ester Madriz, 'Focus Groups in Feminist Research' in Handbook of Qualitative Research (ed) N. Denzin and Y. Lincoln (2nd Ed) 836.

⁴⁴ Ibid.

⁴⁵ See further Sue Wilkinson, 'Focus Group: A Feminist Method' (1999) 23(2) Psychology of Women Quarterly 1999 221-244, for a discussion of using the method of focus groups to carry out feminist research projects.

⁴⁶ Sue Wilkinson, 'Focus Group: A Feminist Method' (1999) 23(2) Psychology of Women Quarterly 1999 221-244.

The selection of the participants in the focus group discussions involved both purposive and snowball methods of sampling. The selection of participants was determined by the research question, and because the research does not value representativeness in the same way as quantitative research, I was able to take a more purposive approach to sampling.⁴⁷ This meant that I was able to ‘select individuals and sites for study because they could purposefully inform an understanding of the research problem and central phenomenon in the study.’⁴⁸ I was attracted by the possibility that purposeful sampling allows for the selection of ‘information-rich cases for study in depth... [that is] those from which one can learn a great deal about issues of central importance to the purpose of the evaluation.’⁴⁹ The participants in the focus group discussion were generated particularly by purposive sampling and for this I enlisted the help of organisations involved in women’s activities (gate keepers). In Mfuwe and Lwiimba, this involved going through several individuals/organisations: in Mfuwe I was introduced to Jennipher Chabwela through Care International and in Lwiimba the gate keeper was The Ministry of Community Development and Social Services. The less purposive method of snowballing was used for the one-on-one interviews with GBV survivors and elites.⁵⁰ The interviewees were contacted again through local organisations, legal institutions and contacts in Zambia.

The research questions which were used to generate discussions in the focus groups⁵¹ and interviews⁵² were approved by the University of Sussex Social Sciences Ethics Committee before field work commenced.⁵³ I had devised the interview and focus group questions with the help of my supervisors in advance to ensure that they did not disadvantage or upset the participants. The objective throughout was to conduct the focus group discussions and the interviews (especially those involving the victims) in a friendly and non-judgmental way in order to put participants at their ease and to facilitate discussion.

⁴⁷ Marie Crowe, Maree Inder and Richard Porter, ‘Conducting qualitative research in mental health: Thematic and Content Analysis’ (2015) 49(7) *Australian and New Zealand Journal of Psychiatry* 616-623.

⁴⁸ John W. Creswell ed, *Qualitative inquiry and research design: Choosing Among Five Approaches* (Sage Publishers, 2007) 125.

⁴⁹ Michael Quinn Patton, *How to Use Qualitative Methods in Evaluation* (Sage, California 1987) 52.

⁵⁰ Ibid 40.

⁵¹ See Appendix 2 183.

⁵² For one on one interviews with victims/survivors see questions in Appendix 3; for judges and court officials see Appendix 4; NGO’S Appendix 5; VSU Appendix 6.

⁵³ My field work was approved by the Social Sciences Ethics Committee of the University of Sussex on 17th February, 2016. Application No. ER/ML428/1.

4.4.2 The Focus Group Discussions

As mentioned above, the data gathered from the focus group discussions came from two groups that were held in Lwiimba and Mfuwe. The focus groups were made up of women only since I was aware that, especially in rural areas, putting men and women together in a focus group may result in the women not expressing their views and in the men taking over proceedings. The men would have been more outspoken in such groups while the women would have been inhibited in expressing themselves because in Zambian rural areas, it is regarded as impolite for women to talk when men are talking. The female participants did, though, cover a wide age range from 19 to 70 years old. I have used coding for all the participants names who took part in interviews and focus group discussions. This is because the topic is of a very sensitive nature and therefore the need to protect the identity of participants.⁵⁴

Lwiimba, near Chongwe district is a town in a rural area and relies mostly on agriculture. I used the Ministry of Community Development and Social Services as an initial point of contact. I approached the Ministry because it is involved with a lot of projects in the community and has a number of NGO partners. As explained above, it would have been difficult to organise a focus group discussion without having a local person who knew the area well. I needed a gate keeper in order to gain the trust of the participants.⁵⁵

On 1st June, 2016, I went to the offices of the Ministry of Community Development and Social Services in Chongwe and drove to Lwiimba with a community mobiliser⁵⁶ from the Ministry. When I arrived there, I found a few women waiting (the meeting was held under a tree) but the area was isolated therefore we did not have a lot of disturbances. I was encouraged to think of having an outdoor space for discussion by having read that '[y]ou can conduct a focus group discussion in any type of location, both indoors and outdoors, as long as the location is quiet, private, comfortable, free of distractions and easy for the participants to locate.'⁵⁷ While waiting for the rest of the group to arrive, we discussed general issues in the community such as the elections that were coming up. Again, I tried to follow the advice that I had read about in preparing for my field work:

⁵⁴ See Appendix 7 for the coding of the name of participants at 187.

⁵⁵ Rosaline S. Barbour and Jenny Kitzinger (ed), *Developing Focus Group Research: Politics, Theory and Practice* (Sage 1999) 10.

⁵⁶ Community mobiliser is the title of the person in the Ministry who goes into the community and arrange for meetings or relies information within the community.

⁵⁷ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage: London 2011) 152.

‘When meeting an interviewee for the first time, it is important not to rush straight into asking your interview questions but to take time to become acquainted with the interviewee, so that you both become comfortable.’⁵⁸

Before starting with the discussion, I explained my research topic to the group and made it clear that they should only talk when they were comfortable to do so and that no one would judge the participants on what they said. I emphasised that focus group discussions are important in that they can allow women to share their experiences collectively. I was mindful of Madriz’s advice that:

‘[f]ocus groups can be an important element in the advancement of an agenda of social justice for women, because they can serve to expose and validate women’s everyday experiences of subjugation and their individual and collective survival and resistance strategies.’⁵⁹

Since in my thesis I argue that GBV affects the community as a whole particularly in a postcolonial setting, having a collective focus group discussion was important to enable me hear how women shared their common experiences and also the way that GBV had affected them as a group.

In Mfuwe, I found my contact person Jennipher Chabwela through an NGO called Care International. I was given her number and before travelling to Mfuwe on 28th June, 2016, we spoke over the phone. Mfuwe is an area in the Mambwe district of Eastern Province that hosts the Luangwa National Park. I chose Mfuwe because of the dynamics at play in that area. Unlike Lwiimba, most people who live in Mfuwe are not originally from that area. It is a tourist area and people usually go there in search of employment and for some women, because there are always new people in that area, they go specifically to engage in sex work. Although it is in a rural part of Zambia, I could tell from the discussion that the women in Mfuwe were not as rigid about certain traditions as people in most rural areas would be. This is so because they did not have the same attachment to the concept of the ‘village’ found in most rural areas in Zambia. Villages are usually formed as a result of family ties, however most villages in Mfuwe especially those near the national park are a result of informal settlements. It is possible to find villages that are based on family and other ties but where I went to conduct the focus group discussion, there were only informal settlements. Basically, people had moved to that area,

⁵⁸ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage: London 2011) 124.

⁵⁹ Ester Madriz, ‘Focus Groups in Feminist Research’ in *Handbook of Qualitative Research* (ed) N. Denzin and Y. Lincoln (2nd Ed) 836.

bought some land and built houses or huts. In some cases, their children may also have built a house next to their parents but other families would also buy land from the same area and build their homes there. I was conscious immediately from the focus group discussion in Mfuwe that there was a different experience and understanding of custom and tradition. The participants talked about men cheating on their wives but they also talked casually about married women having affairs (and did not seem to frown upon it as much as I would have expected). A story was even narrated in the discussion on how a man was killed by an elephant because he went out looking for his wife, who apparently was with another man!⁶⁰

I had agreed with the contact person in Mfuwe that the focus group discussion would be held at 10am. We agreed to meet at her house and since the meeting was in the morning I thought that we could have a meal together after the meeting. So I bought some mealie meal (to make nsima, which is the Zambian staple food), some chicken and vegetables. For the focus group discussions (and also elite interviews) a recorder was used. Here I was aware that data can be collected via a range of means, e.g., observation, textual constructions, open-ended questionnaires, but that keeping an accurate record of the meeting was important.⁶¹

As mentioned above, the focus groups were made up only of women. This was really important, since although men are central in the fight against GBV, statistics show that women are more likely than men to be victims.⁶² The reference to feminist epistemology above ‘identifies woman's status as that of victim, and then privileges that status by claiming that it gives access to understanding about oppression that others cannot have.’⁶³ A key aim of this thesis is to bring out the experiences of women with regard to GBV and to honour women’s experiences and to hear their side of the story. Because of the intersectionality of discrimination that women experience, their experience as survivors can be totally different compared to that of men and women may be more comfortable in talking about their experiences in a woman-only setting.

When I started the focus group discussion in Lwiimba, I noticed that the women were a bit shy. No one wanted to start the conversation but after a bit of prompting, (I had to emphasise how we were all affected by GBV and how we either have experienced it or know of somebody who had experienced it) they opened up. One of the key skills in facilitating a focus group is to

⁶⁰ For more extensive discussion of the findings of the focus groups and interviews see the next chapter.

⁶¹ Marie Crowe, Maree Inder and Richard Porter, ‘Conducting qualitative research in mental health: Thematic and Content Analysis’ (2015) 49(7) Australian and New Zealand Journal of Psychiatry 616-623.

⁶² Avocats Sans Frontières Asbl, ‘Challenges of Implementation of the Anti-Gender-Based Violence Act 2011 in Zambia’ < www.asf.be/wp-content/uploads/2017/09/ASF_ZAM_StudyAntiGBVAct_201708_EN > accessed on 12th March, 2018.

⁶³ Katharine T. Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harv. L.Rev 829.

ensure that interaction between research participants is encouraged.⁶⁴ I was slightly concerned that no one wanted to initiate the conversation, however after one person started talking, most of the participants chipped in (especially those aged 30 and above). It took a while for the younger members of the group to join the conversation and they were invited specifically to say something. I was of the view that this may have something to do with respect (age is an important factor in Zambian society) where the young ones will let the elders talk first. However, it may also have been that the younger participants were not confident enough to talk about their experiences. I was starkly reminded that '[o]ne of the most challenging tasks of a moderator is to manage various personalities of participants in the group to ensure that everyone is given an opportunity to contribute to the discussion.'⁶⁵

From the discussion, I noticed that although the majority of the group had all experienced GBV at one point or the other, and although the older women were more vocal, it was actually the younger women who seemed to be experiencing it more and the degree of violence seem also to be more severe than that of the older generation.

The experience of the focus group in Mfuwe was different from that in Lwiimba with regard to the women participating in the discussion. In the first five minutes of the focus group discussion, the contact person FGMP1 was the one talking. I realised that I needed to shift the balance of power, so I sought to encourage others to participate by intervening and proactively inviting their contributions.

It is important to emphasise the collective spirit of a focus group discussion and how this came out of my groups. 'Focus groups have been labelled a form of humanistic research; they generate empathy, openness, active listening, and various types of interactions with research participants.'⁶⁶ Because of this humanistic approach, I felt that the groups were particularly useful for people who are marginalised or have experienced discrimination. The freedom of participants to construct their own meanings and hear those of others is one of the strengths and advantages of this form of research over survey research.⁶⁷ The singularity of focus groups is that they allow social scientists to observe the most important sociological process –

⁶⁴ Rosaline S. Barbour and Jenny Kitzinger (ed), *Developing Focus Group Research: Politics, Theory and Practice* (Sage 1999) 13.

⁶⁵ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage: London 2011) 160.

⁶⁶ David W. Stewart, Prem N. Shamdasani and Dennis W. Rock, *Focus Groups: Theory and Practice* (2nd ed Thousand Oaks London 2007) 12.

⁶⁷ David E Morrison, *The Search for a Method: Focus Group and the Development of Mass Communication Research* (University of Luton Press 1998) 179.

collective human interaction.⁶⁸ Focus groups ‘avoid the artificiality of many psychological methods because they draw on people’s normal, everyday experiences of talking and arguing with families, friends, and colleagues about events and issues in their everyday lives.’⁶⁹ This was the general spirit of the discussions which ensued in my focus groups and the focus groups enabled discussion to be ‘naturalistic’ insofar as they mirrored the processes of communication in everyday social interaction.⁷⁰ Being in a group enables women to express their views more and bond as a group. When I was conducting the focus group discussion in Mfuwe, the women cooked together and we also ate together. After the discussion, the women danced to traditional songs. Dancing to traditional songs is usually done when people are celebrating. Therefore, the dancing may have been done as a show of the solidarity of the bond that the women shared.

However, while observing the natural flow of conversation and bonding experience that may be present in a focus group discussion, it is also important to be aware of certain types of behaviour. People will know that they are being observed and this can affect forms of verbal communication, body language, and self-report data.⁷¹ The other point to be mindful of is that members of the focus group may sometimes not fully express themselves because of the presence of the facilitator. In addition, ‘given the necessary presence of the facilitator, it is difficult to discern how ‘authentic’ the social interaction in a focus group really is.’⁷² As a researcher, I did ensure that the participants were as comfortable as possible. I was aware of all the above mentioned constraints and thought that it was important to have some sort of ice-breaker to make the women as comfortable as possible.

I was also aware of the group dynamics that were at play in that some members of the group may be more outspoken and therefore likely to overshadow others. I did ensure that each member of the focus groups was given a chance to express themselves. There were times when I had to probe participants to express themselves.

Other feminist researchers who have used focus groups (and other kinds of group work) have noted similar issues but have nevertheless taken advantage of the method to illustrate how arguments are developed and identities elaborated

⁶⁸ Ester Madriz, ‘Focus Groups in Feminist Research’ in *Handbook of Qualitative Research* (ed) N. Denzin and Y. Lincoln (3rd ed 2000 Thousand Oaks, California: Sage) 836.

⁶⁹ Sue Wilkinson, ‘Focus Group: A Feminist Method’ (1999) 23(2) *Psychology of Women Quarterly* 1999, 221-244.

⁷⁰ Sue Wilkinson, ‘Focus Group’ (1999) 23 (2) *Psychology of Women Quarterly*, 221-244.

⁷¹ Ester Madriz, ‘Focus Groups in Feminist Research’ in N. Denzin and Y. Lincoln (eds) *Handbook of Qualitative Research* (3rd Ed) 836.

⁷² Ibid.

in a group context, typically through challenge and provocation from other members of the group.⁷³

The clear advantage of focus groups over individual interviews is that they do make it possible for researchers to observe the interactive processes occurring among participants.⁷⁴ For example, in Lwiimba, one of the members was of the view that people did report incidents of GBV to the police but other women in the group disagreed with the view stating that people rarely involve the police. The social context of the focus group provides an opportunity to examine how people engage in generating meaning collectively, and how opinions are formed, expressed, and (sometimes) modified within the context of discussion amid debate with others.⁷⁵ It also allows for dissenting views and opinions to be aired and discussed and for participants to be exposed to alternative perspectives that they may never have considered.

It is important also to note that the focus groups allowed women to exchange views using their own language and expressions and I, as the researcher, was able to understand this given my background. I expected to let the participants express themselves in a language that was comfortable to them,⁷⁶ and to provide a sensitive understanding of their shared symbols, meanings and vocabularies.⁷⁷ For example, in the Mfuwe focus group discussion, the women talked about illicit beer brewing using the phrase ‘ku chi giidi’, in the context of a discussion about how most women in the community resort to selling illicit beer so as to make ends meet because their husbands do not provide for the family.

The use of local language and expressions coloured the discussions of the groups and again points to the necessity to consider context, tradition and culture in this type of research.

4.4.3 The Interviews

In addition to the two focus groups, I also carried out sixteen (16) one-on-one interviews in Zambia. The purpose of carrying out interviews was to obtain qualitative descriptions of the life-world of the interviewees with respect to their interpretation of meanings and

⁷³ Sue Wilkinson, ‘Focus Group: A Feminist Method’ (1999) 23(2) *Psychology of Women Quarterly* 1999, 221-244.

⁷⁴ Ester Madriz, ‘Focus Groups in Feminist Research’ in N. Denzin and Y. Lincoln (eds) *Handbook of Qualitative Research* (3rd Ed) 836.

⁷⁵ Sue Wilkinson, ‘How Useful are Focus Groups’ in Rosaline S. Barbour and Jenny Kitzinger, *Feminist Research in Developing Focus Group Research: Politics, Theory and Practice* (Sage 1999) 65.

⁷⁶ Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in Rosalind Morris *Reflection on the History of an Idea: Can the Subaltern Speak?* (Columbia University Press 2010).

⁷⁷ Ester Madriz, ‘Focus Groups in Feminist Research’ in *Handbook of Qualitative Research* (ed) N. Denzin and Y. Lincoln (3rd Ed) 840.

experiences.⁷⁸ In order to ensure that I obtained as much specific data as possible to enable me to answer my research questions, I used semi-structured interviews. The interview questions offered a sequence of topics to be covered in each interview while at the same time providing an openness enabling me to change the sequence and form of questions in order to follow up on answers given and stories told by the subjects.⁷⁹

I conducted twelve (12) elite interviews and four (4) one-on-one interviews with survivors of GBV. The elite interviews were carried out with policy-makers, members of the judiciary and with representatives from NGOs and other international organisations.⁸⁰ The interview questions were not necessarily different from the ones used in the focus groups and the questions also differed depending on whether I was talking to elites or survivors/victims of GBV.

In order to carry out the interviews with survivors of GBV, I was able to make use of contacts made during the focus group discussions. I had asked the focus group participants if anyone would be willing to volunteer for a one-on-one interview. I stated that if at the end of the focus group discussion, they felt that they would like to talk about their experiences, then they should let me know. I realised that it was not going to be easy for survivors to talk to me as a stranger about their experiences without developing a rapport. And since I did not live in the areas where I carried out the focus group discussions, I thought that it would be easier after a focus group discussion to approach potential interviewees because then people would be more open to me having already participated in the group discussion. I was aware that '[w]hen rapport is established the interviewee may feel more comfortable to share their thoughts or personal feelings with the interviewer than earlier on.'⁸¹

After the focus group discussions ended, some women did volunteer to talk about their experiences. We found a private place to talk about their experiences. I explained to each woman that I was a researcher and not a counsellor by qualification and that if they needed someone who would help them they could go for counselling. Although I talked about counsellors, I also encouraged women to share their experiences with friends within their communities because sometimes it is difficult to find a trained counsellor to deal with the

⁷⁸ Steiner Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (Thousand Oaks, California: Sage 1996) 124.

⁷⁹ Ibid 124.

⁸⁰ Please see Appendix 3 and 4 for interviews questions and Appendix 7 for the code names of interviewees at the end of the thesis.

⁸¹ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage: London 2011) 125.

effects of GBV. This may be due to the fact that for a long time, GBV has been regarded as a private issue and therefore family members would always intervene to provide support. This worked well some years ago because of the close family networks that existed in Zambia and in most African countries. However, because of urbanisation and people having to move away from families (as noted above in the context of the focus group in Mfuwe), the extended family networks are dying. Therefore, people are now resorting to alternative means although counselling as a service is still rarely utilised. I therefore needed to be mindful about the vulnerability of the GBV survivors that I interviewed and this had been an important consideration in the presentation of my research proposal to the ethics committee at the University of Sussex.⁸²

I was of the view that doing semi-structured interviews would allow me to gain insights into how survivors of GBV in Zambia have experienced violence and what, if any, legal redress they had received. I was aware that the interviewer has access to the world of the interviewee and that the interviewee's lived experiences may be communicated not only by words, but by tone of voice, expressions, and gestures in the natural flow of conversation.⁸³ The interviews did indeed provide me with first-hand information of the experience of the survivors and their views of law enforcement. This was imperative in that it provided a direct way of finding out whether the legal instruments on GBV were being implemented and also the way in which loopholes in the law may be addressed in the fight against GBV.

Twelve (12) interviews were also carried out with elites in the field of GBV in Zambia. These interviews involved a range of participants including a key judicial figure in the fight against GBV in Zambia, a representative from the Legal Aid Clinic for Women, magistrates dealing with victims of GBV, and representatives from supporting partners of programmes against GBV such as the United Nations Development Programme (UNDP), International Labour Organisation (ILO), Women in Law in Southern Africa (WILSA) and the Victims Support Unit (VSU) in Zambia. It was important to talk to this range of stakeholders to understand their perceptions of the way in which the law on GBV is or is not working in Zambia. Of course, as might have been anticipated, these elites were more articulate in their understandings of the law and also in their concerns around its operation. They offered important insights into the

⁸² ER/ML428/1 approval obtained on the 17th February, 2016.

⁸³ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage: London 2011) 125.

workings of the police and judicial processes in tackling GBV and also the work of organisations supporting victims.

4.4.4 Handling the Data

Once the focus groups and interviews had taken place I had to manage and make sense of the data collected.

The ‘first major activity, once the setting has been defined and engaged with, is data collection and analysis. This involves the data, which is what the researcher sees or hears which is collected or recorded, the corpus of data, which is all the data which is used in the research, and data analysis, which is the process of making sense of the data and discovering what it has to say.’⁸⁴

With regards to data analysis the thesis used transcript based analysis. Transcript-based analysis represents the most rigorous and time-intensive mode of analysing data.⁸⁵ The ‘transcribed data can then be analysed alongside field notes constructed by the moderator and any notes extracted from any debriefing that has taken place between members of the group or with the gate-keeper.’⁸⁶ Data analysis involves reading the data itself in order to get an accurate view of the themes. As the aim of a focus group is to provide opportunities for a relatively free-flowing and interactive exchange of views, it is less structured and can be harder to analyse compared with a one-to-one interview which is likely to be more structured.⁸⁷

The interviews and focus group discussions were transcribed by myself and coded to reflect key themes. In some studies, interviews or group discussions are conducted in a different language from that of the researcher, so the transcripts need to be translated prior to data analysis.⁸⁸ Here it is important to note that the focus group discussions were conducted in *Nyanja* which is one of the local languages in Zambia. ‘Prior knowledge (or the ability to pick up on, or interpret) the language, terminology, gestures and cultural meanings of the particular groups with whom one is working is crucial.’⁸⁹ I understand the language very well because it

⁸⁴ Adrian Holliday, *Doing and Writing Qualitative Research* (2nd ed, Sage 2007) 89.

⁸⁵ Sue Wilkinson, ‘Focus Group: A Feminist Method’ (1999) 23(2) *Psychology of Women Quarterly* 1999 221.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage: London 2011) 214.

⁸⁹ Rosaline S. Barbour and Jenny Kitzinger (ed), *Developing Focus Group Research: Politics, Theory and Practice* (Sage 1999) 13.

is my mother tongue and I worked hard to translate my transcripts whilst still doing field work so as to be surrounded by the local language.

The data was coded to draw out particular themes and familiar narratives from the words of the participants. The themes are discussed more fully in chapter 5 below. They reflect the experiences of women and professionals with regard to domestic violence against women, sexual abuse, economic dependency, culture and patriarchy, law enforcement and the inadequacies of the law on GBV in Zambia today.

4.5 The Limitations of the Empirical Study

It is important to acknowledge with any research that there are limitations as to what one can achieve. This study has looked at GBV in Zambia using research methods of focus group and interviews in which it is mainly women who were the subjects. This was done intentionally for the reasons explained above. However, the participants in the focus groups and the survivors of GBV were all heterosexual women and, in addition, there were no persons with physical disabilities among them. Therefore, my findings may not be a reflection of the situation of women with disabilities or those with different sexual orientations.

A further limitation, as also noted above, is that I was unable to offer formal counselling to the participants as might have been expected in a Western setting. The participants were encouraged to talk more about their experiences with their friends and families and if they thought that they needed medical help, they were also advised to visit hospitals or the VSU to seek counselling. In this case, it must be stated that if counselling services had been readily available, the survivors would have been encouraged to seek the services. However, in rural areas in Zambia, the services are not readily available and in urban areas, the services are usually reserved for serious cases of GBV.

The sampling methods used in the data collection were purposive and snowballing. There may be an argument that these methods can be biased as they depend on initial contacts. However, because of the nature of the research itself, it was imperative to use these methods. Purposive sampling was used specifically to identify participants who had direct experiences of the impact of the laws and policies on GBV on women. It was imperative for me, in order to answer my research questions accurately, to obtain views of the most affected people and in this case, that meant women with experiences of violence. However, due to these limitations, the views

expressed with regard to the findings from the participants for the study should not be taken as representing the views of all women in Zambia.

4.6 Conclusion

This chapter has outlined the methods used in the empirical part of my thesis. Carrying out this aspect of the research has had a significant impact upon the findings of the thesis since it has allowed me to gather primary data drawn from the first hand experiences of survivors of GBV and elites who work in this field. I enjoyed immensely the opportunity to talk to fellow Zambian women about their experiences and was heartened by the way in which the women bonded and shared their stories.

Using the tool of qualitative research, the thesis aims to contribute to the knowledge about GBV in Zambia through the lens of the experiences of Zambian women and not through dominant Western ideas or theories about violence against women. Interviewing policy-makers and the judiciary brought forth very different views from those of survivors and victims of GBV and this too was telling of the inadequacies in law enforcement. As will be explored in the chapter below, policy-makers were of the view that the law was reaching its intended targets whereas victims seemed far less aware of the laws and policies to tackle GBV. It is now, therefore, to the research findings that we turn in order to measure more fully the extent to which the law on GBV in Zambia is effective in tackling abuse against women.

Chapter 5:

Listening to the Voices and Experiences of GBV Survivors in Zambia:

The Findings of the Empirical Study

5.1 Introduction

The Anti-Gender-Based Violence Rules which came into effect in 2016 were seen as a positive step towards the implementation of the Act. They too though have limitations and in particular fail to take properly into consideration the criminal aspects of GBV.¹ The Rules brought into effect the eagerly anticipated gender fast track courts, the first of their kind in Southern Africa. It was envisioned by all the stakeholders involved that these courts would be the most appropriate to cater for the survivors of GBV.² However, the judiciary themselves, as we have seen above³, have reservations about the operation of the new courts which has meant that the Act is under used and that victims are not benefitting fully from its provisions. At the time of writing, stakeholders are trying to amend the Rules so that they could cover both civil and criminal aspects of GBV.⁴

The thesis has sought to present a theoretical framework through which GBV in Zambia can be viewed and the inadequacies of the present legal instruments analysed. In chapter 2, it was argued that writers and academics (including feminists) in the global north have used their knowledge to explain events in the global south without giving full recognition to the context of the global south. Chapter 3 explored the notion of culture and its relationship with social structures, legal institutions and GBV in Zambia. Combining a postcolonial perspective with feminist legal theory, the chapter considered the particular situation of Zambian women who live with the background of colonialism and whose culture has been misinterpreted by colonial administrators and local elite men, and who find themselves navigating a tight line between cultural expectations of them and their formal legal rights.⁵ It was imperative in the thesis to adopt a theoretical framework which would draw out the different aspects of the lives of

¹ See above, chapter 3.

² See above, chapter 3.

³ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

⁴ See above, chapter 3.

⁵ Bentzon et al, *Pursuing Ground Theory in Law: South-North Experiences in Developing Women's Law* (Tano-Aschehoug 1998) 51.

Zambian women and explain how they are subordinated and suffer GBV in ways which are different⁶, and have particular, compared with women in the global north.

The discrimination suffered by women in postcolonial Zambia, it is argued, is not simply a product of cultural relations and traditional expectations of women. However, the policies of the missionaries and the colonial administrators acquired at independence with regards to education and employment have continued to contribute to privileging the status of men in Zambia today. In order to continue with the status quo (from which they benefited), postcolonial educated men perpetuated a distorted version of customary law and falsely insisted that customary law was the only area that was not contaminated by Western influence. Hence, the postcolonial elites continued where the colonial government left off and carried. As argued in the preceding chapter, experiences are cardinal when it comes to research, and research involving women is no exception. Listening to the voices of those affected by GBV, and seeking to understand their perspectives and to situate them within the legal framework governing GBV in Zambia, has been an important aspect of the research for the thesis – one of the key aims of which is to critique the adequacy of the legal response to GBV for victims and survivors using a post-colonial feminist theory.

This Chapter uses the data generated from the field work described in chapter 4 to analyse GBV and the law in Zambia for its impact on women and on legal and other professionals who work with GBV survivors. The chapter is divided into two main parts reflecting the different groups of people who were in the focus groups and who were interviewed for this project. In the first part, the chapter discusses the experiences described by the victims and survivors of GBV in a post-colonial state, their involvement with law enforcement and with legal institutions. The second part examines GBV from the perspective of those working in institutions involved in tackling GBV, including the police, the judiciary, policy-makers and those working in NGOs.

The second part of the chapter takes a thematic approach in seeking to draw out and highlight various aspects of the discussions around GBV in Zambia today. This approach is designed to enable the interpretation of qualitative data in order to find patterns of meaning across the data.⁷ The first step in a thematic analysis involves becoming closely familiar with the data by reading

⁶ Refer to chapter 2.

⁷ Marie Crowe, Maree Inder and Richard Porter, 'Conducting qualitative research in mental health: Thematic and Content Analysis' (2015) 49(7) Australian and New Zealand Journal of Psychiatry, 616-623.

and re-reading the interview transcripts⁸ and to this end the data collected during the interviews and focus group discussions was repeatedly read, before being transcribed and coded by the researcher. From the coding (which was designed to pick up, in particular, responses to the issues raised in the research questions of the thesis, the various themes discussed in the chapter were selected.

The themes selected also seek to respond to points raised in the original research questions which underpin the thesis. In this regard I was mindful to keep the research questions at the forefront of my mind when selecting the appropriate themes for discussion and presentation.⁹

As will be seen from the discussion below, and perhaps not surprisingly, the findings reveal very different perceptions about the law on GBV between victims/survivors on the one hand, and professionals on the other. Those professionals, who were not at the direct receiving end of the law, tended to be far more positive and optimistic about the way in which the law and legal institutions are working to tackle GBV. However, the discussions with survivors suggest a different story in that there was a wide-spread ignorance of the law and, where participants did know that the law existed to protect them, they suggested that legal mechanisms, the police and other professionals were unsympathetic towards them, that the law was inaccessible to them and that, because of cultural expectations and values, disputes could be more easily dealt with in the community than through formal legal means.

5.2 Hearing the Voices of the Survivors of GBV in Zambia

In this first part of the chapter, this thesis will explore the narratives of the survivors of GBV in Zambia. The thesis look at the questions that where asked and the responses to the questions. It will then go on to put these answers into themes. As explained above, a number of themes were prevalent in the discussions with survivors who, while having a range of different experiences of GBV, raised similar concerns and expressed similar attitudes towards the legal system and the laws surrounding GBV together with their relationship to domestic issues, VAW, and the importance of culture in Zambian society. The themes which emerged from the discussions demonstrated key concerns around (1) domestic violence, (2) sexual abuse, (3) economic dependency, (4) culture and patriarchy and (5) the workings of the law.

⁸ *ibid*

⁹ Marie Crowe, Maree Inder and Richard Porter, 'Conducting qualitative research in mental health: Thematic and Content Analysis' (2015) 49(7) *Australian and New Zealand Journal of Psychiatry* 616-623.

Before analysing the data thematically, the next section will set out a factual account of the key questions asked of participants, what was said in reply and by whom.

5.3 Focus Group Discussion

During the focus group discussions, a number of questions were posed to the women.¹⁰ This section will look at some of the questions and see how the women responded to them in order to demonstrate the array of opinions and sentiments expressed by the participants.

The first question in the researcher led questions was on the understanding of the term gender-based-violence. Almost all women in both focus group discussions have something to say on their understanding of the term gender based violence and their views demonstrate a range of perspectives and understandings. According to FGLP9,

‘the violence we experience is that when men sell the crops, they usually have a say on how the money is distributed not women. Basically men, make all the household decisions.’¹¹

This is also supported by FGLP2:

‘yes, sometimes women talk back to their men but it is for a reason. For example when we harvest the men would sell everything and then leave home to go and live with other women. But when you complain you are beaten. But now we are grateful that we have loans provided for women.’¹²

One of the women narrated of how her husband forced himself on her.

‘My husband forces himself sexually on me. Whenever i refuse sex, he would go to other women. In the previous years he has left the matrimonial house on two occasions to go and live with other women. However, it has now become rare for him to force himself on me after counselling from the elders. Men need also to be taught on how to treat women. It is not just about teaching women, men should also be involved in the fight against GBV.’¹³

¹⁰ See Appendix 2; Focus Group: Researcher-Led Questions.

¹¹ Focus Group in Lwiimba (Chongwe, Zambia 1st June, 2016).

¹² Ibid.

¹³ FGLP2, Lwiimba focus Group discussion (Chongwe, Zambia 1st June, 2016).

Another woman based in Mfuwe narrated of how her husband ill treated her after bringing another woman in their matrimonial home:

‘My husband brought another wife in the house, and he has since moved to Chipata. He does not even send me money for upkeep and whenever i need money, i have to use a third party to ask him to give the kids and i some money. We have three kids together. The woman he has taken into the house is a police officer. He just brought the woman and moved me to another bedroom.’¹⁴

In addition she stated how her husband used to beat her.

‘After I was told by my neighbours that my husband had brought in another woman, I went to Chipata. But he used to beat me every day. He used to beat me for no reasons. I had to leave because he never used to sleep in my bedroom so I came back to the village.’¹⁵

According to FGLP9:

‘I used bad words against my husband and then we started fighting. He beat me up badly. He is just jealousy and he does not want me to handle money.’¹⁶ (some laughter)

When asked whether they knew somebody who had experienced GBV, all participants answered in the affirmative.

‘There is a lot of physical abuse. (everybody agrees). Men do not even give women the money. They do not provide. Whenever month end comes, you know you are not going to see the money. They take the money to other women. When it is approaching month end, the man just start changing his approach (everybody laughs). He even starts accusing us women of not keep a budget. When month end comes he will be in the bar.’¹⁷

FGLP1, pointing to a young women in the group:

¹⁴ FGMP1, Mfuwe focus Group discussion (Mambwe, Zambia 19th July, 2016).

¹⁵ *ibid*

¹⁶ Lwiimba Focus Group Discussion

¹⁷ FGMP2, Mfuwe Focus Group Discussion.

‘FGLP9 is usually beaten. FGLP9 narrate your story. She is my daughter and she is usually beaten by the husband.’¹⁸

Then FGLP2 joined in the conversation, prompting her to say something

‘FGLP9, it is always good to disclose when you are being abused.’¹⁹

Another woman, FGMP8, also supported the view:

‘it is usually the alcohol and women that make men beat up/mistreat their wives. Sometimes the men even propose to neighbours as girlfriends (it is very rampant). everybody agrees. Sometimes when they come from their girlfriends and you try to say something, you are beaten.’²⁰

One of the participants, FGLP7, stated

‘some men do not only beat their wives, they also emotionally abuse you and deny you the necessities.’²¹

One of the women FGLP4 narrated how her husband was so possessive:

‘my husband does not even want me to be doing other things. Even if I go to do some part-time work, he will be asking me a lot of questions.’²²

Women were also of the view that there is an increase in defilement cases, demonstrating another aspect of gender based violence.

‘Defilement is very prevalent and children are left with diseases. If the child has been defiled, you have to go to the hospital. At the hospital the child will be given a report to go to the police. A lot of people usually have sex with underage children.’²³ (everybody agrees).

FGMP2 said

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ FGMP8, Focus Group Discussion in Mfuwe.

²¹ Lwiimba Focus Group Discussion.

²² Ibid.

²³ Mfuwe Focus Group Discussion.

the police will then summon the accused to be questioned and then take the matter to court. Such cases go to the magistrate. They are usually convicted (everybody agrees).

The women were then asked, ‘do you think men have a right to inflict violence on women’?

They replied in a variety of ways:

‘No, men have no right to beat up women. Everybody agrees. That was a long time ago when that used to happen but now you can report to the police.’

According to FGMP1²⁴, nowadays it is no longer acceptable. This view was supported by FGMP5²⁵ who stated that it is now a crime. (everybody within the group agreed).

FGMP4 agreed with FGMP1:

‘some men mistreat their wives because after visiting their girlfriends they become defensive’²⁶.

FGLP8 chipped in, saying that:

‘a long time ago there were not so many cases of abuse because couples were taught on how to behave in a marriage and counselled, but nowadays it is only the women who are instructed on how to behave.’²⁷

FGLP9:

‘When getting married, men usually refuse to go for counselling, hence the high rise in GBV cases.’²⁸

FGLP6:

‘And the sad thing is that sometimes you will be beaten for not answering (trying to avoid conflict) because he may think you are being rude. In addition when you quarrel with your husband and you go to report to the police, you will usually be told to go home and resolve your issues amicably.’²⁹

²⁴ Mfuwe Focus Group Discussion.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Lwiimba Focus Group Discussion.

²⁸ Ibid.

²⁹ Ibid.

FGLP2:

‘sometimes even if these men leave you, they do not want you to date other people. Therefore, they will be threatening you with violence and society will usually support them.’³⁰

The researcher next asked about what happens in cases where women experience GBV.

‘Sometimes women go to report to the police when they are beaten (if the police station is nearby), but in most cases they do not say they experienced GBV because they do not want their husbands to be apprehended.’³¹

According to FGLP1 there was an NGO that was offering training to women on how to deal with GBV.

‘After Women for Change (NGO) trained us, they told us to be reporting on behalf of other women, however most women hide the fact that they have experienced GBV. So it is difficult to report on behalf of other women because most women would hide such incidents.’³²

The women were then asked whether they felt the community generally sympathised with victims of GBV.

According to FGMP6:

‘women will usually sympathize with the victims. Sometimes we support the man (especially if she is going out with your man and she has been beaten). Sometimes you are happy, at least she has been beaten up on my behalf.’³³

In addition FGMP2 had this to say:

‘some women have boyfriends even if their husbands provide. Actually a man was killed by an elephant while following up on the wife. Therefore sometimes it is hard to sympathise.’³⁴

³⁰ Ibid.

³¹ Lwiimba Focus Group Discussion.

³² Ibid.

³³ Mfuwe Focus group discussion.

³⁴ Ibid.

Asked about whether there was a relationship between culture and GBV, women again had important points to make. According to FGLP8:

‘culture does not always teach women to be submissive; it does say that women should not disclose everything that happens in a home. However, it does not say that when a woman is being abused every day, she should not say anything. The teachings do not say that women should be beaten’.³⁵

When asked whether culture contributes to GBV, FGLP5 said:

‘no, not always sometimes women are also the problem because some women really love the status accorded to being a married woman. They can endure anything for marriage. Even when your husband beats you, you treat him like a king and give him bathing water’.³⁶

The researcher also asked the women what sort of help women who experience GBV receive. According to FGMP1:

‘Whenever I would report my husband to the VSU, the police just issue a warning against him and nothing more would be done. This was because he would bribe the police.’³⁷

Then FGMP3 added her voice to the discussion:

‘once a woman had her vagina sliced by her man. Her labia was sliced with teeth. He was never apprehended. Everybody agrees. The wife did not want to report the matter. The wife was shielding the husband (saying *naalume wangu* (he is my husband)). The wife refused to file a complaint, so nothing could be done. The parents had heavy hearts because of this sorrow. It happened in 2010.’³⁸

FGMP8 responded, saying that:

³⁵ Lwiimba Focus Group Discussion.

³⁶ Focus group discussion in Lwiimba.

³⁷ Focus group discussion in Mfuwe.

³⁸ Ibid.

‘she has got a sister-in-law who is in a polygamous marriage and suffers physical violence at the hands of her husband.’³⁹

According to FGLP1:

‘if a women is beaten, nothing happens unless she herself says that she has been beaten. There is a gender activists here who was trained by Women for Change (NGO), I remember one occasion where a person was beaten and the activists brought a police officer from Chongwe.’⁴⁰

The women were then asked whether there were any NGOs in the area that dealt with victims of GBV. It was reported that there were a number of NGOs that deal with GBV, however most of them were based in urban areas. The NGOs did visit rural areas and train people but their main operations were from urban areas. In the Lwiimba focus group discussion, participants did mention that the NGO, Women for Change had conducted some training in the area. Most of the participants said that there were a number of NGOs operating in the area but when they were asked to name them none of the women could.

The participants were also asked about shelters for victims of GBV. The participants stated that there were no shelters in their areas although there were structures being built in Lwiimba. According to FGLP6:

‘although there are shelters being built I do not think people will be going to such shelters because they are scared that their husbands will be apprehended and therefore they will be divorced.’⁴¹

The participants were asked for their overall views on the effectiveness of the law to address GBV? Most participants had never heard of the Anti-Gender Based Violence Act but were aware that there was a law that deals with GBV.

When asked how the police deal with cases of GBV, FGMP1 reported:

³⁹ Ibid.

⁴⁰ Focus group discussion in Lwiimba.

⁴¹ Ibid.

‘the police can be corrupt in most cases, they tell you to go home and sort out your domestic issues.’⁴²

It is also important to note that in rural areas, people have to walk a long distance to access the police station. This was confirmed by FGLP6 who stated that:

‘in this area, there is not police station nearby, the nearest police station is found in Chongwe which is very far from here.’⁴³

When asked whether they knew how victims of GBV experience the court system, FGMP1 was of the view that:

‘mostly in courts, people are bribed and it is very common. Even the police are bribed. Corruption is rampant. Even in cases of defilement there is a lot of bribery. (everybody agrees). The accused can even bribe the family and then the police.’⁴⁴

According to FGMP1, one local court told her to go home and sort out her problems:

‘I went to court but i was told to go home and try and sort out my problems and if in three months nothing happened i was advised to go back to the court. The courts are very corrupt.’⁴⁵

In Lwiimba, participants stated that they rarely go to court because the court is far away. According to FGLP9:

‘We used to have a local court here but we no longer have one, the nearest local court we have is based in Choongwe which is a distance from here.’⁴⁶

In Lwiimba the participants stated that they mostly take their matters to the headmen. According to FGLP1,

‘we are free to take the case to the head men. Sometimes the head man can advise that we take the case to the court. In matrimonial cases, the headman would then call

⁴² Focus group discussion in Mfuwe (Mambwe, Zambia 19th July, 2016).

⁴³ Focus group discussion in Lwiimba.

⁴⁴ Focus group discussion in Mfuwe (Mambwe, Zambia 19th July, 2016).

⁴⁵ Ibid.

⁴⁶ Focus group discussion in Lwiimba.

the committee and then call both the relatives of the husband and yours and then advise accordingly. But if he fails he refers you to court.’⁴⁷

Having set out in factual terms the responses of the participants to the questions posed by the researcher, we move on now to the thematic analysis of the response data in accordance with the main themes identified above.

5.3.1 Domestic violence

Domestic violence was a recurring theme in the focus group discussions and the interviews. Across the two focus group discussions, a number of women stated that they had been victims of some form of domestic violence. In the focus group discussion in Lwiimba, the women in the group seemed to know quite a lot of what was happening to each other with regards to domestic violence. This may be due to the fact that most houses in the village are close by each other and so, where there is a fight, the neighbours will get to hear about it. That in itself, though, does not mean that any action is taken. According to FGLP1, if a woman is beaten, nothing happens unless she herself says that she has been attacked.⁴⁸

Victims can also be reluctant to talk about their experiences or to acknowledge that violence has been perpetrated against them. In the Lwiimba group, there was one participant, FGLP4, who seemed a bit shy and did not talk much. Another woman, FGLP1, (who it transpired was FGLP4’s mother), asked her daughter to say something on domestic violence. Then FGLP2, (FGLP1’s sister) also asked her to say something. There seem to be a general consensus amongst the group that FGLP4 would have something relevant to say. In this regard, I learnt that researchers can access tacit knowledge, not only by taking note of who is talking, and what they are talking about, but also by noticing who is not talking and what is not said.⁴⁹ I could tell from the laughter of the younger women within the group, not that they were laughing at

⁴⁷ Ibid.

⁴⁸ Focus group discussion in Lwiimba this statement is also supported by Otwin Marenin, ‘Victimization Surveys and the Accuracy and Reliability of Official Crime Data in Developing Countries’ 1997 26(6) *Journal of Criminal Justice* 463 who argues that some of the reasons for non-reporting of criminal activity in developing countries are probably similar to those found in studies in developed countries (seriousness of the crime, the value of property stolen, nothing will happen, the police are incompetent or inefficient, or fear of retribution).

⁴⁹ Sarah J. Tracy, ‘Qualitative Quality: Eight “Big-Tent” Criteria for Excellent Qualitative Research’ (2010) 16 (10) *Qualitative Inquiry* 837-851.

FGLP4 but that they knew something that I (as the researcher and outsider) did not know. When FGLP4 spoke, she narrated how her husband beat her often. I observed, however, that the older women within the group did not seem to have much sympathy for her. The general view was that FGLP4 spent too much time drinking alcohol in bars with her husband and that women should not accompany their spouses when they go on drinking sprees. From the laughter of the younger women, I could tell that they did not seem to agree with the views of the older women. This revealed an interesting generational divide between the participants reflecting different cultural values and expectations of women.

I went on to conduct a one-on-one interview with FGLP4 and she told me that she was married. She also told me that she and her husband usually worked together in the fields. Neither was formally employed, but they relied on subsistence farming for their living. When I asked her what she understood by GBV, she stated that it is when a man ill-treats his wife.⁵⁰ She went on to tell her story of how her husband often beat her. According to FGLP4, when there was no alcohol involved, they rarely fought, but that fights with her husband broke out when they were drinking alcohol. She told me that she usually accompanied her husband to the bar (which, as noted above, is not particularly common in rural areas) and if she talked to other men her husband would become jealous, leading to an argument and then he would physically assault her. 'My husband is so jealous', she explained. 'Whenever we go drinking, I usually go with him because he asks me to go along with him. However, when he sees me talk to other men (just a conversation and not flirting) he beats me up.'⁵¹

Another woman in the focus group discussion (FGLP9) stated that she was also badly beaten by her husband. This woman was young, only 20 years old, and soft spoken. Her narrative was supported by almost everyone in the group. According to FGLP9, she had harvested her crops and wanted to go to the market (in Lusaka) to sell her produce. Her husband did not want her to go to the city and so he threw away the produce. When she asked him what had happened, he beat her up very badly. She then left her matrimonial home and went to her parents' house. Her relatives intervened and had a meeting involving the two families (her's and her husband's). As a result, she went back to her matrimonial home.

⁵⁰ Interview with FGLP4, Lwiimba (Chongwe, Zambia 1st June 2016).

⁵¹ Ibid.

FGLP9 did not involve the police in this incident.⁵² She explained that ‘most women do not report incidents of GBV because they want to keep their marriage. They do not want to report to the police because they believe that once they do that, they will be beaten.’⁵³ This view is also supported by Douglas in a more Westernised context:

‘many interviewees believed that engaging with legal processes might invoke a different aspect of law’s power; it risked inciting further violence from their intimates. One interviewee observed: “I am way more at risk”. Another commented: “I had to beg them to withdraw the charges and withdraw the application....It was making it riskier for me.”’⁵⁴

In the Mfuwe focus group, the women also talked about being beaten by their spouses. There seemed to be a general agreement that most women within the group had been beaten by their husbands although they did appear to recognise that this was a crime and was no longer acceptable. ‘Men will beat up women for no apparent reason; for some, it is because they become defensive after visiting their girlfriends or after taking alcohol.’⁵⁵ It was also stated, as in Lwiimba, that women do not usually report violence to the police. ‘Women do not usually report to the police (general agreement within the group). When you are beaten you would usually call the elders but nothing much happens (they will counsel you). After they leave you go back to square one.’⁵⁶ This response reveals a degree of resignation amongst the women as to how GBV should be dealt with. They recognise that in their community the social cost for men of carrying out GBV is not high even though the women believed that it was now a crime. Evidence suggests that until there is a higher social price to be paid by men who engage in GBV, the women will remain vulnerable;

‘deterrent effects of arrest will be greater for batterers who perceive higher social costs associated with the act of violence and with the arrest. These social

⁵² Otwin Marenin, ‘Victimization Surveys and the Accuracy and Reliability of Official Crime Data in Developing Countries’ 1997 26(6) *Journal of Criminal Justice* 463, who attributes non-reporting to the fact that the law incorporates norms that simply do not fit existing cultural values, and normative systems; hence, its legitimacy is low and the notion that one ought to appeal to the law for redress is risible.

⁵³ FGLP9, Focus Group in Lwiimba (Chongwe, Zambia 1st June 2016).

⁵⁴ H. Douglas, ‘Battered Women’s Experiences of the Criminal Justice System: Decentring the law’ (2012) 20 *Fem Leg Stud* 121-134.

⁵⁵ FGMP8, Focus Group in Mfuwe (Mambwe, Zambia 19th July, 2016).

⁵⁶ FGLP2, Focus Group in Lwiimba (Chongwe, Zambia 1st June 2016).

costs include loss of a job, relationship and children, social status in the neighbourhood, and whatever substantive punishment they receive.’⁵⁷

The one-on-one interviews with survivors, revealed only one woman (FGMP1) who had involved the police in a case of GBV and whose case had gone to court. The incident of GBV had happened in Chipata although now the woman was based in Mfuwe. According to the interviewee, she had left Mfuwe to go to Chipata because her husband had been promoted in his job and had been transferred there. For a few years, they were both happy but then her husband told her to leave and to go to visit her parents. ‘Initially’, the interviewee explained, ‘he would rarely allow me to visit my parents because he would complain that there would be no one to cook for him while I was away.’⁵⁸ According to her, this time though he was really persistent in his request. ‘When I asked him who was going to be cooking for him, he stated that that was not going to be a problem because he would cook for himself.’⁵⁹ Eventually because of his insistence, FGMP1 left to go to her parents’ house. Shortly afterwards, her neighbours started calling her to tell her that her husband has taken on a new wife. When she went back to Chipata, she found that another woman (in fact a police officer) had moved into the bedroom that she shared with her husband. She therefore, took the spare room. ‘When I moved into the spare room, my husband never used to visit me in that room but he would beat me almost every day for no apparent reason.’⁶⁰ When she reported the issue to the police, they would not take her seriously because the woman with whom her husband was having an affair was a police officer. According to FGMP1, despite the fact that the police would not cooperate with her, she reported that the staff at the health centre (clinic) were really helpful. She also stated that her neighbours were very supportive and that they were vital when giving evidence in court.

From talking to the women in Lwiimba and Mfuwe, it became clear that where women did experience domestic violence they would usually keep this relatively private and would rely on members of their families or elders within their communities to try and resolve the matter.⁶¹ From the discussions, it appears that they rarely involved the police unless the violence was extreme or it was the last resort.

⁵⁷ Lee Bowker, ‘Beating wife-Beating’ in Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* www.ncjrs.aspen.com:8/catalog.html accessed on 9th March, 2017.

⁵⁸ Interview with FGMP1 in Mfuwe, resident of Mfuwe (Mambwe, Zambia 19th July, 2016).

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ This is in line with the report of Agnete Weis Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (Tano-Aschehoug 1998) 58.

There was a belief that the police would simply refer victims home to sort out the problem with their partners.⁶² ‘Sometimes when you quarrel with your husband and you go to report the matter to the police, the police will usually tell you to go home and resolve the issues.’⁶³ This sentiment created mistrust of the police by the victims and a lack of faith in their ability to deal properly with domestic abuse.

5.3.2 Sexual abuse

In Zambia, there is no law on marital rape.⁶⁴ Most women are advised to tend to their husbands sexual needs whether they themselves wish to or not.⁶⁵ One woman in the Lwiimba focus group, in particular, talked about how her husband ‘forced himself upon her regularly’.⁶⁶ Here she meant rape, but in Zambia this is not recognised as a criminal act. FGLP2 stated that whenever she refuses sex, her husband would beat her up and then rape her. She stated that in previous years, she would leave him after the beating or the rape but now she has stopped because there was a time when she left and he took on another woman. According to FGLP2, she had to involve elders in resolving the problem as a result the beatings have reduced. However, she no longer feels able to leave her husband because she is scared that he may bring another woman into their matrimonial home. The view that a woman had little choice but to stay with an abusive husband was common amongst the women interviewees, almost all of whom reported that, although in abusive relationships, they would stay with their husbands or spouses because they did not want to lose them. This view may be attributed in part to the fact that, in Zambian society, there is a social cost associated with divorce and in most cases it is the woman who is blamed.

In both focus groups, the criminal act of defilement⁶⁷ was discussed but the participants did not wish to dwell on it. Women were aware that the act is a crime and that it should be reported to the police.

⁶² Otwin Marenin, ‘Victimization Surveys and the Accuracy and Reliability of Official Crime Data in Developing Countries’ argues that ‘the status of groups is unequal in many societies and cultures, and victimizations of individuals from lesser groups is condoned and not reported by offenders or victims for both perceive that the authorities, because they share traditional beliefs, will not take complaints seriously or accept them at all. Gender is actually reported as the most common of inferior status.’

⁶³ FGLP6, Lwiimba Focus Group Discussion (Chongwe, Zambia 1st June 2016).

⁶⁴ See above, chapter 2.

⁶⁵ Interview with PLCOP1, Chipata Local Court (Chipata, Zambia, 18th July 2016).

⁶⁶ FGLP2, Lwiimba Focus Group Discussion (Chongwe, Zambia 1st June 2016).

⁶⁷ S 138 (1) of the Penal Code as amended by Act No. 15 of 2005 states that ‘any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and maybe liable to imprisonment for life.’

“Defilement is very prevalent and children are left with diseases. After the child have been defiled, you have to go to report to the police. At the police station, the child will be given a report to go to the hospital. A lot of people usually have sex with underage children.”⁶⁸

Although this is the case, the women were also of the view that some cases of defilement are not reported to the police because the victim’s family is paid off instead. ‘Mostly in courts, people are bribed. Now it is very common. Even the police are bribed. Corruption is rampant. (child making noise in the back ground). Even in cases of defilement there is a lot of bribery (everybody agrees). The accused can even bribe the family and then the police.’⁶⁹

Corruption with regard to the act of defilement is perhaps not so surprising since, in most rural areas, there is not a great social cost associated with defilement because child marriages are legal so long as all the rites of a customary law marriage are performed.⁷⁰ This, therefore, has an impact on how people regard defilement as only at the margins of criminal behaviour.

5.3.3 Economic dependency

GBV is, in many respects, related to the economic dependency of women on men. While economic dependency alone is not the direct cause of GBV, it may contribute to it and exacerbate its consequences. From the focus group discussions, I was able to note that most women were actively involved in contributing to their household expenses. In most cases, women were involved in the informal sector, in small scale farming and even (in Mfuwe) in the illicit brewing of beer. They work to ensure that their children have enough to eat and that they attend school. Although some men in their households were involved in formal work, it was revealed that they rarely provided financial support to their wives or spouses. This was so especially in the rural areas. In Mfuwe, which is home to one of the national parks in Zambia (South Luangwa or Mfuwe national park), the women found it harder to be involved in agriculture because the animals would destroy almost all their crops. Most women that were part of the focus group in Mfuwe were not formally employed but some of them had spouses who were employed either by the national park or by businesses that operated within the national park.

⁶⁸ FGMP2, Focus Group Discussion, resident of Mfuwe (Mambwe, Zambia 19th July, 2016).

⁶⁹ FGMP1, Focus Group, *ibid*.

⁷⁰ Note that the government and international organisations are now trying to come up with a law to make child marriages illegal.

The women, especially in Lwiimba, reported that men did not provide for them: ‘Men are very stingy with their money, so in order for you to survive you have to be involved in piece work or go to the field so that you can sell your crop once you harvest.’⁷¹

Even then, women were subjected to abuse, as reported by one participant: ‘If you do piece work, he will come and eat whatever food you have bought and even beat you. Eventually, you start having boyfriends so as to provide for the family.’⁷²

However, even though the women were involved in contributing to the household, they did not appear to have a great deal of control over how the income was spent. Instead, the men in the household would decide how the money is going to be used. One of the younger members of the group in Lwiimba had this to say:

‘when we harvested, I wanted to go and sell at the market. But my husband threw away the produce. He did not want me to go into town and sell the harvest. So all the money was wasted.’⁷³

This young woman was actively involved in the field and for almost all of the time she would be the one going out to work. However, even if women usually contribute economically to the household, the public/private divide has a tremendous effect on them and they are excluded from taking decisions about finances in the home.

‘Men do not even give women the money. They do not provide. Whenever month end comes, you know you are not going to see the money. They take the money to other women. When it is approaching month end, the man just starts changing his approach (everybody laughs). He even starts accusing us women of not keeping a budget. When month end comes he will be in the bar.’⁷⁴

This also applies to situations where the couple worked together in the field.

‘Even when going to the field, you may be going together but when harvest time comes, he will usually go and sell the harvest. He will then take other women to Chipata but when you, as the wife ask, he will beat you up.’⁷⁵

⁷¹ FGMP13, Mfuwe Focus Group Discussion (Mambwe, Zambia 19th July, 2016).

⁷² FGMP3 and FGMP4, Focus Group Discussion, residents of Mfuwe (Mambwe, Zambia 19th July, 2016).

⁷³ FGLP9, Lwiimba Focus Group Discussion, resident of Lwiimba (Chongwe, Zambia 1st June 2016).

⁷⁴ FGMP8, Focus group discussion in Mfuwe (Mambwe, Zambia 19th July, 2016).

⁷⁵ FGMP2, Focus Group Discussion, resident of Mfuwe (Mambwe, Zambia 19th July, 2016).

‘We really suffer because men rarely go to work in the field, however, once you do that he will take all your money. Women basically raise the children. We end up brewing kachasu (kuchigoli)⁷⁶ (everybody agrees).

From my discussions with the survivors of violence I learnt that the women had become adept at navigating through the abuse. Sometimes this was because they knew that family, the community and other women may not support them. It was suggested that women will sympathise with victims of domestic violence where they are seen as undeserving victims, but will not sympathise if the woman is having an affair with their husbands. ‘Women will usually sympathise with victims but we sometimes support the man especially if the victim is having an affair with your husband. Sometimes women leave their husbands to go out with other men.’⁷⁷

Hence, some women will stay in relationships not so much because they are economically dependent on their partners but because of other reasons; in particular being married in Zambian society elevates one’s social status in the community. Others stay to keep their children: ‘When we harvest, I am usually the person who goes to the field. He does not give me any money. Even when he works he does not provide. I just stay because I have children.’⁷⁸

Therefore, the narrative that emerged from the discussion groups, was that although women may not always be economically independent, in most cases they are the ones who will provide for families by being involved in informal income generating activities. It was also found that most women were responsible for providing for their children through informal means. Men rarely provided for the family according to the focus groups. Whenever men did have money through a formal source (employment) or more informally (from selling of produce), they rarely used it for the family or household. The burden of providing fell upon the women and was very much under recognised. As in most cases, the contributions made by women to their domestic economy was not acknowledged:

If anything, women's contributions to farming, forestry and fishing may be underestimated, as many surveys and censuses count only paid labour. Women are active in both the cash and subsistence agricultural sectors and much of their

⁷⁶ FGMP8 *ibid*, note that kachasu is an illicit beer, the brewing of which is banned by the government.

⁷⁷ FGMP2, Focus group discussion in Mfuwe ((Mambwe, Zambia 19th July, 2016).

⁷⁸ FGMP11, *ibid*.

work in producing food for the household and community consumption, as important as it is for food security, is not counted in statistics.⁷⁹

Despite their substantial contribution to the financial security of the household, women's labour was low paid, low skilled and largely undertaken for reasons of necessity. Women's economic fragility, and their dependence on remaining in relationships for the sake of their children and community, should not be underestimated. While having some financial resources, women were trapped in abusive relationships for reasons other than economic dependency.

5.3.4 Culture and patriarchy

One of the key issues explored in the focus groups was whether, in the view of the participants, culture contributes to GBV in Zambia. In the Lwiimba group, a participant summed up the situations as follows:

‘Culture tells us to be submissive and also not talk about the problems that we are having in a marriage but it does not allow our men to beat us nor does it condone silence when you are being beaten.’⁸⁰

The women were also of the view that cultural attitudes and practices in most cases just applied to women:

‘When a man and a woman are about to get married [nowadays], a woman is instructed to be submissive and take care of the needs of the husband. Before, both men and women were instructed to be respectful towards their spouse, but now men are not part of these instructions.’⁸¹

Equally, it was questioned whether culture meant that women should not discuss violence carried out on them:

‘Women are taught not to disclose everything that happens in the home. But we are not saying that when a woman is being abused every day, she should not say anything. The teachings do not say that women should be beaten.’⁸²

When asked whether culture was the problem, the women did not agree that it was: ‘No, not always sometimes women are also the problem. Some women really love being married. They

⁷⁹ Women as Food Providers <<http://www.fao.org/docrep/X0198E/x0198e>> accessed on 10th April, 2017.

⁸⁰ FGLP6, Lwiimba focus group discussion (Chongwe, Zambia 1st June 2016).

⁸¹ Ibid.

⁸² FGMP4 *ibid*; see also Jenny Sharpe and Gayatri Chakravorty Spivak, ‘A Conversation with Gayatri Chakravorty Spivak: Politics of Imagination’ (2003) 28(2) *Signs*, *Journal of Women in Culture and Society* 1 who argues that culture is contested on women's bodies.

can endure anything for marriage. Even when your husband beats you, you treat him like a king and give him bathing water.’⁸³

As argued in chapters 2 and 3 above, it is important to apply a critical lens to questions of culture and to understand the complexities of the multiple contexts in which culture is played out. This is especially true for instances of GBV. As Burgess-Proctor argues:

‘although culture is crucial to understanding and combating domestic violence, we cannot rest on simplistic notions of culture. Rather, we must address how different communities’ cultural experiences of violence are mediated through structural forms of oppression, such as racism, colonialism, economic exploitation, heterosexism, and the like.’⁸⁴

This is particularly apt in the context of a society like Zambia. The role of culture in the context of violence against women resists a simplistic analysis and it is important to understand culture as having both positive and negative implications for women. In this respect, I would agree with Burgess-Proctor, that: ‘The goal is to reject simplistic analyses of the role of culture in domestic violence. Although culture may be used to justify violence against women, there is a danger of presenting the role of culture in domestic violence as a purely negative force.’⁸⁵

Hence, culture is not all negative and it is important to bring out its positive attributes and to resist Western colonialist tendencies in the description of cultural practices in the global south.

‘The belief that non-White others are said to engage in oppressive and misogynistic cultural practices fits long-standing biases and serves to downplay the existence of culturally prescribed and equally horrendous acts of violence against women in White Western communities.’⁸⁶

Domestic violence scholars, in explaining abuse against women, struggle to understand the contribution played by culture on the one hand and patriarchal structures on the other, and argue that culture should not be confused with patriarchy.’⁸⁷ Is it vital to understand that patriarchy transcends all institutions and it is found throughout the world. Patriarchy, as discussed in chapter 2 above, is systematic and institutional and has resulted in the interpretation of society in the interests of men or the patriarch.

⁸³ FGLP5 in Lwiimba focus group discussion (Chongwe, Zambia 1st June 2016).

⁸⁴ Amanda Burgess-Proctor, ‘Intersections of race, class, gender and crime: future directions for feminist criminology’ (2006) 1 (1) *Feminist Criminology* 27.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Focus Group in Lwiimba (Chongwe, Zambia 1st June 2016).

The culture that exists in Zambia now is a hybrid of several factors that has been affected by history and colonisation as well as by indigenous and native practices. Given that this is the case, '[s]exual and other violence against women in Native communities and communities of color must be understood in the context of White supremacy, patriarchy, colonialism, and economic exploitation of marginalised communities, not as if such violence is inherent in the culture.'⁸⁸ As mentioned already, the subordination of women in Zambia is not inherent in culture. There are some groups which are historically matrilineal and which valued the birth of girl children and regarded women highly before the contact with colonisation.

'The Bemba people adhered to the house religion where the married woman was in charge of all the domestic ritual and had access to the Divine through the intercession of her forebears. She was the one who led the veneration of the recently dead at the small house shrine. She also led the public remembrance services to the ancient guardians of the land.'⁸⁹

It was colonisation that brought with it Victorian ideas about gender and this has a huge impact on Zambia. The effects of colonisation, industrialisation, and patriarchy have all exacerbated the subordination of women in Zambia. It is not culture that is inherently discriminatory against women but structures and institutions (including customary law) that are extremely patriarchal. Therefore, culture itself is not the problem. The problem comes when culture intersects with colonisation, patriarchal and socio-economic conditions.

While this is the case, it is important to note that women are able to navigate and survive within the patriarchal culture. Hence, as demonstrated by many of the spirited comments and attitudes of the women in the focus groups, the portrayal of African women as passive and dependent is not always true. Women survived domestic abuse and developed strategies to live their lives within their villages and communities despite the patriarchal structures in which they operated on a daily basis.

5.3.5 The workings of the law

Perhaps not surprisingly, the women participants and interviewees were not very familiar with the law on GBV or with legal mechanisms designed to protect them from abuse. The Lwiimba Focus group did mention that the organisation 'Women for Change' had been active in their

⁸⁸ Amanda Burgess-Proctor 'Intersections of race, class, gender and crime: future directions for feminist criminology' (2006) 1 (1) *Feminist Criminology* 27.

⁸⁹ Hugo F. Hinfelaar, *Bemba –Speaking Women of Zambia in a Century of Religious Change (1892-1992)* (Brill Leiden: New York 1994).

area in the provision of support against GBV. The participants were aware that ‘Women for Change’ offered workshops and training to people in Lwiimba on GBV and how to respond to victims and survivors of GBV. It was also stated that after the training was done by ‘Women for Change’, there is now a contact person in the area in case the women experience GBV. One participant commented: ‘There is a woman activists here, once a person was beaten and the activists brought a police officer from Chongwe’.⁹⁰

Although the contact person was mentioned, the women were divided as to whether they would report violence or would involve external organisations and the police. One woman in her late 60’s, however, stated that they ‘do report GBV after the organisation, Women for Change trained the women.’⁹¹ However, FGLP7 (one of the younger women in the group) disagreed with her. ‘Women do not disclose acts of GBV against them, therefore it is difficult to report on behalf of other women.’⁹² On this issue the focus group discussion in Lwiimba revealed a variety of perspectives, perhaps revealing also something about the ability to speak out depending on their age and status.

According to the Lwiimba group, once a person who is a survivor of domestic violence reports to the police, that person will face retaliation from the husband or partner. ‘Most women do not report because they want to keep their marriage. They do not want to report to the police because they believe that once they do that, they will be beaten.’⁹³

This view has been supported by a number of people including the interview that I conducted with a participant working in the courts:

‘Even when women report acts of GBV, they are usually under pressure to withdraw the case. They are not reporting because, there are no alternatives. But if there was alternative sentencing they would be reporting. I have victims who say just counsel him, (but he has been brought to court because of the criminal offence) meaning had such an alternative programme been provided, there would have been a lot of reporting.’⁹⁴

It is well known that ‘[l]aws, practices and initiatives to eradicate gender-based violence are unlikely to succeed without an accurate awareness of the limitations of women’s lives [and]

⁹⁰ FGLP3 participant in Lwiimba Focus Group discussion (Chongwe, Zambia 1st June 2016).

⁹¹ FGLP3, Lwiimba Focus Group (Chongwe, Zambia 1st June 2016).

⁹² Ibid.

⁹³ FGLP9 Focus Group Discussion in Lwiimba (Chongwe, Zambia 1st June 2016).

⁹⁴ Interview with MP1, Magistrates Court Complex (Lusaka, Zambia 25th August 2016).

how their freedom of choice and action is limited’⁹⁵ While law is an important aspect in the fight against GBV, it became apparent that for the women in Zambia, there are certain social and culture practices that are embedded in society and even if the law is invoked it may not do much to protect them. Hence, ‘[i]t is the gap between legal rights and expectations, on the one hand, and prevailing practices and behaviours embodied in social and cultural norms, on the other hand, that pose a fundamental challenge for accelerating gender equality and women’s empowerment.’⁹⁶

In Lwiimba, most women in the focus group had never been to court because of the distance involved. The nearest local court is located in Chongwe district which is about an hour’s drive away from the village. When the group was asked whether any of them had to been to court, only four responded positively. One participant reported:

‘There was a local court that came here but now there is only one in Chongwe and it is far. Therefore you can only go when you are the victim or your relative is involved in a case. Even the police station is far away.’⁹⁷

There are other courts that one can access in the area such as the headman’s court which is a traditional court and women reported that they do take their cases if need be to the headman’s court: ‘People go to the head man, and from one head man to the zone where there are several head men, and if they cannot resolve the issue then they take it to court.’⁹⁸ It was also stated that although women could take the matter to the headman, they were free to go proceed to court if they still felt aggrieved. ‘We are free to take the case to the head men. The headman would then call the committee and then call both the relatives of the husband and yours and advise accordingly. But if he fails to resolve the issue, he refers you to court.’⁹⁹

I instinctively had reservations about the head man’s court because I did not know the composition of its members. However, I was advised that, despite the name, membership also includes women and the headman would advise the female victim to talk to the female

⁹⁵ Women’s Access to Justice for Gender-Based Violence: A Practitioners’ Guide. International commission of Jurists, February 2016< www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practioners-guide> accessed on 5th March, 2017.

⁹⁶ Africa Human Development Report 2016: Accelerating Gender Equality and Women’s Empowerment in Africa,< www.za.undp.org/content/dam/sou> accessed on 20th March, 2017.

⁹⁷ Lwiimba Focus Group (Chongwe, Zambia 1st June 2016).

⁹⁸ Ibid.

⁹⁹ Ibid.

committee members.¹⁰⁰ Although this is positive, it is not clear whether the women in the committee are sensitive to gender-based issues.

Women also had their views on the court system. FGMP1 stated when she initiated the proceedings in the local court in her area, she did not find the court to be accommodating.¹⁰¹ She stated that the case dragged on and she was of the view that the Justice favoured her husband. Her case was then transferred to Jumbe local court in Mambwe District and she reported that the court staff there was very helpful and she was able to get an order requiring her husband to pay maintenance. That said, although the husband was ordered to provide maintenance for her, the husband had not followed the order and she had also not gone back to court to try and enforce it. At the time of the interview, she stated that she had been in Mfuwe at her parents' house for almost two years and that she had not seen her husband since she had been staying with her parents.

Overall, the discussions revealed that most women find the court system to be intimidating. From the women interviewed, apart from the fact that they were not familiar with the court system, there were other factors which, when compounded, made it difficult for them to approach the court. These factors included the travelling distance involved, the issue of corruption, judicial stereotypes and also the social stigma of losing their marriages. Therefore, while ignorance of the law on GBV may be a small part in women's reluctance to pursue their abusers, this is only a small part and other cultural and societal factors weigh much more heavily in the balance.

5.4 Hearing the Voices of Professionals, Lawyers, Judges and Policy-Makers

Having considered the experiences and responses of women survivors of GBV in Zambia, this chapter will now turn to a consideration of the attitudes of those who are involved in law enforcement, in the courts and in helping victims of abuse. Looking at responses to GBV from this alternative perspective demonstrates the different ways in which people view the law and its effects. It will be seen that within the institutions which deal with GBV, such as NGOs, policy-makers and legal personnel in the courts, there was a prevailing view that the law is there and it is up to individuals to use it. That said, some interviewees (magistrates and judges) did express some concern about the implementation of the law and, as will be seen below,

¹⁰⁰ Ibid.

¹⁰¹ Interview with FGMP1 in Mfuwe ((Mambwe, Zambia 19th July, 2016).

acknowledged that on occasions it did fail to meet the needs of the victims and survivors of GBV.

Following the pattern established in the first section of this analysis of interview data, the following section takes a thematic approach to the responses of the elites and professionals who were interviewed as part of my data-gathering exercise. These interviewees were concerned with the following matters: the withdrawal of complaints before trial, the potential of the new Rules on Anti-Gender Based Violence, especially the creation of new fast-track courts, and the effectiveness of the Anti-Gender Based Violence Act itself.

5.4.1 The Withdrawal of Complaints

The withdrawal of complaints is a wide-spread issue leading to a failure to prosecute and convict violent offenders. There are a number of reasons why women might withdraw their complaint and this is not just because of a fear of further beating, although that is an important factor.

‘For those that live together, in cases of assault, 90% of the cases are withdrawn. The survivors or victims withdraw cases. The reason is that most of the survivors or victims are dependent on the perpetrators and if they proceeded they will lose all the support they used to enjoy and eventually the children may suffer. That is one and the main cause of withdrawal.’¹⁰²

It is important to note that it is not just financial support that may lead to the withdrawal of cases. In some instances withdrawal can be connected to the victim being married which is an important aspect of social structures in Zambia. Women would want to maintain their marriages (as evidenced by the voices of the women participants discussed above) because of prevailing attitudes against women who are left by their spouses or those who are single.

Linked to the issue of women’s position in Zambian society, is the fact that when survivors report to the police, the procedure usually takes a long time, particularly if the case goes to trial. Some authors have described an economic model affecting the reporting of crimes which ‘conceives of crime victims as rational actors concerned with the perceived costs and incentives of crime reporting.’¹⁰³ For women in Zambia, the economic consequences of reporting GBV can be severe. Once a woman reports a crime, she has to go back to her community and her

¹⁰² Interview with MP1, Magistrate Court complex (Lusaka, Zambia 25th August, 2016).

¹⁰³ Aiden Sidebottom, ‘On The Correlates of Reporting Assault in Malawi’ *Br. J Criminology* (2005) 55 (2) 381.

life has to carry on much as before. The perpetrator, if it is the husband or partner, may try to win her back and he may be successful in persuading her to go back to the home that they share. This may be sufficient to prompt the victim to withdraw the case, in her own self-interest. Sometimes, the pressure to withdraw the case will come from the woman's relatives or the community.

Women are also often reluctant to report violence against them because of the social stigma, shame and humiliation associated with such claims, the fear of being ostracised by their families and communities if they report the harassment, and the fear of reprisal and retaliation.¹⁰⁴

The legal system and the courts are far removed from everyday life for most women whereas their community is a familiar territory. So, once the woman's family and the community start to put pressure on her, she may easily be convinced to withdraw the case. As one interviewee noted: 'Even within the community, your aunts will come together and try and discourage you. In an African society, we live as a community.'¹⁰⁵

A common fear for women (again as noted by the women themselves above) is that the husband or partner will stop providing for her and the children and, therefore, this may be decisive in deciding to stop the complaint process altogether. The survivor may realise that once the perpetrator goes to prison there will be no one to provide financially for her. One magistrate who was interviewed stated that the victims should actually have more options in terms of taking action:

'There could be an option to resolve the matter in another way other than prosecution, so that even if the case is withdrawn the matter would have been resolved in one way or another because the perpetrator would have gone through counselling, anger management and even rehabilitation.'¹⁰⁶

As stated by Ford, the ties to the assailants may lead victims towards making rational choices in invoking legal sanctions or not. Women may be less concerned with deterrence than they are surviving economically, protecting their children, or getting counselling help for the

¹⁰⁴ Deborah Zalesne, 'Sexual Harassment Law in the in United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms' (2002) 25 Harv. Women's L.J. 143.

¹⁰⁵ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

¹⁰⁶ Anne Sidebottom, 'On Correlates of Reporting Assault in Malawi' Br. J Criminology (2005) 55 (2) 381.

assailants.¹⁰⁷ At the moment, the official Zambian response to GBV rarely involves counselling or anger management programmes and the system is concentrated rather more on criminal sanctions against offenders. Those living particularly in rural areas are less likely to be familiar with the official state criminal justice system and, therefore, more likely to be sceptical as to its potential to tackle abusive behaviour – as evidenced in this extract from a study carried out in the Eastern Democratic Republic of Congo:

‘It is notable that the vast majority of those sceptical of legal remedy were located in the most remote and rural locations in our study. While it is difficult to draw conclusive inferences given our small sample of respondents, we do know that those located in more remote locations are far less likely to have been exposed to rule of law programs designed to socialize local participants to the objectives of criminal justice. Given this, it is understandable that those in the most remote locations had far more negative attitudes towards the value or viability of legal remedy.’¹⁰⁸

The above is true of Zambia too. People living in rural areas (and those in the urban areas to some extent too) are sceptical of the legal system and rarely encounter its provisions. They are sceptical too about the lack of public services and official institutional structures, such as courts and police, especially in remote areas. This scepticism leads victims to think that informal resolution within the community is a more effective way to address issues of GBV and to maintain a peaceful society.

5.4.2 The Potential of the new Anti-GBV Rules and the Specialized Fast Track Courts

When the Anti-Gender Based Violence Act 2011 came into effect, it created a lot of expectations amongst human rights advocates and Zambian society as a whole. The Act promised the introduction of further Rules which would govern the operation of the Act in the courts. Accordingly, the Anti-Gender-Based Rules¹⁰⁹ came into effect in 2016 and stakeholders have been optimistic about their operation thinking that the Rules would strengthen the Act itself and expedite justice for the victims of GBV.

¹⁰⁷ David A Ford, Prosecution as a Power Source: A Note on Empowering Women in Violence Conjugal Relationships in Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* www.ncjrs.aspen.com:8/catalog.html, accessed on 9th March, 2017.

¹⁰⁸ M. Lake, I. Muthaka, and G. Walker ‘Gendering Justice in Humanitarian Spaces: Opportunity and (Dis) Empowerment Through Gender-Based Legal Development Outreach in the Eastern Democratic Republic of Congo’ (2016) 50 *Law & Society Rev* 539.

¹⁰⁹ Anti-Gender Based Violence Rules 2016.

As one magistrate commented:

‘People are just learning about the law. [...] But since I have been here no one has applied for protection orders or accommodation orders. The non-utilisation of these orders is maybe due to the fact that there were no Rules, however with the coming into effect of the Rules the outcome may be different.’¹¹⁰

Importantly, the Rules introduced new, specialised, fast track courts which aim to deal with cases of GBV more efficiently and more quickly. Stakeholders have realised that once a case is delayed, there is a high probability of its being withdrawn as time elapses and witnesses are less willing to give evidence.¹¹¹ Hence, in my interviews with professionals and elites, it became apparent that government officials and stakeholders were rather optimistic about the potential of having new specialized courts which would deal with GBV in a quicker and more efficient manner than previously.

It is thanks to international collaboration that these courts have been envisaged. The United Nations, together with Ireland and Sweden, have acted in partnership with the government of Zambia to set up a joint programme aimed at helping to establish a multi-sectoral scheme to implement the Anti-Gender Based Violence Act and to fund a Child Line Centre.¹¹² In particular, the co-operating partners came together to fund the operation of two Anti-Gender Based Violence fast track courts. With two fast track courts now in operation (in Kabwe and Lusaka), there are plans in place to spread the scheme all over Zambia.

Such specialised courts have been championed by feminist advocates who see specialist courts as better able to deal with the particular issues of domestic abuse in a way which is responsive and protective towards victims:

‘Integrated domestic violence courts typically aim to achieve at least three fundamental goals. First, they try to provide victims with a ‘one-stop shopping’ intake centre that provides comprehensive assistance with the full range intimate violence litigation and related social services. Second, they try to coordinate civil protection order, family court, and criminal dockets so that the

¹¹⁰ Interview with MP4, Magistrate Court (Chipata, Zambia 14th April, 2016).

¹¹¹ Note also, that Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* www.ncjrs.aspen.com:8/catalog.html accessed on 9th March, 2017 argues that there is a framework that suggest that domestic violence cases may be assigned a lower priority for prosecution and punishment when placed alongside other cases.

¹¹² Co-operating Partners in Zambia Commit to ending Gender-Based-Violence-speeches-GOV.UK, www.gov.uk/governments/speeches/cooperating-partners-in-zambia-commit-to-ending-gender-based-violence accessed on 15th February, 2017.

court can handle cases, to the greatest extent, on a ‘one family, one judge basis.’

Finally, they ensure that the court itself is located in a place that provides victims with security and protection from physical assault.¹¹³

Time will tell how well the fast track courts work in practice, but early indications have revealed a few initial problems both technically and procedurally. With regards to the technical problems, one magistrate interviewee stated that the quality of the CCTV was quite bad with both the video and the audio quality needing improvement.¹¹⁴ The issue had been brought to the attention of the stakeholders. The stakeholder interviewee commented that, while the operation of the equipment had been a challenge, a consultant was now at hand who could take care of these challenges and hoped that with the help of operators the problems could soon be resolved¹¹⁵

While in their infancy, it is hoped that the more specialised courts will provide a way for women to access legal structures in a setting that is more familiar and attainable than previously.

However, while the formation of specialised, fast track courts for GBV has been seen as a positive development, there has been some disappointment regards the new Anti-Gender Based Violence Rules in relation to their scope. While originally intended to cover both civil and criminal aspects of GBV, now the Rules only cover civil remedies and not criminal acts. This frustration was articulated by one magistrate interviewee:

‘The problem is that the GBV Rules are on protection orders and not on criminal offences. Our partners like the UNDP (United National Develop Program), think the Rules are on criminal offences which they are not. Unless the Rules under the CPC (Criminal Procedure Code) changed for the purpose of GBV, the Rules on GBV do not provide for procedures to be abridged in the CPC.’¹¹⁶

It is important, therefore, that the Rules should be extended to cover the criminal aspects of GBV. ‘In order to avoid these cases from being withdrawn and protect the victims from

¹¹³ Deborah Epstein, ‘Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court system’ (1999) 11.1 Yale J.L. & Feminist 3, 50.

¹¹⁴ Interview with MP3, Magistrate Court Complex (Lusaka, Zambia 15th June, 2016).

¹¹⁵ Interview with IOP1, UNDP (Lusaka, Zambia, 29th August, 2016).

¹¹⁶ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

changing their minds, the criminal cases should also be brought under the fast track court. These Rules need to be redone to include criminal cases.’¹¹⁷

The effect of confining the application of the new Rules to civil remedies only, is that when it comes to criminal proceedings the courts revert to being bound by the Criminal Procedure Code and the Penal Code. This will inevitably be a setback in the fight against GBV in Zambia and it is telling that members of the judiciary who were interviewed for this research were of the view that the process of developing the Rules was too rushed.¹¹⁸

5.4.3 The Effectiveness of the Anti-Gender Based Violence Act 2011

Having noted above that women survivors of abuse are reluctant to engage in legal action against their abusers, it was equally apparent from the interviews with professionals, that people rarely apply for civil protection or accommodation orders under the Anti-Gender Based Violence Act.¹¹⁹ It was not clear why this was the case but there was a general consensus that there is a need to create better awareness on the civil procedures which the Act provides and the civil remedies which the fast track courts can provide.¹²⁰

However, problem may not necessarily lie with the Rules themselves but rather with the parent Act of 2011 itself. It was mentioned in chapter three, above, that the Anti-Gender Based Violence Act refers back to other laws. This is problematic because there are certain offences related to GBV for which no specific punishment is provided for in the Act. In most cases, it is left to the authorities involved to consider whether they should apply the Act or not and, since the Act does not specifically state the offences or the sentences to be applied, it is generally not used by the courts and neither is it mentioned in most judgments. The magistrates interviewed were of the view that the parent Act itself was not adequately drafted:

‘I think it is the way it has been drafted. It is so dependent on other pieces of legislation. If there is an assault, I would rather just go for the Penal Code and use the provisions on assault. If the intention was for it to be a stand-alone Act, Parliament would have come up with specific offences in the GBV Act with

¹¹⁷ Ibid.

¹¹⁸ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016); Interview with MP2, Magistrate Court Complex (Lusaka, Zambia 14th May, 2016); Interview with MP3, Magistrate Court Complex (Lusaka, Zambia 15th June, 2016).

¹¹⁹ Ibid.

¹¹⁹ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016); Interview with MP2, Magistrate Court Complex (Lusaka, Zambia 14th May, 2016).

¹²⁰ Ibid.

specific sentences. I have actually only used it once in court, when I was trying to find the offence and when I did not find it, I went straight to other Acts and ever since I have never used it.’¹²¹

The fact that the Act refers back to existing laws is interesting, and provides grounds to be sceptical about its operation, since the other laws have failed to make a positive contribution towards the fight against GBV in the past. That said, the UN and other cooperating partners are working hand in hand to ensure that the Criminal Procedure Act and the Penal Code are amended so as to make the laws respond more adequately to cases of GBV:

‘The Criminal Procedure Code must be amended to limit the time to hear the matter. There are also plans to do away with certain Rules of the Criminal Procedure Code for example in cases of GBV, witnesses must be made available on day of plea.’¹²²

At an operational level, an interesting finding from my field work was that the two new fast track courts appeared to have different experiences of the operation of the Act with the court in Kabwe having disposed of more cases than the court in Lusaka. It was reported to me that ‘[i]n Kabwe, the gender fast track court started operating in February 2016 and seventy cases have been disposed of (by August 2016).’¹²³ In Lusaka the figure was reported to be less.¹²⁴ Considering the fact that the courts dealing with GBV in Kabwe and Lusaka operate under the same Rules, I wondered how it could be possible that the court in Lusaka could have heard and concluded fewer cases than its counterpart in Kabwe. I asked the Lusaka Magistrate in charge of the GBV court as to why this might be the case. She was sceptical as to whether the figure quoted for Kabwe was true and if it were, whether it might include criminal cases and not simply cases heard under the new Anti-Gender-Based Violence Act:

‘We went to launch a programme with UNDP together with Magistrates from Kabwe and Lusaka for the fast track court. The numbers Kabwe was producing were too large. If I have to count the defilement cases, yes, but were they heard under fast track. As magistrates we can create our own fast track, if today you say you want to hear a certain number of cases, you can do that. But that does

¹²¹ Interview with MP2 (Lusaka, Zambia 14th May, 2016).

¹²² Interview with MP1, Magistrate Court (Lusaka, Zambia 25th August, 2016).

¹²³ Interview with IOP1, UNDP (Lusaka, Zambia, 29th August, 2016).

¹²⁴ Interview MP1, Magistrate Court (Lusaka, Zambia 25th August, 2016).

not fall under the fast track Rules. The fast track Rules are clear they deal with civil proceedings i.e protection orders or occupation orders.’¹²⁵

The magistrate in Lusaka agreed that Kabwe heard more cases including defilement cases (which are criminal in nature) however, her argument was that these cases could not have been heard under the new Rules which only cater for civil proceedings. Hence, although there is a general feeling amongst stake holders that Kabwe has heard more cases of GBV because of the fast track court and the Rules in place, the evidence so far does not point to that. Another suggestion for Kabwe being up and running more quickly than Lusaka may be that there was a fast track court project in Kabwe just before the Rules came into effect:

‘In Kabwe, when the fast track court started operating, the court was already on a fast track project. The Rules only came out in March when the Chief Justice launched them. Therefore the Kabwe court did not operate according to the Rules.’¹²⁶

I suspect the explanations above go some way to explain the apparent disparity in the operation of the new Act especially since both courts were facing the same technological problems and the same challenges as a result of the Rules not applying to criminal proceedings.

A further drawback in the fight against GBV was said to be the shortage of trained staff in dealing with GBV cases. There seems to be a need for more people involved in the delivery of justice to be trained. In Lusaka, there is need for training since there has been a high turnover in terms of staff leaving. One magistrate had suggested this and linked the lack of training to delays in outcomes:

‘I even proposed to the UN that we need training with regards to GBV. One of the reasons why the victims don’t take the matter to police and court, it is the longevity of hearing the matter.’¹²⁷

The Victim Support Unit (VSU) also stated that although training had been offered to the officers by partners, there was still a need for more capacity building given that it was an ongoing process:

¹²⁵ Interview MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

¹²⁶ *ibid.*

¹²⁷ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

‘There is need for more training because the officers we trained are no longer with the unit. Others have left, retired and others promoted. Training must be an ongoing process.’¹²⁸

Training is an important issue not only for magistrates and police officers but was also important for organisations too. When members of supporting partners such as the United Nations,¹²⁹ WILSA (Women in Law in Southern Africa)¹³⁰ and YWCA (Young Women Christian Association)¹³¹ were interviewed they stated that training was being offered to various institutions involved in the fight against GBV. This led to a further concern though with regard to the judiciary in that members of the judiciary felt that although supporting partners meant well in facilitating training to as many members of staff as possible, there were instances where because of lack of understanding or coordination, they would train people less directly involved in dealing with GBV.¹³² This inevitably would have an effect on the way cases of GBV are handled as those at the real interface with survivors might not necessarily be those best trained.

Alongside the issue of training, some concerns were raised about the use of video screens in the court room to relay pictures of the accused meaning that he is not present in the court room. While such measures may facilitate the process of giving evidence for victims, it was suggested by one magistrate that having video screens might go against fundamental principles of law and the constitutional rights of the accused:

‘This comes into direct conflict with Article 18 of the Constitution which states that no trial can take place without the presence of the accused. This is one of the challenges of the gender fast track court. Similarly it has been argued that the issue of demeanour comes in. The court is supposed to take into consideration issues of demeanour. If the accused is not in court, how is the court supposed to do that?’¹³³

This argument may be valid but in the case of having a screen or video link, the accused is effectively present during the trial. He will be able to advance his case and he will be heard by the court. The only issue is that the witness or survivor will not see the accused and this is

¹²⁸ Interview with VSUP1, Victim Support Unit, Zambia Police Headquarters (Lusaka, Zambia 18th May, 2016).

¹²⁹ IOP1, UNDP (Lusaka, Zambia, 29th August, 2016).

¹³⁰ NGOP2, International Labour Organisation (Lusaka, Zambia, 29th July, 2016)

¹³¹ NGOP1, UNDP (Lusaka, Zambia, 28th July, 2016)

¹³² Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

¹³³ Interview with MP3, Magistrate Court Complex (Lusaka, Zambia 15th June, 2016).

necessary to protect the victim from having to face the accused and to relive horrific memories of the abuse. This is a practice already being used elsewhere in Africa as noted in one of my interviews with a Supreme Court judge.

‘In countries like South Africa where there is the children’s court, the witness will sit behind a glass shield without being seen but they can see the accused. The aim is to cut out on stigmatization. The court facilities are there to ensure that victims/survivors and witnesses as well are protected.’¹³⁴

Ultimately, the question needs to be asked whether the new Anti- Gender Based Violence Act is facilitating the application of penalties against perpetrators of GBV. The figures on GBV in Zambia are outlined in the introduction to the thesis, however, it is important to note that there has been an increase in cases of GBV over recent years.¹³⁵ According to the statistics, 43% of Zambian women aged 15-49 have experienced physical violence, 17% have experienced sexual violence, and 10% of women experienced violence during pregnancy.¹³⁶ In 2014, the national GBV crime statistics were 15,153¹³⁷ and in 2015 the numbers rose to 18,088.¹³⁸ These statistics include offences against both male and female so long as they are gender-based offences. Offences such as marital rape are not included, because this is not classified as an offence according to Zambian law. GBV offences though would include acts of assault, bigamy, unnatural offences, infanticide, arson, living off the earnings of a prostitute, abortion and concealment of birth.¹³⁹ The offences such as abortion and concealment of birth are sex offences and because of the nature of the offences, the perpetrators are usually women. It is questioned whether these offences should even be regarded as GBV cases because they cause further discrimination against women rather than remedying it.

There has been a mixed reaction as to the increase of GBV in Zambia. According to the VSU, the increase may be attributable to awareness, confidence in the police, improvement in data

¹³⁴ Interview with JP1, Supreme Court (Lusaka, Zambia 24th July, 2016).

¹³⁵ Roger Tarling and Katie Morris, ‘Reporting Crime to the Police’ 2010 50(10) *The British Journal of Criminology* 474 states that ‘victims’ propensity to report crime is a key determinant in shaping the statistics recorded by the police and also in providing a broader understanding of how crime impacts on different individuals, communities and neighborhoods. Not fully appreciating reporting renders the analysis of police-recorded crime figures more problematic.’

¹³⁶ Co-operating Partners in Zambia Commit to ending Gender-Based-Violence-speeches-GOV.Uk www.gov.uk/government/speeches/cooperating-partners-in-zambia-commmit-to-ending-gender-based-vilence> accessed on 15th February, 2017.

¹³⁷ Statistics from the VSU, National Gender Based Violence Crime Statistics First Quarter 2016.

¹³⁸ Ibid.

¹³⁹ National Gender Based Violence Crime Statistics First Quarter 2016.

collection and accessibility of the VSU centres and community police stations.¹⁴⁰ Most supporting partners viewed the increase in statistics as a positive development. ‘Those initial figures were only reported figures, people did not have the information. Now because of awareness, most people are able to report the cases, it is a plus for us.’¹⁴¹

Although this view was widely shared by most of the stakeholders, it seemed that there was not much evidence to support it because the base line of the initial statistics was not clear. As one government official explained:

‘Not sure whether there is a base line on which we are basing our assertions [and therefore] if there is an increase or decrease. However, I can say we have an increase because of the awareness and people are reporting, even the newspapers are so dedicated that now they are reporting cases of GBV which was not the case before. That does not mean that in the past it never used to happen. Maybe it used to happen but it was not just reported on. With this awareness in terms of GBV, we are seeing a lot of GBV cases. What we need is an empirical study of whether there has been an increase or decrease, at the moment it is very difficult to say. That is why it is important that with time, we need a base line to help us understand what is going on.’¹⁴²

The UN though was of the view that there was a base line although the levels of reporting were not thoroughly investigated.

‘We did have a base line on the numbers that we had at the beginning but we had not interrogated the levels of reporting. Every year we are seeing an increase and one can be alarmed at the numbers but we are taking it that people are now more aware. They know about the Victim Support Unit and they have knowledge about the law. Even at the village level, one stop centres are reporting quite a number of cases that go there.’¹⁴³

From these interviews, the increase in reported GBV cases is seen as positive because it is a sign that people are becoming more aware of the law. However, it is still unclear how the statistics are arrived at. They are based on the reports that are made to different police units. The problem with this is that firstly, people rarely report acts of GBV especially when the

¹⁴⁰ Interview with VSUP1, Police Headquarters (Lusaka, Zambia 27th April, 2016).

¹⁴¹ Interview with IOP2, International Labour Organisation (Lusaka, Zambia 17th June, 2016).

¹⁴² Interview with MJPI, Ministry of Gender (Lusaka, Zambia 29th August, 2016).

¹⁴³ Interview with the IOP1, UNDP (Lusaka, Zambia, 25th August, 2016).

perpetrator is known to them and secondly, in some rural areas people have to walk long distances or have to get on public transport to access police services. The issue of under-reporting is not just one that pertains to Zambia.

‘The majority of victims of violent crimes do not report to the police and, further, this is even less likely when those crimes are committed by persons known to the victim. And most cases of GBV are committed by persons known to the victims. Hence, they are both a serious undercount and not representative of the crimes committed.’¹⁴⁴

The above is supported by the International Commission of Jurists which state that ‘it is well established that many victims of crimes fail to notify the police. The majority of women who are subjected to gender-based violence do not seek justice frequently because they fear further violence and/or have no confidence in the justice system.’¹⁴⁵ The disparities between police recorded crime statistics and victim survey data reflect this - the so-called ‘dark figure of crime’.¹⁴⁶ Equally, other commentators have noted that in rural areas victims of crime may have particular problems in reporting: ‘[m]any rural-poor households will not have access to a telephone and may be required to travel large distances to report crime at the nearest police station or outpost.’¹⁴⁷ The lack of mobile police facilities can also have a deterrent effect on reporting crime:

“[s]ervices are delivered at specific, discrete locations rather than by a mobile patrol within a geographic area. The central police stations and police posts usually are in the centre of the city and in wealthier neighbourhoods, far from the city’s poorer, crime-ridden residential areas.”¹⁴⁸

Undoubtedly, in Zambia, the police themselves face issues of resources and budgetary constraints. They may have no vehicles or if they have a vehicle they may have no fuel. Although the UNDP as part of the UN-GRZ joint programme does provide vehicles to the VSU, in most cases survivors have to go to the VSU to report. So, as summed up by one of

¹⁴⁴ Sylvia Walby, Jude Towers and Brian Francis ‘Is Violent Crime Increasing or Decreasing? A New Methodology to Measure Repeat Attacks Making Visible the Significance of Gender and Domestic Relations’ (2015) 56 *Brit.J.Criminology* 1203-1234.

¹⁴⁵ Women’s Access to Justice for Gender-Based Violence: A Practitioners’ Guide. International Commission of Jurists, February 2016.

¹⁴⁶ Aiden Sidebottom, ‘On the Correlates of Reporting Assault in Malawi’ (2015) 55 *Br J Criminol* 55 (2) 381.

¹⁴⁷ *Ibid.*

¹⁴⁸ Richard R. Bennett and R. Bruce Wiegand, ‘Observations on Crime Reporting in a Developing Nation’ 2006 32 (1) *Criminology* 135-148.

the magistrate interviewees, ‘awareness has helped in the fight against GBV, but bear in mind that there are also a number of unreported cases.’¹⁴⁹ Thus, although greater awareness surrounding the new Anti-Gender Based Violence Law in Zambia has helped in encouraging people to report, other factors do distort the statistics, such as the way the numbers are arrived at, the social and economic costs of reporting, and the distance involved in reaching the nearest police station.

5.5 Findings

The thesis began with an outline of the incidence of GBV in Zambia. While acknowledging the fallibility of statistics, it is apparent that GBV is prevalent in Zambian society and that it (or reported incidences of it) is on the increase.

The increase is being seen by some policy-makers as a positive attribute in the fight against GBV. It is seen as a sign that people are now more aware of GBV and that they are reporting cases of abuse more than in the past. It has been suggested, however, that not all cases of GBV are reported to the police¹⁵⁰ and also sometimes survivors when reporting a case may not tell the truth of exactly what transpired because of the secrecy that surrounds GBV. In addition, it is important to note that there are other impediments to reporting instances of abuse, such as the geographic location of the nearest police station.¹⁵¹ The thesis has shown that women, especially those in rural areas, also rarely report acts of GBV because of socio-economic factors and the need to maintain good relationships with their family and their community. Bearing this in mind, it is important to note too that GBV is not confined to any particular social group or type of Zambian woman. While other authors have attributed GBV to economic dependency of women on men, economic dependency was not found to be the only, or even a particularly strong, cause of GBV in Zambia. Other factors do intersect though with economic dependency such as the community’s emphasis on the importance of relationships and family as a whole. Women still today may not report acts of GBV because people regard it as a closed family affair. Most people are of the view that such acts are internal, private matters and should be resolved within the family. Marriage as a status is highly regarded in the Zambian community, therefore even those women who are economically independent may not want to report abuse

¹⁴⁹ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

¹⁵⁰ Focus group discussion in Mfuwe (Maambwe, Zambia 19th July, 2016).

¹⁵¹ Focus Group in Lwiimba (Chongwe, Zambia 1st June 2016).

because they are scared that their spouses may leave them, causing social rather than material hardship. In most cases, women feel that they are owned by their menfolk, even when they have a high paid job.¹⁵² So, even in rural areas where most people rely on farming for their households and women are often in charge of providing food, women do not want to leave their husbands for fear of social stigma.¹⁵³

Victims or survivors rarely report acts of GBV because the police services are usually located far from where the victims stay. Therefore in addition, to the socio-economic costs experienced by survivors, the police and legal services are located far especially for rural areas.

The thesis then moved on to explore the legal framework in which acts of GBV are dealt with in Zambia. The law has been largely complicit with social attitudes in that GBV was seen as a private matter with even the Constitution making it clear that claims of discrimination cannot be made in matters that fall under customary law including issues of marriage and divorce. The legal framework has supported the toleration of violence within the family and has treated it more leniently than violence committed by a stranger. This has a negative impact on women's rights since the constitutional provisions offer a degree of sanctity to the private sphere which is where women are more likely to experience GBV.

The thesis sought to argue that the law on GBV in Zambia has historically failed to adequately address the needs of women. It has failed to recognise the complexity of violence against women. In addition, most of the provisions in the criminal law (Penal Code and Criminal Procedure Code) are vague and have not provided for punishment that is equivalent to the offence. It was hoped that the new Anti-Gender-Based-Violence Act which came into effect in 2011 would ameliorate matters. The Act provides for both civil and criminal remedies¹⁵⁴ for victims/survivors of GBV and it is gender neutral in its approach. However as shown in chapter 3, above, the Act has a number of drawbacks which create challenges for the victims of abuse. Although the Act describes the types of conduct which amount to GBV, it does not clearly provide for punishment which means that judges and magistrates have to refer to the laws that were in place before the Act in order to set out the sanctions for abusers. This has resulted in members of the judiciary being reluctant to use the Act.¹⁵⁵ The Act, although providing for

¹⁵² Interview with MP1, Magistrates Court Complex (Lusaka, Zambia 25th August 2016).

¹⁵³ Focus Group in Lwiimba (Chongwe, Zambia 1st June 2016).

¹⁵⁴ Note, however, the reservations discussed above in chapter 6 in relation to the availability of only civil remedies in the gender fast track courts.

¹⁵⁵ Interview with MP2, Magistrate Court Complex (Lusaka, Zambia 14th May, 2016); Interview with MP3, Magistrate Court Complex (Lusaka, Zambia 15th June, 2016).

civil orders such as occupation and protection orders, has rarely been used for this purpose by the courts.¹⁵⁶

The subordination of women can also be attributed to the colonial administrators and missionaries who exacerbated on the ideology that women were inferior to men. This ideology together with Christianity compounded the narrative on the subordination of women. Post-independence Zambia sees its women as mothers and keepers of tradition – a belief which chimes with Giagilio and Kapur’s argument that women are habitually seen to embody nationalism, and the nationalist political elites project on to them stereotypes with regards to motherhood, spousal duties, purity and other symbols of culture.¹⁵⁷ The narrative of women as mother and keepers of culture, equally exists alongside a narrative of women as minors and in need of rescue.¹⁵⁸ As noted in Chapter 2, in the discussion of the work of Boehmer, women tend to represent the national territory and while symbolically they are venerated, in reality women are subordinated to men within society.¹⁵⁹ As argued in the chapter, the framing of GBV as an aspect of Zambian culture has served to create a narrative in which women who are assertive or speak out against abuse are seen to act against the norm or culture. As a result the bodies of women become a site of legal and culture contestation.¹⁶⁰

Having advanced a theoretical framework for the consideration of GBV in Zambia which seeks to highlight the influence of culture upon experiences of violence, chapter 2 then sought to apply the theoretical perspective to the law on GBV in Zambia today. Picking up upon the theme of culture and gender relations, the thesis argues that the law is not necessarily inherently discriminatory against women but the way in which it interacts with culture, colonialism, patriarchy and socio-economic conditions makes it inadequate in its response to GBV. It is argued that the present law on GBV is not enough in itself to stop GBV (and this was supported too by the conclusions from the field work).

¹⁵⁶ Interview with MP1, Magistrate Court Complex (Lusaka, Zambia 25th August, 2016).

¹⁵⁷ Ryan Charles Giaglio, ‘Book Review: Ratner Kapur’s *Erotic Justice: Law and Politics of Postcolonialism*’ (2005) 17 *Yale J.L. & Feminism* 517.

¹⁵⁸ Homi Bhabha, ‘The Other Question... Homi K. Bhabha Reconsiders the Stereotype and Colonial Discourse’ (1983) 34(6) *Screen* 18 who states that ‘the oriental is both a savage (cannibal) and yet the most obedient and dignified of servants (the bearer of food); he is the embodiment of rampant sexuality and yet innocent as a child’; see also Edward Said, *Orientalism* (Penguin Books 1978).

¹⁵⁹ Elleke Boehmer, *Stories of Women: Gender and Narrative in the Postcolonial Nation* (Manchester University Press 2005) 29.

¹⁶⁰ Ryan Charles Giaglio, ‘Book Review: Ratner Kapur’s *Erotic Justice: Law and Politics of Postcolonialism*’ (2005) 17 *Yale J.L. & Feminism* 517 who argues ‘that as a result of colonial experience, the Indian women, as a nationalist ideal and a stereotype, remains the locus of legal and culture contestation.’

Although the law is there to protect women and has been improved in recent years rendering GBV more visible, there are still gaps and deficiencies within the law that make it hard for women to take cases of GBV forward. Notably, the social cost associated with taking a member of the family to court can be high and not worth the price if it leads to exclusion and ostracism from the community. It was also argued that the court system itself is foreign to women, particularly those living in rural locations and is far removed from their everyday lives. Additionally, when cases are brought under customary law, there are significant inconsistencies between the versions of customary law applied by the superior courts, the lower courts and the various informal problem and dispute resolution fora within the wider society.¹⁶¹ A woman may report a case of GBV but it may take a long time to come before the courts and, once there, there is an economic cost to the woman in attending. Women, it has been argued, find the consequences of bringing legal action against their abusers to be drastic and alienating. This leads women often to withdraw their case.

It has been argued that the law (notably the common law) cannot work in isolation and needs to be ever mindful of its relationship with cultural, cultural practices and customary law. Having a dual legal system, the common law cannot ignore its customary twin and it needs to be recognised that the legal system as a whole bears all the hall marks of a colonial legacy. This has a complicated and special effect on women's position within Zambian society and also their relationship and interaction with the law.

The thesis does acknowledge that culture can cause an infringement of women's rights and contribute to GBV and, although there are a number of justifications that are made in the name of culture, it is important to note that culture should not be used to justify violations of women's rights. What is important about culture is that it is developed by the majority and usually that means men because after independence men were more economically stable than women and had more power. This reflected very clearly the colonial policies that were in place in Victorian times.¹⁶² However, it is important to note that although culture is dynamic, men may seek to hold on to the old ways in order to continue their consolidation of power and to maintain the status quo. This does not have to be the case forever, though, and Zambian women are strong and resilient. Changes are starting to happen with the public visibility of GBV being raised and conversations about its impact upon women and their lives being made increasingly audible.

¹⁶¹ Agnete Weis Bentzon et al, *Pursuing Ground Theory in Law: South-North Experiences in Developing Women's Law* (Tano-Aschehoug 1998) 50.

¹⁶² Ibid.

Having analysed the inadequacies of the formal legal provisions on GBV in Zambia, the thesis then went on to test this more doctrinal assessment against the lived reality of women's lives and experiences. Having explained the feminist methodology which guided the empirical research, the thesis then analysed the testimonies of survivors and professionals along thematic lines to draw out their assessment of living with GBV in Zambia. Following on from the doctrinal assessment of the law, the voices of survivors showed that law reform without social change is inadequate to deal with violence against women. The research demonstrated that sometimes women choose not to use the legal system because in weighing the consequences of doing so the disadvantages often outweigh the advantages. Hence, it is evident that:

‘[a] woman with a manifest and coherent identity within her local environment may decline to exercise, or feel no need to enforce, her rights through the formal legal system, particularly so if the dominant legal norms are in conflict with those of the legal system.’¹⁶³

Therefore, when it comes to legal disputes, in most cases women will resort to the local tribal or village courts or to their family because they are more familiar with local tradition and custom. It appears necessary, therefore, to reinforce the customary law settings so as to ensure that women's rights are adhered to. As such, it is important to work within the context of customary courts and customary law to improve justice without destroying or replacing existing, well-used and accessible traditional practices.¹⁶⁴

The thesis found, additionally, that victims and survivors of GBV experience real life problems when they come into contact with police and legal personnel. The focus group discussants pointed out clearly that the police do not make it conducive for them to report GBV because of the stereotypes that prevail. For instance women are told that the violence is a domestic or family affair which they should try to resolve in the context of the family or home. The discussants also talked in negative terms about corruption in the court system and how the courts, especially local courts, tend to side with men. This view is supported by Sidebottom who argues that ‘men tend to fair better in the legal system because they are advantaged in that they have more resources than women.’¹⁶⁵ In addition, as discussed in chapters 2 and 3, the law is male and tends to support the male point of view. Judicial

¹⁶³ Agnete Weis Bentzon et al, *Pursuing Ground Theory in Law: South-North Experiences in Developing Women's Law* (Tano-Aschehoug 1998) 100.

¹⁶⁴ Tiernan Mennen, ‘Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan’ (2010) 2HJRL 218.

¹⁶⁵ Anne Sidebottom, ‘On Correlates of Reporting Assault in Malawi’ Br. J Criminol (2005) 55 (2) 381.

stereotypes can also have an influence on the decision not to take cases through official channels. As seen in the cases of *Bola*¹⁶⁶ and *Mwalla*,¹⁶⁷ discussed in Chapter 3, negative stereotypes about women held by judges can make it difficult for women to have faith in the system. The perpetuation of stereotypes by those in power solidifies and consolidates the stereotypes held by general members of the public and feeds into more societal discrimination against women.

The thesis concludes, therefore, that although the law on GBV in Zambia has been reformed in recent years, it is not yet adequate to end violence against women. While law has brought in some positive changes, there is still a lot more that needs to be done in order for it to be really effective. Unfortunately, the law cannot do more without a corresponding transformation of institutions, cultural practices and societal (male) mentalities.

5.6 Conclusion

Although some legal measures have been put in place in Zambia to combat GBV, it is a very complex problem that has no easy legislative solution. The government and co-operating partners are working hand in hand to curb GBV and this has led to an increased sensitisation to the issue and a push towards education and training of community members and village headmen. The presence of the new legislation and new Rules on Anti-Gender Based Violence has coincided with a rise in reported cases of GBV although it is unclear that there is a direct correlation here. Equally, it is important to stress that the law exists within the confines of culture and not outside of it. Therefore, if social norms do not regard the law as important or legitimate, it becomes very difficult to internalise it. In order for the law on GBV to work, society must have strong social norms that penalise or sanction such acts of violence. Patriarchal tendencies are entrenched in Zambian culture and the law often responds to the symptoms of GBV rather than the problem itself. What is needed is a greater understanding of the intersection between culture, patriarchy and other forms of discrimination. This means challenging the patriarchal characteristics present in legal and cultural institutions and recognising the persistent gap between the legal rhetoric around tackling GBV and the lived reality of those women who experience it and those professionals who work to help improve the lives of victims.

¹⁶⁶ *The People v Godden Bola* Lusaka Subordinate Court Case of 2002.

¹⁶⁷ *Chali v Mwalla* S.C.Z Judgment No.6 of 1992.

Chapter 6:

Conclusion

6.1 Introduction

The aim of the thesis was to examine whether or not Zambian law provides sufficient protection for women survivors of violence. It posited a number of sub-questions in answering the key question such as; the extent of the problem of VAW in Zambia and whether GBV is inherent in Zambian culture or it has been exacerbated by colonialisation. In addition, it looked at legal institutions and legal reforms and how women have experienced these institutions and reforms.

The thesis has explored and analysed the law on GBV in Zambia using a postcolonial lens. It has critically examined the potential of law reform and legislation to address violence against women in Zambia. This involved examining the systems of both common law and customary law and assessing how women themselves experienced the law and the legal system.

Additionally, the thesis has considered the effects that GBV has on the community as a whole. In this regard, Focus Group Discussions revealed how women experienced GBV within their communities and how they as individuals, together with their community, responded to it. In looking at the gap between lived experience and the law in the books, the thesis has questioned the effectiveness of the law on GBV in Zambia and in particular the potential of the Anti-Gender-Based Violence Act to seriously tackle violence against women. The findings of the research suggest that the law by itself is inadequate in the fight against GBV because the law alone is incapable of addressing acts of violence resulting from the complex relationship involving culture, gender and socio-economic conditions.

The significance of the study is two-fold. First, it explores GBV from the point of view and the experiences of Zambian women and in this respect, it challenges dominant theories which seek to attribute GBV to cultures in the global south. The thesis suggests that women in most cases have been held in high esteem in Zambia in pre-colonial times but because of colonialism, most groups now have more patriarchal tendencies. Secondly, the study is significant because it demonstrates that despite an array of different legal provisions (ranging from customary law to the common law and including the Constitution and legislation), the law in itself is simply not enough to tackle GBV without a change in social norms and attitudes. The thesis has sought to

critically interrogate the law and to challenge its inherent claim to truth and objectivity.¹ The law is said to be objective and has the tendency to silence other points of view. However, it has been argued above, in line with many feminist scholars before me, that the law is masculine and therefore privileges patriarchy in its approach. Because of its claim to truth and hence its power, the law has a special status meaning that it is privileged and accepted rather than being questioned or challenged. This enables legal mechanisms and structures to hide their inherent patriarchy and portrays the state of the world as natural. Hence, although the law is patriarchal, patriarchy in the law is very well concealed and not easily noticeable. As Smart has argued, there is a need to demystify the law and to render its operation and influence more transparent.²

In postcolonial states, it is not simply a question of demystifying the law, but also one of interrogating the very production of knowledge by the law.³ Most postcolonial states have inherited their laws from the colonial period.⁴ To the majority of the population, the law is still alien and far removed from reality because it was imposed on the people whose own values and notions of truth were often dismissed. Additionally, the elites (usually men in postcolonial states) continue to control the law and by extension power within society. These male elites have imposed their notions of truth on women and created ideologies about the static nature of customary law that only serve to sustain their power. The thesis suggests that Zambia is not an exception. Customary law is usually dismissed and has to conform to statutory law in order to be administered, that means customary law will only be applied so long as it is not repugnant to natural justice.⁵ Customary law is a creation of colonisation and after colonisation the male elite continued developing customary law sidelining women, resulting in a customary law that is discriminatory against women and favours men. However, it is important to note that customary law as it is now is a creation of so many economic and social factors. Therefore, this

¹ Carol Smart, 'Law's Power, The Sexed Body and Feminist Discourse' in *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications: London 1995) 72. Smart argues that 'his in turn, positions law in a hierarchy of knowledges which allows for the disqualification of 'subjugated knowledges' and hence gives rise to the power of the law.'

² Ibid 2.

³ See Ratna Kapur, 'Precarious Desires and Ungrievable Lives: Human Rights and Postcolonial Critiques of Legal Justice' (2015) 3 (2) *London Review of International Law* 267 who suggests that in the context of sexuality and gender, knowledge of the ways in which these categories should be organized and experienced is knowledge that is claimed by those who presume to know the way to be in the world and how to evaluate a woman based on whether she is exclusively in a marital and heterosexual relationship or in a prescribed role as a mother, wife or daughter, and whether she is with or without the veil. See also Edward Said, *Orientalism* (Penguin Books 1978); Aime` Ce`saire, *Discourse on Colonialism* (MR NewYork 1955).

⁴ Simon Coldham, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects' (2000) 44 *Journal of African Law* 218, 219; See also Edward Said, *Orientalism* (Penguin Books 1978).

⁵ See section 3.1 of the thesis.

thesis observes that GBV is not inherent in Zambian culture but has been exacerbated by colonisation and socio-economic factors.

The research is original in that it is the first critical analysis of the impact of the law on GBV in Zambia drawing on both doctrinal and also empirical research. Previous work around criminal law enforcement in Zambia has not been conducted from a particularly feminist point of view and there is a gap in the analysis of the new Act and Rules on Anti-Gender-Based Violence. The originality of the research also lies, in its questioning of dominant theories on GBV in Africa, and Zambia in particular, and its application of postcolonial theory to explain the disconnect between law and social experience. The type of research carried out for the thesis is rare in Zambia since law researchers will typically concentrate on the black letter nature of the law itself but will not interrogate the law to find out why it has failed to work effectively in practice. This thesis was able to get a first-hand account of GBV from the women themselves through focus groups and interviews and how they navigate the system. It was discovered that although the black letter law is there, the way it played out on women's lives is very different from how it was anticipated. In most cases, women did not use the Anti-Gender-Based Violence Act and if they did, they would later on discontinue the cases.

In addition to analysing the law, the thesis examined the effects of the dual legal system in Zambia and how this too impacts the rights of women at a systemic level. Examining the dual legal system was essential because before colonisation and outside influence, custom was used as a way to resolve disputes in Zambia. This has not changed much in some respects because people, especially women, still resort to family members and the community to resolve issues. However, the customary law as it is known now, it is argued, is a distortion of colonial rule and does not represent pre-colonial customs and values. Since existing customary law too is the creation of colonial administrators, men and the surrounding socio-economic conditions, its effect on women has been adverse. In the creation of customary law, women were excluded from the process due to the influence of Victorian notions of women and appropriate gender relations.

The research is also important in that it acknowledges the relationship between culture, discrimination, the law and socio-economic factors and how these influence women's perception of whether to report acts of violence or not. The thesis has demonstrated that many factors are at play when women are dealing with incidences of GBV and deciding whether to report it or not. Women carefully consider the social cost of reporting acts of GBV within their

family or community contexts but also the risk of dealing with the courts which are unfamiliar territory to them. We have seen that women are far more used to engaging with custom in their everyday interactions than they are with state law and they will resort to statute law only as a last resort. Women's problems are to a large extent resolved at a local, community or tribal level⁶ and this has an effect on how women react towards the law in general. There are a wider range of normative orders than the formal law at play which go to shape a woman's legal and social position.⁷ This means that the formal legal system may actually be the last avenue a woman will resort to when trying to resolve a dispute. If a woman decides to use formal legal mechanisms, it is not an easy task and can be time-consuming and economically challenging, coupled with being a very isolating experience for the woman concerned. It is, therefore, important to understand how the norms and expectations which inform the position of women and gender relationships in Zambia are generated in the intersection between general law, customary law and people's everyday traditions, behaviours and practices.⁸ Put simply, the daily context in which a woman lives her life will influence the kind of decisions that she will make.

Therefore, as seen in the previous chapter, a woman may choose not to use the legal system even if she is aware of the empowerment that the law gives her, because she considers her personal and social relationships to be more important than the problem at hand. A woman's use and non-use of her legal rights and freedoms must be considered in the light of the wider socio-cultural opportunity structure within which she operates.⁹

The thesis has also demonstrated that although there have been legal reforms and an improvement in the law, the position of women has not changed much. The practical experience of women who experience GBV in Zambia is that there is a lot of corruption, lengthy procedures while the social costs of taking a matter to court are high. Women were of the view that although the law exists, it does not cover all aspects of how women navigate around GBV. The law does not cover all aspects of how women experience GBV and therefore renders itself inaccessible to most women. The thesis has discovered that the real-life experiences of women reveal gaps between the ambition of the law to tackle violence and the lived reality of women's daily lives.

⁶ Agnete Weis Bentzon et al, *Pursuing Ground Theory in Law: South-North Experiences in Developing Women's Law* (Tano-Aschehoug 1998) 31.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid 111.

By focusing on the woman and her relationships with men and with other women and the society in which she is a member, we may uncover the norms, expectations and social and economic forces which influence problem solving and dispute resolution.¹⁰ The thesis has shown that the law is not disconnected from its context and that the specific contexts in which GBV in Zambia occurs have a huge influence on the implementation and enforcement (or otherwise) of the law.

6.2 Recommendations

The thesis has concluded that GBV is a problem in Zambia. Although there have been legal reforms to tackle GBV, these reforms have not exactly been effective. The practical experience of women has been that the court officials are corrupt and the police stations are usually located far from their homes. In cases where women are able to access these institutions, the economic and social costs far out weight the cost of reporting cases of GBV. The thesis has also proved the power dynamics in the post-colonial society and having talked to a range of people who are either victims/survivors of GBV or work in close relations with the law, it has proved that the law is not working. It is important to note that in order for the law to work, the context in which it operates is vital and a better way to understand GBV in Zambia is through the post-colonial lens.

This thesis provides some recommendations on what can be done to improve the lives of women with regards to GBV taking into consideration the women's experiences as stated in the focus group discussion and the views of those who work closely with the victims of GBV.

The enactment of the Anti-Gender Based Violence Act has shown a commitment on behalf of Zambian law-makers. However, the inadequacies of the law suggest that further reform, which is sensitive to culture, is needed. Although the Act is a positive step towards the fight against GBV, the Act needs to be further decoupled from other laws and to be clear and specific on which punishments are available in both civil and criminal spheres. The Rules relating to the operation of the Act should in addition be clear and take into consideration the multidimensional aspect of GBV. As seen in the field work, the Rules mostly relate to the civil aspects of GBV while leaving out the criminal aspects. This has brought a number of challenges

¹⁰ Ibid 100.

for the courts¹¹, meaning that judges are reluctant to use the new law. Therefore, the Rules should cater to both civil and criminal proceedings so as to make the fight against GBV more effective.

When coming up with laws relating to GBV, it is also important to look at the multidimensional aspect of GBV. From the discussions with women within communities, it was found that although there have been legal reforms, the position of these women has not changed much. Therefore, it is important to take into consideration the fact that the laws on GBV do not usually operate in isolation. In order for these laws to function, they should take into consideration the social context under which they operate especially the fact that Zambia is a post-colonial state. For the law to work, there should be strong structures within the community that will help the law to be implemented more effectively. While it is important to acknowledge that women find it difficult to navigate the legal system in most cases, there is need to put measures in place to encourage them to report cases to the relevant authorities. The thesis recommends that the government should ensure that police stations are within the reach of communities. During field work, it came to light that most people resident in rural areas have to walk long distances to the nearest police stations. This resulted in most women in rural areas not reporting acts of GBV to the relevant authorities not just because of the distance but also the economic cost¹² of reporting such acts. Ensuring that the police stations are located near communities will encourage women to report acts of GBV.

In addition, the Act should not disregard culture or talk about culture as all negative. It should not undermine the local context and cultural settings within which women navigate the legal system. During field work, a number of women narrated how they resolved their problems by involving family members and relatives. With Zambia being a post-colonial state, these institutions are powerful and affect women's choices to a large extent. The formal (legal) sanctions are effective when reinforced by informal social controls and weakened when these informal controls are absent.¹³ It is also suggested that apart from the law enforcement, efforts should be concentrated on traditional counsellors¹⁴ upon whom many women rely upon and these counsellors should train women on how to handle matters of GBV using both informal

¹¹ Refer to chapter 5, interview with MP1

¹² The economic cost can be reduced by making the police services easily available and also accessible. Women should not be spending money and walking long distances to access them.

¹³ Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*
<www.ncjrs.aspensy.com:8/catalog.html> accessed on 9th March, 2017.

¹⁴ The training would involve sensitising traditional counsellors on the provisions of the Anti-Gender Based Violence Act.

and formal mechanisms. The law will be more effective if women learn to navigate both the informal and formal legal systems because they will then be able to make informed decisions. Therefore, the traditional counsellors should also be conversant with the laws so that they are able to advise women on both the legal and informal systems.

The court system should be more accommodating and more flexible with regard to GBV cases. The courts system has been known to be patriarchal and intimidating to many victims of GBV. Given how the court system operates and the bureaucracy involved, it has been shown to discourage victims while the length of time cases take can mean that victims are likely to withdraw cases.

There is need to train court officials how to handle victims/survivors of GBV. Although there has been training within the judiciary on how to handle victims, it was learnt during field work that sometimes the wrong people are trained leaving out those who are in direct contact with the victims of GBV.¹⁵ Therefore, when donors or partners are providing training, they should work hand in hand with the management of the court system so as to identify relevant staff who work in direct contact with the victims.

The training of police officers is another matter requiring attention. During the interviews with officials at the Victims Support Unit (VSU), it was said that although there has been training by funding partners with regards to how to handle victims/survivors of GBV there is a high turnover rate of officers. During field work, it was suggested that the police and the judiciary should be trained. Training would entail instilling sensitivity in the manner they handle the victims and survivors. This in the long run would encourage more women to report acts of GBV. The thesis recommends that training should not just be an ongoing process but that individuals within organisations should be identified as trainers. This would ensure that even in cases of staff turn overs, there are people within such organisations who will be able to train new recruits within these organisations.

The time for cases to be heard should be sped up as the more time elapses, the more likely that women will feel isolated and out of place in the court process. Therefore, the coming into effect of the specialised gender fast track courts has been an essential step towards the expedition of cases. In addition, since patriarchy is systematic within the court system, the courts should not just concentrate on employing more women but should also ensure that women are able to

¹⁵ Refer to chapter 5

express themselves and are heard. It was learnt during field work that sometimes women experiences are trivialised and this makes women uncomfortable to report incidents of GBV.

Sanctions are another issue that need reconsideration. During field work, it was observed that victims sometimes do not report cases of GBV because there are few alternative sanctions available other than a prison sentence. Victims, though, may prefer that their abuser receives counselling and had the law provided such an option then this may increase the number of cases being reported.¹⁶ The testimony of women survivors, shows that many women do not want their spouses to be imprisoned but they simply want the abuse to stop.¹⁷ It is for this reason that in cases of minor abuses, there should be consideration given to other alternatives such as fines and behavioural training. Introducing fines and behavioural training will send a message that GBV of any nature should not be tolerated and at the same time it will act as a deterrent to those thinking of committing acts of GBV. On behavioural training, they would be community ideas such as sensitisation on the effects of GBV on the community and the country in general.

There is much work to be done with local communities to sensitise them to discrimination against women and its effects on women's rights. In this regard, the cultural norms that encourage and perpetuate the subordination of women should be challenged. This should not just involve women in communities but school curricula should also concentrate on gender equality. Work places and institutions including media houses should be conscious of the gender inequalities within the Zambian society. Media institutions should be extremely careful with how they report news on GBV and also how they relate messages with regards to gender roles in the community. This is because the media is very powerful and has a great impact on shaping public opinion and decision-making in communities. There is a need too for greater awareness that the distorted patriarchal culture is not inherently Zambian and that historically women have had greater prominence and importance within society. This can be done by involving men and women or elders within society who could explain the traditional concepts of equality and also engaging historians who are able to narrate the history of the various tribes in Zambia and how they regarded equality.

The awareness on GBV should not just concentrate on women. Men are important partners in the fight against GBV. Since men are the majority decision makers in the Zambian context and

¹⁶ Ibid.

¹⁷ Amanda Burgess-Proctor, 'Intersections of race, class, gender and crime: future directions for feminist criminology' (2006), 1 (1) *Feminist Criminology* 27.

economically and socially powerful than women, they should not be left out in the fight against GBV. In addition, because of the inequalities in the society, men's participation is critical in the fight. This can be done by encouraging men to talk about gender matters during men's meetings such as insaka. There is a need to engage men if we are to make progress in the fight against GBV.

More formally, there is need to address laws which openly allow discrimination based on gender. In particular, Article 23 of the Constitution which allows for discrimination in certain aspects of customary life needs reform. While Article 23 does not specifically target women, its impact on women is more adverse than on men because women are discriminated against more under customary law. Therefore all laws that allow for discrimination should be repealed or amended.

The judiciary can, and need to be, bolder in challenging and striking down, where necessary, laws which infringe upon women's rights. This will encourage women to report acts of GBV while also making them have confidence in the system. Equally, since customary law is dynamic in its nature, the courts could seek to interpret it as a living law which in today's society is able to deconstruct the patriarchy found in everyday society. It is important to note that customary law is not fixed (it adapts to socio-political and economic situations). Just as statutory law has not remained stagnant but changes according to socio and political conditions, courts should not shy away from striking down customary rules that infringe upon women's rights as unconstitutional. It is important for the society as a whole to acknowledge that the customary law that we have at the moment is a creation of many factors.¹⁸

While all these reforms are important in the fight against GBV, there is need to empower women. Because of how power operates in the post-colonial society, women need to be empowered socially, economically and politically. There is need to invest in the education of women. It has been shown that once women are educated, they are more likely to make informed decisions. Empowered women will be able to stand up and question patriarchy and will be able to leave abusive relationships.¹⁹ With education, women will be able to teach their male children not to oppress girls and their female children to stand up against oppression or

¹⁸ Refer to chapter 2.

¹⁹ Bell hooks, *Feminist Theory From Margin to Centre*, *Educating Women: A Feminist Agenda* (Boston: South End Press, 1984)

violence of any kind. As stated in field work, patriarchal has been systematic, therefore there is need retrain people especially children that all humans are equal.

In addition, there is need for government empowerment programmes to target women. Most awareness programmes usually target women who have leadership positions in communities but it is important for such programmes to target all women in general. This can be done by having policies which clearly state that a programme cannot commence if it does not include a certain percentage of women. As was seen from both focus groups, women are always working hard to support families. By targeting women, they will be more independent and also be able to fend for themselves and their children. When women are independent, it will mean that they will no longer be economically dependent on their husbands or partners and this will in turn reduce their vulnerability when it comes to GBV. Empowering women economically and socially will enable women transcend oppressive cultural and colonial beliefs. This can be done by encouraging women to attend training programmes and also giving priority to women when it comes to accessing small loans.

Law is usually blind to the context in which discrimination happens. In order for the law against GBV to work, it should not just be available but should also be accessible to victims. Victims should be able to easily access the legal institutions. This means that police stations or posts and the courts should be situated where the victims can have easy access. If these facilities are not easily accessible, it means that victims are more likely to incur economical costs and in the long run feel discouraged from reporting.

Finally, there is need to hear further the voices and experiences of those women who are affected by GBV on a day to day basis. Listening to the stories told by Zambian women about how they navigate the complex intersections of culture, gender, colonisation and the law, fills me with admiration for these women who face many challenges in their relationships, their work and their societies. While theory and law can both help explain and address GBV in the global south, there is need to draw more heavily upon the lives of those people affected and to better connect with, and embrace, the context within which the survivors of GBV live their daily lives. With this in mind, it is inevitable that further research, education and training is needed to ensure that all actors within the GBV debate (including survivors, perpetrators, the police, legal professionals and NGOs) better comprehend the scale and nature of the problem and that improvements in the legal and social responses to GBV can take place in the future.

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1.	I confirm that I have had the project explained to me and I have read and understood the Information Sheet, which I may keep for records.	YES	NO
2.	I understand that my participation is voluntary, that I can choose not to participate in part or all of the project and that I can withdraw at any stage of the project (deadline TBC) without being penalized or disadvantaged in anyway	YES	NO
3.	I have had the opportunity to ask questions and I agree to take part in the above interview/focus group discussion	YES	NO
4.	I agree to the interview/focus group/consultation being audio recorded	YES	NO
5.	I agree if I am participating in the focus group, to respect the confidentiality of other participants.	YES	NO
6.	I agree that my name will be anonymised in the project.	YES	NO
7.	I agree that what I say in the interview/focus group sessions may be used, in an anonymous form, in the published doctoral thesis and other subsequent publications such as academic journal articles	YES	NO
8.	I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998	YES	NO

APPENDIX 2:

Focus Group –Questions

Title: Gender-Based Violence in Zambia: A Feminist Legal Critique

Misozi Lwatula: PhD Candidate

Focus Group: Researcher-Led Questions

1. What do you understand by the term Gender-Based Violence? (discussion)
2. Do you know of anybody who has experienced GBV?
3. Do you think that men have a right to inflict violence on women?
4. Do you think that GBV infringes upon the rights of women? (discussion)
5. What happens in case one experiences GBV?
6. Do you feel that the community generally sympathize with victims of GBV?
7. Is there a relationship between culture and GBV?
8. What sort of help do women who experience GBV receive?
9. Are there any NGO's that you know that deal with the victims of GBV?
10. Do you know of any shelter where women can go to in case of GBV?
11. Do you think the law is adequate in the fight against GBV?
12. How do you feel the police deal with the victims of GBV?
13. Do you an idea of how the victims of GBV experience the court system?
14. Why do you think women withdraw cases of GBV?

APPENDIX 3:**One on One interviews with Victims of Gender-Based Violence-Questions**

1. What do you understand by GBV?
2. Have you ever experienced GBV?
3. Can you please describe your experience?
4. Do you think that men have the right to inflict violence on women?
5. Do you think that culture contributes to GBV?
6. What do you think causes violence?
7. Do you think that GBV is common in your community?
8. Do you think that people in general sympathize with victims of GBV?
9. Did you report the incident to the police?
10. Do they police take you to the hospital or did you have to find your way to the hospital?
11. What was your experience with the police?
12. What was your experience like with the medical staff?
13. Do you know what legal options are available for women who experience GBV?
14. Did you pursue the incident/s of GBV by going to the courts
15. Do you know of any NGO's that deal with victims of GBV?
16. Do you know of any place that shelters women who are victims of GBV?
17. Have you ever been to such shelter?
18. What was your experience in the shelter?
19. Did you find the court system friendly/ do they seem willing to help?
20. Have you ever heard of the Anti-Gender Based Violence Act?
21. Do you think that the Act offers enough protection for women?
22. Do you think it is adequately implemented?

APPENDIX 4:

Judges/Court officials-Questions

1. What do you understand by GBV?
2. What types of GBV cases come before your court/do you deal with?
3. Has there been an increase in terms of GBV cases that come before your court?
4. What do you think has attributed to the increase or decrease?
5. Do you think the judiciary/officials are receptive to victims of GBV?
6. Is there any training that is offered on dealing with victims of GBV?
7. Have you attended such training?
8. Do you think that the law is adequate to protect women against GBV?
9. Are you aware of any shelters /NGO's dealing with victims of GBV?
10. Has the Anti-GBV Act helped in the fight against GBV?
11. Does the court usually use the Anti-Gender-Based Violence Act?
12. If not, what are the reasons behind?
13. Do you think that the judiciary is gender friendly?
14. When is the gender fast track court coming into effect?
15. What will be the composition?
16. Do you think that customary law/culture contributes to GBV?
17. Do you think customary law/culture can be reconciled with human rights?

APPENDIX 5:

NGO's-Questions

1. Can you please describe your organisation activities?
2. How prevalent is GBV in Zambia/community?
3. What are the frequent cases of GBV that women who come to your organisation experience?
4. Do women usually open up about their experiences of GBV?
5. What does your organisation provide/offer to the victims?
6. Do you think culture contributes to GBV?
7. Is the law adequate in the fight against GBV?
8. How effective has been the Anti-Gender-Based Violence Act?
9. How responsive are the police to incidents of GBV?
10. Is the court gender sensitive in dealing with the victims of GBV?
11. What are some of the obstacles that women face when dealing with the court system?
12. Why do you think women withdraw cases?
13. Is government doing much in the fight against GBV?
14. Do you think that the government is fulfilling its obligations under CEDAW and the Maputo Protocol?
15. Are there any public policies or programmes on GBV that you are aware of?
16. Do you have a working relationship with the police and the court system?
17. Do you offer training to institutions that victims of GBV are likely to go to e.g hospitals, police and the court?
18. Are you doing anything in sensitizing the public about the effects of GBV?

APPENDIX 6:

The Victim Support Unit and the Police-Questions

1. How many cases of GBV are recorded yearly in Zambia?
2. Has there been an increase in the number of reported cases?
3. What has attributed to the increase or decrease?
4. What are the common types of GBV?
5. Is there a unit that deals specifically with GBV?
6. Do you think you are receptive and sensitive to the victims of GBV?
7. What can be done to make the VSU and the police victim friendly?
8. Is there any training offered on how to deal with victims of GBV?
9. Have you attended such training?
10. What type of GBV usually end up in court and why? (domestic or by stranger)
11. Are you aware of any shelters/Ngo's dealing with victims of GBV?
12. Do you work hand in hand with such NGO's?
13. Is there a working relationship between the police and health facilities with regards to GBV?
14. How familiar is the VSU or the police with the Anti-Gender-Based Violence Act 2011, regional and international instruments dealing with women's rights? CEDAW, Maputo Protocol
15. Do you think culture contributes to GBV?
16. Do you think the law is adequate to curb GBV?
17. What are some of the problems faced by the police when dealing with victims of GBV?
18. What is the main reason why people withdraw cases of GBV?

APPENDIX 7:**Breakdown of Interviewees Coding****MFUWE FOCUS GROUP**

FGMP1

FGMP2

FGMP3

FGMP4

FGMP5

FGMP6

FGMP7

FGMP8

FGMP9

FGMP10

FGMP11

FGMP12

FGMP13

LWIIMBA FOCUS GROUP

FGLP1

FGLP2

FGLP3

FGLP4

FGLP5

FGLP6

FGLP7

FGLP8

FGLP9

JUDICIARY /COURT OFFICIALS INTERVIEWS

JP1

MP1

MP2

MP3

MP4

INTERNATIONAL AGENCIES

UNDP- IOP1

ILO - IOP2

NGO

YWCA- NGOP1

WILSA- NGOP2

Victim Support Unit (VSU) – VSUP1

Ministry of Gender

MGP1

Provincial Local Court Officer - PLCOP1