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**AN INVESTIGATION INTO ADULTERY AS A GROUND FOR DIVORCE UNDER  
CUSTOMARY LAW IN PATRILINEAL MARRIAGES IN ZAMBIA**

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**BY**

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## ABSTRACT

The objective of this research was to explore ways and means of strengthening equal rights between a woman and a man married under customary law compared to a man and woman married under statutory law in Zambia. Sexual rights are embraced by a number of human rights instruments. The inability of the Government to enact laws that remove discrimination from its laws and policies causes women married under customary law to be continually prejudiced. For example, a woman married under customary law cannot divorce her husband on grounds of adultery whereas the same law unfairly (with respect) allows her husband to do so. This study was motivated by a serious attempt to answer the following question, ‘While on the one hand there is sufficient legal protection in the nation’s laws to promote and protect equality between wives and husbands when they divorce (including the Constitution of Zambia which guarantees that all its citizens enjoy fundamental rights and the Matrimonial Causes Act that allows both wives and husbands to divorce each other on grounds of adultery), what laws, practices and other barriers are still in existence which have the effect of continuing to discriminate against women married under customary law?’ This task was most ideally managed by employing the unique women’s law approach as the study’s main methodology, among others (including the human rights approach), to investigate the affected women’s lived realities and just how they interact with the law which prohibits women married under customary law from divorcing their husbands on grounds of adultery. It was found that as a result of this law, they lose their Constitutional protection against discrimination on the basis of sex and their right to justice. The study found that the law denies women the right to justice and triggers a lot of anguish and mental stress in them. The study also found that while customary law is in the process of being codified, the question that was asked and tentatively answered is, ‘Will customary law address the discrimination against women under customary law marriages?’ This study recommends that in the short term the government provide guidelines for the law enforcers (i.e., Local Court justices and traditional chiefs) to follow when they handle divorces and in the long term to take inspiration from countries such as Kenya and South African who have amended their Constitutions and included in them a Bill of Rights so that women living in customary law marriages are entitled to enjoy the same rights as those in civil law marriages.

**Declaration**

I, EUNICE MWISA NTHANI, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

Signed.....

Date.....

This Dissertation was submitted for examination with my approval as University Supervisor

Signed.....

## ***Dedication***

*I dedicate this piece of work to all who made it possible for me to go through this programme and pay special tribute to my late mother, MYSRIP, for laying down a good foundation for me.*

*To my children for being tolerant and understanding when I was not there when you needed me and to my late husband, for your ever encouraging words of 'hard work' as the only way one can make it in life, MYSRIP.*

***TO GOD I GIVE ALL THE GLORY!***

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## **List of acronyms**

AIDS	Acquired Immune Deficiency Syndrome
ACHPR	African Charter on Human and People's Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
NGOCC	Non-Government Organization Co-ordinating Council
SADC	Southern African Development Community
SEARCWL	Southern and Eastern African Regional Centre for Women's Law
UDHR	Universal Declaration of Human Rights
WILSA	Women and Law in Southern Africa

## **List of international human rights instruments**

African Charter on Human and People's Rights  
Convention on the Elimination of All Forms of Discrimination against Women  
International Covenant on Civil and Political Rights  
SADC Protocol on Gender and Development  
Universal Declaration of Human Rights  
The United Nations International Covenant on Economic and Social and Cultural Rights

## **List of statutes**

The Constitution of Zambia, Chapter 1 of the Laws of Zambia  
The Local Court Act, Chapter 29 of the Laws of Zambia  
The Marriage Act, Chapter 50 of the Laws of Zambia  
The Matrimonial Causes Act, No. 20 of 2007

## **List of cases**

*Beluti Kaniki v Loti Jairus* (1967) S.J.Z.  
*Meby Chisani v George Mwaaga*  
*Mwiba v Mwiba* (1980) ZR 175  
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## **Executive summary**

This study sought to investigate why women in Zambia married under patrilineal customary law marriages are not allowed to divorce on grounds of adultery. Men are allowed to do so and so are woman married under statutory law. This shows the inequality between men and women in relation to article 16(d) of CEDAW.

When I was in high school, we young girls had a slogan ‘women power’ which meant that we were proud to be born women. However when I look at how women suffer in customary law marriages I feel sad and ask myself what has happened to the women power slogan? I look around and notice that there are persistent customary practices which are detrimental to women and despite human rights instruments such as CEDAW continue to exist and discriminate against women in the areas of marriage, divorce, early marriages, child bearing, bride price and polygamy.

The Bible tells us that God created man in His own image, in the image of God he created them male and female and God blessed them to be fruitful, and multiply, and replenish the earth and subdue it; and have dominion over fish of the sea, and over the fowl of the air, and over every living thing that moves upon the earth (Genesis 1v27-28). This passage shows two things, first, that a woman as well as man are created in the image of God, God did not create woman to be inferior to man; both are equally important. Second, the woman was also expected to have authority over God’s creation. Therefore men and women are to share this authority. Therefore, a woman married under customary law should be allowed to divorce on the grounds of adultery in the same way as a man is entitled to do so.

The research was carried out in Lusaka the capital city of Zambia and in Mungule in Chibombo District, some 10 miles from the capital city in the rural areas. Guided by the main objective I sought to pursue the topic. The main objective of the study was to assess customary law and the impact it has on women married under a patrilineal customary marriage system and to see whether a woman can divorce on grounds of adultery and how that impedes the enjoyment of women’s rights.



Most respondents interviewed agreed with this assumption and blamed it on customs and cultural practices in Zambia, where a man is believed to be a potential polygamist in all 73 ethnic tribes.

The findings show that a number of researchers have researched mainly on customary practices like inheritance, and general customary practices but not many on this topic, i.e., divorce on grounds of adultery. Therefore, it is for this reason that I sought to find out why women married under customary law cannot divorce under customary patrilineal marriages. Is it the case that customs, culture or religion act as barriers against woman divorcing on grounds of adultery? Or it is that customary law is rigid due to the patriarchal dividend or that women really want to divorce but cannot do so? What are the pull factors?

The findings further show that lack of constant HIV/AIDS campaigns, human rights awareness and a lack of a policy to act as a guide to enforcers of customary law has meant that custom and culture have remained a barrier to women. There is there is no definition under customary law as to what about a customary practice amounts to it being repugnant to natural justice. The problem is that the interpretation has been left only to the enforcers of customary law. Therefore, women remain marginalized.

The study also established that under customary law women suffer because of the customs and practices and some traditional sayings all of which encourage men to be polygamous. For example, the saying, *ubuchende bwamwaume tabutobanganda* (which means ‘adultery by a man does not break a marriage’) was acknowledged by many respondents I interviewed. Because of such sayings, a man can commit adultery with impunity; conversely, however the courts will allow a man to divorce his wife on the very same day if she commits the same offence. Once polygamy is scrapped from customary law marriages by recognizing the same grounds of divorce as those under the Matrimonial Causes Act No. 20 of 2007, the rights of women married under customary law will be the same as those of women married under the statute. In other words they will also be able to divorce if they so wish, as the law says that if you cannot tolerate living with a man then you can divorce him but if you can tolerate it you cannot divorce on grounds of adultery.

Further findings were that the lack of written customary law makes it difficult for law enforcers to implement the law justly due to the many ethnic tribes in Zambia and the rise in

intermarriages, as they lack guidelines. Therefore a policy is required to be put in place in terms of article 2 of the CEDAW which obliges State Parties to strike out any law that discriminates against women.

The study takes note of religious teachings. In the Bible, Genesis 3v16 states that...‘man shall rule over you’ and Ephesians 5v22 says ‘women submit yourselves unto your husbands’. That has made man seem more important than women religiously. For example, in some family setups, the father or eldest son makes decisions that affect the whole family, while the woman has very little to say. This patriarchal (father-centred) form of family life sets the tone for the way women are treated in customary law marriages and as a result religion acts as a barrier against a woman divorcing on grounds of adultery because of the way religion is interpreted. To be fair to Christianity, the Bible also speaks of equality in Christ (see Galatians 3 v 28).

The study also found that there is a gap between the existence of related laws and article 11 of the Constitution of Zambia which is the supreme law of the land which recognizes and declares that every person in Zambia has been and shall continue to be entitled to enjoy fundamental rights and freedoms, that is to say the right whatever his race, colour, place of origin, political opinion, creed, sex or marital status, which law gives a woman who also belongs to the category of ‘every person’ while article 23(d) of the same Constitution recognizes the practices of customary laws which has practices that prevent women from enjoying their fundamental rights provided for under article 11, and other related laws.

In view of what is obtaining on the ground where there is inequality in laws, the Zambian Government should fulfil its obligations as a UN Member State, by putting in place gendered policies with equality laws for both men and women, as contained in the National Gender Policy (2000). This policy recognizes the contradictory interpretation of statutory and customary laws when it comes to interpretation, especially of those customary laws which contradict the provision of statutory laws that relate to marriages, divorce, property ownership, inheritance and devolution.

The government should make the process of enacting customary law a priority and ensure that discriminatory laws that continue discriminating against women are not included in

marriage and divorce. The same grounds of divorce in the statute (i.e., the Matrimonial Causes Act) should also be the same grounds contained in the customary law statute.

The study found that the Government recognizes the need for equal and full participation of women and men at all levels of national development. Therefore, the Government is committed to facilitating the process of removing gender imbalances in order to attain its vision of gender equality (National Policy, 2000).

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# CHAPTER 1

## 1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

### 1.1 Introduction and motivation for the research

Zambia is a land locked country which is located in the southern part of Central Africa. It has an area of 752,620 square kilometres and is divided into 10 provinces. It has 73 ethnic tribes which are categorised into four social systems:

- (i) Matrilineal ethnic groups which practice matrilineal residence (uxorilocal marriages), e.g., the *Bembas* of Northern Province and the *Nsengas* of the Eastern Province;
- (ii) Matrilineal ethnic groups which practice patrilineal residence (virilocal marriages), e.g., the *Tonga* of the Southern Province and the *Lunda* of the Northern Province;
- (iii) Patrilineal and patrilineal ethnic groups, e.g., the *Mambwe* and *Namwanga* of the Northern Province and the *Ngoni* of the Eastern Province; and
- (iv) Bilateral ethnic groups, the *Lozi* of the Western Province (WILSA,1994).

Today, however, there is a very high incidence of intermarriages in Zambia. The majority of Zambians contract marriages under customary law; I found out that even those married under statute law and according to their religion still comply with customary law requirements, i.e., *lobola* or *nsalamu* (i.e., bride wealth) is paid so that the marriage is valid under customary law. This shows how entrenched customary law norms are in the daily lives of Zambians. There is no uniform manner of contracting marriages or dissolving marriages under customary law. Each ethnic group has its own practices and procedures for contracting marriages (Gender Report, 2011). However I discovered that customary law marriage systems have changed over time due to urbanization and intertribal and inter-ethnic marriage patterns. There is also evidence that changes have taken place because of religious influences and this is due to the fact that customary law up to the time of this research remains unwritten.

I chose this topic because of my own experience and also out of curiosity. I was married according to customary law. I noticed that under customary law marriages are simple to contract. After my late husband paid *lobola* we had a simple wedding ceremony and later the

reverend from our church came and blessed our marriage at our house and that was all. After a year, we went to the Local Court with just one witness who attended my wedding and was chosen by me my elder brother and a marriage certificate was given to us. A marriage certificate is a requirement which has to be presented to an employer to enjoy certain privileges of being married such as a housing allowance, a good house, mealie meal allowance and so forth. It is not compulsory, however, to have a marriage certificate at all. The dissolution of a customary law marriage is also a simple procedure: the man can just tell the local court he does not want the woman any longer and that is all, but for a woman to divorce she must bring proof as why she wants a divorce. (In that respect customary law is unfair to women and puts them at a disadvantage in relation to men.) It is only then that a divorce certificate is given.

From my experience at my former work, a military establishment where I worked as an Assistant Director Legal, I received many cases where men married under customary law could divorce their wives, while wives could not divorce their adulterous husbands. Therefore out of curiosity I wanted to investigate why women do not divorce their husbands on the grounds of adultery but rather condoned what their husbands were doing. I saw that some women do not approach the courts for divorce, while others would like to divorce their husbands but they cannot do so. I wanted to find out what informed customary law, 'Is it culture, religion or custom which is unchanging due to the advantages the patriarchal system confers on men?'

My findings might help to put in place measures that will give women married under customary law the same rights as men and women who are married under statutory law and who enjoy equality before the law.

## **1.2 Research background**

Zambia administers justice to her citizens using two legal systems: customary law and statutory law. The Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia and the Marriage Act, Chapter 50 of the Laws of Zambia, provide the primary legal systems of the laws of marriage. The two statutes acknowledge civil law marriages and customary law marriages. This is in accordance with the dual legal systems Zambia inherited at independence from the UK on 24 October 1964.



The dualism comprises civil law and customary law which are administered under parallel legal systems. Both customary and civil laws have provided judicial precedents which are additional sources of law (MUSHOTA L, 2005). Civil law is based on received English law by virtue of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia which makes common law the doctrine of Equity, and English Statutes up to 17 August 1911 (date when the Northern Rhodesia Order-In-Council commenced), applicable to Zambia as well as statutes enacted by the Republican Parliament. Section 2 of the Chapter 11 provides as follows:

‘Subject to the provisions of the Constitution of Zambia and to any other written law:

- (a) the common law; and
- (b) the doctrine of equity; and
- (c) the statutes which were in force in England on 17 August 1911 (being the commencement of the Northern Rhodesia Order-In-Council, 1911); and
- (d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic or which hereafter shall be applied thereto by any Act otherwise shall be in force in the Republic.’

Therefore, in Zambia there is both general law and customary law. Customary law is comprised of all the customary law of the seventy three ethnic groups that are found in Zambia. I was interesting to find out whether the dualism in the court system allowed forum shopping to the detriment of women. Also I wanted to find out whether a woman married under customary law would be allowed to divorce on grounds of adultery in a patrilineal marriage. My perspective towards customary law is that it is fluid and changing and therefore it must be investigated today as a living custom not just as stated in the past or even as stated as the ideal today. Customary law is not just that which is recognized by the state, but it is also the evolving practices of the people today.

Customary law itself may have been altered by historical forces and by its interaction with the state apparatus, but it is necessary to ‘deconstruct’ concepts of customary law to get to their true meanings (CHANOCK, 1982). Thus, in my research I would re-evaluate the conceptualization of each legal term as ‘marriage, divorce, adultery’ and so on. Since I realized that the mischief associated with customary law marriages had their roots in the manner in which they are contracted, I, therefore, included the manner in which these marriages are contracted in my research.

As customary law is a living subject that is constantly undergoing change in response to societal dynamics, it is imperative to note that the customary law that was in operation decades ago has not remained static but has continued to evolve. It is, therefore, important to develop legislation that will be responsive to social changes in order for the law to be relevant and responsive to the needs of a dynamic society.

### **1.3 Statement of the problem**

As already observed, Zambia administers two legal systems, customary and statutory law. Section 9 (1) of the Matrimonial Causes Act provides for grounds of divorce as follows:

- ‘(a) That the respondent has committed adultery and the respondent finds it intolerable to live with the respondent;
- (b) That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
- (e) That the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.’

A marriage under statutory law is a monogamous marriage, while a marriage under customary law is potentially polygamous marriage: Zambia has a dual legal system in which

both statutory and customary laws apply. This area of law has often been subject to contradictory interpretation, especially in relation to customary law which contradicts the provisions of statutory law in the areas of marriage, divorce, property ownership, inheritance and devolution.

Whereas the Constitution of Zambia (which is the supreme law of the land under article 11) recognizes and declares the entitlement of fundamental rights to every individual, whatever his/her race, colour, sex, marital status, article 23(d) at the same time recognizes and upholds customary law practices which discriminate against women, hence, women married under customary law are denied the fundamental rights provided for under article 11 above.

In addition, we read in the Bible that God created man in His image, in His image God created them male and female and God blessed them, and said; 'Be fruitful, and multiply, and replenish the earth and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moves upon earth.' (Genesis 1v27-2). This passage shows two things about women. First, that women, as well as men, were created in the image of God, God did not create woman inferior to man; both are equally important. Secondly, the woman has authority over God's creation. Men and women are to share this authority over God's creation it does not belong only to man.

It is further noted that both the national laws and international instruments provide for equal rights as provided for in the Universal Declaration of Human Rights (UDHR) which declares a range of rights to be inalienable and inviolable. The principle of universality refers to those rights that belong to all human beings and to be enjoyed by all human beings without distinction of any kind such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status. In other words, human rights grant equal rights and dignity to all human beings to be enjoyed wherever they are and at all times.

Further, the International Covenant on Civil and Political Rights recognizes that the enjoyment of civil, political, economic, social and cultural rights is interconnected and interdependent (Clause 3, ICCPR). The ICCPR and the ICESCR prohibit discrimination on the basis of sex.

Another principle Convention on women's human rights is CEDAW which is relevant to all work on women's rights (Mehra, 2004). Article 1 of CEDAW defines 'discrimination against women' as, any distinct exclusion or restriction made on the basis of sex which has the effect or purpose of impacting or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Also, article 15 of CEDAW, provides for the principle of equality before the law, in that it necessitates equality before the law in civil law, procedures and contractual matters and prohibits restrictions on legal capacity and in accessing the law. Similarly, any private or contractual restriction on legal capability and status of women must be treated as null and void. Where is the equality before the law if a woman married under customary law cannot divorce her husband on grounds of adultery but her husband can?

Further, Article 16 of CEDAW addresses discrimination and inequality in the primary unit of the private sphere (which is the family) and states that (HRC, 2006) regardless of the origin of inequality (cultural or social norms, traditional or modern law), equality in marriage with respect to the rights to enter into marriage, during its subsistence and upon its dissolution is to be ensured by State Parties. It is also noted that CEDAW obligates State Parties to put in place laws that are not discriminatory to women. Therefore as a signatory to the above conventions, Zambia is obligated to remove any practices that subordinate women in customary law marriages.

It is a known factor that love is the basis of marriage, as marriage is an institution of God, a key respondent said. However, this is not the case for a woman married under customary law as her right to enjoy equal rights is provided for in the above national laws and international Instruments. She is not allowed by customary law to divorce on the grounds of adultery, while a man may do so. Under statutory law, i.e., the Matrimonial Causes Act, the grounds for divorce apply to both men and women. The question is, 'Where is the equality referred to in this situation?' Hence, the research seeks to find out why a woman married under customary law cannot divorce on grounds of adultery in customary law marriages, while a man may do so. Furthermore, a woman, like a man, married under statutory law may divorce on grounds of adultery as provided for under the Act.

This research therefore seeks to explore the probable reasons why customary law denies women married under customary law the right to divorce on grounds of adultery while men are allowed to do so. It is here also noted that women like men married under statutory law are also allowed to divorce on the grounds of adultery according to the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia which under section 9 has provided that adultery is one of the grounds for divorce. This is a clear example of discrimination against women married under customary law. In accordance with human rights theory, it is the responsibility of everyone to recognize and respect the fundamental human rights of every other person and ensure that those rights are protected accordingly (Munalula, 2005). The study is, therefore, based on the fact that women married under customary law suffer more discrimination than men and women married under statutory law as the women married under customary law are not allowed to divorce on the grounds of adultery, while those married under statutory law may do so. However, this study is not intended in any way to diminish discrimination against men. The purpose of law and order is in fact to protect and promote human rights for all human beings, men and women.

#### **1.4 Justification for the study**

The purpose of the study is to investigate the challenges that are faced by women married under customary law in patrilineal marriages. The study asks why women cannot divorce on grounds of adultery while men are allowed to do so and this is based on the belief that a man under customary law is a potential polygamist and as such he can marry as many women as he pleases. In a nutshell a man may commit adultery against his wife but she cannot divorce him on this ground.

Apart from the practice being discriminatory a woman married under customary law is subordinated to her husband as he can take another wife in marriage at any time, whereas this is not permitted under statutory law in terms of the Marriage Act which defines a marriage as between one man and one woman to the exclusion of others (the Marriage Act Cap 50 of the Laws of Zambia). Why should Zambia which is a signatory and has ratified many international human rights instruments, like the ICCPR, CEDAW, UDHR, and other Women's Protocols, continue to condone discriminatory laws like customary law which still perpetuates practices that subordinate women to men?

It is therefore clear that there is no uniformity in the way Zambia administers its justice. In this case there are two sets of divorce laws depending how a woman is married to her husband. If she is married to him under statutory law, she can divorce him on grounds of adultery, but she cannot do so if she is married to him under customary law.

### **1.5 Objectives of the research**

The objective of this study is to investigate the reason why women married under customary law in patrilineal marriages are not allowed to divorce on grounds of adultery while men are allowed to do so. This study seeks to find out current customary laws and practices on adultery as a ground for divorce, and how in this context a customary law can be introduced that will be gendered which will not be biased or discriminatory against women married under customary law. In order to achieve this I had to focus on:

1. Analysing the existing customary laws in different provinces in Zambia that practice patrilineal marriages and matrilineal marriages on adultery as a ground for divorce to find out why men are allowed to divorce and women are not.
2. Finding out how customs culture and religion act as barriers preventing women from divorcing on grounds of adultery under patrilineal marriages in Zambia.
3. Investigating what advantages the patriarchal dividend confers on men in a patriarchal society.
4. Assessing whether women married under customary law want to be able to divorce on grounds of adultery in patrilineal marriages.
5. Recommending reforms to the Government to reduce customary law to writing so that it contains the same grounds of divorce as those in the Matrimonial Causes Act No. 20 of 2007, in which adultery is a ground of divorce among other grounds, as well as advocating for good policies to empower women economically.

### **1.6 Assumptions and research questions**

In view of the above objectives, the following were my assumptions:

1. Men married under customary patrilineal marriages are allowed to divorce on grounds of adultery while women are not.

2. Customs, culture and religion act as barriers against women divorcing on grounds of adultery under customary law.
3. Customary law is rigid due to the patriarchal dividend or the advantages it confers on the men in a patriarchal society.
4. Women married under customary law in patrilineal marriages want the right to divorce their husbands on grounds of adultery.

### **1.7 Research questions**

In order to guide me in my investigations, I developed the following research questions based on the above assumptions:

1. Are men married under patrilineal marriages allowed to divorce on grounds of adultery but women are not?
2. Do custom, culture and religion act as barriers against women seeking divorce on grounds of adultery?
3. Is customary law rigid due to the patriarchal dividend?
4. Do women married under customary law in patrilineal marriages want to divorce on grounds of adultery?

### **1.8 Research site**

The research study was conducted in Lusaka Province and in Chibombo District which is in Central Province. The respondents were from urban areas in Lusaka and Chibombo rural in Chieftainess Mungule area which is situated in Chibombo District in the Central Province. I decided to conduct my research in Lusaka, due to the fact that the biggest local court that deals with a bigger population of Zambian people across all tribes is in Lusaka the capital city of Zambia, which is home to all 73 ethnic tribes of Zambia. This is the case due to urbanization as a result of which people from all tribes trek to the capital city for work and business.

I chose the Mungule area (which is a rural set-up), about 10 kilometres from the capital city so that I could compare the situation of married women living in urban areas to those married in rural areas. I wanted to compare the two situations and to find out how marriages are contracted and dissolved, especially on grounds of adultery.

## **1.9 Limitations of the study**

This kind of research was received with hope and disappointment as most women thought I had brought good news on how to empower women economically (from an NGO), especially when I was introduced as having come from outside the country! I noted some disappointment when they learned that it was just a research project from the University of Zimbabwe. Their attitudes definitely changed and, as a result, I am not sure if I obtained correct information.

Another limitation was getting permission from government officials as they asked for at least three months notice. In some Government institutions, some officials were reported to be out of town on official duty.



## **CHAPTER TWO**

### **2.0 CONCEPTUAL FRAMEWORK AND LITERATURE REVIEW**

#### **2.1 Anthropological literature**

A search has yielded very little in the way of relevant Zambian literature as very few scholars have written on this topic, which seeks to find out the challenges that women married under customary law face when seeking to divorce on grounds of adultery in patrilineal marriages. Under such marriages men are allowed to divorce on grounds of adultery but a woman is not; under statutory law, however, both men and women are permitted to divorce on grounds of adultery. Some scholars have written about customary law marriage and divorce in patrilineal marriages. For example, one scholar has written about the *Malози* tribe in the Western Province of Zambia, and about how a *Malози* marriage is contracted and dissolved.

Many other writers that I encountered have written generally about customary law marriage and divorce. This study sets out to investigate the reasons why women married under customary law in patrilineal systems cannot divorce on grounds of adultery while men can. Most of this study will focus on women divorcing on grounds of adultery from a general point of view and from my own observation and evaluation since this study is being carried out in an apparently under-researched area of the law in Zambia.

The first part of my literature review discusses the issue of customary law marriage and divorce under customary law and is dealt with from the general point of view. The second part will present points of view of locals, in other words, how Zambians view these issues. The last part is an illustration and interpretation of key concepts and how the courts manage the challenges brought before them when they deal with divorce on grounds of adultery of customary law marriages in the patrilineal system.

#### **2.2 Defining customary law**

Societies have patterns of related systems of customs, norms, values, expectations, beliefs and assumptions which are rarely questioned but which are the behaviour of the individuals in a given society. Customary law is derived from customs of people. Harsh (1992) defines customary law as follows:

‘Custom is a usage or practice of society which by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject matter to which it relates. Customary law evolves out of various norms and practices of indigenous people. It is an ever-fluid and dynamic system which responds to changing social, economic and political conditions, it is a process-oriented; unlike the received statutory law which is rule based.’

From this research I learn that Zambia practices a dual legal system, in fact, I have found out from this research that Zambia has a plural legal system in which a number of laws operate side by side. Therefore, in my attempt to deconstruct the term ‘law’ I ask myself, ‘What is law?’ ‘What is the difference between customary law and the living law?’ ‘At what point does custom crystallize into customary law?’ In our situation, in Zambia where we have 73 ethnic groups, and, therefore, what would be the customary law that an urban Local Court justice would apply? Who in its application defines what customary law is which is not static, but is constantly evolving? That then makes me wonder whether there is a law under customary law enforced by local court justices that prohibits a woman married under customary law from divorcing on grounds of adultery or whether it is simply a practice which is repugnant to natural justice.

### ***2.2.1 A brief history of customary law***

The pre-colonial law in Zambia was essentially customary in character, having its source in the practices and customs of the people which regulated the community, and were used to solve disputes between individuals and groups. Through long usage, these customs and practices crystallized into customary law. The colonial regime recognized customary law in the area of personal law through article 4 of the Royal Charter of Incorporation of the British South African Company of 29 October 1885, and which provided the administration of justice to the native people. Careful regard was given to the customs of the class or tribe or nation to which the parties to the dispute belonged.

The recognition of customary law in Zambia was given by an Order-in-Council and was applied as law between natives in all native courts, while a separate court system applied statutory law and English common law to the settlers. Thus customary law existed side by side with what is called general law (Ndulo, 1979). Therefore, up to today customary law is applied in Zambia; however such customary law should not be repugnant, equity or good

conscience and should not be incompatible either in terms of or by necessary implication with any written law in force in Zambia.

How do courts decide what is repugnant to natural justice and what is not? The decision is left to the discretion of one person who is the presiding justice in the local court, as the court that presides over cases of customary law marriage and divorce in Zambia.

### **2.3 Customary law marriages**

In Zambia we have two types of marriages which seem to be prominent, statutory and customary law marriages. Other marriages recognized for example are Moslem marriages, church marriages and Hindu marriages. Customary law marriages are governed by a set of rules and values which prescribe the practices of different ethnic groups of Zambians or are observed in the founding of a family and regulate marriages, divorces, custody of children and property rights during and after marriage (Mushota, 2005). Customary law is the most important source of family law in Zambia. When contracting a civil marriage, some aspects of customary law are observed (e.g., *lobola* or bride price). So, for instance, for a marriage to be valid *lobola* must be paid.

However, in this study I am restricting myself to customary law in patrilineal marriages and divorce on grounds of adultery, in a social system that pays a lot of money or cattle in contracting a marriage called *lobola* which means that children belong to the man. This research, therefore, seeks to find out why a man is allowed to divorce on grounds of adultery in patrilineal marriages while a woman is not. Is it because of the large amount of money that is paid to marry or is it just a law or a fact that women cannot divorce on grounds of adultery? At the same time this study seeks to address issues affecting a woman married under customary law in comparison with a woman married under statute, who is allowed by law to divorce on grounds of adultery. Why does a woman married under customary law suffer discrimination and subordination under customary law?

They are four main social systems for the seventy-three Zambian ethnic groups (WILSA, 1994) and they are classified as follows:

- (1) Matrilineal ethnic groups, which practice matrilocal residence (uxorial marriages), for example, the *Bemba*, *Ambo*, of the Northern Province and the *Senga*, *Chewa* and *Chikunda* of the Eastern Province. These are marriages where the man goes to reside with his wife's family and the children belong to the woman;
- (2) Matrilineal ethnic groups which practice patrilocal residence (virilocal marriages), such as the *Tonga* of the Southern Province and the *Lunda* of the North-Western Province. These are marriages or customs, where, after the wedding, the bride moves to her husband's family home;
- (3) Patrilineal and patrilocal ethnic groups. There are three of these: The *Mambwe* and *Namwanga* of the Northern Province and the *Ngoni* and *Tumbukas* of Eastern Province. These are marriages where a woman, after the wedding celebrations, resides with her husband's family and the children and the family name belong to the man; and
- (4) Bilateral groups. Only the *Lozi* of the Western Province are classified as bilateral.

My focus therefore is centred on the patrilineal and patrilocal ethnic groups and on how customary law marriages are contracted and dissolved. Because without marriage there can be no divorce, I, therefore made my starting point of my research to find out how customary law marriages are contracted. First I had to define what patrilineal and a customary law marriage is.

'Patrilineal' as defined on the internet, means tracing descent through father's line; it means that inheritance is through the men of the family on the father's side, while matrilineal is the mother's side of the family.

A customary law marriage is the association of a man and a woman in a conjugal relationship according to the applicable Zambian customary law. A marriage serves two major functions; the continuation of the lineage group through natural reproduction, the provision of domestic labour by the wife and ties between the two families (WILSA, 1994).

It is noted here that customary law marriage may be monogamous or polygamous. Polygamy is only available to a man and not a woman. For a man it is, therefore, potentially

polygamous in the sense that, during its substance, there is no legal impediment to the man contracting another marriage by the husband.

It is further noted that for a customary law marriage to be valid, it must meet a minimum of three requirements, which are (1) the consent of both the woman's and man's competent relatives, (2) the consent of the parties and the payment of *lobola*. Payment of *lobola* depends entirely upon the parents of the girl and whether they will charge money or cattle. In the case of *Tongas*, *Lozis* and *Ilas*, it is usually cattle, as I found out from in-depth studies, court records and key informants. Some matrimonial groups such as *Lambas*, *Kaondes Bembas* and *Lundas* charge very little money for *lobola*. In fact some key-informants categorically said since *lobola* is being commercialized today it is actually being accepted as a new concept among the matrimonial groups (Ngulube 1989). Normally a man just worked for his in-laws or gave an axe simply as a symbol of appreciation to the parents of the woman for having brought her up in a decent way and as a way of proving to the in-laws that he is capable of keeping a wife. In the case of *Meby Chisani v George Mwaaga* it was held that non-payment of *malobolo* meant that the marriage was illegal.

Contracting a customary law marriage does not involve any court procedure. One can go to the records of a local court to seek information on how to get married under customary law and information can be given very fast. In fact only a few rules are followed in contracting a marriage. The main characteristics of a customary law marriage is that it is a potentially polygamous marriage and that divorce is easy, and that it is contracted very often by the husband transferring goods or money to the parents of his prospective wife. Disputes arising within such a marriage are determined by the local courts but they may reach the higher courts on appeal.

In contracting a customary law marriage, a man need not be single, as customary law recognizes polygyny. It was noted in this study that, although customary marriage is said to be potentially polygamous, the study found that in the whole country there is only one case of polyandry. The court held in the case of *The People v Nkomana* (1978) ZR 4 that 'a customary law marriage is as much a "marriage" as a statutory law marriage, for purposes of committing bigamy' (Munalula, 1997).

Under customary law marriage there is no minimum age for contracting a marriage. The common practice is just to wait until both parties have attained puberty. The male spouse should have the capacity to maintain a family, regardless of the woman's status. A woman must obtain the consent of her guardian before contracting a marriage (Munalula, 1997). In the case of *Muyamwa v Muyamwa* she did not get the consent from her mother, so the petitioner prayed for a declaratory decree of nullity.

Under customary law the types of marriage may be that of the choice of the parties, arranged by parents/family, forced or by way of elopement or polygamy where, if a man finds something wrong with his earlier wife, for instance, if she does not seem to be taking enough care of her husband or his extended family. In other cases, a man maybe involved in extra-marital sexual relationships and will perceive that his concubine gives him more respect than his wife and this may lead to his marrying his girlfriend besides his wife or if his wife is believed to be barren, her husband may decide to marry another wife who will bear him children.

I found out in the study that polygynous marriages were believed to come about as a simple result of lust on the part of men. It is also believed that some women are not able to resist sexual relationships with married men because they believe that the there are more women in the population than men and therefore single men to marry are in short supply (Colson 1958). Some women were very assertive and they spoke against polygamy if their husbands brought up the subject. Most of these practices are now dying out, and the most prevalent type of marriage is by way of couples choosing whom they want to marry.

Marriage is perceived by the church as a union between two persons for life and nothing can change that. Marriage is primarily a relationship based on a conjugal pact, which is irrevocable personal consent. This is a bond which is sacred and for the good of the married parties, the children and society itself it does not depend on man's choice but on God who made the marriage and he endowed it with various values and purposes. The Bible says that a man and a woman shall no longer be two but one (Matthew19v6). Marriage is a covenant which in the Jewish tradition is an agreement, which forms a relationship.

However, this covenant, this relationship, does not cease, even if the consent of one of the parties is withdrawn. The marital covenant is compared with the covenant between God and

Israel (Burke, 2007). Covenant is considered an accurate theological description of the nature of marriage, in that God alone brings a marriage into existence with, of course, the consent of the partners. The marital state is considered unique in that it means a union of the spouses on all levels of human activity. Marriage is a loving relationship; marriage is a human and divine reality. Marriage is permanent and demands fidelity.

In patrilineal marriages, when a man meets a girl whom he wants to marry, he will inform his relatives usually an uncle, and then the uncle will inform the other relatives to make an appointment to go to the parents of the girl for an introduction. They will take with them two white plates covered in a white cloth. On the appointed day both families will meet at the woman's family home where the father, mother, aunties and a few uncles will assemble.

No one will speak until *chivulamulomo* (which means, 'opening of the mouth') is paid by the man's family side, they will now put on the table the covered white tied plates which will be picked up by the aunt who will come forward and open the cloth and see what is inside the plates. Then they clap and ululate which is a sign that they have accepted them. Then the man's side will say that they have seen a beautiful woman we want to marry. Then the father of the woman/girl will ask the mother to call the girls in the house so they can say which one is being referred to; the man will be asked to point at the girl, and the girl will be dismissed as she is not allowed to say anything. Even the man will leave the room and then the elders will remain discussing the payments. Accordingly, for the *Ngoni* tribe, they know that they will be charged in the form of cattle. The number is not fixed.

Some key informants I interviewed told me that they can even charge up to six cattle. Then it is up to them to negotiate. Then they will leave the room to discuss how many animals they can afford to pay and after long negotiations they will agree on the amounts of cows. This payment is called *kuloola* (meaning, 'to get as theirs'). It means the woman and the children are now the man's. On divorce, the woman will leave the man's compound without anything or on the death of the woman the children will remain with the man and the children will bear the family name of the man's kin. Under the matrilineal system the man will be asked to bring an axe or will be shown the field where he has to farm until harvest time in order to prove to the woman's family that he is capable of looking after their daughter in marriage. There is no *malobolo* or *kuloola* as the children belong to the woman and upon divorce or death of the man the children remain with the woman.

Another form of marriage according to the *Ngoni* tribe is by way of stealing the girl on the day of her puberty, when the girl is of age, she is kept in the house for about a month to teach her about how to look after a husband and her home. At the end of that month there is a celebration during which the girl demonstrates, by way of traditional dancing, what she was taught by a *nkhoswe* or *alangizi* (meaning, 'the traditional trainers'). Before the end of the ceremony, the man will go and removed the girl from the ceremony and take her to his compound and puts her in his house. Then he will inform his parents to go to the woman's parents to negotiate marriage payments. In both cases the consent of the girl is not important.

Another way is where the parents of the man approach the family of the girl they have seen is a good family to arrange the marriage for their son who is working in town. They will call him to show him the girl or the woman his parents want him to marry. He is not supposed to refuse, as it believed that his parents know what is best for their son. If he does not like the woman, he can tell them to find him another woman (for one reason or another).

One traditional chief I interviewed told me of another form of elopement practised by the *Tonga* tribe of elopement. This happens where a man has seen a girl he likes in another village. He will go there in the evening and steal the girl by putting her on his shoulders and he will take her back to and lock her in his house. The following morning he will send his uncle to go to the village to find out if they have lost something in their village. Then they will say, 'Yes, we have lost a girl by the name of X', then he will say, 'That's why I am here, I want to marry your daughter.' Then they will make an appointment regarding the payments. The *Tongas* and *Ilas* charge in cattle as well. The amount is not fixed. They can demand up to eight or more cattle, as the children and the name belong to the man upon death or divorce.

I was one of the negotiators at the introduction of one of my nieces' marriage. My niece works in the hospital in Petauke in the Eastern Province of Zambia. She informed me that there was a man who wanted to marry her, so we arranged for a day for the man's representative to come so we could charge them. It was interesting as it coincided with my data collection for this research and I sat in so I could observe the customary law marriage procedure. On our side there was an uncle of my niece who was in charge of the charging aspect (we would just chip in to say one word here and there). We started the charge at fifteen thousand kwacha (15,000) or US\$3,000 as the man is of the *Ngoni* tribe which by tradition



pays *lobola* for children. We had to covert the number of cattle to money, as the culture now is that, if the man has no cattle then you charge in cash, for *maloolo*. After the man finishes the payment of *lobola* then the kitchen party will take place and then the wedding cerebation finally will take place. Before paying he cannot stay with the girl.

They were shocked that we charged them so much as if we were selling her off. After a long period of hard negotiating we reached an agreement of nine thousand kwacha. Since the girl's father was *Mambwe* by tribe (MHSRIP as he is the late),they were charged items in addition to the money, being, two axes, two hoes and six meters of *chitenge* material for her mother who had raised her and a suit for her father if he was alive.

## **2.4 Divorce under customary law marriages**

### **2.4.1 *The definition of divorce***

Divorce is the legal termination of a marriage by a court in a legal proceeding, requiring a petition or complaint for divorce or dissolution in some states by one party. There are two types of divorce fault and no fault. A fault divorce is a judicial termination of a marriage based on marital misconduct or other statutory cause requiring proof in a court of law by the divorcing party that the divorcee had done one or several enumerated things as sufficient grounds for divorce.

A no fault divorce is one in which neither party makes any allegations against the other. They only need to allege and testify that either irretrievable breakdown of the marriage or irreconcilable differences between the parties makes termination of the marriage appropriate (U.S.LEGAL, 2001-2014).

As seen above, the definition of divorce, be it in a statutory marriage or customary marriage, means the same thing. Divorce basically is the termination of a marriage. I found out in this study that, for a marriage to be terminated by divorce order, there must be proof that there was a marriage between the parties. In a civil marriage the petition must be filed with a copy of the marriage certificate. In a customary law marriage, the parents must prove consent and that a dowry was paid. That is what validates a marriage according to the customs of the parties. A customary law marriage comes to an end after the families of both parties have made several attempts to counsel and reconcile them. In the same way as the families are

fully involved in the process of marriage, so they are equally involved in a divorce. If the parties wish, they can proceed to a traditional court or to a local court for the dissolution.

In both courts parents of the parties, particularly of the woman, are required to confirm that the parties were actually married by proving the issues of consent and marriage payments. Allegations by a man do not need to be proved in a local court; the marriage can be dissolved as long as the man declares that he no longer wants his wife. However allegations by the wife need to be proved and the marriage will not usually be dissolved if the man contests it. The marriage will even be dissolved if the woman commences the action for reconciliation with no intention of divorcing, but the man tells the court that he no longer wants her.

One mode of commencing proceedings in a local court is by way of a prescribed form of reconciliation; the reason being that differences could have been resolved by families since complaints by women do not carry any weight. I found out from this study that when a man is not happy with his current wife he can marry another wife as a way to make up for the inadequacies of his existing marriage. In this case the family of the woman has to return some of the marriage payments and families of women are not always willing to do so and the inability of a woman's family to pay back has forced women remain in marriages, regardless of how odious it has become for them to do so (Mushota, 2005).

The process of obtaining a divorce in a court based on a statutory law marriage is complex, expensive and protracted (Munalula, 1997), while obtaining a divorce under customary law is much simpler, cheaper and quicker. Where a customary law marriage has not been registered under the Local Courts Act, it may be terminated through compliance with simple customary procedures such as returning the woman to her parents. In the case of *The People v Nkomana* (1978) ZR 4, the court held that the appellant had a defence to a charge of bigamy, as he believed that by writing a letter to the woman, of divorcing his first wife, he had validly terminated his first marriage which was contracted under customary law. However, under the Marriage Act Chapter 50 of the Laws of Zambia the relevant section provides that any person who contracts a marriage under the Act, being at the time married in accordance with African customary law to any person other than the person with whom such marriage is contracted having contracted a marriage under this Act, during the continuance of such marriage contracts a marriage in accordance with African customary law, shall be guilty of an offence and liable to a conviction of five years imprisonment. The court held that a customary law

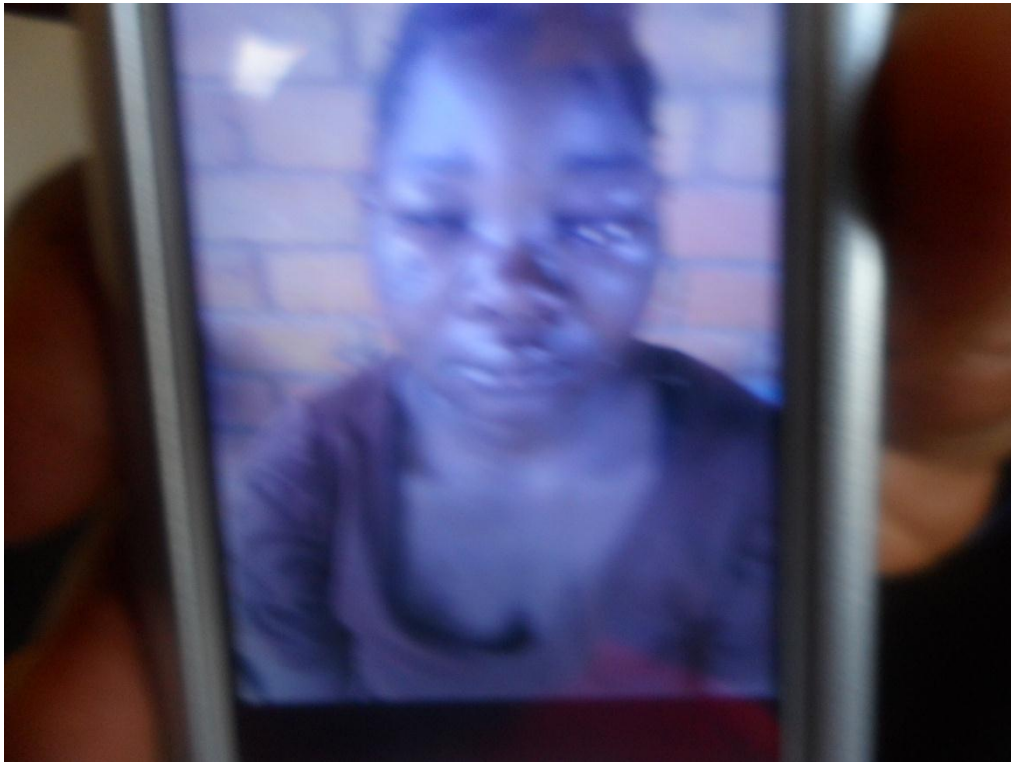
marriage, particularly a registered one, is more definitely dissolved by the courts and proceedings should be instituted in a local court.

In another customary law case, *Mwiba v Mwiba* (1980) Z.R.175, a marriage registered under the Rhodesia African Marriages Act Chapter 105 (which has since been repealed) was a potentially polygamous customary union. The marriage could not be dissolved by the High Court under the Matrimonial Causes Act 1973, as all registered customary law marriages can only be dissolved in the Local Court.

The grounds for divorce under customary law are varied and sometimes are gender specific. Thus, men often seek divorce on the basis of the wife's adultery, barrenness, laziness and lack of affection shown to the man's relatives. Women generally complain about lack of maintenance, battering, co-wives or concubines and desertion a common ground of divorce. Since lawyers have no right of audience before the local courts, each party orally presents his or her own case, following the issue of a simple summons and judgment is given there and then (Munalula, 1997).

With patrilineal marriages a respondent interviewed told me how it was unheard of for a woman married according to a patrilineal marriage to petition for divorce on grounds of adultery, she experienced as follows.

Statistics from previous research show that in cases where a woman petitioned for divorce on the grounds of her husband's mistreatment of her, such divorces took place more often in matrilineal than in patrilineal marriages. The in-depth interviews revealed that, if a woman took the matter to court she would lose and go back to her village without anything, and her children would remain with the man. Therefore even if she caught her husband committing adultery his wife would rather forgive him. If the man found his wife in the same situation, however, he would divorce her and the man would pay her husband compensation. A wife might only be allowed to sue a female rival for marriage interference if her adulterous husband decides to marry the woman then his wife cannot sue the woman instead the wife just forgives the man and the wife stays on.



**Figure 1: Photograph of a woman who has been battered by her husband**

She said she heard rumours of her husband picking up a woman from her place of work. She reported the matter to the Young Women Christian Association (YWCA) so that the man could be arrested. Two days later the woman withdrew the matter saying she could not go ahead with the petition for divorce because they had reconciled and that the husband had apologized to her so she has forgiven him. When I asked her why she could not proceed with the case she told me that she had no money to start a new life and that she has no house where she can go and stay. She said:

‘I caught my husband with this woman who my husband says now that he wants to marry when I asked him what he was doing with her the first time that I found him with her seated in the car, I told him that today I have found you, a big fight stated that is how I was beaten like this, but I had to withdraw the matter because if he is jailed his family will not be happy with me, and if I divorce him on adultery, he will marry that same woman and I will be the one to lose my marriage, is better I suffer for the sake of my children as I have four children, I don’t have money my parents are not working how do they pay back the money he paid. I don’t work, I have no house where do I go from here, *so cabe tizankala bazakachinja ku sogolo* (meaning, ‘It’s okay we will stay he will change in future.’) Because I know that he will not marry that

woman he is just threatening me, but if I leave he definitely will marry her so I don't want to go away.'

With patrilineal marriages I found that there are many 'pull factors' that discourage a woman from divorcing on grounds of adultery, for example, poverty is one of them. Lack of economic empowerment makes women stay in these marriages with adulterous husbands, which is my fourth assumption which says that women may want to divorce on grounds of adultery but they cannot, because one key respondent, a local court justice, said:

'If a woman persisted to wanting to divorce on ground of adultery we allow a woman to divorce as we take into consideration issues of HIV/AIDS, if the wife says the man has been found committing adultery many times we can allow divorce, but you find there are very few women who can do that, most women just stay, I that the issue poverty and other issues like society and just the women themselves they don't want to divorce for one reason or the other.'

It is clearly seen in from the above quotation by the local court justice that there is a need to prove that the man has committed adultery many times for divorce to be allowed (James, 1956). In the Old Testament in the Bible a husband could divorce his wife if he found some uncleanness in her in that he could just write her a certificate of divorce, put it in her hand and send her out of the house (Deuteronomy 24v1). Also a wife who was suspected of having sexual relations with another man had to take a jealousy test (Numbers 5v11-31). However, there was no test for a man suspected of being unfaithful with another woman.

The grounds for divorce under customary law are many and they vary from one ethnic group to another, and most of them are weak and frivolous. The following are grounds for divorce available to a husband (Mushota, 2005):

- Disobedience of wife;
- Childlessness;
- Greed and selfishness;
- Adultery;
- Witchcraft;
- Disrespect of in-laws
- Illness from a communicable disease, such as HIV/AIDS, STDs;
- Fits;

- Rigidity.

The following are the grounds of divorce available to a woman:

- Cruelty;
- Impotence;
- Insanity, epilepsy or leprosy;
- Laziness/ negligence / inability to provide the family with necessities;
- Persistent adultery;
- Habitual criminality;
- Adultery with one of the wife's relatives;
- Favouring one of his wives in a polygamous marriage.

## **2.5 Adultery as a ground for divorce**

### **2.5.1 What is adultery?**

'Adultery' as defined by the World English Dictionary 'as voluntary sexual intercourse between a married person and someone other than his or her lawful spouse.'

In the Old Testament adultery was understood as sexual relations between a married (or betrothed) woman and a man other than her husband, it was a sin against the husband. In the New Testament in the Gospel of Mark 10 v 11 Jesus said, 'Whoever divorces his wife and marries another, commits adultery against her'.

Under customary law adultery is not generally entertained by a traditional court if a divorce petition is brought by a wife. However if the petitioner is a husband against his wife he is allowed to divorce, as a husband under customary law is allowed to have extra-marital relationships because the marriage is potentially polygynous and the man has a right to marry additional wives. Thus, a wife cannot petition for divorce on grounds of adultery.

Research on Gender Bias in Courts in 1993/4 showed that of the sampled women in six provinces of Zambia who had petitioned for divorce in local courts, 100 per cent had their petitions rejected because their husbands had not committed actionable offences. A husband may be allowed on the adulterous wife, the wife maybe allowed also to divorce the husband for persistent adultery which brings shame on her or otherwise prejudices her interests.

Women of late have been suing their husband's lovers for marriage interference (Mushota, 2005).

The question then is, 'Where is the equality for a woman married under customary law?' The Constitution of Zambia which is the fundamental law of the land has provisions that determine the relationship between the state and its people, most of which relate to citizenship and constitutional rights and freedoms. Therefore, the fact that the Constitution clearly retains of discriminatory laws against women means those women's rights to full citizenship is lacking or at best compromised (Munalula, 2005).

Feminist theories observe that women continue to be excluded as full legal subjects, even after law reforms have taken place (O'Donovan, 1996). Men and women are not equal in the private sphere and therefore do not enter the public sphere on equal terms. Feminists note that the universal model citizen poses difficulties for 'embodied women with families and relationships because gender is relational and also because gender affects reproduction, family, sexuality and myriad other social interests and relations. There substantive change can only be brought about by a reconstitution as opposed to gradual reform' (Munalula, 2005).

Therefore, the Constitution should widen the scope and regime of rights and freedoms as required by an open democratic society by reformulating the existing Bill of Rights to include adultery as a ground for divorce and other grounds as in the Matrimonial Causes Act to allow a woman married under customary patrilineal marriage to divorce on grounds of adultery.

## **2.6 The definition of the patriarchal dividend**

The patriarchal dividend as defined on the internet, as the privilege that is given to all men in a society that openly or otherwise favours males, maleness or masculinity. This does not mean that all men who benefit from this privilege are sexist, misogynistic or gynophobic, nor does it mean that the culture/country in which they have openly embraced its patriarchal heritage (e.g. Saud Arabia, Afghanistan, China and India). The patriarchal dividend even occurs in countries and cultures where women's rights are generally considered worthwhile, and society at large has made conscious efforts to discourage sexism efforts to discourage sexism, misogyny, gynophobia and gender typification (countries such as France, the United

States and the United Kingdom). The patriarchal dividend simply put is the conscious (or unconscious) precedence a society places on the welfare of its males over its females and the trend towards favouring 'maleness over femaleness' (hegemonic masculinity).

A customary law marriage under patrilineal society favours males over females as seen in the definition of patriarchal dividend above. A woman can be married with or without her consent, a woman cannot divorce on grounds of adultery but a man can, a woman cannot marry more than one husband but a man can. A woman in a patrilineal marriage is still considered a minor in the eyes of society and the law due to the patriarchal dividend.

## **2.7 Feminist theories**

In order to effectively inquire into the practices of excluding women married under customary law from divorcing on grounds of adultery three theoretical frameworks (liberal feminism, the sameness/difference approach and relational feminism) informed the study. It is their purpose is to help establish gender equality in all areas of law including customary law.

### **2.7.1 Liberal feminism**

The feminists' approach relies on gender consciousness as its basis, although it goes on to call for the abolition of prescribed gender roles. The earliest feminist approach is liberal feminism. It demands that equality should be extended to women in all spheres of life (Wollstonecraft). The main concern of liberal feminist is equal rights, the extension of liberty, equality and justice to women through legal and social reforms. Liberal feminists argue that women are always judged first on the basis of sex, and then only as human beings, whereas men are always judged on their individual merits.

Feminist theory defines itself as giving women the hope for the future as women fight for equality in society where female subordination is rooted in a set of customary and legal constraints that block women's entrance and/or success in the so-called public world (Tong, 1994). Because society has the false belief that women are by nature less intellectually and/or physically incapable than men, it excludes women from the academy, the forum and the market place. Liberal feminism requires us, first, to make the rules fair and, second, to make certain that none of the runners in the race for society's goods and services are systematically



disadvantaged.<sup>1</sup> This theory gave me a better understanding of why women married under customary law in patrilineal marriages could not divorce on grounds of adultery, as liberal feminism calls for equality for both men and women in society. Gender inequality and gender is a question of power, specifically of male dominance and female subordination.

One example of its goals is that liberal feminism calls for equality in education, for both boys and girls. However despite all its the campaigns, society still brings up boys and girls to perform their gendered roles, a boy under customary law is brought up as the head of the family and he can marry many wives and the saying prevails that '*ubuchende bwamwaume tabutoba nganda*' (which means, the 'adultery' of a man does not break a marriage.) Society has brought up a woman on the custom that as a woman she cannot sue on the grounds of 'adultery' because a man is a potential polygamist. Where then in this situation is the liberalism that preaches the equality of a woman?

### **2.7.2 *The sameness/difference theory***

The sameness/difference theory analyzes the issue of sex equality and treatment of women vis-a-vis men in the framing of laws and policies. This theory looks at the issue of discrimination of women and men, and asks, 'Are women the same as men?' Mackinnon (1979) discusses the approach by looking at the question of whether or not women are the same as or different from men. In other words, in this theory she is addressing the position which the law should take, that is, should it give women special treatment with men, implying that women are the same as men; or should it give women special treatment, thereby implying that women are different from men. Therefore in this study an effort is made to understand the position of a woman married under customary law by asking the question, 'Can a woman divorce on the same grounds of adultery as a man?' If the answer is in the affirmative it is not the case that the law is giving a woman special treatment but rather it implies that both men and women should be able to divorce on grounds of adultery; if a man is able to do so, so should a woman.

Therefore, having invoked the sameness/difference theoretical framework as regards the first assumption of this study on the practices of customary law not allowing women to divorce on grounds of adultery, the issue then became whether the Constitution treats women as equals

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<sup>1</sup> R. Tong 'Feminist Thought' (1989: 3).

to men. Here there is a dilemma: While article 23 proscribes the usage of customary law which discriminates against women, another provision of the Constitution simultaneously fails to recognize the special treatment which women are entitled to enjoy which is equality before the law. This study attempts to understand and offer an explanation or recommendation about this.

### **2.7.3 Relational feminism**

Relational feminism centres on women's roles in a family as a caring mother. This theory emphasizes the role of a woman as a care giver of the family and it is that relationship that prevents a woman married under customary from divorcing on grounds of adultery as society expects a woman to take care of her family including her husband. What the theory looks for is for both men and women to recognize that inequality is embedded within society and should work for change. In my view society's expectation of women which women are socialised to share impacts negatively on women's empowerment. I see this mindset as an impediment to women, because as girls grow into women in society, they will always have a male who is in authority over and superior to them throughout their lives and they know that men have the right to marry many wives and that as women they can do nothing to challenge that. As a result women will be subordinate to men.

It is therefore possible to use all these theories to understand the predominant discrimination against women in Zambia as can clearly be seen in this study. Where the customary law has been left to subordinate women married under customary law in patrilineal marriages it shows that our country is a patriarchal society where the roles of men and women are socially constructed in such a way that the women occupy an inferior position in the scheme of things. All the feminist theories used in this study are used as a launch pad for demanding women's rights in Zambia.

## **2.8 Contemporary literature**

Among the notable works on customary law, Mvunga's paper on the customary law of inheritance is an extensive piece of work covering the patrilineal *Ngoni* of Eastern Province, the matrilineal *Tonga* of the Southern Province and the matrilineal *Luvale* of the North-Western Province. The paper is more concerned with the impact of the social change on the customary laws of inheritance.

Another piece of work on customary law is a short paper by McClain (1970). He gives a general overview of these rights of under customary law in Zambia. McClain takes a look at the trends in inheritance among matrilineal and patrilineal groups while giving examples of ethnic groups such as the patrilineal *Ngoni*, bilateral *Lozi* and the matrilineal *Bemba*.

Another scholar Himonga examines the position of women and children in family property disputes after the dissolution of marriage or death of the husband.

A key informant at the Law Development Commission has been tasked by the Ministry of Justice to codify customary law in an Act of Parliament and to include clauses, e.g., allowing for both men and women to divorce on the grounds of adultery.

## CHAPTER THREE

### 3.0 METHODOLOGIES, DATA COLLECTION TECHNIQUES AND THEORETICAL FRAMEWORK

#### 3.1 Introduction

This chapter deals with the methodology used to select study sites, respondents and participants and analyze both quantitative and qualitative data. The study used a cross sectional design to identify specifically how customary law promote or undermine gender equality in customary law patrilineal marriages in Zambia.

#### 3.2 Study areas, sampling and sample size

The study was conducted mainly in Lusaka. Lusaka is the fast growing capital city of Zambia in Southern Africa, and with around 3 million people living in Lusaka this makes it the largest city and commercial centre. The British established Lusaka as the capital of Northern Rhodesia in 1935 and it remained the capital once the country gained its independence in 1964 (ANOUK, 1995).

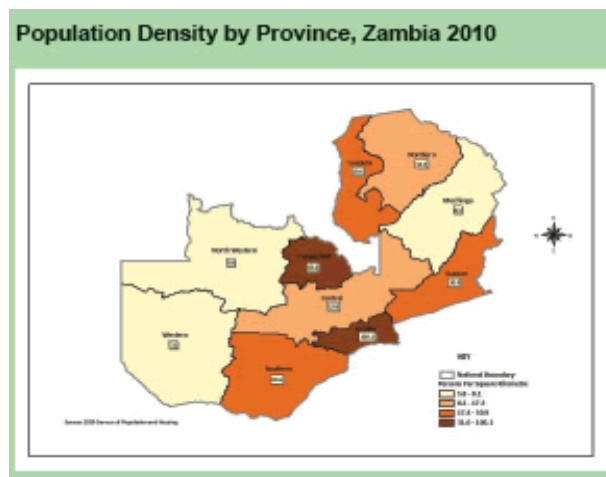


Figure 2: A map of Zambia

In Lusaka you find a cross section of all tribes in Zambia. Due to urbanization most people have migrated to Lusaka for professional reasons, to seek both formal and informal work. Therefore I found it conducive to carry out my study in Lusaka. Another area for my study was conducted in Chief Mungule's Area which is 10 kilometres outside Lusaka in Chibombo

district, where I interviewed a Chieftainess on customary laws as chiefs are the custodians of customary laws and I also spoke with other respondents.

### **3.3 Methodologies**

#### ***3.3.1 Women's law approach***

The women's law approach assumes that there are problems beyond law reform which need to be addressed, and that it can only be done by carrying out field research using women as the starting point. In order to bridge the relationship between law and practice, this study has found it fruitful to collect empirical data about the experiences of women in their interaction with the law (statutory and customary law) and other disputes (WLEA, 2001).

The women's law approach is associated with grass-root oriented research methodology, which aims at examining the position of women in society. It aims at describing, understanding and improving the position of women in law and society (Dahl, 1986). It uses perspectives from 'below' and 'above'. Perspectives from above seek to analyze statutory laws so as to determine whether they are gender neutral, discriminatory or gender specific. The perspectives from below use women's experiences as a starting point in analyzing the interplay between the law and the realities of women's law lives. The two perspectives thus permit a more complete critique of the law. This application meant going to the grassroots levels and meeting women from all walks of life. The women's law perspective enabled in-depth research to be carried out on the inter play between statutory and customary laws, dispute resolutions processes and women's roles in customary law marriages and statutory law marriages, looking at grounds of divorce for customary law and statutory laws. It was also an opportunity to look at adultery as a ground for divorce for both men and women; why women married under customary law cannot divorce on grounds of adultery while a man can; and the fact that a woman or a man married under statutory can divorce on grounds of adultery.

In addition this approach was resorted to in attempt to understand women's experiences in their different marriages. It was also useful in efforts to appreciate the different levels at which women interact with the law, for example, in communities, courts, churches and between themselves as women.

I interviewed women who are divorced and these women are still married under customary law and in statutory law marriages. I listened to them as they related their experiences when it comes to divorces on grounds of adultery, whereby a man can divorce while a woman cannot. I choose this methodology mainly because I took advantage of its interactive process in which data, theory and lived realities about the perspective and norms are constantly engaged with each other. Women's law as a methodological approach was deemed necessary to collect relevant data that responded to the research objectives. These were aimed at interrogating whether women were aware of the existing customary law which provided that if a woman persisted on grounds of adultery she can divorce or due to HIV/AIDS a woman can divorce on grounds of adultery in customary law marriages.

In applying this methodology most women narrated the real ordeal they undergo when they petition for divorce on grounds of adultery. Customary law does not recognize that women can divorce men on the grounds of adultery because it is believed that a man is a potential polygamist and can marry as many women as he can manage. Customary law, however, does recognise that men have the right to divorce on the grounds of adultery.

It became imperative for me to interview women who were themselves affected by that law. In the focus group discussion at the Human Development Centre one of the women discussants said the following:

'I suspected my husband of having an affair, one day I followed him to the house of the woman and I found my husband in the house with the woman, the woman ran away and my husband told me that that was the woman he wants to be with in marriage. Why I suspected him was that my husband's behaviour had changed, he started coming home late and the support at home had reduced so that's how my friends told me that he was seeing another woman, that's why I followed him on this particular day when he did not come home early. I took the matter before our relatives both from my side and his side, he just said he wanted to marry the girl as it is allowed to marry another wife under customary law. I took the matter to the local court as I refused to be in a polygamous marriage. The court also told me the same that customary law marriages are polygamous marriages so that's how I stay up to today.'

This approach facilitated the collection of information, which would otherwise have been unobtainable if the study was based solely on library research.

### 3.3.2 *Grounded approach*

Grounded theory was one of the approaches that I used in my field research in this study. Grounded theory is described as a repetitive process in which data and theory are observed as lived realities and perceptions about norms are constantly engaged with each other to help the researcher decide what to collect and how to interpret it (Hellum and Stewart, 1998). This approach to research develops a theory to explain a phenomenon which is the subject matter of the research out of the data collected from the field study.

The grounded approach helped me to have an open mind in exploring my research assumptions by not being rigid or by not having any pre-conceived ideas but rather to explore new ideas as I found new evidence on the ground. It entails that as a researcher I had to approach my research without preconceived theories so that my findings and analysis could be properly grounded in the data. Accordingly, in the pursuit of investigating institutional responses as to why women married under customary law in patrilineal marriages may not divorce on the grounds of adultery while a man can, I closed myself off from the influence of my earlier perceptions about the topic and allowed the data I was collecting to inform and determine the subsequent sources of information. For instance, after interviewing the Local Court Justices on why women are not allowed to divorce on grounds of adultery while men can, the following is what he said:

‘It’s true under customary law women cannot divorce on grounds of adultery as a man is a potential polygamist, however, these days if a woman informs the court that the man has been a persistently committing adultery due to HIV/AIDS we can allow divorce but they are rare such cases.’

On the basis of the data that I got from the interview, it became imperative that women are not aware that they can divorce on grounds of adultery if the man is a persistent adulterer. Proceeding from there, I had a discussion with the Director of the Zambia Law Development Commission (ZLDC), who said:

‘Customary law is in the process of being codified into a written law, the Act will contain grounds for divorce in line with the Matrimonial Causes Act No. 20 of 2007 of which adultery is one of the grounds for divorce. The advantage of a written law is that the law is certain and uniform while the disadvantage is rigidness, however that’s why there are amendments to the laws if there is a law that is outdated it can always be repealed or amended so there are more advantages than disadvantages. Because of intermarriages across tribal lines

make it difficult for courts that preside over such marriages disputes to know which custom to apply. This situation leaves courts that administer unwritten customary law in a difficult position as they have to deal with the problem of reconciling conflicting customary norms and practices of different tribes.’

She went on to inform me that they received a letter instructing the ZLDC to undertake research and come up with a draft legislation to regulate matrimonial causes under customary law, and in the letter the Minister of Justices stated as follows:

‘While customary laws are divers, it is still possible to come up with laws of general application which are acceptable to Zambians and which are consistent with natural justice. In this regard the draft bill should be guided by moral principles and standards which are common to the people of Zambia, while repugnant customs and practices should be identified and specially proscribed.’

The question to ask is what are those common threads in customary law marriage practices? Will the purported findings address the issues faced by women in customary law marriages? As customary law is a living subject that is constantly undergoing change in response to societal dynamics, it is imperative to note that the customary law that was there decades ago has not remained static but has continued to evolve. It is therefore important to develop legislation that will be responsive to social changes in order for the law to be relevant and relevant and responsive to the needs of a dynamic society.

By using grounded theory methodology, I was able to understand that the lack of statutory regulation of customary marriages has raised concerns among stakeholders which include the local court system which is a system of justice delivery that is not properly guided by any written law.

### ***3.3.3 Human rights approach***

Most ethnic groups do not give equal rights and powers to both the husband and wife in customary law marriages and this has led to women being abused and discriminated against. Further, lack of uniform and reasonable prescribed grounds and procedures for divorce have resulted in the suffering of women especially those married under patrilineal marriages as they are not allowed to divorce on grounds of adultery whereas men can. The general law under statutory law allows a woman to divorce on grounds of adultery.



A human's rights based approach to development brings the promise of increasing access to justice, equality and freedom and ultimately the elimination of poverty (Hellum, 1998). Zambia like most states as members of the United Nations and regional bodies have signed or gone further and ratified major human rights treaties, declarations and platforms of action.

Human rights may generally be defined as those rights which are inherent in our nature and without respect of which we cannot live as human beings. They are rights to every human being anywhere, at all times irrespective of sex, religion, language or race (Atsenuwa, 1995). This entails that whether you are male or female you have the same human rights and no one has more than the other. Human rights are universally applicable and therefore, they cover women's rights as well. The question to ask is, 'Do women enjoy human rights and responsibilities?' The answer of course lies in the negative. In fact much of the civil law has been found to reassert the inequalities of women and men so that it now becomes necessary to particularize women's rights in the context of the protection guaranteed to women by the law. Article 1 of CEDAW obliges state parties to remove discriminatory clauses in the national laws against women. This is to enable women to participate on an equal basis with men in all fields of human endeavour.

In order to assess the effect of the customary law practice of excluding women from divorcing on grounds of adultery, I had to invoke comparative standards and principles of practice in this regard at international, regional and national levels as the norm. Zambia by virtue of being a member of the United Nations and the International community is a party to several international and regional human rights instruments which have a bearing on the subject of this study. For instance, article 1-5 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) to which Zambia is a State Party, enjoins state parties to eliminate all forms of discrimination against women. This involved my assessing the practice that precludes women married under customary law from divorcing on grounds of adultery (while a man in the same marriage is able to do so) whereas both men and women can married under statutory law have the right to divorce on grounds of adultery in accordance with section 9 of the Matrimonial Causes Act. In terms of the human rights approach I found that customary law is found to be discriminatory. Further, article 16 of CEDAW enjoins state parties to promote equality in marriages and family laws. The study found out that this objective cannot be achieved by preventing women from divorcing on

grounds of adultery in customary law marriages. One of my interviews was with the director of the Young Women Christian Association (YWCA) who said the following:

‘In customary law marriages we suffer a lot as our rights are not recognized in the marriage even the State has failed to protect the woman married under customary law, because a husband can wrong you by marrying or have an affair, but the courts will not punish that man but all they say is that a man is a potential polygamist.

The government should do come up with a written policy on customary law marriages, why should the women married under customary law be the one denied this right to divorce on grounds of adultery? While the woman married under the statute has the right to divorce on grounds of adultery? While the elders also tell the women that *ubuchende bwamwaume tabutoba nganda* (meaning, “adultery of a man does not break a marriage but it does for a woman”). Every day we receive 8-10 cases of women having marital problems we just advise them to reconcile or just proceed to court though we know there is not much help from the courts. A lot of women are married under customary law and there are many divorces at the same time compared to statutory law marriages.’

In using human’s law approach I found that article 23 of the International Covenant on Civil and Political Rights (ICCPR) recognizes that all laws and activities ought to be based on the principle of equality and equity before the law. In this regard, therefore, having established the fact that women and men are equal and that the principle of non-discrimination should be the ultimate goal together mean that women can freely then choose their own economic, social and cultural endeavours without interference from anyone, i.e., custom, cultural and religion.

Through this approach I was able to understand the common international practice in matters of customary law marriages and compare them with those in statutory law marriages in order to reach an informed position on this matter.

**Table 1: Showing divorces under customary law (2011 to 2013)**

YEAR	MALE	FEMALE	TOTAL
2011	217	0	0
2012	203	0	0
2013	200	0	0
TOTAL	620	0	0

**Table 2: Showing divorces on other grounds (2011 to 2013)**

YEAR	MALE	FEMALE	TOTAL
2011	513	13	526
2012	623	08	631
2013	380	18	398
	1,516	39	1,555

**Table 3: Showing divorces under statute law (2011 to 2013)**

YEAR	MALE	FEMALE	TOTAL
2011	217	56	277
2012	203	78	211
2013	202	62	264
TOTAL	622	196	752

#### **3.3.4 Actors and structures approach**

The actors and structures approach made me collect information from various decision makers and influential people. The methodologies I have used are all interrelated, and each has been instrumental in bringing about very useful insights. In using the actors, norms and structures analysis I was able to systematically dissect the issue at hand by first of all identifying who my major actors were in respect of each objective, i.e., the church leaders, traditional chiefs, organization staff, local court justices and High Court judges.

The traditional chiefs are crucial in this research as they are the custodians and enforcers of customary laws and are responsible for the current provisions under which customary laws favour men but not women on the dissolution of customary law marriages in terms of which men are allowed to divorce on grounds of adultery while women are not.

I interviewed different chiefs from different provinces as Zambia has 10 provinces and 73 ethnic tribes. One of the chiefs spoke as follows:

‘Every country has culture and customs that guides them, when the white man came to colonize Zambia come of our customs have been replaced by what the whites wanted. However we still practice some cultures as not all of them are not bad as others are good, like *lobola* is good it makes the marriage be respected, and polygamy is good because the family grows fast. Therefore, in Zambia it is our custom that a woman cannot divorce on ground of adultery as

a man is a potential polygamist and he can marry as many women as he can manage. If a law is brought about, maybe it can work in town but not in rural areas, because that is our custom.’

Further, the Local Court Justices are also major actors as they are the ones that are responsible for interpreting and applying the law and ensuring that it is clear to the beneficiaries. In using this methodology I was able to see how the courts handle cases of adultery brought by men or women and how the law and the courts treat a woman married under statutory law. I was able to understand what lies behind their interpretation of adultery as a ground of divorce under customary law and statutory law in both the Local Court and the High Court in Lusaka the Capital City of Zambia.

The table below provides a synopsis of the analytical process that was involved in determining my selection of the actors and the structures relevant to this study. Interviewing these selected actors improved my understanding of how women married under customary law are marginalized on the issue of divorcing on grounds of adultery. Each actor derives their power from the structure they operate in. It is this power that can be used to bring about inequality and discrimination, subordination and domination of one sex by the other. However, an important part about this methodology is that it not only helps the researcher understand the root causes of inequalities, conversely it also helps them come up with appropriate interventions for each actor and structure. By interrogating the norms that govern each structure and the influence these norms have on the various actors, substantive equality measures between men and women can be sought. It was from such a profound understanding of the relevance of such methodologies that recommendations, interventions and remedial measures about the various issues raised in this paper were conceived.

**Table 4: Showing categories and details of people (respondents) interviewed**

No	CATEGORY	DETAILS	MALES	FEMALES	LOCATIONS
1	Religious Leaders	Catholic Priests	1	0	Catholic Secretariat. Kabulonga.
		Catholic Women National Council Of Zambia		5	National Council of Catholic Women. Kabwata
		Pentecostal Bishop	1		Northmead Assemblies Of God. Northmead
		United Church Of Zambia Bishops/Reverends	3	1	United Church Of Zambia Synody Head Quaters(UCZ) Kabwata.St Pauls Church. Kabwata, Matero UCZ Church, Matero
		Church of Nazarene Reverend	1	0	Town Center Lusaka
2	Traditional Chiefs	Traditional Chiefs	5	1	Mungule, Chibombo District, Fairview Hotel, House Chiefs. Lusaka
3	Community Members	Women Groups		12	Human Development Center, Kabwata
		Women groups		6	Young Women Christian Association Kabwata
		Women		5	Matero compound
		Women		1	Kaunda Sq compound
		Women		1	North Mead
		Women		3	Chilenje Market
		Men	4	0	YWCA.Kabwata
		Men	1	0	Mungule

4	Government Officials	Director of Information at Ministry Gender	1	0	Ministry of Gender and Child Development. Offices. Kamwala Lusaka
		Director of Law Development Commission		1	Law Development Commission Offices Lusaka
		Assistant Director Law Development Commission	1		Law Development Commission Offices Lusaka
		The Director of Information Human Rights	1	0	Human Rights Commission Offices. Lusaka
	Non Governmental Organizations	The Deputy Director Legal Clinic For Women	1	0	Legal Clinic For Women Offices. Lusaka
		Senior Legal Advocate		1	
	Local Court	Justices	1	1	Local Courts offices Lusaka
		Clerks	1	3	Local court Lusaka
	High court	Justices		1	High court Lusaka
TOTAL			22	46	
OVERALL TOTAL =68					

### 3.4. Data collection methods

Data for this study was collected using two main methods, namely, desk review and field work.

#### 3.4.1 Desk review

Desk review involved the use of a structured checklist for review of literature on customary practices that promote or undermine cultural practices. A review of literature was conducted to look at general beliefs and customary practices that impact on gender equality. This process helped me to identify and analyze customary practices in relation to the participation of women and men in customary law marriages in patrilineal groups as to why women cannot divorce on grounds of adultery.

The review helped me to highlight both local and general efforts to address issues of gender inequality stemming from customary practices, as well as the challenges faced in this regard. Information from the literature review made possible the development of tools for collecting primary data.

### ***3.4.2 Field work***

Two (2) data collection tools were used in the field: a semi-structured questionnaire and interview or Focus Group Discussion Guide (FGD). There were three main categories of respondents. The first category comprised the general population which included community members, i.e., men and women in general, working class and non-working class, married or not married under customary law, and these were chosen by random sampling.

The second group of respondents were key informants who were purposely selected to provide specific information on customary practices. Key informants interviewed included the chiefs, religious leaders, non-governmental organizations officials, YWCA officials, officials from the Human Development Community Centres, markets, and a few from their homes, Local Court Justices and High Court, and the Legal Clinic for Women. Using the interview guide I collected qualitative information on customary practices in both matrilineal and patrilineal groups, the content and procedures involved, and my main focus was on patrilineal groups. Views, perceptions and experiences of key informants regarding customary practices and gender equality, past and current initiatives and changes made over time were also solicited.

The third group of respondents included the focus group discussion participants. The interview guide administered to key informants was also used with focus group discussions. The only difference was that the focus group discussions were held with selected individuals with common characteristics such as women married under customary law in patrilineal marriages, divorced and undivorced but still living with their adulterous husbands. Most of the key informant interviews were conducted in local languages.

### ***3.4.3 Ethical considerations***

Before the study was conducted a letter of introduction was given from the SEARCWL management. This letter was used to introduce me to gate keepers in the area, such as the Courts, the chiefs, Government Ministries, and churches and even individuals who would no

doubt need more than a simple introduction. Permission was granted in some areas and not in others.

#### ***3.4.4 In-depth interviews***

As indicated above various theoretical perspectives have been adopted in this study, including the women's law approach and grounded theory. The aim of deploying these perspectives was to provide a conceptual starting point and to have a sound basis for in-depth analysis of research findings. The women's law approach is based on the lived realities of human life using women as a starting point. It is associated with grass-roots oriented research methodology, which aims at exploring and examining the position of women in society. It aims at describing, understanding and improving the position of women in law and society (Dahl, 1986). It uses perspectives from 'below' and 'above'. Perspectives from above seek to analyze statutory laws so as to determine whether they are gender neutral, discriminatory or gender specific. The perspectives from below use women's experiences as a starting point in analyzing the interplay between the law and the realities of women's lives. The two perspectives thus permit a more complete critic of the law.

This approach assumes that there are problems beyond law reform which need to be addressed, and that this can only be done by carrying out field research using women as a starting point. In order to grasp the relationship between law and practice, I have found the women's law approach in my research fruitful to collect empirical data about the experiences of women in their interaction with the law (statutory and customary), and other dispute management practices (Dahl, 1987).

In this study on investigations on adultery as a ground for divorce in customary law marriages as to why women married under customary law in patrilineal marriages cannot divorce on grounds of adultery while men can, the women's law enabled my in-depth research to be carried out on the experiences of women regarding adultery as a ground for divorce and the interplay between statutory and customary laws, disputes resolution process and women's roles in these settings. In addition, this approach was resorted to in an attempt to understand women's experiences in their different roles as mothers and wives.

I also found it useful in efforts to appreciate the different levels in which women interact with the law, customs, culture, religion, community and courts and between themselves as women.



This approach facilitated the collection of information which would have otherwise been unobtainable if the study was based solely on library research. This approach meant my going to the grassroots levels and meeting women from all walks of life.

In pursuing the grounded theory approach gave me a holistic picture of the situation of the women affected and the fact that they cannot divorce on grounds of adultery while men can this needs to take women as its starting point. I interviewed women divorced on grounds of adultery and women living with adulterous husbands. I listened to them as they related their experiences when it came to divorcing on adultery as a ground for divorce.

The grounded theory approach helped me have an open mind in exploring my research assumptions by not being rigid or by not having a pre-conceived mind but to explore new ideas as I found them on the ground. By using grounded theory I was able to find that customary law is being codified.



**Figure 3: Photograph of a typical grassroots interview**

The question is whether women are aware about the codification of customary law into a law that even women can divorce on grounds of adultery, and if they are aware do they know the importance of this law of converting customary law into a statutory law. In applying this methodology, most women narrated the real ordeal they undergo if they want to divorce on ground of adultery in the local court justices or in the traditional courts. The local court justice does not allow women married under customary law to divorce on grounds of adultery. The custom only allows a woman to divorce on ground of adultery if she can prove that a man has committed adultery persistently as a man customarily is a potential polygamist. The reality of life is that Zambian women are discriminated against under customary law. The unequal status of women should be addressed as human rights issue. Human rights are provided for various instruments such as CEDAW and the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (called the Women's Protocol). Zambia has ratified CEDAW and is a signatory to the Women's Protocol.

Using the human rights approach I was able to compare the international human rights standards on marriages and their dissolution, and it was clear that the national statutes both agree and disagree with the human rights, because Zambia is a member state of United Nations and has ratified human rights instruments that do not support discrimination of women the same time Zambia applies customary law that has customs that are discriminatory against women as women up to today women are discriminated against by the application of customary law in local court by justices.

The human rights approach also helped me compare the international human rights standards with what is on the ground. For example, article 16 of the UDHR gives the right of equality during marriage and dissolution while on the actual ground there is inequality, as women are not allowed to divorce while men are allowed to divorce on grounds of adultery. Why has Zambia not domesticated the ratified human rights instruments in its national laws? Does it mean that the rights of women married under customary law are not important? There is no awareness campaign for chiefs about the danger of promoting promiscuity among men married under customary law of the HIV/AIDS and the prevailing human rights for women not to be discriminated against?

These are among the many questions that came to my mind as I went around interviewing different actors, one key informant lamented at how custom is custom and how Zambia as a country shall be without identity if customary law is overtaken by foreign culture which has come with new technology of Internet, Facebook, cell phones, television and the like. He went on to say that:

‘That’s why there are so man divorces now days because you have totally lost our culture and our custom is lost on marriages, because children stay too long in school, where children are exposed to television, Facebook and internet so children have no knowledge about customs, am seeing custom finishing with new generation of our children’s children.’

The study was made possible also by using an actors structure approach by collecting data from influential people like: Traditional Chiefs, church Leaders, Organizational Staff, Local Court Justices and High Court Judges. For me to get the required information I had to interview the actors themselves so as to uncover the reality on the actual ground and to find

out as whether women were indeed not being allowed to divorce on ground for adultery, inquiring as to what the role the actors and structures play in the enforcing customary law taking into consideration the HIV/AIDS and the human rights for women on marriages and dissolution marriages provided for in CEDAW. This methodology explored how various actors like the lawmakers, courts, traditional chiefs, NGOs, Ministry of Justice, Ministry of Gender and Child Development influence the implementation of the law of customary law.

The courts who are the implementers of the law are the major actors who are responsible in ensuring that once this law is finally made into a statutory law should be made clear to the beneficiaries. They should make it is clear that the aggrieved persons can challenge the action. In using this methodology I was able to assess how local courts handle cases of divorce on grounds of adultery, how women are discriminated against by customary law and their interpretation of the customary law. To this effect I interviewed the local court justices.

#### ***3.4.5 Focus Group Discussions (FGD)***

I held group discussions for women only and another one was a mixed one for men and women. This was an attempt to get the views of both men and women in line with our gender perspective. The aim of group discussion was for me to get a general view and attitude on customary laws and the divorce on ground of adultery in patrilineal marriages. Group discussions were interesting as members shared ideas, experiences and knowledge.

In group discussions it was sometimes difficult to control the discussion as sometimes one individual would take over the discussion with emotions relating to terrible experiences. I would end up having to offer a prayer in order to calm their emotions. Sometimes the discussions strayed far from discussing customary marriages to comparing statutory marriages and just having general discussions on marriage in general.



**Figure 4: Photograph of a group discussion**

In the above photo I am seated in the centre in a black jacket, having a cup of tea after the group discussion.

In the mixed groups, it was usually men who spoke which was a reflection of the culture that women do not talk in the presence of men. However when the discussion heated up both men and women would express themselves freely, as men blamed women for the way men behave in their homes. One of the men said:

‘Actually some wives make us behave in the manner that we behave, some women nag you until you beat her as a way of shutting her mouth. My wife, I beat her because she is too argumentative, she will not let you sleep until you explain where you went who you were with, where you ate food if you make a mistake to tell her that you are satisfied, there is no pleasing a woman, you women you are difficulty so the only answer is to beat so she keep quite then you can sleep. Other women are too lazy you can’t find food ready or your

clothes clean, the house is dirty so what do you do with such a woman? That's why we marry or having plot 2 (girlfriend) where you can go and just to have a breather or peace, because a girlfriend will not nag you, she only shows love.'

### **3.4.6 Key informants**

I interviewed key people like representatives in the Ministry of Gender and Child Development, the Ministry of Chiefs, the judiciary, churches, the Human Rights Commission, NGOCC, the Legacy Clinic for Women, the Young Women's Christian Association, the Women Human Development Centre Law Development Commission, and traditional chiefs as custodians of customary laws.

Key informants were people in the community who handled or came across customary law information or cases. I wanted to know how they dealt with customary law disputes or customary law interpretations or how customary law is implemented and how cases in which adultery as grounds for divorce in customary law in patrilineal marriages are resolved.

The intention was to get information on the customary law, the practice of the church, how the church views customary law and adultery as a ground for divorce whether religion acts a barrier against women divorcing on grounds of adultery. One clergyman I interviewed said:

'The church recognizes customary law marriages and couples are encouraged to come to church and register the marriage then the marriage is blessed by the church. However the church does not encourage divorce on any grounds of divorce the teaching of the bible talks of reconciliation. In the Bible in the book of Mark Chapter 10:9 Jesus said that once two people marry they become one flesh and therefore what God joins no man can separate so as a church we don't have authority to separate what God has put together as one, on the question of adultery, that's why couple take vows so that is also for better or for worse, to forgive each other. But the aggrieved party insists we wash our hands, then they can go the courts of law if they so wish, we do not impose we just teach them the word of God and what God expects from a Christian.'

The most difficult part was the protocol involved particularly with traditional authorities and government officials. I was required to follow a certain tradition when interviewing chiefs. When I went to interview a chieftain and despite my having an introductory letter from SEARCWL I was also supposed to get another letter from the Ministry Chiefs and

Traditional Affairs. Then, after getting that letter I then had to make another appointment through a kapaso called the Returner for the chief.

Then I was told that I could interview the Chief empty handed, the custom is that you must take money and some food stuffs like cooking, oil, sugar salt, and the like plus money. After the Returner was satisfied I was given an appointment which kept on being moved to another date. I was looking forward to interview a woman Chief so I could find out the position of women under customary law as a woman and how she dealt with cases of adultery under customary law. Finally I received a call telling me that I could interview the Chieftainess. When I interviewed the Chieftainess, she said:

‘When I receive a case of a woman bringing a complaint that her husband has committed adultery, first I shall ask both of them to reconcile because a man traditionally can marry many wives so why should a wife divorce on adultery? (For a) long time there was nothing like a woman divorcing on adultery. How about the many cows that your parents paid for you who is going to pay back? With the cattle disease call kenkede all the animals might be dead. So a woman is taught to keep her marriage well and her husband and children. It’s now because HIV/AIDS if a woman insists like (they do) these days I refer such cases to the local courts. Mostly in this court I am dealing more with cases on land issues and we treat women equally in my Chiefdom.

‘Customs, I know that it is a barrier, it does not allow a woman to divorce on grounds of adultery but I know as chiefs they teach us in seminars the rights of women. Yes women should be allowed to divorce as well because a man is allowed, so the same should be so. The other thing I have seen is that most women don’t bring this cases to the palace but we hear that so and so has committed adultery but women are not bringing this cases to the palace. Why? The reason is simple, most women have nowhere to go, they don’t want to go to their parents, that’s why most women don’t bring these matters to court, they have no money they are poor. If women can be empowered economically they can be free to even insist to divorce in the courts, because she knows she has no house of her own as she stays in her husband’s house.’

### **3.4.7 Observations**

I planned to observe the court hearings, where I was interested in learning how the court system functions and the attitudes of the officials to litigants. During the hearing as I got a notebook to take note of the proceedings in one the hearing I was asked why I was writing after telling the court clerks, they demanded for a letter from the court registrar, which letter I gave them then they allowed me to take notes.

My aim of observing in court was to me to find out the attitude, and behaviour of the audience, the court officials as they influence the hearing, the function of the court system, the actual behaviour of the different parties in court and the power relations of the court officials, litigants and defendants. I was particularly interested in observing how these factors affect female and male litigants.

In the court I observed adultery cases where a husband had sued another man for compensation because of marriage interference, the court ruled against him because of inadequate evidence on the issue adultery. The man did not find the two in the act, but the husband simply found the man and the woman just seated together and chatting in an unknown house as the man had followed the two up to the unknown destination.

Another case was where a husband sued the man where his wife worked as a maid. She was fired from work and she was pregnant as the woman confessed to her husband that her employer used to take advantage by having sexual relationship with him. Unfortunate the key witness who was the wife of the man died before the matter was brought before the courts of law. Hence, the court acquitted him for lack of corroborating evidence.

From the above observations I observed that it was difficult to prove adultery as the woman's evidence is never taken as admissible evidence in local court. In that case the woman was dismissed from where she was working and her husband divorced her.

In another case a man sued his wife for reconciliation but after the wife narrated how cruel the man treated her throughout the reconciliation the court granted the divorce in favour of the woman on grounds of cruelty.

I observed in this case that the courts do grant divorces in favour of women on grounds of cruelty so the study shows that a woman can divorce her husband on grounds other than adultery.

I observed that court proceedings can be time consuming as a number of cases are lined up for hearing each day with no specific time given, so I found myself seated for a long time and listening to many cases on the day I was waiting to hear a particular case I had selected



involving adultery. Sometimes I came to court only to discover that the case has been adjourned because one of the parties was not present in court.

At the High Court level this problem did not arise as cases are heard at specifically appointed times. However the problem I encountered was that the Judge heard the particular case in chambers and the seating limits the number of people who can attend. Often there was no space for me as the chambers were filled with relatives. Another time the matter was adjourned as one of the parties was reported to be out of town.

## CHAPTER FOUR

### 4.0 FINDINGS OF THE STUDY AND DATA ANALYSIS

After carrying out my research in line with my assumptions I found out the following:

#### 4.1 Are women married under customary law in patrilineal marriages allowed to divorce on grounds of adultery?

There is only one law that regulates customary marriages and divorces in Zambia and it is an unwritten customary law which provides that a woman married under customary law whether under patrilineal or matrilineal marriage cannot divorce on grounds of adultery as a man is a man is believed to be a potential polygamist as he can marry anytime he wants. A woman married under statutory law, however, can divorce in accordance with international and national laws. Section 9 of the Matrimonial Causes Act No. 20 of 2007 provides for adultery as a ground for divorce, among others, and other international instruments, for example, article 16 of CEDAW provide for equality in marriages and dissolution of marriages for both men and women and it obligates State Parties to include in legislation non-discriminatory laws, that is, laws that do not discriminate against women.

Therefore, I see a conflict of laws between Zambia's national laws and international law and even regional laws to which Zambia is a member state in that Zambia, under article 23 of its Constitution, recognizes customary law which contains laws that discriminate against women married under customary law.

I interviewed a woman who was married under customary law and told me how she failed to divorce on grounds of adultery as follows:

'I got married under customary law. We had a simple traditional wedding after the relatives of my husband paid *lobola*. After we stayed for eight years we had two children but the man started having an affair. On a tip from a friend, one day I followed him and I found him at the house of the woman, the woman ran away when she saw me, as she thought that I was going to cause a fight but why should I fight a woman because she was just proposed just like me or I wanted was to prove the rumours that I was hearing from people and my husband used to refuse, but I could see that he had changed a lot. He was not the same man I married eight years ago. When I asked he told me this is

the woman he wants to marry. He never gave any reason for his decisions. I called his relatives and my relatives for a discussion, but they told me that it is our custom, for a man to marry another wife if he wanted.

I went to court with a view to divorce they gave me a reconciliation form, but I was told that the man under customary law can marry as many wives as he can manage. They asked my husband for his opinion and he said I was still his wife. The court told us to go home and keep the children in marriage, the divorce was not allowed. What about my rights as a person in this marriage? I was not told that that's what happens in a customary laws marriage. At the time the marriage my parents told me that the family of the man were good people and he paid three cows as *lobola* since the man is a *ngoni* by tribe. So am still in the marriage as I have children and am not working. If I leave where do I go? This law is unfair if I knew I was not going to get married under customary law.'

This is a clear indication that in Zambia apart from the un written customary law, there is no policy in place to act as a guide to the local court justices in the interpretation and implementation of customary law to their beneficiaries, apart from the Constitution which, under article 23(d), allows customary law practices, and this discriminates against women.

It is noted further that the Local Court Act Chapter 29 of the Laws of Zambia administers customary so far as it is not repugnant to natural justice or morality or incompatible with any law (section 12)(a)). However, in relation to customary law marriages, the Act does not define what would be in line with written law or repugnant is left to the subjective interpretation of those who administer the law.

Further, I interviewed a Local Court justice as to why women married under customary law cannot divorce on grounds of adultery. He said the following:

'Women under customary law cannot divorce a man under customary law is a potential polygamist that is the custom, which has been accepted in Zambia, as long as the marriage is a customary law marriage the man can divorce if he found his wife committing adultery but a woman cannot. However customary law allows a woman to divorce if the woman says that the man has persisted committing adultery because of HIV/AIDS we can allow a divorce on grounds of adultery.'

This study established that a woman married under customary law can divorce only if the man persists in committing adultery. However for a man, if he finds his wife committing adultery the court will allow divorce the same day. Where is the equality for the women in a

customary marriage? Liberal feminists demand that equality should be extended to women in all spheres of life (Wollstonecraft). The main concern of liberal feminists is equal rights, the extension of liberty, equality and justice to women through legal and social reform.

Therefore, the fact that a man is a potential polygamist and that only a man can divorce and not a woman is something that is debatable indeed. The law enforcers of the law should critically review this legal issue and ask themselves whether this law which law enforcers have interpreted and used to treat women unfairly for so long is repugnant or not.

#### **4.2 Do customs, culture and religion act as barriers against women divorcing on grounds of adultery?**

I interviewed traditional chiefs who are the custodians of customs and culture, if they were aware that customs act as a barrier against women divorcing on grounds of adultery. One Chief had this to say:

‘It is actually true that custom act a barrier because woman are taught how to obey your husband who to take care of your family as a whole as a woman you are a care giver, but it is a custom that a woman cannot take her husband to court on grounds of adultery, because as a man if I see that the woman is doing right things to please me I can marry another woman, it is allowed. Especially if the woman is barren a man is expected to marry another woman so that his name can continue in the clan. So that’s why under customary law a man can marry as many wives as you can manage, though it is not a good practice as it demeans women and it takes away happiness, but that has been the practice from long time up today.’

I interviewed an elderly woman who told me how customary law acts as a barrier in women’s lives to prevent women married under customary law from divorcing on grounds of adultery. She said the following:

‘It is true customs act as a barrier because when I was about to get marriage I was put in the house whereby I was taught how to take care of a man in a home, how a woman should not bring shame on the family, they taught me that even if my husband beats me it is my secret I should not tell anyone so even if you catch your husband committing adultery by custom you can’t tell anyone about that especially on adultery because a man can marry any time because a man is the one who marries not a woman. And a man is the head of the house so as women we are told to keep our marriages well and to keep secrets of the marriage. But these days you young ones you don’t keep secrets you find a man is arrested for beating a wife! Because to beat a wife he shows

that he loves you, but now there are issues of human rights that a woman has rights, what rights in a marriage a woman will always remain a woman and will never be the head of the house, that's why many marriages are breaking up because of this confusion of human rights. Even long time our husbands gave us respect as wives, as long as he provides for a woman that was what is important.'

The above quotes show that more should be done to educate women, on the need for women to know their rights. There is a need for the government to intensify their campaigns and teachings for women especially the *alagizi* (traditional women teachers) about the danger of some of the traditional beliefs and customs, for example, the custom of 'keeping silent' even if a woman is beaten. There is a need for the Government through its Ministries, like the Ministry of Gender, the Human Rights Commission, NGOs and other stakeholders to come on board to help women understand their rights. The teaching of the *alagizi* should be brought into line with what is prevailing in the regional and international human rights instruments which promote equality for all women.

I also interviewed a woman as I wanted to find out whether she knew that customary law is being codified into a written law and whether it will be of any help and she said the following:

'Well that will be very good because now women can also have a voice. I just pray that they will not include polygamy and other clauses that demean women. The only problem with codifying customary law is that, whatever they will put will be the law even if it is a bad one it will stay as law. What are we going to do about such? I didn't even know customary law is being codified, at least they should have asked for more inputs from more women as many women we don't know, the government will just surprise us with a customary law statute. I don't even know if it will be good law for us women or not. We have suffered a lot as women, when getting married as a woman you have no say, you can't divorce on adultery as a man is a potential polygamist. Everything is for the men, where are the rights for a woman? The law for sure it will be good for women married under customary law, I like the idea.'

From this interview I found out that many women are not aware about customary law being codified and the fear that the woman expressed that whatever will be put into the Act will remain law is one of the disadvantages of codifying customary law. The government should inform the people through the media, workshops and seminars. What is the use having laws that fail to benefit the beneficiaries?

When I interviewed the Local Court Justice he was happy that at least they will have a guide:

‘It is good news that at least we shall have something to lean on to guide us as we deliver justice. I am happy to know that. I have heard about it but I don’t know when we shall have this law in place, otherwise it is a step in the right direction so the rights of women in customary law can be the same as in the Matrimonial Act. Our job is to see at the end of the day that everyone is happy, a man and a woman. Because it has been a challenge for us without a guide to follow with the intermarriages in Zambia and the many different tribes so it has really been a challenge for us at local court, how to dispense fair justice without any written guide.’

From the above I could see that the codification of customary law is welcome. I also found during this study that in the Kenyan 2013 Constitution has a Bill of Rights that provides for adultery as a ground of divorce under customary law.

I also interviewed a traditional Chief on the codification of customary law. He had this to say:

‘Well it is the decision of the Government and we are aware as the Zambia Law Development Commission are still consulting with us. (We) as the chiefs (you know) we are the custodian of customary law we don’t want our custom to be taken away from us. Otherwise the idea is welcome. However the debate is still going on in different provinces. It is not all the customs that are bad, others are ok like polygamy is good as it makes the family to grow fast. Now because of HIV/AIDS and the so called human rights some of this has to change because of life. It is good to respect the rights of both men and women therefore if the woman can divorce on grounds of adultery it is ok because of AIDS she has rights.’

From this discussion I could see a lot of resistance especially when I asked him about polygamy and divorce on grounds of adultery. But it is good that the government is still going ahead with the codification of the customary law in spite of resistance from other stakeholders.

I also interviewed church leaders. I wanted to find out whether the church acts as a barrier against women divorcing on grounds of adultery in customary law marriages. One of the church leaders said as follows:

‘The church does not act as a barrier as the teachings of the Bible are very clear. When the Pharisees dragged an adulteress to Jesus and wanted to stone her, no one stoned her and he forgave her in the book of John 8:3-11. Therefore who are we not to forgive each other? We preach forgiveness as the church does not encourage divorce. When you marry is for death do us part no divorce is allowed in church if the woman or man insists on wanting to divorce then we tell them to go to court. Otherwise we don’t allow divorce in church.’

From the above discussion it is clear that the teachings of the church discourage a woman from divorcing on grounds of adultery as she feels that if she does so she will be an outcast in the eyes of the church.

### **4.3 Is customary law rigid due to the patriarchal dividend?**

I had a discussion with men and women in a group discussion as I wanted to find out whether customary law is rigid due to the patriarchal dividend. The patriarchal dividend, as defined earlier, means that the law favours men and not women. Hence due to the patriarchal dividend a woman cannot divorce on grounds of adultery but a man can. One member of the group offered their opinion:

‘In Zambia we can not deny that it is a patriarchal state, because our custom says that a man is the head of the house so a woman and children are under him as the head, even if a woman is the one providing for the home a man still is considered the head of the family. Yes customary law in Zambia favours men as you can see that a man can be allowed to divorce on ground of adultery as long as I say I don’t want a woman the courts will allow a divorce, but a woman must prove many things before the courts can allow divorce, for example, that I beat her am cruel to her and the children that’s when maybe she can be allowed to divorce. We don’t see that law changing for a long time to come, even if customary law is codified and be a written law the mind set of people will take time to change because every country has its own cultural.’

The group further argued that being a woman married under customary law does not take away their rights as human beings. I found out from this discussion that codifying customary law on its own will not bring about change for women. The government needs to go further by including it under a Bill of Rights which includes grounds for divorce under customary law (as seen in Bill of Rights in the Kenyan Constitution). In addition, the South African Constitution’s Bill of Rights includes equal rights for every individual, while the Zambian Constitution has no Bill of Rights clause.

I interviewed an officer at the Law Development Commission about customary law being codified and whether there are laws that favour women. I saw that my assumption on the rigidity of customary law was not holding and I noticed that something was being done to change some customary practices so that they come into line with human rights standards.

The officer said:

‘Yes there are many clauses that favour women since women are the ones who are subordinated against under customary law. For example, age, has been looked at, also consent of a woman is included even grounds for divorce are same as those in the Matrimonial Causes Act. Women as well as men will be divorcing on grounds that are provided for in the statute. However, the discussions are still going on with stakeholders, like chiefs and other relevant organizations in support of gender balance as it has been seen that women married under customary law are discriminated against under customary law. So, to me I see that customary law is not rigid as it keeps on changing according to societal changes. Customary law is not rigid as it is changing every day so as to be in line with international conventions that support equal rights for women in customary law.

‘Zambia as you know is signatory to many international instruments so it’s for this reason that Zambia wants to legislate laws that are in line with the international standards where there are calls of equal rights for women who are discriminated against, therefore it has been found that under customary law women are mostly discriminated against. Starting from contracting of a marriage to dissolution of a marriage, hence this task that the ZDLC has been given to see how the rights of women can be addressed under customary law.’

After a lengthy interview with the official from the Law Development Commission I found out that as this law might take some time to be made into legislation there is a need for the government to put in place a policy which shall act as a guide to the local court justices while waiting for this to occur. This is what they have done with Anti-Gender-Based Violence Act.

The Government through the Ministry of Gender needs to start sensitizing women, Chiefs, and other stake holders about the importance of this legislation, as many people that I interviewed had no idea that customary law is being codified to make provision for its grounds for divorce to be the same as the ones in the Matrimonial Causes Act.



#### 4.4 Do women married under customary law want to be able to divorce on grounds of adultery?

I interviewed a woman whom I found at YWCA who was beaten by her husband but who later came back to withdraw the case just after two days of having reported the matter. I wanted to find out what made her withdraw the case and this is what she had to say:

‘Yes I wanted to divorce my husband but where can I go I don’t have money to start a business and have no house where I can go and stay if I had money or working. I could have left him long time, then I was going to help pay back what he paid, when he married me. Like this my parents are poor where do we get money to pay, because he was charged four cows but it was converted in money from which he has finished paying. My parents told me to come and withdraw the case. Men are paying a lot of money to marry these days; parents don’t know that it is bringing problems in marriages. If there can be a policy of the minimum payment on *lobola* I think things can be a bit all right because I have seen that as long as a man has money he can just marry any woman, it’s like business. If I was working or doing something but there are no credit facilities where I can borrow money to start business. The biggest problem why us women suffer is poverty. When a man marries he becomes your saviour so it becomes difficult to take the matter to court to divorce (because) where will you go? Many women are suffering due to poverty. In homes that’s (what) you hear (about) of (sic.) a marriage. Here it is called *shipikisha* club, which means ‘be strong’. Others will tell you, *naikalila fye abana* (which) means, I just stay because of my children.’

As seen in this interview these are the factors that discourage a woman from divorcing under customary patrilineal marriages. In the interviews with the chiefs and local court justices, they are not saying that the law or practice is absolute. What the local court justices said was that if a man repeatedly commits adultery then a divorce may be granted. Divorce is also granted on grounds of adultery if the woman complains and insists on divorce because of her husband’s HIV/AIDS status and also on the basis of international human rights law (guaranteeing equality of women and men before the law). It is probable that women themselves are not aware that this is how the local court justices are administering the law and that if they persisted with their case the justices would grant them a divorce. Therefore my assumption that women cannot divorce and that only men can do so is also not holding. Although women can divorce but only if they insist, the question then remains is, ‘How many women know that?’ What is clearly coming out of a customary law marriage is that women cannot divorce on grounds of adultery.

Poverty is the other reason that women spoke of as a barrier to divorce on grounds of adultery. It is because of poverty that women are forced into marriages and once in them are forced to stay in them.

I interviewed another woman who said that due to the social stigma associated with divorce women will rather suffer and stay in an unhappy marriage. She said:

‘I have been married for 16 years with 5 children. I have gone through a lot in my marriage whereby at one time my husband brought a woman home whom he introduced as his cousin, since you can’t know all the relatives. Later when I came from work I found them in the spare room with her then he told me they were just chatting since I didn’t find them in the sexual act I believe him but later I called his sister who confirmed they did not have a cousin of such a description. After the girl had left my husband confirmed the relationship and said the girl was from another town so he had no place to keep her. After some time I forgave my husband since he said he will never do that again. But what made not divorce him was that all my friends are still in marriage. What will they say, because they all said that’s how women are. He will change. So sometimes we fear stigma from society and also at my age who will marry a woman with children?’

I found out therefore that apart from the law barring women from divorcing on grounds of adultery, there other factors that prevent women from divorcing which include society, and social stigma. Article 11 of the Constitution of Zambia recognizes the fundamental rights of every individual. Liberal feminism relies on gender consciousness as its base which calls on the abolition of prescribed gender roles. Liberalism demands equality which should be extended to women in all spheres of life. Women must recognize this equality themselves and be liberated from the fear of society or poverty and from male dominance. Article 2 of CEDAW obliges state parties to condemn discrimination against women in all its forms. The article further obliges State Parties without delay to adopt a policy of eliminating discrimination against women by putting in place policies which will empower women to be self-sustaining.

#### **4.5 Human rights, legal and Constitutional elements related to my research findings**

Human rights may generally be defined as those rights which are inherent in our nature and without respect of which we cannot live as human beings. They are rights belonging to every human being anywhere, at all times, irrespective of sex, religion, language and race

(ATSENUWA, 1995). Human rights are universally applicable and therefore they cover women's rights as well. The important questions however are, 'Do women really enjoy human rights?' 'Are women treated like other human beings with equal rights and responsibilities?' The answers to these questions are in the negative. In fact much of the civil law has been found to reassert the inequality of women and men so that it now becomes necessary to particularize women's rights in the context of the protection guaranteed to women by law. Article 1 of CEDAW provides for state parties to remove discriminatory clauses in the national law against women. This is to enable women to participate on an equal basis with men in all fields of human endeavour.

The failure to recognize the human rights of women is due mainly to misogynistic conceptions of women much of which have resulted in stereotyping women according to gender constructed roles. Most of these have subordinated women to men and it is thought that human rights are not necessary for women since customary law marriages only favour men. For example, men can marry more than one wife whereas a woman cannot. Also a man can divorce his wife caught committing adultery but a woman cannot. So as far as the applicability of customary law is concerned women's rights have been shelved since only men's rights matter. The more cohesive and systematic efforts to promote women's rights since the formation of the United Nations Organizations in the 1940s owe a lot to the theoretical formulations and explanations of women's equality with men and gender (deconstruction and reconstruction) theories.

#### ***4.5.1 International human rights***

In researching the inequality in customary law marriages on the issue of divorce on grounds of adultery arising from customary practices that exclude women from divorcing on grounds of adultery, a review of international and regional human rights instruments is undertaken. Zambia by virtue of being a member of the United Nations and the international community is a party to several international and regional human rights instruments which have a bearing on the subject of this study.

These instruments are not self-executing and require legislative implementation before they can take effect. However, the conventions, treaties and protocols are legally binding which means that once Zambia has ratified them she is under an obligation to domesticate them. While the declarations on the other hand although not legally binding, provide a standard to

which States Parties must rise in terms of its laws and policies. Therefore a human rights based approach to development brings the promise of increasing access to justice, equality and freedom and, ultimately, the elimination of poverty while the advancement of equality between men and women can be achieved through a range of economic and policy tools, human rights norms and standards provide a legal framework through which individuals and groups can combat discrimination and seek substantive equality (Hellum, 2007).

Therefore, Zambia, having ratified certain human rights instruments, has an obligation as a State party to prohibit discrimination and promote equality between men and women by looking at customary law marriages and divorce practices in Zambia and taking steps to ensure that women should not be discriminated against when it comes to their seeking a divorce in patrilineal marriages on the grounds of adultery.

Article 2 of the Universal Declaration of Human Rights which upholds the principle of non-discrimination on grounds of race colour, sex language, religion, political or on any other opinion, national or social origin, property, birth or other status, is probably the most dominant and most powerful principle of international human rights law. It applies to 'everyone' in relation to human rights and freedoms and it prohibits discrimination.

Article 1 of UDHR provides for all human beings to have been born free and equal in dignity and rights and endowed with reason and conscience and that we should act towards each other in a spirit of brotherhood. From the foregoing it is clear that international human rights law has set the universal standard for non-discrimination. Therefore, the basis that women married under customary law cannot on grounds of adultery divorce, one key informant I interviewed at the local court said as follows:

'Women cannot divorce on grounds of adultery because a man under customary law is a potential polygamist, however a man can divorce on grounds of adultery, that is the custom in Zambia, however due to HIV/AIDS and if the woman insists we might allow a divorce but none so far has been allowed. There was a survey, in six provinces 100% adultery cases brought by women none succeeded.'

It is clear from the above interview that Zambia is not doing what it is preaching, because article 11 declares fundamental rights for all, and if that is the case how is it that a woman cannot divorce a man on the same grounds as a man can divorce a woman? And what about

the fact that Zambia is a signatory to CEDAW in which article 2 obligates state parties to do away with such discriminatory laws against women? The government is here urged to remove this law which totally discriminates against women as is shown, above.

Further, article 1 of CEDAW the international human rights instrument that is most explicit when it comes to focusing on discrimination as it provides a definition of what discrimination means:

‘The term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...’

It is almost official that women cannot divorce on ground of adultery as almost every person I interviewed expressed the same views, including the local court justices, traditional chiefs, elders and some women themselves all to the effect that only a man can divorce on grounds of adultery and that women cannot! However CEDAW sets the tone for understanding discrimination. The tone of CEDAW is that any form of distinction, exclusion or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, constitutes discrimination. Article 2 of CEDAW requires State Parties to condemn discrimination in all its forms, to embody the principle of equality of men and women in their national constitutions. And it also requires that State Parties adopt appropriate legislative, and put in other measures including sanctions where appropriate, prohibiting all discrimination against women.

Article 16 CEDAW provides for state parties to ensure equality in marriages and family laws as follows:

‘State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations in particular shall ensure, on the basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same right and responsibilities during and after resolution.’

However the study observes that customary law marriages unite two families as opposed to simply uniting the two parties to that marriage. The rules governing the formation of customary law marriage suggest that the objectives of the perpetuation of lineage overrides the objectives of the attainment of personal goals which would benefit the individual.

It is observed further that under statutory law marriage neither *lobola* nor parental consent is necessary to contract the marriage. The fact is, however, that most women and men marry under both regimes. This means that even where parties have contracted a marriage under statutory law, payment of *lobola* signifies the delivery of the bride and the confirmation of the marriage. In marriages like in the patrilineal marriages where *lobola* is paid, the husband has absolute rights over the children and the reproductive rights of the woman.

Another convention that influenced my study in the promotion of rights for women is the International Covenant on Civil and Political Rights (ICCPR). Article 23 of the ICCPR recognizes that all laws and activities ought to be based on the principle of equality and equity before the law. Having established the fact that women and men are equal and that the principle of non-discrimination should be the ultimate goal, it means that women can freely choose their own economic, social and cultural endeavours without interference from anyone.

Article 1 of the International Covenant on Economic Social and Cultural Rights (ICSECR) states that:

‘All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

The above article states that all people have the right to freely pursue their economic, social and cultural development. This includes a woman married under customary law because most of what the women I interviewed said qualified my fourth assumption which states that women want to divorce but they cannot and this is because they are not economically empowered. They have neither the starting capital nor the shelter to access after a divorce.

It has also been seen in one case, above, that a woman wanted to divorce her husband who beat her up simply for asking about a woman in whose company she had found him. She really wanted to proceed with the case but she withdrew it two days later, citing poverty as her reason. Therefore, it follows that if women were empowered economically they might be able to divorce on grounds of adultery.

This study also found that denying woman the right to divorce on grounds of adultery was actually not an absolute prohibition as women may be able to divorce if they insist or if their husband persistently commits adultery. What is not right is that the man is not tasked by courts with many conditions when he desires a divorce, but when women desire to divorce they are burdened and frustrated by many conditions which are attached to the divorce. The local court justices I interviewed said that ‘if a woman insists, divorce can be allowed on grounds of adultery due to HIV/AIDS, but that (is what) women don’t do (that). Why?’ Most women cited lack of economic empowerment.

Therefore the principle of equality is one that should resound in all areas of women and men’s lives, if this is not so State parties are hereby encouraged.

#### ***4.5.2 Regional human rights instruments***

Article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa implores State Parties to:

‘Combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- (a) Include in their national constitutions...the principle of equality between women and men and ensure its effective application;
- (b) Enact regulatory measures that prohibit discrimination;
- (c) Integrate a gender perspective in their policy decisions, legislation, development plans programs and activities.

2....modify, social and cultural patterns of conduct of women and men through information, education and communication strategies, with a view to achieve the elimination of all practices based on the idea of inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.’

The foregoing article encourages State Parties to include in their national constitutions the principle of equality between men and women. State Parties are to commit themselves to modify the social and cultural patterns that border on making on sex inferior or superior to the other.

The African (Banjul) Charter on Human and Peoples Rights (ACHPR) provides for equal rights before the law and entitles equal protection of every individual of the law. Article 18 protects the rights of women and recognizes the family as the natural unity and basis of society which the state should protect by ensuring elimination of every form of discrimination against women. If therefore, marriage is the base of the family unity why should Zambia still allow polygamy to continue being practised under customary law as the practice demeans women and subordinates women. In my opinion most people I interviewed called polygamy repugnant to natural justice. One key informant, a traditional chief from Northern Province, said:

‘In my Chieftom I do not encourage polygamy as it only brings disunity in a marriage and misunderstandings and quarrels all the time. I was married to three wives, but I never experienced peace in that type of marriage, as a result I divorced all three women and remained single after about a year that’s when I remarried only to one woman, it is not a good customary law it lowers the integrity of women it must just be done away with especially with the HIV/AIDS, it means if one is sick all of you get sick. I personally I don’t support polygamy at all, in fact in my chieftom I have put a law that whoever wants to marry another wife must first pay one cow to his wife and one cow the chief, so far no one has done that its now five years ago. It’s a lie if someone says that they enjoy in polygamous marriage it’s not true, there is only unhappiness.’

Going by this view the government should come up with the law of abolishing polygamy in its totality, as polygamy reduces a woman to the status of a dependent in a marriage in the face of national and international laws all of which encourage promoting the equality of both men and women in a marriage. Article 2 of CEDAW obligates state parties to abolish laws that discriminate against women. Therefore the practice of polygamy in customary law simply encourages some men to be promiscuous in the name of customary law.



### **4.5.3 Domestic legislation**

In this study, several relevant pieces of legislation were reviewed, including the Constitution of Zambia.

#### **4.5.3.1 The Constitution of Zambia**

The Constitution of Zambia is the supreme law of the land, and if any other law is inconsistent with the Constitution, that other law, to the extent of the inconsistency, is void. Article 1(3) of the Constitution of Zambia. Further, Part 111 of the Constitution of Zambia, provides *inter alia* thus:

Article 11 recognizes and declares that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions colour, creed, sex or marital status, but subject to the limitations contained in this part.

The specific rights provided for in the aforementioned article includes protection from discrimination on the grounds of race, tribe, sex, place of origin marital status, political opinions, colour or creed. Article 23(2) further provides that a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public authority. However, the non-discriminatory clauses aforementioned have claw-back clauses which exclude areas of personal and customary law which is article 23(d). Effectively, this article allows for discrimination in customary and personal law. This is because a number of customary marriages practices promote discrimination and violations of victims' human rights under the guise of customary law where women cannot be allowed to divorce on grounds of adultery in the name of customary law.

#### **4.5.3.2 The Local Court Act, Chapter 29 of the Laws of Zambia**

The Local Courts administer African Customary Law in so far as the custom is not repugnant to the principles of natural justice or morality or incompatible with any law (Section, 12(1)(a)). In relation to customary law marriages, the Act does not define what would not be in line with written law. Consequently, the issue of what would be repugnant to the principles of natural justice or morality or incompatible with any written law is left to the subjective interpretation of those who administer the law.

Therefore, the commonly held views that every man is a potential polygamist, and that only a man can divorce and not a woman are clearly debatable issues. Law implementers and enforcers must critically review these notions and whether women are being unfairly treated by law enforcers themselves who are left to interpret what aspects of customary law are considered to be repugnant or not. In its Bill of Rights in the Constitution, the government should interpret what is repugnant and which custom/s is/are repugnant or not. They may determine that polygamy is repugnant to natural justice as well as the customary law prohibiting women from divorcing on grounds of adultery.

## CHAPTER FIVE

### 5.0 CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusions

The research has revealed that Zambia is in the process of codifying customary law and proposals have shown that its grounds for divorce will be in line with what is contained in the Zambian Matrimonial Causes Act No. 20 of 2007. The Law Development Commission has been tasked by the Ministry of Justice to come with draft legislation to regulate matrimonial causes under customary law. Concerns have been increasing that the local courts have no proper guidance concerning the handling of matrimonial causes under customary law as customary law is not written.

However a negative finding of the study is the resistance being encountered by some stakeholders who are the custodians of customary law. They insist that customary law remains the way it is now which is unwritten. They say that every state has its own culture and customs and that the traditional chiefs are the custodians and implementers of customary law.

Apart from the local court not allowing women to divorce under customary law on grounds of adultery, they are other contributing factors that discourage women from divorcing and they include the lack of a proper definition as to what is repugnant under customary law and the current lack of any proper guidelines to help determine how judicial officers should handle matrimonial causes. The poverty in which women find themselves also forces them to stay in adulterous marriages. However, if women are empowered and insist that they want a divorce they can do so and they can succeed as the law is not absolute.

There is a traditional saying that goes, *ubuchende bwamwaume tabutoba nganda*, meaning, the adultery of a man does not break a marriage, but it brings disunity, is demeaning to a woman making her subordinate and lowers the morale of a woman by bringing about unhappiness.

The decision to codify customary law is very progressive and it really deserves our support. It reflects global trends encouraging women for social, economic and cultural reasons, because a happy family is a source of a progressive country. It is clear from my findings that we need a customary law that is more inclusive and takes account of the rights of a woman in customary law marriages.

## **5.2 Projections based on a deeper analysis of my findings**

A deeper analysis of my findings clearly indicates that issues of customary law are quite contentious in Zambia because of its many tribes. Furthermore, we have a customary law which is not written and the interpretation for example of what is repugnant is left in the hands of the enforcers of the law as seen in the *Kaniki* case above, in which case customary law was defined as saying that what is accepted by the majority as a practice in that particular society is what is called law. This leaves much room for speculation as to who decides what is accepted by men or women? These are some of the questions that I asked myself in this study but the answer is of course it is the patriarch.

This ambiguity has led to many women suffering and it has caused marriages to break down and many others to die for saying it is a law that has been accepted that a woman cannot divorce because a man is a potential polygamist.

The officials tasked to do this work should not leave any stone unturned in ensuring that all areas of human rights for women which have been lacking will now be addressed in this law. A woman married under customary should enjoy the same rights as a woman married under statutory marriages.

## **5.3 Recommendations**

Arising from the findings of my research, I wish to make the following recommendations:

- The Customary Law Act should be amended to include adultery as a ground for divorce (i.e., bring it into line with the Matrimonial Causes Act No 20 of the Laws of Zambia).

- As a short term measure the government should come up with a policy guideline to make it easier for women married under customary law to divorce on grounds of adultery.
- The NGOS should carry out awareness campaigns for traditional chiefs and women in rural areas.
- Women leaders should mobilize women to educate them on the new law which is in the process of becoming part of Zambian law.
- Human rights campaigns should be intensified by human rights activists.
- The Ministry of Gender and Child Development should spearhead campaigns for the law reforms.
- Government should put in place economic empowerment policies for women.
- The Ministry of Gender should spearhead awareness campaigns to train chiefs and local court justices before the new customary law is enacted and through radios drama seminars workshops to women in rural and urban to make people making people aware of the new law.

## **Bibliography**

Atsenuwa A.V. (1995) *Women's Right as Human Rights*. Legal Research and Resource Development Centre Lagos, Nigeria.

Burke J. (1999) *'Christian Marriages'*. Paulines Publications Kenya. Africa.

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

Colson E. (1958) *Marriage and Family among the Plateu Tonga*. Manchester UP.

Dahl T.S. (1986) *Taking Women on the Starting Point-Building Women's Law*, Working Paper in Women's Law No.4. University of Oslo.

Harsh *et al.* (1992) "Gender The evolution of Legal Institutions and Economic Development in Colonial Sub-Saharan Africa" World Bank Working Paper No. 2.

Himonga C.N. (1987) *Family the Property Disputes: The Predicament of women and Children in a Zambian Urban Community* University of London (Theses).

McClain W.T. (1970) "The Rights of Widows under Customary Law" In *Women's Rights*. In Zambia. Report of Consultation. Mindolo Ecumenical Foundation, Conference and Consultation Program, Nov 20-24 p.87.

Munalula M. (1997) *'Family Law in Zambia'* The International Survey of Family Law. Published on behalf of The International Society of Family Law. London.

Munalula M.M. (2005) *Women, Gender Discrimination and The Law: Cases and Materials*. University of Zambia Press.

Mushota L. (2005) *'Family Law in Zambia: Cases and Materials'*. Published by UNZA Press Lusaka, Zambia.

Ndulo M. (1985) Widows under Zambia Customary Law and Response of the Courts  
Comparative and International Law of Southern Africa Vol. 1.

Tong R.M. (1994) Feminist Thought. A comparative Introduction to Feminist Jurisprudence.  
London, Rutledge.

WLEA Kenya (2001) Inheritance Law and Practices Affecting Kenyan Women. Women &  
Law in East Africa. Nairobi, Kenya.

WILSA Zambia (1994) Inheritance in Zambia Law and Practice. Lusaka: Women and Law in  
Southern Africa Research Project.