PROCEDURAL INJUSTICE: A CASE STUDY OF DOMESTIC VIOLENCE IN ZAMBIA.

BY

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PROCEDURAL INJUSTICE: A CASE STUDY OF DOMESTIC VIOLENCE IN ZAMBIA.

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An Obligatory Essay submitted to the school of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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DECLARATION

I Nancy Chewe Mulenga of computer number 26007002. Do hereby declare that the contents of this Dissertation are entirely based on my own findings and that I have not in any respect used any person’s work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

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Signature: [Signature]

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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Supervisor............................. Date..........................

DR. M.M.MUNALULA
Abstract

This dissertation had the task of looking at the procedural injustice that exists with regards to the way cases of domestic violence are dealt with in Zambia. The dissertation endeavored to look at the various forms in which domestic violence occurs, the effects it has on its victims and how the law, law enforcement agencies and the family respond to cases of domestic violence.

The dissertation through research and interviews found that, domestic violence has many faces of which some are difficult to prove and causes so many effects. At its worst, domestic violence may lead to death of a victim. An analysis made of the current law on domestic violence found that the current law is inadequate in the way it deals with domestic violence victims for instance in cases of rape, the law of evidence still tries the victim instead of the offender. The research also discovered law enforcement agencies are reluctant and ill equipped to adequately deal with domestic violence cases, leading to most victims withdrawing cases. It was also found that, poverty levels contribute to the negative attitude that the family has with the way issues of domestic violence are dealt with. Most family members are reluctant to intervene because of fear of losing their only source of income. Reconciliation is what is encouraged thus removing cases from judicial scrutiny.

The dissertation recommends the need for law enforcement agencies to have specialized training on how to deal with domestic violence victims and that same rules as are applicable to other offences should apply in cases where procedures make such offences more difficult to prove or where the rules mete out higher sentences.
DEDICATION

To my late mother Edina Phiri. Thank you for always teaching me that I can achieve all I want in life through hard work. It is unfortunate that you are not around to see the achievement of your only child. However, I know that this very work will speak of your achievement: For you are and will always be my inspiration. I LOVE YOU. To Nsofwa Mulungu my son, thank you for understanding during times I could not be there for you, without you there could be nothing worth working hard for. I Love you more than you could ever imagine.
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This dissertation would not have maintained focus and insight on various issues of domestic violence obtaining on the ground, without the magnanimous help, guidance, patience and tolerance of my able and articulate supervisor, Dr. M. M. Munalula. I cannot find sufficient words to express my gratitude. I am so thankful.

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Aunt Mailess, Janet, Grace, Christine, Sara, Maria, all my relatives and friends not mentioned, I have not forgotten about you. thank you for being in my life, you are all a blessing.
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CHAPTER ONE

1.0 INTRODUCTION

Gender Based violence in the form of Domestic violence has very devastating effects on its victims, in that most of them are physically, emotionally and psychologically disturbed as a result. Victims of domestic violence also lose their self esteem because of the trauma they go through. Domestic violence is also largely responsible for the speed at which HIV/AIDS has spread in countries across the world.

The research intends to look at the procedural injustice that exists with regards to the way cases of domestic violence are dealt with. It will examine what the current law is on domestic violence and whether it provides justice to victims of domestic violence. An assessment will also be made on whether the proposed legislation will offer adequate remedies to domestic violence victims. Furthermore, an evaluation on whether to stiffen punishment of domestic violence perpetrators will be carried out.

1.1 BACKGROUND/ CONTEXT

Gender shapes the lives of all people in all societies. It influences all aspects of our lives, the schooling we receive, the social roles we play and the power and authority we command. Violence against Women is widespread, it cuts across all cultures and peoples of all ethnicities worldwide. It is defined in psychological, sexual, physical and economic terms and although there are exceptions, it is generally perpetrated by men against
women. It thus covers things like, rape, assault and battery, spousal homicide, property grabbing, female genital mutilation and defilement of underage girls.¹

The research will focus on female victims of gender violence. This is because the most prevalent form of gender violence all over the world is violence against women due to their vulnerability to discriminatory laws, traditional norms, customs and practices that impact negatively on women. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) does not specifically prohibit violence against women but rather condemns discrimination against women in all its forms.² It is against this background that this research has chosen to focus on female victims, who as already alluded to, are vulnerable in most domestic relationships and Zambia is no exception to this scenario.

Gender violence in the form of domestic violence has become a matter of grave concern all over the world. The problem has far reaching results on society. Its consequences touch on the core of survival of society. Domestic violence has confounded various stakeholders, the government, the church, Non Governmental Organizations (NGOs) and other cooperating partners. Frantic efforts have been made to address the problem. Despite the concerted efforts being made to remedy the problem, the scourge has continued to affect many lives. Zambia has not been left out in this problem and there is need for the law to come up with adequate safeguards to address the issue. It is a well known fact that when

² Convention on the Elimination of all forms of Discrimination against Women, 1979. Article 2
there are such problems in society, the law can be used as an effective tool of social control.

1.2 STATEMENT OF THE PROBLEM

Gender violence is defined as any act that results in or is likely to result in physical, sexual or psychological harm or suffering including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life. The United Nations Declaration on the Elimination of Violence against Women defines violence against women as,

any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life. It includes but is not restricted to battery, sexual abuse of female children in the home, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non spousal violence and violence related to exploitation of women and children.

Since gender based violence is so broad, this study chooses to focus on gender based violence that occurs within a domestic setting. It is concerned with violence that occurs due to domestic relationships. By this we mean for example, relations between husband and wife, a man and a woman who are simply cohabiting, parents of a child or such similar relationships. It is violence instigated on the basis of such relationships. The domestic relations that two or more people share are the basis of such violent behavior, and are used by perpetrators and victims to justify acts of violence. Domestic violence is gender based violence perpetrated by an intimate partner and which include physical,

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4 1993
sexual, psychological and economic abuse. It is considered to be a global epidemic that kills, tortures and maims women all over the world.\textsuperscript{5}

Zambia is in the process of enacting the Anti-Domestic Violence Act\textsuperscript{6} to specifically look at the issue of Gender based violence within the domestic setting. Whilst domestic violence offences may be defined as any other offences between ‘strangers’ captured in the Penal Code, the essence of the new law is to adjust the concept of violence and the procedures related to it so as to ensure that this type of violence is eliminated. In the proposed legislation there are procedures that have been laid down on how to deal with the issues of gender violence. Thus it is imperative that the procedures in the proposed Bill are analysed in order to determine how and whether they will offer adequate and effective protection to victims of domestic violence in Zambia once enacted into law. In addition, there is need to analyse and advocate for a more systematic and current way of reporting and documenting these offences, where they are committed and how the law is being used to handle them.

\textbf{1.3 SIGNIFICANCE OF STUDY}

The research is significant because it comes at a time when there has been a significant increase in the number of reported cases of domestic violence and this has become a source of concern among the various groups that preoccupy themselves with the fight against gender violence. The upswing in the number of reported cases of domestic violence in the country has raised concern about whether or not our laws are in place and

\textsuperscript{5} A study of Domestic violence in the Republic of Mauritius. Undertaken by S.O.S Femmes. A Women’s Non governmental organization. 1995. p. 10

\textsuperscript{6} Anti-Domestic Violence Bill, 2009
effective enough to deal with this problem. Many gaps have been seen in the law and it is felt that this has led to the continued existence of the current status quo. Some customary laws have been the basis upon which women are discriminated and most domestic violence is perpetrated under the guise of customary laws. This has been compounded by the fact that the Constitution\(^7\) permits discrimination based on matters of customary law. In most instances of domestic violence the stability of the family is a priority over the rights of the victim.

Due to inadequate State response, the problem of domestic violence has escalated to epidemic proportions. Further inquiry into this matter, which, it must be acknowledged is an issue being faced by families in Zambia today, will ultimately lead to visibility of domestic violence. This will also assist members of the public that maybe suffering silently and have not reported these cases for fear of victimisation.

1.4 OBJECTIVES OF RESEARCH

General objective

1. To determine whether the current legal provisions, provide a form of justice that is preferred by victims of domestic violence and further assess whether the proposed legislation will offer adequate remedies to victims of domestic violence.

Specific Objectives

1. To analyse the current legal provision dealing with domestic violence

2. To establish whether there is need to strengthen the procedures and stiffen punishment of domestic violence perpetrators.

\(^7\) Chapter 1 of the Laws of Zambia. Article 23
1.5 RESEARCH QUESTIONS

1. What is the current law on domestic violence in Zambia?

2. What new procedures are introduced by the Anti-Domestic Violence Bill in order to protect female victims of domestic violence?

3. Are the procedures relevant and adequate?

1.6 METHODOLOGY

The research was conducted in two stages. Firstly it was a desk research in which various pieces of legislation, legal commentaries as well as case law and other publications that have been written on the topic were consulted. Secondly, field work was also carried out in order to elicit interview data from various organizations and persons concerned with the fight against domestic violence. The organizations visited include; Gender in Development Division (GIDD), Young Women Christian Association (YWCA), Women in Law in Southern Africa (WLSA), Women in Law and Development in Africa (WILDAF), Zambia Law Development Commission (ZLDC), Non Governmental Coordinating Council (NGOCC) and the Victim Support Unit (VSU).

1.7 LIMITATIONS OF STUDY

The major problem that this research has faced concerns the unwillingness of some organizations to assist with information. It was also difficult to visit all organizations which deal with women's rights due to inadequate financial resources. The other limitation related to incomplete statistical records of domestic violence cases at Lusaka Police Force Headquarters.
1.8 ORGANISATION OF RESEARCH

The research will be divided into five chapters as follows:

Chapter 1

This chapter will give an introduction of the research, general background of domestic violence, the significance of the research, its objectives, methodology and definition of concepts.

Chapter 2

It will look at the general nature of domestic violence in respect of the Zambian situation. In doing so, it will analyse the current law on domestic violence.

Chapter 3

This chapter will look at the procedural injustice that exists with regards to the way victims of domestic violence are dealt with in the administration of justice.

Chapter 4

This chapter will look at what new procedures if any are introduced by the Anti-Domestic Violence Bill (2009), in protecting female victims of domestic violence and whether the proposed legal reform will effectively deal with the procedural injustices that currently exist in the administration of justice. It will also discuss whether the proposed legal reform will go beyond just protecting women and sanctioning perpetrators, and more so if it will remove barriers that keep women in violent relationships.

Chapter 5

This chapter will conclude the paper and give the recommendations.
CHAPTER TWO

GENERAL NATURE OF DOMESTIC VIOLENCE AND THE CURRENT LAW

2.0 INTRODUCTION

Chapter one gave a brief background of domestic violence. This chapter will look at the general nature of domestic violence; this will be achieved by looking at the various forms of domestic violence, its causes and some of the effects of domestic violence on its victims. It will also analyse the current law on domestic violence.

2.1 FORMS OF DOMESTIC VIOLENCE

Domestic violence may be broadly defined as, abuse by one person of another in an intimate relationship.\(^8\) According to Mable Mugala,\(^9\) domestic violence is violence that happens at household level. Most victims of domestic violence depend on their perpetrators for shelter and other basic needs. Domestic violence manifests itself through various forms, the most common being; physical, sexual, psychological and economic abuse. These different forms often co-exist and are used simultaneously or in close succession.\(^{10}\) The term violence is used to describe the use or threat of physical force against a victim and extends to abuse beyond mere typical instances of assaults to include any form of physical, sexual or psychological molestation or harassment which has

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\(^9\) Interview: Non Governmental Organisations Coordinating Council, member in Kitwe, 9th December, 2009.

\(^{10}\) A study of domestic violence in the Republic of Mauritius, p. 10
serious detrimental effects upon the health and well being of the victim albeit that there is no violence involved in the sense of physical force.11

(i) PHYSICAL VIOLENCE

Brinegar12 defines physical violence as, “any physical action towards another person designed to injure, hurt or cause physical pain.” It manifests itself in the form of violent acts. It involves acts like; pushing, slapping, kicking, punching hitting, pinching, hitting with objects, using or threatening to use a weapon which is common among people in relationships. Such acts cause injuries, deformities and even death. For instance in the case of Lungu v The people,13 the accused stabbed his wife in the stomach with a spear as a result of which she died. Most physical violence is mainly in the form of spousal battery. Thomas and Beasley14 states that:

Traditionally the home has been idealised as a place of safety and security, a sanctuary from duty, responsibility and work. The relationship between members of the family are also idealised as respectful and supportive. The reality is quite different …domestic violence is not unusual or an exception to normal private life; the vast majority of crimes against women occur in the home and are usually committed by a spouse.

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12 J. Brinegar, Breaking free from Domestic Violence. (Minnesota: Compcare Publishers Minneapolis USA, 1992) p. 3
13 (1972) Z.R. 95
From the statistics below it is clearly shown that most women are killed by their own husbands.

Statistics on the pattern of violence against women.

<table>
<thead>
<tr>
<th>Offender</th>
<th>Number of Cases</th>
<th>Percentage</th>
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</thead>
<tbody>
<tr>
<td>Husband</td>
<td>80</td>
<td>80</td>
</tr>
<tr>
<td>Boyfriend</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Relative</td>
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</tr>
<tr>
<td>Unknown</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: Young Women’s Christian Association (1960-2000)

(ii) SEXUAL VIOLENCE

Sexual violence can be defined as violent conduct that is sexual in nature. It is mostly directed at women. The most serious form of sexual violence is rape, including marital rape although this is not yet criminalised in Zambia.\(^\text{15}\) It is also evident in offences such as; indecent assault, sexual harassment at places of work, abduction, genital mutilation, forceful insertion of objects in the female sexual organ and so on. Women are forced into non consensual performance of immoral sexual acts for fear of being left for another woman or because they believe their role in a home is to satisfy the man sexually.\(^\text{16}\) In accordance with accepted gender roles, women are taught to submit sexually to their husbands. Some men have taken advantage of this and view women as sex objects.

(iii) PSYCHOLOGICAL VIOLENCE

This involves threats or acts that will injure the mind or emotions of the victim. It involves acts such as; denial of sex to the wife by the husband, insulting, humiliation,


\(^\text{16}\) Interview: Mable Mugala. 9\textsuperscript{th} December, 2009.
suspicious behavior by the husband, restriction of the woman’s freedom of movement and friends, ridicule, threatening to harm the victim or her property, installing a mistress at the matrimonial home, calling at unsocial hours when the victim is known to be afraid.\textsuperscript{17} Men who maintain extra marital affairs torment their partners, as they do not receive the care and attention they need and deserve. Such women become less productive due to loss of self esteem and confidence.

(iv) ECONOMIC VIOLENCE

Muchelema\textsuperscript{18} defines economic violence as any act which takes or prevents a woman using or enjoying something which results in the exploitation of the woman to gain a benefit. Most women are not economically empowered. In that there are few women in formal employment. Although there are no visible official barriers to women’s formal employment, their access to formal employment is hindered by lower education levels attributable to the preference to educate male children and the patriarchal nature of some bureaucratic structures that retain remnants of Victorian principles advocating that women belong in the home.\textsuperscript{19} Women comprise the largest number of the lowest paid public sector employees; for every kwacha a man earns, a woman earns about seventy ngwee.\textsuperscript{20}

\textsuperscript{17} L. Moshota, Family Law in Zambia: Cases and Materials. (Lusaka: UNZA Press,2005) p. 283
\textsuperscript{18} B.J. Muchelema, Economic Battering. 1991
\textsuperscript{19} M.M. Munaulu, Women, Gender Discrimination and the law. P. 159
\textsuperscript{20} A report on the proceedings of the National Symposium on Millennium 2000. Leadership Challenges for Women. 1\textsuperscript{st}-3\textsuperscript{rd} July, 1999.
(v) SOCIAL AND CULTURAL VIOLENCE

Traditional practices and societal attitudes that have been passed on from time immemorial have contributed to violence against women, for instance it is not a taboo for a married man to have an extra marital affair whilst it is almost unheard of for a married woman to have an extra marital affair. A man would instantly throw his wife out of the home if he finds that the woman has been cheating whilst women have been taught to tolerate a husband’s infidelity; hence the bemba saying that, *ubuchende bwamaume tabutoba nganda*, meaning prostitution by a man does not breakup a home.

In most households, women perform all chores. This continues to be the case even as they take on waged labour and contribute directly to the household income. Their role as breadwinner is seen by men as undermining of their status as head of the household and leads to more violence. This violence remains pervasive and may even increase as women become more economically empowered.

2.2 CAUSES OF DOMESTIC VIOLENCE

(i) Drugs and Alcohol abuse

Most domestic violence in a home is perpetrated by men who drink beer or use drugs, this is because such people tend to be aggressive and neglect the family. Sadler\(^2\) is of the view that:

Substance abuse escalates a person’s loss of control and diminishes the ability to think rationally. Alcoholics frequently display characteristics of irresponsibility and inability to tolerate frustration.

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Most men who drink resort to drinking beer whenever they are faced with a problem, instead of finding a solution to their problem, they would rather leave their families without anything to eat and use the money for beer.

(ii) Provocation

Most men who violate their wives physically claim to have been provoked by their wives and that the provocation made them momentarily lose control of themselves and in a fit of anger battered their wives. Munalula\(^{22}\) contends that, spousal homicide is often linked to section 205 and 206 of the Penal Code, which provide for the mitigatory factor of provocation. Under these provisions, a killing which would otherwise constitute murder, is, if done in the heat of passion caused by sudden provocation, reduced to manslaughter. However, in the case of *Herman Mvula v The People\(^{23}\)* The defence of provocation failed because of the manner in which the killing was done and the events immediately preceding the commission of the crime.\(^ {24}\)

(iii) Culture Socialisation and discriminatory customary laws

Culture is passed on from one generation to another through socialization, children who grow up in a violent home take the violence as a model and are likely to become violent when they grow up. Most traditions and cultures promote the superiority of men and subordination of women, the man is considered to be the head of the household and the owner of everything including the woman. In most instances this is reinforced by the *lobola* that men pay to the woman’s parents before marriage. Most women tolerate

\(^{22}\) M.M. Munalula, *Shelter and Gendered Power Relations*. p. 254
\(^{23}\) (1990/1992) *Z.R. 54*
\(^ {24}\) M.B. Chuulu, et.al *Gender Violence, the invisible struggle*. p
violent relationships due to the cultural belief that, if they leave the home then the *lobola* has to be repaid. Most of them cannot afford to make the repayment. Women's human rights are thus being violated in the name of culture causing Dawitt to argue that the state shields its failure to act behind the nebulous idea of culture.

There is also much societal pressure for women to get married and maintain their marriages, despite problems. Most mothers would just advise their daughters to be strong even if their husbands are violating their rights, this is because they are afraid of being 'laughed at' when their daughters are divorced and forced to return to the natal family home. Their concern is society's perception of them and not what the victim of the violence is going through.

Most customary laws have also been the basis under which most domestic violence occurs. The Constitution in Article 11 which is the core article guarantees basic human rights to every individual. It provides that:

> It is recognized and declared 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 opinion, colour, creed, sex or marital status, but subject to the limitation contained in this part, to each and all of the following, namely; life, liberty, security....

However, the same Constitution in Article 23 which is also an important article as it prevents discrimination, does permit discrimination in matters of personal and customary law. Article 23(4) provides in (c) and (d) as follows:

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26 Quoted in M.M. Munalula, Shelter and Gendered Power Relations, p. 252
27 Chapter 1 of the Laws of Zambia. Article 11
(4) Clause (1) shall not apply to any law so far as that law makes provision;

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

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

Thus most domestic violence is perpetrated under the guise of customary law. Therefore, Mabula\textsuperscript{28} notes that:

The Constitution permission of discriminatory laws in matters of divorce, marriage, devolution of property and other matters of personal law and the application of customary laws is problematic for the human rights of women. Most of the instances of the denial of human rights to women lie in this sphere. The Constitution’s permission of discrimination in these areas flies in the face of International provisions such as Articles 23 and 26 of ICCPR, and Article 15 and 16 of the Women’s Convention which Zambia ratified in 1984 and 1985, respectively. The Zambian Constitution does not embody the principle of equality of men and women and, therefore, does not appear to be an adequate or reliable tool in the fight against gender discrimination.

2.3 EFFECTS OF DOMESTIC VIOLENCE

The effects of domestic violence are long lasting. In one study, 88 percent of victims suffered psychological traumas and 79.3 percent of the children developed behavioral problems.\textsuperscript{29} Domestic violence dislocates women’s lives and blocks their individual growth and participation in society, in that they are unable to fully contribute to their own well being, to that of their families and also to that of the country, thereby hindering


\textsuperscript{29} A study of domestic violence in the Republic of Mauritius.
national development since women constitute 51 percent of the population here in Zambia.

Most victims of domestic violence lose their self esteem, respect and confidence as they cannot express themselves or even share these problems with their friends having been taught to keep secrets and not to reveal whatever goes on in the home. Due to the fact that victims do not share the problem, they continue being in violent relationships which sometimes makes them very depressed. Some victims even go mad as they are psychologically tortured by the violence. Victims of domestic violence in particular have suicidal tendencies; they feel betrayed and humiliated and believe that the only way out is to kill themselves.\textsuperscript{30} Most women who are sexually abused feel that their dignity has been trampled upon and that they are merely treated as objects, used and abused whenever their partner wanted.\textsuperscript{31}

Domestic violence has also had an impact on the high rate at which HIV/ AIDS has spread. Violence against women is rooted in the gender imbalances and inequality between men and women which leads to women’s disempowerment and this is largely responsible for the speed at which HIV/AIDS has spread in countries across the world, for the unconscionably high death toll, and the devastating impact the disease is having on affected communities.\textsuperscript{32} Women can become infected as a result of sexual assault or

\textsuperscript{30} Interview: Mable Mugala. 9\textsuperscript{th} December,2009
\textsuperscript{31} Interview: Thandiwe Ngoma. 14\textsuperscript{th} December,2009
\textsuperscript{32} Women and Law in Southern Africa (WLSA): Issue paper towards the development of an effective and comprehensive legislative response to gender based violence in Zambia. 2007
coerced sex, and the abrasions and tearing that can accompany these violations increase the chance of infection. Women are unable to express themselves and hence they cannot negotiate safer sex, since decisions are made by men and women cannot disobey for fear of violence. Other effects of domestic violence include:

- Broken homes
- Alcoholism and drug addiction
- Unwanted pregnancies
- Suffering miscarriage

2.4 THE CURRENT LAW ON DOMESTIC VIOLENCE

Every State enacts pieces of legislation in order to criminalise certain conduct and preserve the good of society by imposing sanctions on those who violate the law. In Zambia the only laws available for combating violence against women are the Penal code, Cap 87, the Intestate Succession Act Cap 59 of the Laws of Zambia and the Criminal Procedure Code Cap 88 of the Laws of Zambia. The Penal code was enacted a long time ago, prior to the issues of violence against women. However, related Penal Code offences include assaults, wounding, poisoning and grievous bodily harm. If death results from the violence, then section 199 and 200 provide for the offences of manslaughter and murder respectively.34

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33 Women and law in Southern Africa (WLSA). 2007
34 M.M. Munalula. Shelter and Gendered Power Relations, p. 254
Munalula\textsuperscript{35} contends that:

> Even theoretically non-gendered offences are often perpetrated on gendered terms. The law recognises this by ensuring special procedures in the case where one spouse is the victim of an offence perpetrated by the other, as follows.

The Criminal Procedure Code provides that:

1. In any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person:
   a. in any case where the wife or husband of person charged may, under any law in force for the time being, be called as a witness without the consent of such person;
   b. in any case where such person is charged with an offence under Chapter XV of the Penal Code or with bigamy;
   c. in any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them.\textsuperscript{36}

The above provisions ensure that even in cases where a woman is a victim of violence special procedures are followed. As a wife, she is a competent witness, and can testify against her husband.

It is important to note that violence against women has been dealt with under the common law offences, as there is no offence called domestic violence. Hence whenever a victim of domestic violence reports a case to the police, it would be treated like any other common law offence. As already stated, violence against women is not dealt with directly even by the Penal Code. It is however enveloped in various other offences that affect it indirectly. These offences deal, albeit indirectly with the forms that violence against women takes. For instance, assault, murder, rape, negligent act likely to spread infection and abortion.

\textsuperscript{35} M.M.Munalula, Women, Gender discrimination and the law. p. 132
\textsuperscript{36} Chapter 88 of the Laws of Zambia. Section 151
Physical violence is covered in various provisions under Chapter XXIV of the Penal Code, Act:

(i) ASSAULTS

Any person who unlawfully assaults another is guilty of a minor offence and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.\(^{37}\)

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.\(^ {38}\)

Having looked at the provisions which cater for physical violence which is one of the forms of domestic violence, it deserves to be noted that none of the provisions is gender specific in that both the provisions do not take the susceptibility of women into consideration. The sentences being meted on offenders are the same regardless of whether or not the perpetrator and the victim are in a close relationship. However, the amended provision takes into account the vulnerability of children as victims of domestic violence in certain instances and this is an improvement on the law as it provides that:

Any person who commits an assault or battery on a child occasioning actual bodily harm commits an offence and is liable, upon conviction, to a term of imprisonment of not less than five years and not exceeding ten years.\(^ {39}\)

\(^{37}\) Chapter 87 of the Laws of Zambia. Section 247

\(^{38}\) Section 248

\(^{39}\) Penal Code (Amendment) Act No. 15 of 2005. Section 248A
(ii) MURDER

The offence of murder is defined in the Penal Code as: "Any person who of malice aforesaid causes the death of another person by an unlawful act or omission is guilty of murder." ⁴⁰

The offence of murder can be committed by anyone but the surrounding circumstances are what will determine as to whether it amounts to domestic violence. For instance where a husband due to accumulative physical violence kills his wife, this will amount to murder perpetuated on 'gendered terms' arising from domestic violence. As earlier alluded to, death is one of the results of domestic violence. In most instances such deaths are reduced to manslaughter due to provocation. The Penal Code provides that:

When a person who unlawfully kills another under circumstances which, but for the provision of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only. ⁴¹

Most men, whenever, they face a murder charge caused by domestic violence would raise the defence of provocation, thus it is necessary for the law to put stringent measures for this defence to apply in order to reduce a charge of murder to one of manslaughter. Presently it is used as an escape clause for people who ordinarily are supposed to be charged and convicted of murder and not the lesser offence of manslaughter. In so doing, justice in cases of extreme violence against women is undermined.

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⁴⁰ Chapter 87 of the Laws of Zambia. Section 200
⁴¹ Section 205
(iii) RAPE

In Zambia, the offence of rape is defined by the Penal Code as:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed “rape”.  

Rape is one of the serious crimes committed against women the world over. Zambia has been no exception in suffering the effects of this brutal offence, which leaves detrimental life changing effects on the victim. It is committed on women because of their sex. Where a woman does not give consent or withdraws her consent is a clear indication that there is violence involved in the sexual act. Thus the need to have the offender punished. For instance in the case of Kaitamaki v. R in which a woman revoked her consent during intercourse and the man refused to withdraw. It was held that persisting with sexual intercourse after consent has been withdrawn is rape.

The offence of rape and attempted rape as envisaged in sections 132 through to 134 of the Penal Code also seek to punish a dimension of violence against women. The ingredients of rape are settled law. However, there has been particular concern about what is termed as ‘marital rape’. Within the Zambian context, marital rape does not exist. From the definition of rape as unlawful carnal knowledge it means that within a valid marriage there can never be unlawful carnal knowledge. Cultural beliefs also preclude marital rape. However, the fact that this is violence against women is undeniable. There have been calls from some quarters of the society to criminalise marital rape in order to take care of

42 Section 132
43 (1985) A.C. 147
situations where men force themselves on their wives.\textsuperscript{44} Where men force their wives to have sex with them against their wish, women are unable to protect themselves against diseases like; STDs, HIV and AIDS. Thus the need for the law to provide for marital rape as a form of domestic violence whose prevalence in many homes is high. This is an important moral issue that the law must adequately address. The Penal Code also provides that:

\textit{Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanor.}\textsuperscript{45}

\textbf{(iv) ABORTION}

The Penal Code criminalizes attempts to procure abortion by providing that:

\textit{Any person who, with intent to procure the miscarriage of a woman or female child, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever, commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding seven years.}\textsuperscript{46}

As already stated, some of the effects of domestic violence are unwanted pregnancies and alcoholism and drug addiction. These effects may have far reaching consequences, one of which may be risky abortion.

\textbf{(v) ECONOMIC VIOLENCE}

Economic violence, takes many forms, one of which is property grabbing. This refers to the taking away by third parties of household property and real property upon the death

\textsuperscript{44} Zambia Law Development Commission. Working paper on the development of comprehensive legislation to combat gender based violence. 2008
\textsuperscript{45} Chapter 87 of the Laws of Zambia. Section 183
\textsuperscript{46} Section 151
of one’s spouse. This occurs mostly at the death of the male spouse, thus most victims are women and children. The Intestate Succession Act has tried to remedy this by providing for the statutory distribution of the estate as follows:

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<th>Percentage</th>
<th>Beneficiary</th>
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<td>20 percent</td>
<td>surviving spouse or spouses</td>
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<td>50 percent</td>
<td>children</td>
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<tr>
<td>20 percent</td>
<td>parents of the deceased</td>
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<tr>
<td>10 percent</td>
<td>dependants in equal shares</td>
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</table>

Despite the above provisions, many people have still been victims of property grabbing as the law is not adequate to act as a deterrent to property grabbing.

It can be observed from the discourse that, domestic violence has many faces, as well as many causes. In the same way, the effects of domestic violence are far reaching and at its worst, domestic violence can lead to death. These are effects that are currently the daily cries of women throughout this country. Violence against women is a major human rights issue which cannot be looked at with a blind eye, as women are invariably stripped off their dignity and rights to life, liberty and the pursuit of happiness.

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47 Chapter 59 of the Laws of Zambia. Section 5
CHAPTER THREE

PROCEDURAL INJUSTICE UNDER THE CURRENT LEGAL SYSTEM

3.0 INTRODUCTION

This chapter will look at the procedural injustice that exists with regards to the way cases of domestic violence are dealt with. This will be achieved by looking at the injustice that exists in the law, law enforcement agencies and also the injustices that exist in the sphere of family.

3.1 THE INJUSTICE THAT EXISTS WITH REGARDS TO THE LAW.

In every community, law serves a very important purpose, which is maintaining social stability and order; it regulates people’s conduct and behavior. However, as already alluded to, there is no specific law in Zambia which deals with domestic violence; it is not considered to be a serious offence. The State’s ability to protect the rights of women is reflected in the content of the law and also in the way the law is interpreted and administered. However, the shortfall in the legal response to domestic violence in Zambia and the world over has left many women vulnerable to domestic violence.

The Criminal Procedure Code Chapter 88 of the Laws of Zambia, makes provision for procedures to be followed in criminal cases. Currently, the procedures have been described as oppressive and not user friendly. This is due to the fact that the standard of proof in a criminal case, which is proof beyond reasonable doubt dictates that an accused person’s due process rights must be respected, the right to counsel, the constitutional

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privilege against self-incrimination and so forth. Since offenders have the right to counsel, Watts contends that:

There is need for a concerted effort in training the Police and State Prosecutors, because many a times, they lose cases simply because defence Attorneys are more agile and experienced in criminal cases.

Fitzpatrick notes that:

In many respects, the problem of domestic violence results from a failure of the legal system to treat the battery, murder and rape of women by husbands or lovers as crimes, in the same manner and to the same degree as if they had occurred between strangers. Selective tolerance for domestic violence frequently stems from cultural norms that encourage men to abuse their wives. Thus victims of domestic violence are denied the equal protection of the criminal laws, contravening fundamental human rights principles of equality before the law.

Domestic violence is not provided for under any law, however, it is dealt with like any other offence of common assault in the Penal Code. At present, the criminal law remedies available to women who are victims of domestic violence are limited to the commencement of proceedings for Assault Occasioning Actual Bodily Harm under the Penal Code. Women who have suffered physical injury as a result of domestic violence may also sue their husbands or partners for damages in the civil courts. However, in instances where a perpetrator of domestic violence assaults the wife and is arrested, considering the fact that assault is a bailable offence, one maybe admitted to bail and this

48 The report of the Technical Committee on strengthening of the Laws; Enforcement mechanism and support systems relating to Gender based Violence, particularly against women and children, July, 2000. p. 42
49 C.Watts. et.al. The Private is Public. p. 35
51 Chapter 87 of the Laws of Zambia. Section 248
52 Legal Resources Foundation News, No.28, June,2001

25
in most instances would interfere with the dispensation of justice. However, bail cannot be denied because it is a constitutional right that every person charged with a bailable offence enjoys.

Thus, looking at the nature as well as the effects that domestic violence has on the victim, it is imperative that a specific law is enacted to deal with assaults that occur in a domestic setup. Such offences should not be bailable so as to prevent offenders from interfering in the justice delivery system. Also the punishment given to an offender should be different from one that is given to assaults occurring between strangers. The law needs to acknowledge the peculiar nature and circumstances within which domestic violence occurs. It is inadequate to ‘consume’ or ‘envelope’ domestic violence in the offence of Assault Occasioning Actual Bodily Harm.

The procedures regarding rape, which is one of the most serious crimes against women, leaves much to be desired, in that... As a rape victim, the woman is denied subjectivity, constructed as the ‘other’ through a variety of evidential provisions. First she has been subject to a corroboration warning which requires the judge to tell the jury that they must be careful if they are to convict on her uncorroborated testimony because she may have ulterior motives for bringing these charges... Secondly, only in rape does the defendant-the male subject- retain his shield, his protection against the court’s taking his previous convictions into account if he attacks the character of the complainant. In the rape trial alone, the complainant can be constructed as a whore, as temptress, as liar, with
impunity. Thirdly, it is open to the defendant in a rape trial to apply to the court for the complainant's sexual history to be put in evidence.\textsuperscript{53}

The issue concerning rules relating to evidentiary and defence requirements such as, corroboration and consent in rape charges is very challenging and has resulted in many victims not reporting cases due to the fact that, one is expected to prove beyond reasonable doubt that she was raped by the accused. The victim also has to provide proof in an open court in front of the perpetrator and this can be intimidating to the victim. A rape survivor’s testimony further needs to be corroborated by other evidence such as medical reports confirming injuries sustained or an early complaint. Often the effect of the rule is to put the victim on trial.\textsuperscript{54} These procedures are detrimental to female victims and consequently compromise their access to justice.

According to official statistics, over 4,700 cases of rape were reported in Zambia between 1991 and 1998 and of these, approximately 30 percent resulted in conviction and five percent in acquittal while the remainder were either dismissed or left unresolved.\textsuperscript{55} This is as a result of problematic trial and evidential procedures.

With regards to murder, most women are murdered at the hands of their husbands and close relatives due to domestic violence. In Zambia, murder can only be prosecuted in the High Court. If it can be established that the accused has committed the murder, the focus


\textsuperscript{54} M.M.Munalula. Women, Gender Discrimination and the Law. p. 202

of the trial then moves on to whether the accused is to be found guilty of murder or manslaughter. The Penal Code provides that:

(1) Any person convicted of murder shall be sentenced-
(a) to death; or
(b) where there are extenuating circumstances, to any sentence other than death.\(^{56}\)

The law in this regard gives excessive discretion to the court to grant any sentence other than death where there are extenuating circumstances. Extenuating circumstances provide a partial excuse for the murder of women. In Most instances the extenuating circumstances are unconvincing and unsubstantiated, although they carry weight in court, especially where death occurred in a domestic relationship. However, this should not be the case. Murder resulting from a domestic quarrel should attract serious penalties and extenuating circumstances should not even be taken into consideration because the accused is a person who might have been trusted to provide security and care by the victim. In fact the so called extenuating circumstances in a domestic set up must not be considered as the possibility of amicable resolution of disputes in a domestic set up is higher. Those that perpetuate violence leading to murder in a domestic set up betray the trust of their partner and abandon the available option of resolving the disputes amicably. The law must acknowledge this and refuse to reduce murder to manslaughter just on the basis that domestic quarrels are equivalent to 'extenuating circumstances'.

Most perpetrators of domestic violence that results in death, raise the defence of; provocation, intoxication or insanity. For instance in the case of *The People v Njouvi\(^ {57}\)*

The accused was charged with the murder of his wife, according to his own evidence

\(^{56}\) Chapter 87 of the Laws of Zambia. Section 201

\(^{57}\) (1968) Z.R. 132 (HC)
immediately prior to the stabbing, his wife slapped him twice in the face, seized him by
the throat attempted to drag him from the bedroom into the sitting-room. The court held
that the wife's conduct amounted to provocation and the accused was convicted of
manslaughter.

The defence of insanity is normally entered where the murder was done in a very violent
and terrible manner. This seems to suggest that the judiciary cannot believe how a person
can kill somebody in such a way and so judges him to be insane. In such cases, it is
important to ask why it is that, when a man gets so insane, he does not kill other men but
women. Where the insanity plea has been made this has the effect of shifting focus away
from the victim and the gruesome way in which she was tortured to the offender. The
focus also shifts from punishing the offender to again finding him less culpable for what
he has done. This is problematic as it implies that the death of the woman victim is not
something serious. And yet, this is a violation of human rights as every person has the
right to life.

It must be observed that, this is totally different from the way women who kill their
spouses are treated. For instance in the case of Esther Mwiimbe v The People Ms
Mwiimbe had poured a pot of hot cooking oil over her husband as he lay sleeping in bed.
He suffered extensive burns and later died. She appealed against her conviction claiming
self-defence, and cumulative and immediate provocation arising from the violent history

58 C. Watts, et.al. The Private is Public. p. 38
59 (1986) ZR 15.
of the marriage. The court rejected her claim. It held that, threats to kill her, exploding a
dangerous brief case and hiding weapons under the bed did not amount to provocation.

In Most instances men succeed in raising provocation as a defence. However, it is
virtually impossible for women to raise the same partial defence because of their physical
inability to respond in the heat of the moment and with deadly force during a domestic
altercation. Their type of response or homicide is therefore more measured and delayed
and precisely fitted to the offence of murder which carries the ultimate penalty of death.60

Similarly, even in cases where a woman who is not mentally well kills a child, the law
does not treat the woman with any compassion or take her mental incapacity into
consideration when convicting her. The Penal Code provides that:

Where a woman by any willful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.61

Munalula62 contends that, the emphasis is on punishment rather than ensuring that the
woman receives requisite treatment and care. The approach should be to regard the
woman as being mentally deficient and therefore should be in a mental health facility
rather than a prison.

60 M.M. Munalula. Women, Gender Discrimination and the law. p. 153
61 Chapter 87 of the Laws of Zambia. Section 203
62 M.M. Munalula. Gender Discrimination and the Law. p 136
### 3.2 PROCEDURAL INJUSTICE BY LAW ENFORCEMENT AGENCIES

The table below indicates the status of some of the reported cases for the year 2007.

**CASES REPORTED TO AND DEALT WITH BY THE ZAMBIA POLICE VICTIM SUPPORT UNIT.**

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**NOT TAKEN TO COURT**

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Source: Central Police, VSU

**Key**  
A = B + C

From the above table, one can observe withdrawn cases, those pending, delayed judgments and the fact that there are with few convictions. This can led to erosion of confidence in the system on the part of a victim of domestic violence.
The Police through the Victim Support Unit, (VSU) which is one of the most important organizations working together with NGOs such as YWCA in the protection of women and children against domestic violence. The Police Act states that:

(1) There shall be a Victim Support Unit at all police stations and posts to be administered by police officer appointed by the Inspector-General.  
(2) The functions of a Victim Support Unit shall be to: provide professional counseling to victims of crime and offenders. To protect citizens from various forms of abuse.  
(3) Police Officers in the Victim Support Unit may co-ordinate with the civil society and professional bodies in carrying out their duties.\textsuperscript{63}

The VSU deals with most cases of domestic violence thus most cases are first reported at the nearest Police Station. In instances where a case is taken to an NGO such as the Young Women Christian Association (YWCA), but YWCA considers that an offence has been committed and there is need for the offender to be apprehended, the case is referred to the VSU. The VSU mediates in reported cases by investigating the complaint; it also offers counseling to victims, apprehends and prosecutes offenders.

Police, magistrates and other State officials who come into contact with women who have been victims of domestic violence in Zambia are not systematically trained in dealing with complaints of violence against women in the family. Generally, the police are unable to deliver justice because of interference from higher authority; a direct result of the power imbalance between the victim and the perpetrator.\textsuperscript{64} For instance in cases where an offender is someone in authority or a relative of someone in authority, cases

\textsuperscript{63} Chapter 107 of the Laws of Zambia as Amended by Act No. 14 of 1999. Section 53  
\textsuperscript{64} M.B. Chuulu, et.al Gender Violence, the invisible struggle. p. 114
will normally die a natural death in that, Police Officers are just given orders not to apprehend and prosecute the offender.

The Police have also been undermined by bias and corruption in the way domestic violence cases are handled. Some Policemen are perpetrators of domestic violence and hence they tend to be biased in the way they treat female victims of domestic violence. In addition, the existence of corruption, actual and perceived has greatly reduced the effectiveness of the VSU in handling such cases in a just and fair manner. Women are often pressured into withdrawing complaints of violence and to reconcile with their abusive husband or partner.  

In the context of a 1999 divorce case involving domestic violence, the Principal Magistrate of Lusaka, Mr. Edwin Zulu reportedly declared that battered women should not sue their husbands for compensation for injuries suffered if they later wished to reconcile as, “in reconciliation the idea is to forgive and not to punish.” The Magistrate went on to encourage the woman in the case at issue to pursue reconciliation and stated that “the fact that he is your husband is the more reason you should reconcile.” The social factors that make reconciliation an appealing option for women even in the face of violence against them must also not be ignored. The most important of these is that women are not always economically independent; they often depend on their husbands to put food on the table. The possibility of not having someone to do these things and

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65 Violence against women against women, p.19
66 Quoted in, Violence against Women in Zambia, p. 19
provide for basic life needs can be agonizing, prompting them to seek reconciliation with their partner, the perpetrator of the violence.

In certain instances justice is not attained because Police officers lack legal knowledge. Most police officers lack training in issues of law. The Police are also facing a challenge where it is unable to follow up cases due to inadequate logistics such as transport and communication. In the end it is the victim that suffers and denied her rights.

YWCA is one of the NGOs that works in close collaboration with the Police in dealing with cases of domestic violence. It offers counseling, support services and has shelters in which battered women are kept for a while until they are able to take care of themselves. Some victims who decide to go back to the matrimonial home are sent to the social welfare department for financial help, so that they are able to start up a business so as to have some source of income to take care of themselves. However, due to lack of resources, the department of social welfare finds it difficult to perform its functions as there are many victims in need of help.

INJUSTICE BY THE FAMILY

In most cases, if not all, the family constitutes the first structure in the informal sector of justice delivery...It can be both a sanctuary and a site for violence. Most family members are very unwilling to help a victim of domestic violence or to find a better

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68M.B. Chuulu, et.al Gender Violence, the invisible struggle. p. 87
solution for the victim as they owe allegiance to the perpetrator especially if he is an economic provider. Most families are afraid of losing their only source of income.

Poverty is one of the major factors that constrain the attainment of justice for domestic violence victims in that, in most instances certain cases like rape are settled within the family in order to facilitate economic gain through payment of compensation. The VSU is facing a challenge because victims withdraw cases as it is their right and hence it becomes difficult to prosecute offenders.

The administration and access to justice in domestic violence issues remains a big problem. This is made worse by other existing impediments to justice such as lack of legal aid, the cost of litigation and missing files, rushed litigation and overstretched man power, insufficient court rooms and funding etc. The statistics obtained from the VSU show a dismal performance by agencies tasked with the administration of justice in our country especially as regards to domestic violence. It is for this reason that there is need for adequate legislation to regulate the practice and procedure of administering law especially for domestic violence per se.
CHAPTER FOUR

WHAT NEW PROCEDURES ARE INTRODUCED BY THE ANTI-DOMESTIC VIOLENCE BILL, 2009.

4.0 INTRODUCTION

The inadequacies in the legal response to domestic violence, had left many women vulnerable to such violence. The violations of women’s rights have become a global problem with human rights activists and organizations being challenged to find a lasting solution to guarantee and ensure the full enjoyment of human rights, as violence retards many women from taking full participation in the development of the country. There is great need for legal reform that will curb domestic violence and thus create an environment where enjoyment of women’s rights becomes the norm.

4.1 BACKGROUND TO THE ANTI-DOMESTIC VIOLENCE BILL, 2009

Domestic violence against women has become so rampant in society, that there is need for adequate legislation to deal with it as a problem requiring a legal response. There is great concern expressed by various stakeholders throughout Zambia over the prevalence of domestic violence. Consequently, the government through the Zambia Law Development Commission was obliged to develop the Anti-Domestic violence Bill, 2009 as a response to the many concerns.
The State’s obligation to enact domestic violence legislation is founded on the Constitution. Under the Bill of Rights in the Constitution every Zambian is entitled to the fundamental rights to life, liberty and security of the person, the protection of the law and protection from inhuman treatment. As observed in chapter three these rights are currently inadequately provided for within existing laws and procedures. Hence there was need for the State to enact laws that provide for the security and protection of women, so that they too can enjoy their right to human dignity. The draft legislation is contained in a Bill entitled the Anti-Domestic Violence Bill.

The drafting of the Bill is a positive way forward as it sends out a clear message to the public and especially to perpetrators of domestic violence that the State will not tolerate violence against women and that action will be taken against any perpetrator of violence. More so as the law reflects the values of society and the state in general. Enacting a law that specifically deals with domestic violence is a clear condemnation by society of the vice of domestic violence.

The enactment of laws which outlaw violence in the family or in the home, entails that the government is in a way domesticating and giving effect to the United Nations Declaration on the Elimination of Violence Against Women, which provides that the State shall:

(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by

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national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;\textsuperscript{70}

Thus the government must be commended for drafting the Anti-Domestic Violence Bill, as this is indeed progressive and a move towards the development of an effective and comprehensive legislative response to domestic violence.

\textbf{4.2 PROCEDURES INTRODUCED BY THE BILL}

The Anti-Domestic Violence Bill is a step forward in the elimination of domestic violence as it is gender neutral. However, the Zambia Law Development Commission in its working paper on the Development of Comprehensive Legislation to Combat Gender Based Violence states that:

> It must be stated at the outset that although men are also victims of abuse, the majority tend to be women and children. As a result, most discussions and efforts tend to focus on women and children. However, it must be stressed that any legislation that may arise as a result of this exercise is and will be intended to be gender neutral and thus will apply to male victims of abuse just as much as females.\textsuperscript{71}

Hence the Bill employs gender neutral language, as it attempts to protect both male and female victims of domestic violence. Despite the Commission’s recognition that women and children are the most vulnerable to violence.

The objective of the Bill sends a clear message to all as to the intention of Parliament, in that it will provide for the prevention, prosecution and punishment of the offence of domestic violence and also protection of victims of domestic violence. The application of the Bill will be partially facilitated by the Criminal Procedure Code and the Penal Code.

\textsuperscript{70} Declaration on the Elimination of Violence Against Women. 1993. Article 4
\textsuperscript{71} August, 2008. p. 9
Whenever, a person has information regarding the commission of domestic violence, the Bill provides that, such person shall inform the victim of his or her rights and advise the victim on how to obtain shelter, medical treatment, legal service and also the victim’s right to lodge a complaint against the respondent including remedies to the victim.\textsuperscript{72}

Clause 9 of the Bill makes provision for the filing by different parties of a complaint on domestic violence to the Police. A child victim of domestic violence may be assisted by a next of friend to file a complaint of domestic violence. It also includes the filling of a complaint, where the complainant has died, to be made by the deceased person’s personal representative.

Clause 10 and 11 of the Bill makes provision for the Police to respond promptly to a request for assistance from any person, and provides for the Police to render assistance after receipt of a complaint. The Bill also provides that, the Police can arrest a person for committing domestic violence with or without a warrant.

The instances under which a Police officer can arrest without a warrant are outlined and they include among other things, instances where the Police officer has reasonable grounds to believe that the person is about to commit an offence under the Act and there is no other way to prevent the commission of the offence. A private person may also arrest without warrant where the private person has reasonable suspicion that the person has committed an offence.

\textsuperscript{72}Anti-Domestic Violence Bill (2009). Clause 8
Part III of the Bill provides for protection Orders. A protective order is usually an action brought by a complainant to stop the abusive action of an abuser or respondent. The Bill states that:

Notwithstanding any other law, proceedings for a protection order shall be held in chambers in the presence of the parties, their legal representative and any other person permitted by the court to be present.\(^{73}\)

The Bill provides that the complainant may obtain a temporary ex parte order pending a full hearing at which the respondent or perpetrator is present. Clause 22 provides that the grant of a protection order does not exclude any criminal liability. The court may also issue an occupation order, requiring a respondent to vacate the matrimonial home or other home which the respondent shares with the complainant and to continue to pay rent, mortgage payment and maintenance to the complainant.\(^{74}\)

Part IV of the Bill deals with shelters for victims of Domestic Violence and categorizes these shelters, that is shelters for adult victims and shelters for child victims. It provides for the appointment of inspectors and assessment of victims upon admission. It also provides for the minimum norms and standards of the shelters. The Bill also provides that:

The Ministry responsible for social welfare shall provide mechanisms and programs for the rehabilitation of victims. Victims may receive financial assistance from the Fund and that the best interest of the child shall be paramount in any assistance given to rescue, rehabilitate or re-integrate the child.\(^{75}\)

\(^{73}\) Clause 15  
\(^{74}\) Clause 23  
\(^{75}\) Clause 32
4.3 ANALYSIS OF THE PROCEDURES INTRODUCED BY THE BILL

(i) APPLICATION OF OTHER ACTS

In terms of Clause 2 of the Bill it provides that:

All offences under this Act shall be inquired into, tried, and otherwise
dealt with in accordance with the Criminal Procedure Code and the Penal
Code.

The Criminal Procedure Code also provides that:

(1) All offences under the Penal Code shall be inquired into, tried and
otherwise dealt with according to the provisions hereinafter contained.
(2) All offences under any written law shall be inquired into, tried and
otherwise dealt with according to the same provisions, subject,
however, to any enactment for the time being in force regulating the
manner or place of inquiry into, trying or otherwise dealing with such
offences.\textsuperscript{76}

By applying procedures in the Penal Code and Criminal procedure Code to the inquiry
and trial of domestic violence matters the Bill has failed to take into consideration the
special and peculiar nature of domestic violence offences. This in essence waters down
the whole purpose of the Bill, because when we consider the effects domestic violence
has on its victims, it is preferable that the procedures relating to it should be different
from the procedures applicable to non domestic related criminal matters.

The offence of rape serves to illustrate the point. Under the Penal Code provisions, rape
is a criminal offence and as such it is subject to criminal law procedure and to rules such
as those relating to evidentiary and defence requirements namely, corroboration,
compellability of witnesses, negation of consent, the introduction of the complainant’s

\textsuperscript{76} Chapter 88 of the Laws of Zambia. Section 3
sexual history in criminal proceedings. The victim must prove beyond all reasonable doubt that she was raped by the accused. This has in a way made the achievement of justice in rape matters difficult, and consequently, underreporting of this crime is likely to continue.

In order to provide justice to victims of domestic violence, the Bill should regulate its own procedures instead of opting to apply the provisions of the Penal Code and Criminal Procedure Code when inquiring and trying any matter under the Bill. Those provisions have been on our statute books for a long time and have proved to be ineffective in terms of dealing with domestic violence. It would therefore not do justice to enact a law that follows the same procedures that have not worked well.

(ii) PENALTY FOR DOMESTIC VIOLENCE OFFENCES

The Anti-Domestic violence Bill provides that:

(4) Notwithstanding any other law, a person who commits an act of domestic violence is liable, upon conviction, to a fine of not less than one hundred thousand penalty units and not exceeding four hundred thousand penalty units or to imprisonment for a term of not less than ten years and not exceeding fifteen years.  

This provision creates a penalty for which no specific offence is created, unlike provisions of the Penal Code which have a statement of the prohibited act, omission and provision for a sanction or penalty in the case of a violation. Looking at the fact that the

77 Anti-Domestic Violence Bill (2009). Clause 4
Bill has created a penalty for which no offence has been created, by implication the penalty applies to all offences created by the Bill and this is problematic.\textsuperscript{78}

Furthermore, Clause 2 of the Bill which allows the application of the Penal Code poses a serious challenge because the Penal Code carries different and punitive sanctions relating to similar offences in the Bill. For instance the Penal Code provision on rape provides that any person who commits the offence is liable to imprisonment for life.\textsuperscript{79}

However, the corresponding offence, of rape is not expressly addressed in the Bill. The definition of rape can be deduced from the definition of sexual abuse which means that:

forceful engagement of another person in sexual contact, whether married or not, which includes sexual conduct that abuses, humiliates or degrades the other person or otherwise violates another person’s sexual integrity, or sexual contact by a person aware of being infected with HIV or any other sexually transmitted infection with another person without that other person being given prior information of the infection.\textsuperscript{80}

This offence in the Bill would carry a sanction of imprisonment for a period of not less than ten years and not exceeding fifteen years.

In view of the above, the anomalies may cause serious problems as a prosecutor would have to determine under which law a person will have to be prosecuted considering that the penalties in the Penal Code are more stringent and punitive than what is in the Bill. Therefore, in order to eliminate the anomalies that would exist, the Bill should create specific offences and create different sanctions for each offence and exclude the

\textsuperscript{78} It must be noted, however, that there has been argument that asserts that, penalties like the one above are now included in pieces of legislation in order to avoid any loopholes that might arise.

\textsuperscript{79} Chapter 87 of the Laws of Zambia. Section 133

\textsuperscript{80} Anti-Domestic Violence Bill.Clause 3
application of certain provisions of the Penal Code and Criminal Procedure Code so as to eliminate certain procedural injustices that exist with regard to the way victims of Domestic violence are treated. Theoretically, there is sense in which some people feel that it is better to update and grow the Penal Code than to have a series of separate stand alone pieces of legislation which are fragmented and difficult to enforce, as this causes more problems, rendering the law uncertain and hence resulting in a questioning of the legal system and its efficiency.

(iii) POLICE PROCEDURES

In order to ensure efficiency in the way cases of domestic violence are dealt with, the Bill provides that:

A Police Officer shall respond promptly to a request by any person for assistance from domestic violence and shall offer such protection as the circumstances of the case or the person who made the report requires even when the person reporting is not the victim of the domestic violence.\(^1\)

In most instances Police officers portray reluctance in the way in which they deal with cases of domestic violence, hence the need to have clear Police procedures so that they know beforehand what they are expected to do, so that they expeditiously deal with domestic violence cases. This will reduce factors, such as corruption, that hinder police officers from effectively dealing with domestic violence matters. However, the Bill has not adequately made any special provision for the carrying out of investigations of domestic violence, in that all it says is that the police should respond promptly, without stating the procedures to be followed.

\(^{1}\text{Anti-Domestic Violence Bill (2009). Clause 10}\)
(iv) PROTECTION ORDERS

When the World Organisation Against Torture (OMCT) called upon the government to urgently discuss, draft and adopt specific legislation for the prevention, prohibition and punishment of Domestic Violence, it stated that the legislation should be drafted in such a way that it covers both physical and psychological violence and it provides for protective mechanisms including restraining orders.\textsuperscript{82} The United Nations Fund for Women is also of the view that, law should include Protection Orders and provisions regarding children and the sharing of property or income.\textsuperscript{83} Since most people would not report instances of domestic violence for fear of losing their only income, such provisions would encourage more reporting of these offences.

In view of the above, Part III of the Bill provides for Protection Orders. A Protection Order is the centre of an urgent response to domestic violence. The order can be temporary or final and it is granted in order to stop the abusive action of an abuser.\textsuperscript{84} Since most domestic violence offences are bailable, Protection Orders will ensure that victims are protected from violent offenders who may want to interfere with the dispensation of justice.

\textsuperscript{82} Violence against women in Zambia. (2002) p.33
\textsuperscript{83} Not a minute more ending violence against women. p. 39
(v) SHELTERS FOR VICTIMS

The Declaration on the Elimination of Violence Against Women provides that: States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international co-operation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation.\(^{84}\)

In view of the above provision, the Anti-Domestic Violence Bill in part IV provides for shelters for adults as well as child victims. It also provides for the minimum norms and standards of the shelters, appointment of inspectors and assessment of victims upon admission.

Though the rationale and reasoning behind the legislation providing for Shelters is prima facie good and intended to assist victims who fear becoming homeless it is potentially problematic and might not serve its intended purpose. This is because people, despite being victims would not readily leave their matrimonial homes, sometimes with children, for Shelters provided and run by the government. The Shelters, it must be admitted, cannot replace the environment and dignity of a home. Thus if anything, it is the perpetrators that are supposed to be removed from the home and not the innocent victims.

\(^{84}\) Declaration of the Elimination of Violence Against Women. 1993. Article 4
(vi) ANTI-DOMESTIC VIOLENCE FUND

Victims will also be assisted financially by the Fund that has been established for the purpose of ensuring that they are able to sustain their lives. The monies of the Fund shall be applied to:

(a) The basic material support of victims;
and
(b) any other matter connected with the rehabilitation of the victims in their best interest.  

In most instances victims are people who do not have a stable source of income, and are dependent on the abuser for their basic needs. The establishment of the Fund and Shelters will in a way remove barriers that keep women in violent relationships.

Due to high poverty levels, the realization of justice is constrained as victims may opt to settle their matters out of court even when the violence is aggravated in order to facilitate economic gain through payment of compensation. Thus in order to circumvent this, the Bill provides that:

(4) In any criminal trial in respect of domestic violence which is aggravated, the court shall not consider or approve any settlement of the matter out of court.

This provision will ensure that justice is attained in that perpetrators will face the law. However, in other instances victims do not report instances of domestic violence because the court environment is intimidating, hence the Bill provides for proceedings to be held in camera. This makes the court environment friendlier to both victims and witnesses and has the potential to increase reporting of domestic violence by victims.

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85 Anti-Domestic Violence Bill.(2009). Clause 34
86 Clause 38
The Anti-Domestic Violence Bill is a step in the right direction towards the elimination of violence against women. The fact that government, stakeholders and society at large have recognized the need for separate legislation to respond to domestic violence is a major step in the right direction. However, there is still need to ensure that the Bill addresses the specific gaps that are in the current legislation. As earlier stated, there are numerous situations where the Bill has not effectively dealt with these gaps; hence, if enacted in its current form, enforcement of the law will be difficult. This means that its effect on domestic violence, though progressive, will still not address pressing concerns.

In this regard, the comprehensiveness of the Bill can be called into question. If the Bill is to pave way for an effective law on domestic violence that stands the test of time, there is need to address these shortfalls.
CHAPTER FIVE
CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSIONS

The focus for this dissertation has been to look at the procedural injustices that exist with regards to the way victims of domestic violence are dealt with in Zambia. The paper looked at the various forms of domestic violence and the effects that domestic violence has on its victims. The essay also endeavored to look at the current law on domestic violence and its inadequacies and the responses of the law enforcement agencies. In addition an analysis was done as to whether the Domestic- Violence Bill 2009 will adequately deal with the injustices that were identified in the current law in its current form.

From the research carried out it has been observed that domestic violence has many faces, it can manifest itself through various forms, the most common being; psychological, sexual, economic, physical, social and cultural violence. Domestic violence also has many causes which among other things include; drugs and alcohol abuse, provocation and cultural socialization and discriminatory customary laws.

It was further observed that the effects of domestic violence on its victims are very devastating. The advent of the HIV/AIDS pandemic has posed a serious challenge as domestic violence has been cited as being responsible for the speed at which HIV/AIDS has spread in some countries across the world. During the African Consultation on
Violence against Women, the Deputy Chief Justice of Zambia, her ladyship Mrs. Justice Ireen Mambilima alluded to the fact that sexual violence which is one of the forms of domestic violence has made women and young females suffer, as many of them ended up contracting diseases.\textsuperscript{87}

It has also been noted that at its worst, domestic violence may lead to death, in that in many instances victims may tolerate violence in the hope that one day things might get better. However, the reality is that things worsen as the state which is supposed to uphold human rights is reluctant to intervene in what it considers to be domestic relationships or private matters, to be dealt with within the family. Ultimately the violence may lead to death of the victim. Most women are killed by those who are close to them, as observed from the statistics on the pattern of violence against women obtained from YWCA that, 96 percent of violence against women is perpetrated by those close to the women.

Domestic violence has not been catered for by the law, as there is no offence called domestic violence. Hence whenever, a victim reports a case of domestic violence, it is treated like any other common law offence under the Penal Code. The law has been found to be inadequate in the way it deals with domestic violence offences and its victims. The general attitude of the law is to turn a blind eye to domestic violence. Where Law enforcement officers are obliged to face up to such violence, then the attitude is to act with reluctance and with utmost leniency.\textsuperscript{88} Thus many women have been left vulnerable to the vice.

\textsuperscript{87} Zambia Daily Mail, 21 January 2010
\textsuperscript{88} M.M. Munalula, Shelter and Gendered Power Relations. P 253
The paper also found that, the law has failed to take the special nature of domestic violence into consideration, when it comes to procedural rules; in cases such as rape the procedures are intimidating to the victim. The court must warn itself if it has to convict on uncorroborated evidence. The procedures in the long run make prosecution more difficult. Moreover, the environment in which the victim has to prove her case is intimidating. In cases where death results due to domestic violence, the penal provision has been found to give excessive discretion to the court to grant any sentence other than death where there are extenuating circumstances.

The law treats women who kill their spouses differently from the way males are treated. From the cases that have been cited, it has been shown that extenuating circumstances in most instances work in favour of men and not women. By implication, the law seems not to regard the death of female victims as something serious. And yet it is a violation of human rights. In most instances, women’s access to justice is compromised. Law enforcement agencies equally pose a challenge to the attainment of justice by women victims of domestic violence. From the research carried out, it was found that, Police, Magistrates and other State officials who come into contact with women who are victims of domestic violence are not systematically trained in dealing with complaints of domestic violence against women in the family.

The paper also found that, the existence of corruption, actual and perceived has greatly reduced the effectiveness of the VSU to handle cases of domestic violence in a just and
fair manner. It was found that the Police lack legal knowledge. Consequently many victims are pressured into withdrawing cases and reconciling with perpetrators, thereby removing the case from judicial scrutiny. From the field of work, it has been shown that most cases that are reported to the police end up being withdrawn and this has been found to cause erosion of confidence in the justice delivery system on the part of the victim. It was also established that family members are not willing to help victims of domestic violence due to high poverty levels. In most instances the perpetrator is the bread winner and hence they are afraid of losing their only source of income.

Finally, the research found that Zambia’s response to the inadequacies in the legal response to domestic violence is a step in the right direction towards the elimination of violence against women, in that the government through the Zambia Law Development Commission has drafted the Anti-Domestic Violence Bill of 2009. The drafting of the Bill has been found to be positive, as it sends a clear message to perpetrators of domestic violence that the State will not tolerate Domestic violence. It is a clear condemnation by society of the vice. The provisions of the Bill have been found to be progressive. However, the research found that there are some provisions of the Bill that might require redrafting so as to address the specific gaps that are in the current legislation and to make implementation of the law on domestic violence easier and ensure that it serves its intended purpose.
5.1 RECOMMENDATIONS

Having discussed the procedural injustice that exists in the way victims of domestic violence are dealt with, and having looked at some of the short falls of the Anti-Domestic Violence Bill, it is recommended as follows: First that, there is need to redraft some of the provisions of the bill so as to eliminate injustices that have been identified under the current law and have still not been addressed by the bill.

The paper recommends that, domestic violence cases should be treated in the same way as other offences in terms of applicable rules. In terms of rape that occurs in domestic relationship such as marital rape, exceptions should be created on evidentiary and defence rules contained in the Criminal Procedure Code, as such offences require special procedures in order to ensure efficacy. For instance the requirement for corroboration in order to secure a conviction in relation to sexual offences should be removed. An early complaint or medical report in cases of rape should not be the only conclusive evidence that a sexual offence has been committed. The introduction of the complainant’s sexual history in both civil and criminal proceedings should be excluded. The procedures ought to be as friendly as they can so as not to compromise the victim’s access to justice. Proceedings of sexual offences must be held in camera.

With regards to murder resulting from domestic violence, it is recommended that the court should not easily reduce the conviction from murder to manslaughter due to extenuating circumstances. Extenuating circumstances provide a partial excuse for murder of women and should not be taken into consideration as there are high chances of
settling domestic disputes amicably. The law must take deaths resulting from domestic violence very seriously and therefore should not easily reduce the conviction. The law must also provide for exceptions as to when bail cannot be offered for those offences that are bailable. For instance assaults occurring in a domestic set up should not be bailable, as bailing such offences interrupts the course of justice. In most instances perpetrators have been known to coerce victims into withdrawing a case when they are out on bail.

Law enforcement agencies need specialized training on how to deal with victims of domestic violence, as most of them are ill-equipped and tend to be discriminatory. There is need for law enforcement agencies to be given gender-sensitive training in responding to domestic violence. Victims do not report such violence due to the discriminatory attitudes of law enforcement agencies. The police being the institution which deals with most cases of domestic violence through the VSU should be provided with enough resources in order to guarantee its effective functioning. In order to eliminate corruption, actual and perceived by the police, there is need for the government to increase the budgetary allocation to the Zambia Police Service for their operations and salaries so that the temptation of being corrupted is removed.

The paper also recommends that, victims of domestic violence should not be allowed to withdraw cases, the police must ensure that all cases reported are effectively dealt with to their logical conclusion. More so as domestic violence is a criminal offence and hence a crime not only against the victim, but against the state and society. There is need to stiffen punishment for domestic violence. The fact that domestic violence occurs in a
domestic setup, should be the reason for stiffening punishment as in most instances the perpetrators are trusted by the victim who should provide security and care. Perpetrators of violence can also benefit from rehabilitation whilst in custody.

The government needs to make a concerted effort in sensitizing the public on what constitutes domestic violence due to the fact that many people do not know what constitutes domestic violence and accept such violence as a normal way of life. Thus the government and other stakeholders should organize awareness programs to educate people on their human rights. Most people have died in silence as they do not know what their rights are. Sensitisation of the public will ensure that such violence does not go unreported. There is need to focus even more on rural areas, where unjustifiable cultural norms that encourage domestic violence still have a particularly strong influence.

Having observed that most domestic violence is perpetrated under the guise of customary laws, the government must eliminate the applicability of discriminatory customary laws that are incompatible with national and international human rights standards. The government must domesticate certain international legal instruments as they have no legal effect without domestication. The government must implement the provisions of the Declaration on the Elimination of Violence Against Women as it provides that the State should put measures of a legal, political and cultural nature that promotes the protection of women against any form of violence as most domestic violence occurs under the guise of cultural beliefs.
In relation to the Anti-Domestic Violence Bill, the paper recommends that it should provide for specific offences to which different sanctions may apply to avoid forum shopping. It also recommends that the application of certain provisions of the Penal Code and Criminal Procedure Code in so far as they relate to domestic violence should be excluded.

Therefore, in order to eliminate the injustice that exists, there is need for a review of the law and redrafting of the bill, because if enacted into law in its current form, there would still be some injustices. In addition, every Zambian must be encouraged to speak against domestic violence against women as it undermines women’s full participation in the development of the family and the country as a whole. There is need for a concerted effort in changing men’s mind set on how they look at women as this has been a contributing factor to the high rate of domestic violence against women.
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