

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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**A CRITICAL ANALYSIS OF THE INFLUENCE OF FEMINIST
JURISPRUDENCE ON ZAMBIAN LAWS RELATING TO DOMESTIC
VIOLENCE**

By

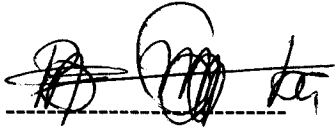
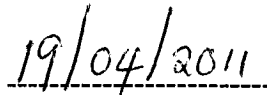
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**A directed research essay submitted to the University of Zambia Law Faculty in
Partial fulfillment of the requirements for the Award of the Bachelor of Laws
(LLB) Degree.**

Declaration

I, **Alice Chinyimba, Computer Number 26100274**, do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.

A handwritten signature in black ink, appearing to be 'Alice Chinyimba', written over a horizontal dashed line.**Signature**A handwritten date '19/04/2011' in black ink, written over a horizontal dashed line.**Date**

THE UNIVERSITY OF ZAMBIA
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**A CRITICAL ANALYSIS OF THE INFLUENCE OF FEMINIST
JURISPRUDENCE ON ZAMBIAN LAWS RELATING TO DOMESTIC
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Abstract

This essay critically analyses the influence of feminist jurisprudence on Zambian laws relating to domestic violence. It focuses specially on domestic violence against women and thoroughly discusses provisions in the Zambian laws that purport to address the issue of domestic violence. The essay embraces feminism, and the writer shares the view with the various discussed feminist schools of thought that the law and society are patriarchal. Therefore, regard is had to feminism as the various provisions of the law are discussed and their inadequacy exposed. The essay also looks at what effort is being made by the Zambian government to minimise domestic violence against women.

It has been said that Sweden ranks highest in the world as the country that has achieved the greatest equality between men and women, although it still experiences the problem of domestic violence against women. Norway, although not at the same level with Sweden in terms of equality between men and women has been found to have a number of good laws that address domestic violence against women. Thus, the essay has looked at the situation obtaining in these two countries as a way of comparing it with what is obtaining in Zambia concerning laws on domestic violence against women, and what lesson if any, that Zambia can learn from those two counterparts.

On the findings, the essay gives recommendations that ultimately entail a radical change in the very organisation of society, the state and the law. The recommendations suggest a systematic application of various feminist theories by the state, the society and women so as to rid the law of patriarchy. To codify the change in attitude towards domestic violence against women held by the society at large, it has highly been recommended that the Sexual Offences and Gender Violence Bill which is currently before parliament be passed as it somewhat comprehensively provides for domestic violence against women.

Dedication

To my awesome parents Mr. Michael and Mrs. Jennifer Chinyimba, who like the spirit of this essay have emphasised the true value of a woman and have illustrated this through their conspicuous support of my education.

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First and foremost, I would like to thank the Almighty God who has made me witness to the fact that he can do exceedingly, abundantly, above all I can ask or think. Law school has been a great challenge and yet through God I conquered. All glory be to you My Master and Lord.

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To my awesome family that has been exceptionally supportive towards my education; I could never thank you more. You are the best family in the whole world and I would lay my life down for you. Ok so you now have a lawyer in the family, but that does not mean you escape legal fees for my professional advice. You are special, but I have to put food on the table!

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Thanks to many others whose names are just too numerous to mention. Your impact in my life is not any less.

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CHAPTER ONE

GENERAL INTRODUCTION AND DEFINITIONS

DEFINITIONS

Patriarchy: The belief in male supremacy by both females and males. It is also a system that maintains male privilege and supremacy, and establishes a subordinate position for women in social, political and economic arenas.¹

Feminist Jurisprudence: The theory of law that seeks to analyse the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and which looks at ways in which this patriarchy can be undermined and ultimately eliminated.²

Gender and Sex: ‘Sex’ and ‘Gender’ have been distinguished. Sex has been said to be the biological attributes of a person, that is to say male or female, which are universal, given by birth and generally permanent; and therefore, cannot be changed. Gender, on the other hand, connotes the socially constructed roles and responsibilities assigned to men and women by society. Therefore, since these roles are learned, they can be changed. In short, males and females are born, but men and women are made. Gender as a social construction is systematically (systematic in that it follows an ideological blueprint of what a woman or man in a particular society should be) constructed (because it is a deliberate action that combines various factors), maintained (in the sense that there are structures in place to ensure its longevity), justified (in that it can always be explained away) and perpetuated (reproduced in later generations).³

Violence: Any act, omission or conduct by means of which physical, sexual or mental suffering is inflicted directly or indirectly, decent, seduction, threat, coercion or any other means on any woman with the purpose or effect of intimidating, pushing or humiliating her or of maintaining her in se-stereotyped roles or of denying her human dignity, sexual self-determination, physical,

¹ R L Allen, and P Kivel, ‘Men Carving Out Solutions’ FEMNET Training Manual on Gender Based Violence (June 2003), Page 3.

² M D A Freeman, Lloyd’s Introduction to Jurisprudence, Sweet & Maxwell, London, 2001. Page 1124.

³ R L Allen, and P Kivel, ‘Men Carving Out Solutions’ FEMNET Training Manual on Gender Based Violence (June 2003), Page 7.

mental and moral integrity, or of undermining the security of her person, her self-respect or her personality, or of diminishing her physical or mental capacities.⁴

Gender Violence: Any act of gender based violence that results in or 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 the public or private life.⁵

⁴ Draft Pan African Treaty Against Violence (DPATAV), Cited in Heise 1994.

⁵ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia, WLSA, Zambia, 2001. Page 6.

1.0 INTRODUCTION

The controversial perception of the Law, as taught and learnt in the traditional law curriculum of law schools, is that it is an institution that is above reproach.⁶ Critical Legal Studies and various women's movements of the 1960's and 1970's in the United States of America⁷ focused on a concept referred to as Patriarchy, which is a system of male control and domination in and out of the family,⁸ in order to punch holes in the alleged perfect law. They argued that the law was patriarchal in that it's drafting, interpretation and application was done from the point of view of men alone, without considering that of women. Women were generally expected to run a home and not to be trusted with decision making as they were seen as emotional and incapable of logical thinking.⁹ These views were attacked by various feminist theories that attempted to explain why this inequality between men and women existed. For instance, controversial arguments were advanced regarding the law allowing less interference by the State in matters of the home (the Private) as opposed to the Public and more radical thinking that attacked the very irreproachable perception of the law and its foundation.¹⁰

1.1 THE SUBORDINATION OF WOMEN AND FEMINIST LEGAL THEORY

It has long been realised that women world over are generally subordinated by men and thus, the movement to win social, political and economic equality for women, referred to as feminism was initiated.¹¹ This movement focuses on the resolution of the problem of subordination rather than on the actual difference between women and men.¹² This is to be accomplished by what is referred to as Feminist Jurisprudence.¹³ Christine Littleton defines feminist jurisprudence as including all attempts to explain, critique, and change the law on behalf of, and from the perspective of the women.¹⁴ In other words, feminist jurisprudence seeks to capture an understanding of the law as a

⁶ C Anyangwe, *An Outline of the Study of Jurisprudence*, UNZA Press, Lusaka, 2005. Page 345.

⁷ C Anyangwe, *An Outline of the Study of Jurisprudence*. Page 346.

⁸ C Anyangwe, *An Outline of the Study of Jurisprudence*. Page 345.

⁹ R L Allen, and P Kivel, 'Men Carving Out Solutions' *FEMNET Training Manual on Gender Based Violence* (June 2003), Page 11.

¹⁰ M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Pages 1131-1132.

¹¹ J A Baer, *Our Lives Before the Law: Constructing a Feminist Jurisprudence*. Princeton University Press, Princeton NJ, 1999. Page 5.

¹² M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Page 1127.

¹³ M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Page 1124.

¹⁴ A C Littleton, 'Book Review; Feminist Jurisprudence: The Difference Method Makes,' 41 *Stanford Law Review* 751, 1989. Page 725.

creature which is not necessarily free of bias as per popular perceptions and it brings to light the ways in which the law is structured on patriarchal premises.¹⁵ Feminist jurisprudence is not a single theory, but a family of different perspectives or frameworks used to analyse the actual and the desirable relationship between law and gender.¹⁶ It should be noted that despite the different movements in feminist thought, what unites feminist legal theorists is a belief that society, and necessarily legal order, is patriarchal.¹⁷ That is to say that feminist legal thought seeks to analyse the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated.¹⁸

There are various feminist theories and for the purpose of this paper, the following four will be considered. First are the Liberal feminists who emphasise measures such as affirmative action to overcome the difference between men and women, but this was only achievable by a small fraction of women in society, forming part of the formal sector.¹⁹ To this school of thought, equality amounts to equal opportunity between women and men. Liberal views can clearly be seen in international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)²⁰ which seeks full equality between men and women by requiring the maximum participation of women on equal terms with men in all fields, however, this already is a problem as it makes the ‘man’ the standard.²¹

Cultural feminists emphasise the difference between women and men, but view it more positively. To them, this difference between men and women should be celebrated as both are expected to assume certain roles for society to be balanced.²² The question however is, ‘who determined these

¹⁵ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*, UNZA Press, Lusaka, 2005. Page 10.

¹⁶ K T Barlett, *Perspectives of Feminist Jurisprudence*, in: Betty Taylor *et. al* (eds), *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda and Bibliography*, Rothman & Co., Littleton, 1999. Page 3.

¹⁷ M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Page 1124.

¹⁸ M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Page 1124.

¹⁹ C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*, Harvard University Press, Cambridge, 1987. Page 35.

²⁰ For example, Article 4(1) provides that:

“Adoption by States Parties of temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”

²¹ C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*. Pages 32-36.

²² M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Page 1125.

roles and is the determination beyond criticism, bearing in mind that all feminists agree that the law is patriarchal?’

The post-modern theorists, in their criticizing all these other theories, argue that instead of generalizing that all women in the world are marginalized, focus should be placed on each individual culture in the world and investigate it for itself regarding what is viewed as gender inequality in that culture.²³ In other words, they believe that attacking oppression of women requires contextual judgment that recognises and accommodates the particularity of women’s experience.²⁴

Last but not least, are the radical feminist views that argue that since it is the law that perpetuates gender inequality, it is the law itself, therefore which should be rethought.²⁵ Since the law stems from the values, norms and morals of society and not society from the law, it is only a matter of changing the mindset of individuals in society and such change will be reflected in the law thereafter enacted.²⁶

It should also be noted that the feminist movements mentioned above generally were birthed and promulgated by the inequality situation in the western world²⁷ and therefore, given the different culture in Zambia it should be established and settled whether in Zambian culture feminism has fully been appreciated and with the same intention borne in mind by the initial western feminists.²⁸

It is said that the divide between the ‘public’ and the ‘private’ is ultimately what the feminist movement is about.²⁹ There has been considerable debate on whether the state should intervene in family relations. The emphasis instead is on ‘public’ wrongs and therefore, the women’s injuries in the private home are often not recognised or compensated by the public legal culture.³⁰ It is because of this organisation of the society that gender violence is prevalent in the home.³¹ The feminist perspectives introduced above are useful in uncovering gender violence because they

²³ C Anyangwe, *An Outline of the Study of Jurisprudence*. Page 351.

²⁴ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 37.

²⁵ C A MacKinnon, *Difference and Dominance: On Sex Discrimination, in Feminism Unmodified: Discourse on Life and Law*. Page 35.

²⁶ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Pages 356-357.

²⁷ C Anyangwe, *An Outline of the Study of Jurisprudence*. Page 346.

²⁸ M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Page 1127.

²⁹ M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Pages 1130-1131.

³⁰ M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Page 1131.

³¹ M D A Freeman, *Lloyd’s Introduction to Jurisprudence*. Page 1131.

focus on relations between men and women in society.³² They challenge the origins of oppressive gender relations in society and offer alternative ways of creating a just society. The oppressive gender relations are the context in which gender violence takes place.³³

1.2 STATEMENT OF PROBLEM

Violence against women is widespread in that it cuts across all cultures and people of all ethnicities worldwide.³⁴ At both global and national levels, there are laws in place to combat such violence.³⁵ These laws are argued to be problematic and the role of the international community has been to attack the patriarchal laws,³⁶ through instruments like CEDAW, which tends to have the spirit of providing an equal opportunity for men and women in achievement.³⁷ However, here too the inferiority of a woman is acknowledged as the nature of such instruments is to use the man as the standard against which equality is measured.³⁸ It follows, therefore, that the national laws on domestic violence in countries like Zambia are inadequate because they have adopted the provisions of international instruments such as the CEDAW, which instruments themselves are rather patriarchal in nature.³⁹ This, in the author's view, has been because of the failure by legislative bodies at both international and national level to utilise a systematic combination of feminist theories that could possibly and effectively minimise domestic violence.⁴⁰

1.3 PURPOSE OF THE STUDY

The overall objectives of the study are to analyse the success of Africa having generally adopted the liberal feminist approach and underutilised the Cultural, postmodern and radical approaches, in combating domestic violence. This is to ensure a broader understanding of why domestic violence

³² M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 44.

³³ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 44.

³⁴ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 121.

³⁵ At international level these are the CEDAW (Articles 1, 2, 3 and 4) and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Articles 1,2 and 3), while at national level, for instance Zambia, these laws are The Penal Code Act, Cap. 87, ss. 132-156 and ss. 199-206 and the Criminal Procedure Code Act, Cap. 88, s. 151.

³⁶ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 121.
The laws are said to be patriarchal in that their enactors are mostly male.

³⁷ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Pages 12-14.

³⁸ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 14.

³⁹ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 14.

⁴⁰ J Cotter, *The Red Critique: War and Violence*. <http://www.redcritique.org/SeptOct02/warrant>. (Accessed on 27th September, 2010).

continues to be prevalent despite the adoption of international instruments such as CEDAW and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The study also seeks to establish how the four theories can be used together systematically to achieve the goal of eradicating the long-existing problem of gender inequality, and specifically domestic violence.

1.3.1 SPECIFIC OBJECTIVES

1. To evaluate whether the biased application of liberal ideologies at both international and national levels in eliminating gender violence has sufficiently tackled the problem. That is to say, to evaluate whether the current international instruments have succeeded at eliminating domestic violence, by influencing member states in their national laws.
2. To establish the reason behind the continuance of domestic violence despite the international standards set and national laws enacted, consequentially, to eradicate it.
3. To advocate for a tentative solution to this problem, by suggesting a systematic and interdependent adoption and application of four feminist theories, as the most likely successful approach to exterminate domestic violence.

1.4 SIGNIFICANCE OF THE STUDY

This research is justified on the basis that despite the clear and inclined adoption of liberal feminism in changing the laws relating to domestic violence, there is still so much domestic violence in homes, whether reported or not and all this is greatly influenced by how society and its thinking are organised.⁴¹ There has been concern raised by radical feminists of the failures of the liberal ideologies in that they focus too much on the male as the standard on which equality between men and women should stand.⁴² On the other hand, some other philosophies such as the culturalist and postmodernist feel the difference between the genders should be embraced and that the difference between men and women should not be globally generalised.⁴³ This research paper is, therefore, important in that it seeks to prescribe a systematic adoption and application of four major feminist theories, namely the liberal, cultural, post-modern and radical theories as an

⁴¹ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Pages 42-43.

⁴² M D A Freeman, Lloyd's Introduction to Jurisprudence. Page 1128.

⁴³ M D A Freeman, Lloyd's Introduction to Jurisprudence. Page 1127.

effective means of positively influencing international and national laws in Zambia on domestic violence. For instance, as a way of fighting domestic violence, Swedish Marxist politician Gudrun Schyman in 2007 suggested a bill that would collectively tax Swedish men for violence against women.⁴⁴

1.5 METHODOLOGY OF THE STUDY

This research will be a qualitative one which will involve desk research. It will draw information from secondary sources, comprising books, journals, scholarly articles, pieces of legislation, legal commentaries, case law and other publications as well as the internet.

1.5 OUTLINE OF CHAPTERS

To ensure a systematic approach to this topic, this research will be undertaken in five chapters as follows:

Chapter one will constitute the definition of terms; the introduction; background; the statement of the problem; the purpose and significance of the study; the methodology of the study and an outline of the chapters. The essence of this chapter is to acquaint the reader with feminist jurisprudence and how it relates to the problem of domestic violence against women. Under the chapter, feminist jurisprudence is made reference to as a result of the recognition that Society is organised in a patriarchal manner, whether it be in the public domain or the private domain,

In chapter two, the paper will delve into analysing statutory and case law on domestic violence in Zambia. The chapter, thus, thoroughly considers various provisions of some Zambian statutes that purport to address the issue of domestic violence. This is not done without reference to cases of domestic violence that have been decided on the foundation of the said provisions and which cases bring, into the light, the inadequacy of the law in that regard. The chapter will then assess the influence feminist jurisprudence has had on domestic violence laws in Zambia.

⁴⁴ F Jordman, 'How the Feminists' "War against Boys" Paved the Way for Radical Islam', 11(December, 2007). <http://www.spectator.se/stambord/index.php?p=240>. (Accessed on 22nd September, 2010).

Chapter three, as a way of comparison and establishing a standard, will analyse the impact of feminist Jurisprudence on the Scandinavian (Sweden and Norway) fight against domestic violence. Therefore, Swedish and Norwegian laws on domestic violence will briefly be considered in this chapter.

Chapter four will compare the findings on Zambia with the Scandinavian situation and establish whether, Zambia can take a similar course in adopting feminist views in its laws, and if the Scandinavian laws are inadequate, what lesson Zambia can learn from there in its own attempt to minimise, as much as possible, domestic violence through the law. That is to say, the paper will establish the benefit the radical approach⁴⁵ is capable of bringing with it when properly utilised in Zambia. This will not be in isolation of the liberal theory, the postmodern theory and partly the cultural theory.

In Chapter five, the conclusion and recommendations on how domestic violence can best be combated and minimised will be given.

⁴⁵ C A MacKinnon, *Difference and Dominance: On Sex Discrimination, in Feminism Unmodified: Discourse on Life and Law*. Pages 32-36. The Radical approach proposes the very reformation and rethinking of the law as the most efficient means of ending women's subordination and patriarchy.

CHAPTER TWO

AN ANALYSIS OF ZAMBIAN STATUTORY AND CASE LAW ON DOMESTIC VIOLENCE

2.0 INTRODUCTION

The country has a dual legal system based on both statutory and customary laws⁴⁶, and while statutory laws provide for more equality for women in such issues as inheritance and the control of and access to land, the day to day life of a majority of the Zambian population is governed by the local courts that administer customary laws, which is primarily based on male power, authority, and domination over women.⁴⁷ At the statutory level, the Zambian Constitution⁴⁸ encompasses many rights, including those prohibiting discrimination on the basis of gender.⁴⁹ Likewise, the Penal Code prohibits sexual violence, rape, incest, defilement, neglect and desertion of children, coercion, discrimination and other associated abuses.⁵⁰ It prohibits offences that endanger life or health, assaults causing bodily harm, and unlawful compulsory labour.⁵¹

Zambia has not yet introduced specific legislation on domestic violence⁵² and no provisions for prohibiting or punishing such violence are contained within the Marriage Act⁵³ either. Perpetrators of domestic violence can only be tried by invoking the Zambian Penal Code⁵⁴ under ‘assaults’,⁵⁵ in instances of violence resulting in bodily harm. In addition, section 8 of the Matrimonial Causes Act, 2007, read together with section 9 (1) (b) of that same Act, allows for cruelty as a ground for

⁴⁶ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 2.

⁴⁷ National Action Plan on Gender-Based Violence (NAP-GBV) 2008-2013, Lusaka, April 2008. Page 5.

⁴⁸ Constitution of Zambia, Cap.1. In terms Art 1(3), the constitution is the Supreme Law of the land and all other law enacted in Zambia derives its validity and authority from the constitution.

⁴⁹ Of particular interest and importance in the constitution, is Part III entitled, ‘Protection of the Fundamental Rights and Freedoms of the individual’. This part of the constitution running from Art 11 through Art 32, is the National Bill of Rights which bestows upon all persons in Zambia regardless of race, place of origin, political opinions, colour, creed, sex or marital status, the rights and freedoms enshrined therein. Every person in Zambia can claim the protection of his or her rights through Art 28 which gives the right to petition the High Court in the event of a violation.

⁵⁰ ss. 132-134, s. 159, s. 138, ss. 168 and 169; and ss. 135,136,142 and 143.

⁵¹ ss. 222-236, ss. 247-248 and ss. 257; and ss. 261-263 in the order of offences mentioned.

⁵² M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Pages 155- 156.

⁵³ Marriage Act, Cap. 211.

⁵⁴ Penal Code Act, Cap. 87.

⁵⁵ ss. 247-250.

divorce. However, under the Penal Code, the provisions on assault⁵⁶ do not capture psychological, economic, social and cultural violence which are equally prevalent forms of domestic violence.⁵⁷ The Penal Code provisions on desertion of children and neglecting to provide food for children do not specially capture the unique situation of women as victims of domestic violence in that they tend to focus on the children as the victims and not the women.⁵⁸

2.1 PENAL PROVISIONS INTENDED TO ADDRESS DOMESTIC VIOLENCE

2.1.1 PROVISIONS ON ASSAULT

The Penal Code contains no provisions that are gender sensitive vis-à-vis physical violence. Sections 247 and 248, which provide for common assault and assault occasioning actual bodily harm respectively, relate to all persons generally. Whether the victim is male or female, the consequences are basically the same. Therefore the law in its current form has no special consideration for the vulnerability of women and girls.⁵⁹ Female persons are generally more vulnerable to physical violence than their male counterparts in that they are generally weaker in physical strength and smaller in physical build and stature.⁶⁰ This contention was ably illustrated in the case of *Rosalyn Thandiwe Zulu v The People*⁶¹. In that case the appellant had shot dead her abusive husband and was convicted of murder and sentenced to death by the High Court. The High Court found that there was no provocation because in its view, the previous assaults on the appellant by the deceased were too remote. Given this line of thinking, the court was of the view that the action by the appellant of picking up a pistol and shooting her husband amounted to murder. However, on appeal to the Supreme Court, she was acquitted on the plea of self-defence. The Supreme Court observed that the deceased was a person capable of extreme violence and thus the appellant was justified in believing that her life was in danger and that she would be killed herself if she did not use the weapon first.

⁵⁶ ss. 247-250.

⁵⁷ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia, OMCT, Lusaka, 2008. Page 46.

⁵⁸ s. 168 and s. 169, respectively.

⁵⁹ M B Chuulu, *et. al.*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 31.

⁶⁰ M B Chuulu, *et. al.*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 32.

⁶¹ (1981) ZR 341.

In another case with a similar history of domestic violence, *Esther Mwiimbe v The People*⁶², the appellant poured cooking oil over her husband as he lay in bed. He died ten days later from the burns. The appellant raised the defences self-defence and cumulative provocation. However the High Court rejected her defences and convicted her of murder and sentenced her to death. On appeal, the Supreme Court upheld the High Court's decision and held that both defences could not stand since, according to the court, the appellant had embarked on a course of action which was dispassionate and deliberate and therefore amounted to premeditation. Inconsistently, the court sympathised with the appellant's predicament and appealed to the republican president to exercise clemency and lift the death sentence. Following petitions from Women's Rights activists, Mwiimbe's death sentence was commuted and substituted with a ten year prison sentence.

The two cases indicate the rigidity of the courts in interpreting the law.⁶³ Despite the cases being similar, the court integrates the general law on murder with the principles of self-defence and acquits the appellant in the former case, while in the latter; the court's evasion is noticeable.⁶⁴

Nonetheless, the two cases are significant in that they are partly the force behind the mitigation of the rigidity of the laws in cases of domestic violence. For instance, in 1990, the Penal Code (Amendment) Act No. 3 was passed and the amendment ushered in the defence of diminished responsibility for persons who were not insane but whose reasoning had been substantially impaired by, among other things, injuries suffered.⁶⁵ In addition, section 201 of the Penal Code was replaced by a provision that the death penalty was no longer mandatory upon a conviction of murder.⁶⁶

2.1.2 PROVISIONS ON SEXUAL OFFENCES

While there is no specific legislation on gender-based violence, the Penal Code provides for the definitions and penal sanctions for offences against morality and these provisions include the

⁶² (1986) ZR 15.

⁶³ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Pages 34-35.

⁶⁴ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 35.

⁶⁵ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 148.

⁶⁶ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Pages 34-35.

offences of rape, abduction, defilement and incest.⁶⁷ The penal provisions are quite stiff with maximum jail terms of life imprisonment for rape, seven years for abduction and life imprisonment for defilement and incest on female girls aged less than twelve years old.⁶⁸ It has been argued that while cases of murder and aggravated robbery are committed to the high court for trial, all offences against morality are not, thus giving the impression that cases against morality are minor offences since they are tried before magistrates.⁶⁹ Since magistrates have a limited sentencing jurisdiction,⁷⁰ the maximum penalties have never been given to any convict in Zambia.⁷¹ Although magistrates have the authority to transmit the records to judges of the High Court, for higher sentences, they rarely ever do so.⁷²

Rape is forced sexual intercourse by a man of a woman and this does take place within a marriage.⁷³ However, at present the law in Zambia does not recognise rape within marriage as an offence.⁷⁴ This is because most people feel that when a couple gets married, a woman should consent to sexual intercourse even if she does not feel like it.⁷⁵ The offence of rape currently defined in section 132 of the Penal Code is adequate only as far as ordinary rape is concerned. 'Ordinary rape', which is otherwise the same as rape defined under the Penal Code⁷⁶ can be distinguished from marital rape in that while 'ordinary rape' is generally a man having unlawful carnal knowledge of a woman without her consent, and which woman could be any woman other than the wife of the offender, 'marital rape' is forced sexual intercourse by a husband of his wife.⁷⁷

⁶⁷ ss. 132-134; ss. 135-136; ss. 138, 139 and 158; and ss. 159, 161, 163, respectively.

⁶⁸ s. 133, s. 135, s. 138 and s. 159 respectively.

⁶⁹ National Action Plan on Gender-Based Violence. Page 16.

⁷⁰ On the Powers of the Subordinate Courts, the Criminal Procedure Code Act, Cap 88 of the Laws of Zambia provides in s. 7 (i) that:

“...a subordinate court of the first, second or third class may try any offence under the Penal Code or any other written law, and may pass any sentence or make any other order authorised by the Penal Code or any other written law provided that a subordinate court presided over by a senior resident magistrate shall not impose any sentence of imprisonment exceeding a term of nine years.”

Therefore, this being the highest of the classes of Subordinate Courts in Zambia, it has a maximum of nine years sentencing and which maximum it cannot exceed when sentencing a convicted criminal.

⁷¹ National Action Plan on Gender-Based Violence. Pages 16-17.

⁷² Criminal Procedure Code Act, Cap. 88, ss. 7 and 9.

⁷³ M B Chuulu, *et. al.*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 16.

⁷⁴ M B Chuulu, *et. al.*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 16.

⁷⁵ J Shezongo-Macmillan, Spousal abuse, Women and Law in Southern Africa (WLSA), Lusaka, 1995. Page 3.

⁷⁶ s. 132.

⁷⁷ J Shezongo-Macmillan, Spousal abuse. Page 3.

In some findings of a study, ‘Gender Violence and its Relation to Women’,⁷⁸ a woman named Martha was continuously forced by her husband to have sex with him in spite of her being unwell and having boils for eight months. In addition to this, Martha’s ill health was directly linked to her husband’s promiscuity and on several occasions he transmitted Sexually Transmitted Infections to her. Despite the doctor advising the couple not to have sex without protection, the husband insisted on having unprotected sex. Although the case was brought before the National Legal Aid Clinic for Women, the clinic could not proceed with taking the matter to the courts because there was and still is no provision in the law for marital rape in the Penal code or indeed any other law.⁷⁹

In respect of sentencing, the current law provides for a maximum of life imprisonment for the offence of rape and since this is not mandatory, the offender can be sentenced to as weak a term in prison as one year, seeing that section 133 of the Penal code provides no minimum threshold for sentencing a convicted rapist.⁸⁰ In view of the seriousness of the offence of rape, the Penal Code should clearly provide for a mandatory life sentence in the phrasing of section 133 which will bind judges as they sentence the convict.⁸¹ This should apply to ordinary rape, marital rape as well as attempted rape. Current law imposes a maximum penalty of life imprisonment in section 134.⁸² In practical terms, however, people are hardly sentenced to life imprisonment for attempted rape.⁸³ This makes the provision in its current form quite ineffective and unrealistic.⁸⁴ A mandatory minimum sentence threshold of 15 years in prison should be introduced with the maximum being life imprisonment for the offence of attempted rape.⁸⁵

⁷⁸ Women and Law in Southern Africa Research Trust, Zambia, 2001.

⁷⁹ As it then operated. The National Legal Aid Clinic for Women has since ceased its operation. M B Chuulu, *et. al*, ‘Gender Violence: The Invisible Struggle’ Response to the Justice Delivery System in Zambia. Page 53.

⁸⁰ M B Chuulu, *et. al*, ‘Gender Violence: The Invisible Struggle’ Response to the Justice Delivery System in Zambia. Page 25.

⁸¹ M B Chuulu, *et. al*, ‘Gender Violence: The Invisible Struggle’ Response to the Justice Delivery System in Zambia. Page 25. s. 133 of the Penal Code provides as follows:

“Any person who commits the offence of rape is liable to imprisonment for life.”

Despite the use of word ‘is’, many judges employ their discretion and go on to sentence rape convicts for as short a term as three years, as was the case in *Mwale v The People* (1965) Z.R. 156.

⁸² s. 134 provides that:

“Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment for life.”

⁸³ M B Chuulu, *et. al*, ‘Gender Violence: The Invisible Struggle’ Response to the Justice Delivery System in Zambia. Page 25.

⁸⁴ M B Chuulu, *et. al*, ‘Gender Violence: The Invisible Struggle’ Response to the Justice Delivery System in Zambia. Page 26.

⁸⁵ M B Chuulu, *et. al*, ‘Gender Violence: The Invisible Struggle’ Response to the Justice Delivery System in Zambia. Page 25.

Section 159 of the Penal Code is, *prima facie*, a good provision regarding the offence of incest by males except that the attempt of incest by a male should be classified as a felony and a mandatory sentence of ten years in prison provided for as opposed to the absence of any sentence at all in the current provisions of the Penal Code.⁸⁶ In some other findings of the ‘Gender Violence and its Relation to Women’ study,⁸⁷ Makala, a married woman and mother who went through marital problems was almost raped at gunpoint by her cousin who was about eight years younger than her. Makala had previously kept her cousin for five months in her flat. He told her that he wanted to have sex with her as he always admired her and that he wanted to give her satisfaction because he knew that she was suffering in her marriage. The case did not go for trial merely because the offence was an attempt of incest.

In practice, it appears that most cases of sexual offences against women are brought before the local courts and because of this, perpetrators of such violence are punished with less than a diminutive fine as opposed to the heavy penalty provided for in the Penal Code.⁸⁸ On the one hand, Sections 4, 5 and 7 of the Criminal Procedure Code read together state that any offence under the Penal Code is vested only before the Subordinate, High or Supreme Courts.⁸⁹ On the other hand, Section 12 of the Local Court Act, Chapter 29 of the Laws of Zambia empowers the local courts in the administration of the sole customary law.⁹⁰ Therefore, violence to a person as an offence under

⁸⁶ s. 159 (1) provides that:

“Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, is guilty of a felony and is liable to imprisonment for five years...”

and s. 159 (3), on the offence of attempted incest provides that:

“If any male person attempts to commit any such offence as aforesaid he is guilty of a misdemeanour.”

⁸⁷ Women and Law in Southern Africa Research Trust, Zambia 2001.

⁸⁸ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Pages 37-38

⁸⁹ Under the Criminal Procedure Code, s. 4 provides that:

“Subject to the other provisions of this Code, any offence under the Penal Code may be tried by the High Court.”

ss. 5 (1) and (2) go on to state that:

“Any offence under any written law, other than the Penal Code, may, when any court is mentioned in that behalf in such law, be tried by such court or by the High Court...and when no court is so mentioned, such offence may, subject to the other provisions of this Code, be tried by the High Court or by any subordinate court.”

Finally, ss. 7 provides that:

“Subject to the other provisions of this Code, a subordinate court of the first, second or third class may try any offence under the Penal Code or any other written law, and may pass any sentence or make any other order authorised by the Penal Code or any other written law...”

⁹⁰ s. 12 (1) (a) provides that:

the Penal Code should not be tried by the local courts. The practice of bringing such offences as rape, defilement and incest before the local courts suggests that these crimes are not considered by the judiciary as constituting serious criminal offences.⁹¹ In addition, the application of customary law, for instance in cases of defilement, leads to these crimes being settled through indemnities to the victim's family, rather than prosecution of the offender in the criminal justice system.⁹² In other words, this reinforces the idea that rape of women and girls is an offence against the family status as opposed to constituting a serious criminal offence against the victim herself.⁹³

2.2 ENFORCEMENT OF THE LAW AND THE ATTITUDE OF THE COURTS AS INFLUENCED BY PATRIARCHY

The above are some of the issues that need to be addressed in order to encourage survivors or victims of domestic violence to seek redress and to deter the perpetrators from committing such crimes as rape, incest and defilement.⁹⁴ In addition, there is need to enhance the capacity of members of the judiciary and the criminal justice system with the requisite knowledge, information, skills and experience to render the expeditious handling of cases of domestic violence against women.⁹⁵

There is weak enforcement of laws against sexual and domestic violence because there are no specific laws and policy guidelines on domestic violence and because women are ignorant of the existence of laws criminalising sexual and domestic violence.⁹⁶ Marital rape is a common phenomenon which has not yet been accepted as domestic violence against women and neither has it been recognised as a criminal act.⁹⁷ There is no common definition of various kinds of domestic violence against women such as physical, sexual and psychological violence, thus allowing judges wide interpretation, often leading to inconsistent court decisions or decisions that exemplify

“Subject to the provisions of this Act, a local court shall administer the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law...”

⁹¹ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 38.

⁹² J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 38.

⁹³ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 38.

⁹⁴ National Action Plan on Gender-Based Violence. Page 16.

⁹⁵ National Action Plan on Gender-Based Violence. Page 16.

⁹⁶ National Action Plan on Gender-Based Violence. Page 15.

⁹⁷ National Action Plan on Gender-Based Violence. Page 10.

traditional attitudes that blame the victim.⁹⁸ For instance in the case of *The People v Godden Bola*,⁹⁹ the magistrate stated that it was highly questionable for an old woman to be forced into having sex on several occasions without revealing to anyone. The judge further stated that the complainant's silence about what had transpired between her and her boss raised concern and showed that she consented to the alleged offence. The magistrate thus held that the complaint was baseless and the complainant had hallucinated showing that she was traumatised. This clearly a demonstration of how patriarchy influences the reasoning of some judges as they hear matters in court.¹⁰⁰ Similarly in another case of *Chali v Mwalla*,¹⁰¹ where a father had impregnated his daughter, the Supreme Court disregarded relevant criminal elements of incest and instead blamed the victim and also stated that the learned trial judge being a woman must have decided the case in favour of the victim out of emotion and not objective thinking.

There is no specific legislation on domestic violence, such that despite amendments to the penal code enhancing protection for women and children¹⁰², many perpetrators of domestic violence typically act with impunity.¹⁰³ An example of this can be seen in the case of *Chystal Alyson Denn v The People*,¹⁰⁴ where Mrs. Denn, a mother of two and who was convicted of murdering her abusive husband is currently imprisoned for life in maximum prison. The five year marriage between Mrs. Denn and her deceased husband was characterised by the latter battering the former. At trial, evidence was adduced to indicate that Mrs. Denn had made reports to the police about assaults occasioning actual bodily harm perpetrated by her deceased husband. The deceased tore her clothes in public on more than one occasion and inserted his fingers into her vagina in order to verify his suspicions that she had sex with another man. On the fateful night of the murder, the deceased attempted to insert his fingers into her vagina and she grabbed a knife, intending to

⁹⁸ National Action Plan on Gender-Based Violence. Page 10.

⁹⁹ Lusaka Subordinate Court Case of 2002. The facts of the case are that Bola was accused of having forced sexual relations with his secretary on three occasions in November 2002. He was tried for indecent assault and acquitted in July 2004 after a long trial.

¹⁰⁰ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Page 132. Patriarchy has been defined in Chapter One of this essay as the belief in male supremacy by both females and males and that it is also a system that maintains male privilege and supremacy, and establishes a subordinate position for women in social, political and economic arenas.

¹⁰¹ SCZ Judgment No. 2 of 1997.

¹⁰² An example of an enhancement to the Penal Code protecting women was the Penal Code (Amendment) Act No.3 of 1990 which brought in a more gender sensitive defence to spousal homicide. The new Act brought in the defence of diminished responsibility, for persons who were sane, but whose reasoning had been substantially impaired by, *inter alia*, injury suffered.

¹⁰³ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), *Human Rights Situation in Zambia*. Page 39.

¹⁰⁴ Appeal No. 5/2000.

frighten him off, but fatally wounded him in the struggle and he later died. In acknowledgement of the history of the deceased's continuous violence against Mrs. Denn, the trial judge conceded that he would not impose the death sentence, but impose life imprisonment. This case demonstrates the fact that the trial judge did not take into account the nature of the gravity of the violence suffered by Mrs. Denn nor indeed the long-term effects of the violence that influenced her act threatening the deceased with a knife.¹⁰⁵ On appeal, however, the Supreme Court quashed the earlier order of life imprisonment and substituted it with a fifteen year sentence.

Customary law often overrides statutory law,¹⁰⁶ such that even where statutory law provisions might protect a survivor/victim, customary law and practice prevail.¹⁰⁷ For example under Bemba custom in Zambia, only a parent or guardian of a girl, and not the girl who is the victim, has the right to sue the first man to have sexual intercourse with her, since this right is derived from the family's status and for this reason can only be claimed by the family.¹⁰⁸ At the local court level victims' families more often opt for compensation through the said courts rather than pursuing criminal proceedings through the penal system.¹⁰⁹ This can be seen in the case of *Chitumbi v Bwalya*,¹¹⁰ where a man who abducted a grade seven pupil and ended up impregnating her and infecting her with gonorrhoea was sued by the father of the girl for damages and ordered to pay K360.00 as compensation.

2.3 EFFORTS TO MINIMISE DOMESTIC VIOLENCE AGAINST WOMEN

Steps are being taken to enhance the existing legal framework in order to improve protections related to domestic violence in Zambia. In 2000, the government created a Division for Gender in Development (GIDD) within the Zambian cabinet.¹¹¹ Through this Division, in 2006, Women in Law and Development (WiLDAF) Zambia and other Non-governmental Organisations drafted a Proposed Sexual Offences and Gender Violence Bill.¹¹² This Bill is currently being considered by

¹⁰⁵ M B Chuulu, *et. al.*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 78.

¹⁰⁶ National Action Plan on Gender-Based Violence. Page 15.

¹⁰⁷ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 36.

¹⁰⁸ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 36.

¹⁰⁹ National Action Plan on Gender-Based Violence. Page 15.

¹¹⁰ Unreported.

¹¹¹ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 35.

¹¹² J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 35.

parliament.¹¹³ The Bill contains amendment to criminal law with regard to violence against women and children. It defines gender-based violence, including explicit psychological and economic violence; marital rape, dowry violence, widow inheritance to mention but a few of the crimes occurring within the family. Most importantly, the bill provides for the creation of a ‘Sexual Offences and Gender Violence Court’ and the granting of protection orders to victims.¹¹⁴ These provisions are important in that the creation of the said court shall specifically deal with matters concerning gender violence and which matters shall be heard by judges that are specialised in gender issues.¹¹⁵ The discretion of the courts in giving minimum sentence that is inadequate to punish the offender was challenged by interest groups in the country such as WILDAF and WLSA¹¹⁶, and as such the draft bill provides for minimum mandatory sentences such as fifteen years for rape and three years for indecent assault.¹¹⁷

2.4 CONCLUSION

As has been observed from the statutory and case law analysed under this chapter, thorough reforms of the law have yet to take place in order for the Zambian law to be more sensitive to the effects of gender differences on domestic violence. Clearly the women being the weaker sex are more prone to domestic violence than their male counterparts. There has been noted, also, the tendency by the Justice System to put the blame on the victim as was the case in *The People v Godden Bola*,¹¹⁸ seeing that the system itself stands on patriarchy. Perhaps the fact that no specific law on domestic or gender violence has been enacted poses an even larger problem as the Penal Code, in its general provisions on offences against morality, against marriage and domestic obligations; and against the person, does not fully or comprehensively capture domestic violence as a serious offence.¹¹⁹ Not even through the provisions on sexual offences against women is domestic violence against women wholly catered for. There has thus been a proposal to enact

¹¹³ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 35.

¹¹⁴ In the Bill, remedial measures are covered under Part 5 titled, “Protection Orders”. The Bill under this part proposes that in terms of access to remedies, any person, including the victim of sexual violence, can make an application to the court to safeguard such persons’ interest. The Bill still in Part 5 goes on to propose that the court can make ex parte protection orders where any delay would endanger the life of the victim. The rationale behind this is that the victim’s confidence in their protection by the courts and the police is guaranteed and that the offender realises that penal sanctions await him should he threaten the life of the victim in any way.

¹¹⁵ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Pages 36 and 47.

¹¹⁶ Women in Law and Development in Africa and Women and Law in Southern Africa Research and Educational Trust.

¹¹⁷ J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), Human Rights Situation in Zambia. Page 47.

¹¹⁸ Lusaka Subordinate Court Case of 2002.

¹¹⁹ Chapters 15, 16 and 19 respectively.

separate law specifically to handle issues of domestic violence. This has already been done through the 2006 Sexual Offences and Gender Violence Bill which is still under consideration by Parliament. The bill, if successfully passed, is a significant opportunity for progress in Zambian national law concerning domestic violence.¹²⁰ As they stand at present, the Zambian laws being applied to cases of domestic violence leave much to be desired.

¹²⁰ National Action Plan on Gender-Based Violence. Page 16.

CHAPTER THREE

AN ANALYSIS OF SWEDISH AND NORWEGIAN LAWS ON DOMESTIC VIOLENCE

3.0 INTRODUCTION

While the previous chapter focused on analysing statutory and case law on domestic violence in Zambia in light of the influence of feminist reasoning and whether the Zambian laws adequately address the problem of domestic violence against women, this particular chapter focuses on Swedish and Norwegian Laws for the same reason as the one in the previous chapter. The chapter will thus reveal what impact feminist Jurisprudence has had on Swedish and Norwegian laws through various law reforms.

3.1 SWEDEN

Feminists in Sweden have relentlessly pushed for women's rights and their triumphs such as Sweden ranking at the top or near to the top in the number of women who hold public office, serve as cabinet ministers, graduate from university and are in formal employment.¹²¹ As was the case in 2005, the feminist movement was gaining strength in Sweden and the country was expected later that year to create its first 'feminist' political party, which a previous poll indicated could court as many as one in every five votes.¹²² However, one significant blot on the record of women's empowerment in Sweden is that until recently, domestic violence remained muffled in shame.¹²³

¹²¹ L Alvarez, Sweden Faces Facts on Violence Against Women, 30 (March, 2005).
http://www.nytimes.com/2005/03/29/world/Europe/29iht-letter-4909045.html?_r=1. (Accessed on 14th December, 2010).

¹²² L Alvarez, 'Sweden Faces Facts on Violence Against Women', 30 (March, 2005).
http://www.nytimes.com/2005/03/29/world/Europe/29iht-letter-4909045.html?_r=1. (Accessed on 14th December, 2010).

¹²³ L Alvarez, 'Sweden Faces Facts on Violence Against Women', 30 (March, 2005).
http://www.nytimes.com/2005/03/29/world/Europe/29iht-letter-4909045.html?_r=1. (Accessed on 14th December, 2010).

3.1.1 BRIEF BACKGROUND TO SWEDISH LAW ON DOMESTIC VIOLENCE

Although Sweden criminalised marital rape in as early as 1965¹²⁴, other forms of domestic violence were rarely tried as no legislation could be pointed to as specifically spelling them out as offences.¹²⁵ What used to occur was that, in order to prosecute a domestic violence case, prosecutors needed explicit accusations from victims.¹²⁶ In addition, Swedish legislation mandated that the courts view each criminal act as an isolated matter. As a result, courts rarely could consider the aggravating circumstances or the number of repeat occurrences perpetrated by an offender.¹²⁷ Moreover, the Swedish legislature previously viewed reconciliation between the involved parties as preferable to judicial intervention.¹²⁸

Domestic violence does not constitute an independent legal concept but is covered by law under the category of assault.¹²⁹ The legal concept of assault involves infliction of bodily injury, illness or pain and the concept of illness, in turn, is not only connected to its physical aspects, but also to mental anguish and shock.¹³⁰ Violence against women is included in other offences such as

¹²⁴ Chapter 4, Section 4a of the Swedish Penal Code stipulates that a person who commits criminal acts as defined in Chapters 3, 4 or 6 against another person having, or having had, a close relationship with the perpetrator shall be sentenced for gross violation of integrity. Although marital rape is not expressly stated in the Penal code, it is captured by the mentioned provisions in that while chapter 6 provides for Sexual Crimes, Chapter 4, Section 4a encompasses the situation in which sexual crimes are committed within, among other close relationships, a marriage. Section 4a of Chapter 4 of the penal code thus provides that:

“If the acts were committed by a man against a woman to whom he is, or has been, married or with whom he is, or has been cohabiting under circumstances comparable to marriage, he shall be sentenced for gross violation of a woman’s integrity.”

¹²⁵ G Nordborg, “‘Women’s Peace’: A Criminal Law Reform in Sweden”, (April, 2008). <http://web.eduskunta.fi/dman/Document.phx/~public/kvasiat/EN%2B2008/Nordborg+8.4.08?folderId=~public%2Fkvasiat%2FEN%2B2008&cmd=download>. (Accessed on 30th December, 2010). To encompass all forms of domestic violence, the comprehensive definition of violence given by the Draft Pan African Treaty Against Violence and as reflected in Chapter One of this paper applies equally in this chapter in order to describe the different forms of domestic violence against women. Thus, violence is:

“any act, omission or conduct by means of which physical, sexual or mental suffering is inflicted directly or indirectly, decent, seduction, threat, coercion or any other means on any woman with the purpose or effect of intimidating, pushing or humiliating her or of maintaining her in se-stereotyped roles or of denying her human dignity, sexual self-determination, physical, mental and moral integrity, or of undermining the security of her person, her self-respect or her personality, or of diminishing her physical or mental capacities.”

¹²⁶ L Nylén, ‘Sweden’s Response to Domestic Violence’, FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

¹²⁷ L Nylén, ‘Sweden’s Response to Domestic Violence’, FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

¹²⁸ L Nylén, ‘Sweden’s Response to Domestic Violence’, FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

¹²⁹ M Olausson, ‘Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden’, (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹³⁰ M Olausson, ‘Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden’,

murder, manslaughter, gross violation of a woman's integrity, rape and other kinds of sexual abuses under the Swedish Penal Code of 1962.¹³¹

The Swedish law was amended in 1982 in a way that was decisive for the perception of men's violence against women.¹³² Prior to the amendment, the crime of assault against a woman was perceived to be a private crime which could only be prosecuted at the behest of the injured party bringing a claim to court.¹³³ The amendment changed the law in such a way that assault against a woman, even if it takes place in the confines of a private domicile, is considered a public crime, and charges can be pressed by the public authorities or public institutions on behalf of the injured party.¹³⁴ This elevates the legal status of violence against women to that of a social problem from one of being seen as a dispute between individuals.¹³⁵

(September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹³¹ M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010). Chapters 3 to 7 contain acts about crimes against a person. Chapter 3 specifies crimes against life and health, which include bodily injuries, assault and murder. Chapter 4 specifies crimes against liberty and peace, chapter 6 outlines sexual crimes. Section 1 of Chapter 3 describing Crimes against Life and Health states that:

"A person who takes the life of another shall be sentenced for murder to imprisonment for ten years or for life" and section 2 supplements it by stating that "If, in view of the circumstances that led to the act or for other reasons, the crime referred to in Section 1 is considered to be less serious, imprisonment for manslaughter shall be imposed for at least six and at most ten years."

Section 5 states that:

"A person who inflicts bodily injury, illness or pain upon another or renders him or her powerless or in a similar helpless state, shall be sentenced for assault to imprisonment for at most two years or, if the crime is petty, to a fine or imprisonment for at most six months."

And Section 6 provides that:

"If the crime referred to in section 5 is considered gross, the sentence for gross assault shall be imprisonment for at least one and at most ten years."

In assessing if the crime is gross special consideration shall be given to whether the act constituted a mortal danger or whether the offender inflicted grievous bodily harm or severe illness or otherwise displayed particular ruthlessness or brutality.

¹³² M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹³³ M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹³⁴ M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹³⁵ M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

3.1.2 CURRENT SWEDISH ACTS PROVIDING FOR DOMESTIC VIOLENCE

3.1.2.1 THE RESTRAINING ORDERS ACT (1988:688)

The Restraining Orders Act (1988:688) was introduced in Sweden in 1988.¹³⁶ The fundamental objective of the Act is to prevent crimes against individuals who are subject to stalking and harassment by the offender and to create a sense of security for such individuals.¹³⁷ The law is drafted in a gender-neutral way, however, as far as the reality of the vulnerability of women is concerned, the Act was in particular intended to be applied in situations in which a woman is exposed to violence or threats within a relationship or where a man is harassing and stalking a woman in connection with the break-down of an intimate relationship.¹³⁸ On 1 September 2003, the law was extended by the inclusion of two new forms of restraining order namely, the ‘specially extended restraining order’ and the ‘domestic exclusion order’.¹³⁹ These forms of restraining order are important in that if a restraining order under Section 1a and 2 of the Act is not sufficient, it may be extended in order to apply to prohibiting a person from remaining in the vicinity of the home or workplace of the victim or any other place where the victim tends to spend time. This would occur under an extended restraining order on one hand.¹⁴⁰ Under a domestic exclusion order on the other hand, a restraining order applies to common living quarters of both the victim and the offender and larger geographical areas.¹⁴¹

¹³⁶ Section 1 of the Restraining Orders Act defines a restraining order as:

“a prohibition order which may be issued to prohibit a person from visiting or in any other way making contact with another person, or following that other person.”

Such a prohibition order may be issued if, due to special circumstances, there is a risk of a crime being committed, or of persecution or other serious forms of harassment.

¹³⁷ M Olausson, ‘Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden’, (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹³⁸ M Olausson, ‘Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden’, (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010). The evaluation of the Act, made by The Swedish National Council for Crime Prevention showed that most of those applying for restraining orders (four out of five) are women and that the vast majority of those who comprise the subjects of these applications (nine out of ten) are men. In the majority of cases, the parties concerned are currently involved or have been involved in a relationship.

¹³⁹ M Olausson, ‘Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden’, (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010). Under a specially extended restraining order, individuals may be ordered to stay away from areas of particular importance to the victim. Under the domestic exclusion order, the victim’s partner may be ordered to stay away from the couple’s shared residence for a maximum of one month.

¹⁴⁰ Section 2, paragraphs 2 and 3 of the Restraining Orders Act, a person who has breached an extended restraining order may be prohibited from entering an even larger area.

¹⁴¹ Sections 1a and 2 provide that restraining orders pertaining to common living quarters may only be issued if the reasons for such orders carry considerably more weight than the intrusion or other disadvantage for the person for whom the order shall apply. In addition to this, the person whom the order is intended to protect should undertake to

3.1.2.2 THE SWEDISH PENAL CODE OF 1962

Currently, domestic violence is a general indictable crime.¹⁴² On 1 July 1998, the government introduced a new offence into the Swedish Penal Code.¹⁴³ One part of the new offence, “gross violation of a woman's integrity”, covers repeated acts of violence committed by men against women with whom they have a close relationship.¹⁴⁴ The new offence means that if a man commits certain criminal acts such as assault, unlawful threat or coercion, sexual or other molestation, or sexual exploitation against a woman to whom he is or has been married or with whom he is or has been cohabiting and seriously damages her self-confidence, the courts can sentence him for gross violation of the woman's integrity in addition to sentencing him on each traditional crime, such as aggravated assault.¹⁴⁵ In this way, the new legislation allows the courts to take into account the entire situation of the abused woman and increase the offender's punishment to fit the severity and frequency of the acts of violence.¹⁴⁶ As it is now, the police and the prosecutors seem to pay much more attention to the repeated patterns of violence, which are all too common in domestic violence against women.¹⁴⁷ Before the new provision, the Swedish law allowed the prosecution of several criminal acts in the same trial except the focus in the investigations of that case would only be on the reported crime as an isolated incident.¹⁴⁸ In other

help to enable the person to whom the order applies to gain access, within reason, to his personal belongings.

¹⁴² L Nylén, ‘Sweden's Response to Domestic Violence’, FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

¹⁴³ Section 4a of Chapter 4 provides as follows:

“A person who commits criminal acts as defined in Chapters 3, 4 or 6 against another person having, or have had, a close relationship to the perpetrator shall, if the acts form a part of an element in a repeated violation of that person's integrity and suited to severely damage that person's self-confidence, be sentenced for gross violation of integrity to imprisonment for at least six months and at most six years. If the acts described in the first paragraph were committed by a man against a woman to whom he is, or has been, married or with whom he is, or has been cohabiting under circumstances comparable to marriage, he shall be sentenced for gross violation of a woman's integrity to the same punishment.”

Chapter 3 of the Swedish Penal Code contains provisions on Crimes against Life and Health, Chapter 4 on Crimes against Liberty and Peace and Chapter 6 on Sexual Crimes.

¹⁴⁴ G Johansson-Latham and S. Croall, *Patriarchal violence: an attack on human security*. (Stockholm: EO-Print, 2005). <http://www.sweden.gov.se/content/1/c6/05/68/94/42d6d51b.pdf>. (Accessed on 30th December, 2010).

¹⁴⁵ L Nylén, ‘Sweden's Response to Domestic Violence’, FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

¹⁴⁶ L Nylén, ‘Sweden's Response to Domestic Violence’, FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

¹⁴⁷ J Niemi-Kiesiläinen, ‘Feminist Policy Against Violence in Sweden’, 20 (May, 2005). http://www.iss.uw.edu.pl/arch/20.05.2005/Niemi_Sweden.pdf. (Accessed on 30th December, 2010).

¹⁴⁸ J Niemi-Kiesiläinen, ‘Feminist Policy Against Violence in Sweden’, 20 (May, 2005). http://www.iss.uw.edu.pl/arch/20.05.2005/Niemi_Sweden.pdf. (Accessed on 30th December, 2010).

words, the main effect of the new law has been the increased awareness of violence against women.¹⁴⁹

On 1 April 2005, new and reformed legislation on sexual crimes entered into force, containing a series of important changes, including stronger protection for women against exposure to sexual violations.¹⁵⁰ In connection with the introduction of this legislation, emphasis was placed on the need to monitor its impact and to determine whether it was being applied in an appropriate and effective way.¹⁵¹ As a society changes and develops, the seriousness with which courts view various crimes changes with it.¹⁵² The rules governing criminal sanction should reflect how reprehensible the offence is.¹⁵³ A stricter view of serious violations of personal integrity has already developed in Sweden¹⁵⁴ as well as regarding sexual crimes. The laws regarding serious physical abuse, however, have not been subject to any general reforms.¹⁵⁵ The Government

¹⁴⁹ J Niemi-Kiesiläinen, 'Feminist Policy Against Violence in Sweden', 20 (May, 2005).

http://www.iss.uw.edu.pl/arch/20.05.2005/Niemi_Sweden.pdf. (Accessed on 30th December, 2010).

¹⁵⁰ Ministry of Integration and Gender Equality, 'Action plan for combating men's violence against women, violence and oppression in the name of honour and violence in same-sex relationships', 15 (November, 2007).

http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010). Section 1 of Chapter 6 of the Swedish Penal Code States as follows:

"A person who through violence or threat which involves, or appears to the threatened person to involve an imminent danger, forces another person to have sexual intercourse or to engage in a comparable sexual act that, in view of the nature of the violation and the circumstances in general, is comparable to enforced sexual intercourse, shall be sentenced for rape to imprisonment for at least two and at most six years. Causing helplessness or a similar state of incapacitation shall be regarded as equivalent to violence. If in view of the nature of the violence or the threat and the circumstances in general, the crime is considered less serious, a sentence of imprisonment for at most four years shall be imposed. If the crime is gross, a sentence of imprisonment for at least four and at most ten years shall be imposed for gross rape. In assessing whether the crime is gross, special consideration shall be given to whether the violence involved a danger to life or whether the perpetrator caused serious injury or serious illness or, having regard to the method used or the victim's youth or other circumstances, exhibited particular ruthlessness or brutality."

¹⁵¹ Very important is Chapter 6 of the Swedish Penal Code, which states penalties and describes sexual crimes.

¹⁵² Ministry of Integration and Gender Equality, 'Action plan for combating men's violence against women, violence and oppression in the name of honour and violence in same-sex relationships', 15 (November, 2007)

http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

¹⁵³ Ministry of Integration and Gender Equality, 'Action plan for combating men's violence against women, violence and oppression in the name of honour and violence in same-sex relationships', 15 (November, 2007)

http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

¹⁵⁴ As can be seen in Section 4a of Chapter 4 of the Swedish Penal Code.

¹⁵⁵ Ministry of Integration and Gender Equality, 'Action plan for combating men's violence against women, violence and oppression in the name of honour and violence in same-sex relationships', 15 (November, 2007)

http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

considers that there is reason for a stricter view of such offences in the meeting out of punishment.¹⁵⁶

From 1950, The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, to which Sweden is a member state, is the only convention that has been fully incorporated into Swedish legislation.¹⁵⁷ Thus Swedish law, like the convention, enshrines everyone's right to life, the prohibition of torture and slavery, the right to freedom and security, and the prohibition of discrimination.¹⁵⁸ By Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, to which Sweden is also a signatory as from 1980, the country agrees to realise gender equality in practice by legislation and other appropriate means and create legal protection.¹⁵⁹ Regarding domestic violence against women and since the country's criminalisation of marital rape in 1965, this realisation of gender equality through legislation appears to be true only for the 1998 amendment to Section 4a of Chapter 4 of the Swedish Penal code which introduces the crime of gross violation of integrity and Section 11 of Chapter 5 of the Social Services Act (2001:453) discussed below.

3.1.2.3 THE SOCIAL SERVICES ACT (2001:453)

Social services bear the ultimate responsibility for ensuring that everyone living in their municipality receives the assistance and support they need, irrespective of whether or not they are crime victims and regardless of age or sex.¹⁶⁰ Cooperation between all actors, including the social services, is important so that the individual does not suffer from any gaps in provision of support.¹⁶¹ Prior to the 2007 Swedish Government Action Plan for combating men's violence against women, the realisation of the fact that domestic violence remained rampant and a subject

¹⁵⁶ Ministry of Integration and Gender Equality, 'Action plan for combating men's violence against women, violence and oppression in the name of honour and violence in same-sex relationships', 15 (November, 2007) http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

¹⁵⁷ G Johnsson-Latham and S Croall, *Patriarchal violence: an attack on human security*. (Stockholm: EO-Print, 2005). <http://www.sweden.gov.se/content/1/c6/05/68/94/42d6d51b.pdf>. (Accessed on 30th December, 2010).

¹⁵⁸ Section 1, Articles 2, 3, 4, 5 and 14 respectively.

¹⁵⁹ G Nordborg, "'Women's Peace': A Criminal Law Reform in Sweden", (April, 2008). <http://web.eduskunta.fi/dman/Document.phx/~public/kvasiat/EN%2B2008/Nordborg+8.4.08?folderId=~public%2Fkvasiat%2FEN%2B2008&cmd=download>. (Accessed on 30th December, 2010).

¹⁶⁰ M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹⁶¹ M Olausson, 'Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden', (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

not adequately discussed in the public nor comprehensively provided for in one specific piece of legislation could not be escaped.¹⁶² Thus, measures¹⁶³ were taken in order to solve this problem. Among the measures taken by Sweden to combat domestic violence against women was the amendment of Chapter 5, Section 11 of the Social Services Act (2001:453) on 1 July 2007.¹⁶⁴ The same was amended to clarify the obligation and responsibility of social welfare committees and municipalities regarding the provision of help and support to domestic violence victims.¹⁶⁵ The revision of section 11 specified that a municipality ‘shall’ rather than ‘should’ give special consideration to the needs of women exposed to violence and of children who have witnessed violence.¹⁶⁶ The Act describes the general objectives of Swedish social services. Different sections of the Act specify, to some extent, the aims related to different target groups or types of problems. Chapters 5 and 14 refer to procedures dealing with victims of crime and reporting of the abuse.¹⁶⁷

¹⁶² G Nordborg, “‘Women’s Peace’: A Criminal Law Reform in Sweden”, (April, 2008).
<http://web.eduskunta.fi/dman/Document.phx/~public/kvasiat/EN%2B2008/Nordborg+8.4.08?folderId=~public%2Fkvasiat%2FEN%2B2008&cmd=download>. (Accessed on 30th December, 2010).

¹⁶³ The Swedish Government, in November of 2007, also instructed the National Board for Youth Affairs to take steps to combat violence and oppression in the name of honour via the activities of the country’s young women’s shelters. Girls and young women exposed to violence and oppression in the name of honour were to have access to support via the activities of young women’s shelters. The aim of this initiative was to equip staff at the shelters, through national training programs and local seminars, with a better understanding of how honour-related violence and oppression worked and how they could reach women exposed to such practices. Still in 2007, the Swedish Government instructed the National Police Board to further intensify its efforts to combat men’s violence against women. This measure was to cover training and education, information dissemination and other courses of action deemed likely to strengthen regular police activities in the said area in the long term. The aim was to improve the ability of the police to proceed in that work from the perspective of the crime victim as well as enhance police skills and capacity in respect of such issues, and to strengthen public faith in the police so that more crimes could be reported. The assignment was to be undertaken in consultation with the Swedish Prosecution Authority. The Government also intended to review the need for allocating additional resources to other agencies in the judicial system, including the Swedish Prosecution Authority and the National Courts Administration, in connection with the said mandate.

¹⁶⁴ Ministry of Integration and Gender Equality, ‘Action plan for combating men’s violence against women, violence and oppression in the name of honour and violence in same-sex relationships’, 15 (November, 2007)
http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

¹⁶⁵ Ministry of Integration and Gender Equality, ‘Action plan for combating men’s violence against women, violence and oppression in the name of honour and violence in same-sex relationships’, 15 (November, 2007).
http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

¹⁶⁶ Ministry of Integration and Gender Equality, ‘Action plan for combating men’s violence against women, violence and oppression in the name of honour and violence in same-sex relationships’, 15 (November, 2007).
http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

¹⁶⁷ Chapter 5 of the Social Services Act states that particular attention should be paid to the fact that:
 “women who are being or have been subjected to violence or other abuse by a person close to them may be in need of support and help in order to change their situation,”
 and Chapter 14 of the Social Services Act states the responsibility of every social worker, in case he or she will receive any information about an abuse or crime being committed to report the case to the authorities, thus:

The most important thing is that the victim of crime and her or his close relatives receive proper support and assistance.¹⁶⁸

3.2 NORWAY

The approach Norway has taken is that domestic violence cannot be combated with the use of criminal policy instruments alone.¹⁶⁹ An effective fight against violence requires close cooperation with other central government authorities with responsibility for health, social welfare and gender equality issues.¹⁷⁰ To meet the need for coordination at central government level, a cross-ministerial working group has been set up.¹⁷¹ This group consists of representatives of the Ministries of Health, Social Affairs, Children and Family Affairs, and Justice and the Police.¹⁷²

3.2.1 BRIEF BACKGROUND TO NORWEGIAN LAW ON DOMESTIC VIOLENCE

Norway became party to CEDAW in 1981 and which international instrument the country incorporated into national law in full length in 2005.¹⁷³ Rape was prohibited in the Civil Penal Code and this included rape within marriage, although not explicitly stated. However, the first conviction of rape against a spouse was pronounced by the Norwegian High Court in 1974.¹⁷⁴ This

“Any person receiving information of a matter, which can imply a need for the social welfare committee to intervene for the protection of a child, should notify the committee accordingly. Authorities whose activities affect children and young persons are duty bound, as are other authorities in healthcare, medical care, other forensic psychiatric investigation services and social services, prison and probation services to notify the social welfare committee immediately of any matter which comes to their knowledge and may imply a need for the social welfare committee to intervene for the protection of a child. The same applies to persons employed by such authorities. The same duty of notification also applies to persons active within professionally conducted private services affecting children and young persons or any other professionally conducted services in health and medical care or in social services field.”

¹⁶⁸ M Olausson, ‘Domestic Violence in the South Baltic Region: Kaliningrad, Lithuania, Poland and Sweden’, (September, 2010). <http://www.neww.org.pl/pliki/baltic/report2.pdf>. (Accessed on 30th December, 2010).

¹⁶⁹ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁷⁰ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁷¹ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁷² [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁷³ A. Hole, ‘Lifting Domestic Violence from the Private to the Public Sphere’, 4 (September, 2007).

<http://www.regjeringen.no/en/dep/bld/dep/org/avdelinger/sla/ekspedisjonssjef-arni-hole/lifting-domestic-violence-from-the-privat.html?id=481305>. (Accessed on 16th February, 2011).

¹⁷⁴ A. Hole, ‘Lifting Domestic Violence from the Private to the Public Sphere’, 4 (September, 2007).

<http://www.regjeringen.no/en/dep/bld/dep/org/avdelinger/sla/ekspedisjonssjef-arni-hole/lifting-domestic-violence>

is currently the legal status of marital rape. In 1988, unconditional prosecution was introduced in cases of domestic violence. Thus, as is the situation obtaining now, a criminal case may be brought before the court, even if the woman withdraws the formal report.¹⁷⁵ In 2002 a nation-wide system of domestic violence coordinators was established in all twenty-seven police districts and the main role of that system was is to enhance competence in the police force on how to deal with domestic violence.¹⁷⁶

3.2.2 SOME RECENT EFFORTS IN COMBATING DOMESTIC VIOLENCE AGAINST WOMEN IN NORWAY

There is political consensus in Norway that violence against women is not a private matter, and that the public authorities are responsible for preventing and helping to avert this type of violence.¹⁷⁷ The efforts of the public authorities are based on their acknowledgement of this responsibility. In recent years, the Norwegian authorities have implemented a large number of measures to combat domestic violence. These efforts have essentially been channelled through the Government's two Action Plans to combat Violence against Women (2000-2003) and to combat Domestic Violence (2004-2007).¹⁷⁸

3.2.2.1 THE NORWEGIAN PENAL CODE

On 20 December 2005, Norway adopted a penal provision regarding domestic abuse.¹⁷⁹ This provision came into force on 1 January 2006, thus making domestic violence a specific offence in

from-the-priv.html?id=481305. (Accessed on 16th February, 2011).

¹⁷⁵ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian_Plan_of_Action_to_combat_Domestic_Violence_2007.ppt). (Accessed on 20th December, 2010).

¹⁷⁶ A. Hole, 'Lifting Domestic Violence from the Private to the Public Sphere', 4 (September, 2007). <http://www.regjeringen.no/en/dep/bld/dep/org/avdelinger/sla/ekspedisjonssjef-arni-hole/lifting-domestic-violence-from-the-priv.html?id=481305>. (Accessed on 16th February, 2011).

¹⁷⁷ Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Norway's Seventh Periodic Report. http://www.regjeringen.no/upload/kilde/bld/rap/2006/0004/ddd/word/297365-7th_cedaw_report_15_september_2_-med_forside-copy.doc. (Accessed on 16th February, 2011).

¹⁷⁸ Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Norway's Seventh Periodic Report. http://www.regjeringen.no/upload/kilde/bld/rap/2006/0004/ddd/word/297365-7th_cedaw_report_15_september_2_-med_forside-copy.doc. (Accessed on 16th February, 2011).

¹⁷⁹ Section 219 of the Norwegian Penal Code.

Norway.¹⁸⁰ Violent attacks in the private sphere come under the provisions of Section 219 of the Norwegian Penal Code.¹⁸¹ The legislative amendment modernises and expands the former section 219 regarding domestic violence, which was out-dated, difficult to understand and contained some complicated conditions.¹⁸² In the new provision, it is the perpetrator's long-term terrorisation and abuse of the next-of-kin that constitutes the criminal aspect of the act. The penal provision will strengthen the legal status of women since women are the main victims of domestic violence.¹⁸³

A new, more comprehensive provision prohibiting contact in section 33 of the Penal Code came into force on 1 January 2006.¹⁸⁴ The provision is particularly designed to protect the aggrieved person in cases concerning abuse of women and domestic violence. The new penal provision makes it possible to impose a ban on more forms of threatening or annoying behaviour than was previously the case.¹⁸⁵

3.2.2.2 THE CRIMINAL PROCEDURE ACT

Assaulted and sexually abused women are protected against repeated violence from the abuser.¹⁸⁶ In an amendment in 1995, to Section 222a of the Criminal Procedure Act, a person can be prohibited from entering a specific area, following, visiting or otherwise contacting another

¹⁸⁰ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁸¹ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010). Section 219 of the Norwegian Penal Code currently provides as follows:

“Any person who by threats, duress, deprivation of liberty, violence or any other wrong grossly or repeatedly maltreats; a) his or her former or present spouse, b) his or her former or present spouse's kin in direct line of descent, c) his or her kin in direct line of ascent, d) any person in his or her household, or e) any person in his or her care shall be liable to imprisonment for a term not exceeding three years”.

If the maltreatment is gross or the aggrieved person dies or sustains considerable harm to their body or health as a result of the treatment, the penalty shall be imprisonment for a term not exceeding six years. In deciding whether the maltreatment is gross, particular importance shall be attached to whether it has endured for a long time and whether such circumstances as are referred to in section 232 are present.

¹⁸² [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁸³ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁸⁴ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁸⁵ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

¹⁸⁶ [http://www.enu.ee/lisa/200_Norwegian Plan of Action to combat Domestic Violence 2007.ppt](http://www.enu.ee/lisa/200_Norwegian%20Plan%20of%20Action%20to%20combat%20Domestic%20Violence%202007.ppt). (Accessed on 20th December, 2010).

person.¹⁸⁷ That is to say, a restraining order can be granted against a perpetrator of domestic violence. This can be done if there is specific reason to believe that the offender will commit a criminal act against or otherwise violate the victim's right to be left peacefully alone. If a ban pursuant to section 222a of the Criminal Procedure Act on visiting the victim is violated, the offender violating the ban is arrested and remanded in custody. Section 222a was changed and revised in 2003, and the changes in the rules regulating ban on visits took effect. The changes are meant, *inter alia*, to provide better protection for persons exposed to violence from others in their own household. Section 222 of the Norwegian Criminal Procedure Act provides clear legal authority for prohibiting a person subject to such a ban from staying in his own home.

3.3 CONCLUSION

Traditionally the penalties for domestic violence and violence against women in Sweden were mild. Although Sweden has made considerable progress towards gender equality, the exposure of women to violence by men remains a major social problem.¹⁸⁸ Some reforms such as the 1965 criminalisation of rape within the marriage and the 1982 public prosecution of domestic violence and the 1998 inclusion into the Penal Code, of the offence of gross violation of a woman's integrity, though positive aspects, still do not adequately provide for the minimization of domestic violence in Sweden. Another problem is that the eviction of the perpetrator of domestic violence from the common abode is not actively executed, save in particularly serious cases. Therefore, it is usually the victim who leaves home and lives in a shelter. In terms of attitudes, the Swedish Society needs a period of self-reflection seeing that although they rank highest in the world in having attained formal gender equality, patriarchal thinking still influences how people live in their private homes. It is however, commendable on the State of Sweden for the clear provisions in their laws on domestic violence so far. Norway in a similar way has got quite some elaborate provisions in its Penal Code in that it criminalises domestic violence in Section 219 of its Penal Code. It should also be emphasised that the unconditional prosecution of domestic violence is one of the sure ways to raise the confidence of the public in the prosecution as prosecuting a domestic violence case no longer rests on the victim bringing an action against the perpetrator personally,

¹⁸⁷ http://www.enu.ee/lisa/200_Norwegian_Plan_of_Action_to_combat_Domestic_Violence_2007.ppt. (Accessed on 20th December, 2010).

¹⁸⁸ http://www.coe.int/t/pace/campaign/stopviolence/source/Sweden_actionplan_en.pdf. (Accessed on 30th December, 2010).

but can be done by any other concerned person including the prosecution itself. Restraining orders in both countries as provided for by their respective laws, are another way domestic violence is being curbed as a perpetrator who breaches such an order is liable to being arrested and remanded in custody. It is worth mentioning, that both Sweden and Norway have progressed positively in their fight against domestic violence and this is evidenced in the reforms they have done to their laws. However, that is not to say that they have completely achieved their goal as attitudes still need to be changed.

CHAPTER FOUR

A COMPARISON OF THE FEMINIST THEORY BEHIND ZAMBIAN AND THE SCANDINAVIAN LAWS ON DOMESTIC VIOLENCE

4.0 INTRODUCTION

It cannot be stressed any further that feminists have identified the gendered nature of the public and private divide as the main obstacle in the protection of women's rights in most if not all the states in the world. This entails that subjects such as domestic violence against women, which occur in the privacy of the home have long been perceived as subjects the state cannot interfere with. Thus, the state concerns itself with what occurs in the public, which is an area of society constituting mainly of men, and hence is patriarchal. The driving force behind the fight of ensuring that states protect the rights of women in the home as promptly as they do in the public has been feminist legal thought. This chapter will essentially compare the findings on Zambia with the Scandinavian situation in chapters two and three, respectively and will establish whether, Zambia can take a similar course in adopting feminist views in its laws, and whether or not the Scandinavian laws are adequate, what lesson Zambia can learn from there in its own attempt to minimise, as much as possible, domestic violence through the law. In doing so, the paper will establish the benefit the radical feminist approach is capable of bringing with it when properly utilised in Zambia. This will not be in isolation of the liberal theory, the postmodern theory and partly the cultural theory.

4.1 BRIEF RECAPITULATION OF FEMINIST THEORY

For the purpose of this paper, four feminist theories were discussed in Chapter one. First was Liberal feminism which argues that gender equality amounts to equal opportunity between women and men and, thus emphasises measures such as affirmative action to overcome the difference between men and women, but this is only achievable by a small fraction of women in society, forming part of the formal sector.¹⁸⁹ Liberal views, to say the least, make the 'man' the standard

¹⁸⁹ C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*. Pages 32-36, at 35.

against which women's equality to men is measured.¹⁹⁰ Second was Cultural feminism which recognises the difference between women and men, but views it more positively, arguing that men and women are expected to assume certain roles for society to be balanced.¹⁹¹ Third was radical feminism which argues that since it is the law that is patriarchal, it is the law itself, therefore which should be rethought.¹⁹² Last was Post-modern feminism which, in criticising all the three aforementioned theories, argues that instead of generalising that all women in the world are marginalised, focus should be placed on each individual culture in the world and investigate it for itself regarding what is viewed as gender inequality in that culture.¹⁹³

It is said that the divide between the 'public' and the 'private' is ultimately what the feminist movement is about.¹⁹⁴ There has been considerable debate on whether the state should intervene in family relations. The emphasis instead is on 'public' wrongs and therefore, the women's injuries in the private home are often not recognised or compensated by the public legal culture.¹⁹⁵ It is because of this organisation of the society that gender violence is prevalent in the home.¹⁹⁶ The feminist perspectives introduced above are useful in uncovering gender violence because they focus on relations between men and women in society.¹⁹⁷ They challenge the origins of oppressive gender relations in society and offer alternative ways of creating a just society. The oppressive gender relations are the context in which gender violence takes place.¹⁹⁸

4.2 A COMPARISON OF ZAMBIAN AND SCANDINAVIAN LAWS AND POLICIES TO COMBAT DOMESTIC VIOLENCE AGAINST WOMEN

In chapter two, it was observed that patriarchy is the environment within which domestic violence against women in Zambia is conceived, incubated and perpetrated.¹⁹⁹ What is worse is that Zambia

¹⁹⁰ C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*. Pages 32-36, at 35.

¹⁹¹ M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Page 1125.

¹⁹² C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*. Pages 32-36, at 35.

¹⁹³ C Anyangwe, *An Outline of the Study of Jurisprudence*. Page 351.

¹⁹⁴ M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Pages 1130-1131.

¹⁹⁵ M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Page 1131.

¹⁹⁶ M D A Freeman, *Lloyd's Introduction to Jurisprudence*. Page 1131.

¹⁹⁷ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 44.

¹⁹⁸ M B Chuulu, *et. al*, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 44.

¹⁹⁹ National Action Plan on Gender-Based Violence (NAP-GBV) 2008-2013 April 2008, Lusaka. Page 5.

being a country with a dual legal system, consisting of both codified or statutory law and uncodified customary practices, most of the indigenous Zambians would rather be regulated by customary practices in their social lives than statutory law, and as was established in chapter two, customary law is primarily based on male power, authority, and domination over women.²⁰⁰ Although no duality in legal systems governing the Scandinavia in the findings of chapter three, so that uncodified customs of the indigenous citizens could be cited as one of the major curators of patriarchy, it was discovered nonetheless that patriarchal thinking exists there too.²⁰¹ This came with the recognition that even though Scandinavia has attained great achievement in ensuring that women and men are equal formally and that it has also taken steps to specifically criminalise domestic violence in statutes; women in the home are still oppressed by men.²⁰²

It was also observed from the statutory and case law analysed under chapter two that thorough reforms of the law have yet to take place in order for the Zambian law to be more sensitive to the effects of gender differences on domestic violence. For instance, the criminalisation of marital rape under the penal code or indeed the enactment of the long-debated Sexual Offences and Gender Violence Bill would a great step towards combating domestic violence against women. However, as the case is in Zambia currently, there is no specific law on domestic violence and the provisions of the Zambian Penal Code do not criminalise domestic violence in clear terms.²⁰³ It was also observed that there is weak enforcement of laws against sexual and domestic violence because there are no specific laws and policy guidelines on domestic violence and because women are ignorant of the existence of laws criminalising sexual and domestic violence.²⁰⁴ The case is

²⁰⁰ For example under Bemba custom in Zambia, only a parent or guardian of a girl, and not the girl who is the victim, has the right to sue the first man to have sexual intercourse with her, since this right is derived from the family's status and for this reason can only be claimed by the family. J Mulenga (ZCEA) and M Kamanga (Wildaf Zambia), *Human Rights Situation in Zambia*. Page 36.

²⁰¹ L Alvarez, 'Sweden Faces Facts on Violence Against Women', 30 (March, 2005). http://www.nytimes.com/2005/03/29/world/Europe/29iht-letter-4909045.html?_r=1. (Accessed on 14th December, 2010).

²⁰² L Alvarez, 'Sweden Faces Facts on Violence Against Women', 30 (March, 2005). http://www.nytimes.com/2005/03/29/world/Europe/29iht-letter-4909045.html?_r=1. (Accessed on 14th December, 2010).

²⁰³ Penal Code Act, Cap. 87. Relevant Sections that purport to capture domestic violence under the Penal Code of Zambia are: ss. 132-134, s. 159, ss. 138, ss. 168 and 169; and ss. 135,136,142 and 143; ss. 222-236, ss. 247-248 and s. 257; and ss. 261-263; and ss. 247-250.

²⁰⁴ For instance in the case of *The People v Godden Bola*, Lusaka Subordinate Court Case of 2002, the magistrate stated that it was highly questionable for an old woman to be forced into having sex on several occasions without revealing to anyone. The judge further stated that the complainant's silence about what had transpired between her and her boss raised concern and showed that she consented to the alleged offence. The magistrate thus held that the complaint was baseless and the complainant had hallucinated showing that she was traumatised. This clearly a demonstration of how

different in the Scandinavia in that both Sweden and Norway have criminalised marital rape in their respective penal laws²⁰⁵ and have modified provisions of their penal laws to clearly cater for domestic violence such as physical violence, sexual violence and psychological violence, to mention but a few.²⁰⁶

While Sweden, through its Social Services Act, places an obligation and responsibility of social welfare committees and municipalities regarding the provision of help and support to domestic violence victims in Section 11 of Chapter 5 of the Act, the same cannot be said about Zambia. This can be seen in some findings of a study, 'Gender Violence and its Relation to Women',²⁰⁷ Muuka, fourteen year old girl was offered as a wife by her father to defray his debt to a seventy-six year old man whom he had lost a bet to, as Muuka's father had neither money nor any other property. When the case was reported to the police, they refrained from arresting the perpetrator despite the overwhelming evidence of the crime committed. This case illustrates the complacency of the police in Zambia owing to the fact that no law clearly places any obligation on them to provide help and support to victims of domestic violence.

The development to the Swedish and Norwegian laws discussed in chapter three cannot go uncelebrated. In Norway for instance, a victim of domestic violence who decides to drop charges against the offender will not stop the prosecution of the offender on the crime he has committed.²⁰⁸ However, in Zambia this position is not clear as victims drop charges against the offenders for reasons known or none at all.²⁰⁹

Through seminars and other training programs, Sweden and Norway engage the police, social welfare institutions and other related bodies in developing skills in how best to deal with victims of domestic violence. In addition, the governments of Sweden and Norway financially support women's shelters, crime victim support centres and free legal aid centres. Regarding Zambia, no

patriarchy influences the reasoning of some judges as they hear matters in court. At the local court level victims' families more often opt for compensation through the said courts rather than pursuing criminal proceedings through the penal system. See the case of *Chitumbi v Bwalya*.

²⁰⁵ The Swedish Penal Code and the Norwegian Civil Penal Code.

²⁰⁶ Under the Swedish Penal Code, reference can be made to Chapters 3, 4, 5, 6 and 7. While under the Norwegian Penal Code, reference can be made to sections 33 and 219 of that Act, as well as Section 222a of the Norwegian Criminal Procedure Act.

²⁰⁷ Women and Law in Southern Africa Research Trust, Zambia 2001.

²⁰⁸ M B Chuulu, et. al, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 82.

²⁰⁹ M B Chuulu, et. al, 'Gender Violence: The Invisible Struggle' Response to the Justice Delivery System in Zambia. Page 82.

similar exercises are currently are known to be taking place. As a matter of fact, the organization that used to deal with offering legal aid to women victims, the Women's Legal Aid Clinic has since ceased its operation.

4.3 FEMINIST THEORY BEHIND THE ZAMBIAN AND SCANDINAVIAN LAW

In Zambia as is the case in Sweden and Norway, there is demonstrated a certain level of liberal thinking in how the laws regarding domestic violence against women in these countries have been set. Under the *Zambian Penal Code*, a prima facie conclusion can be drawn in an argument that the provisions of the Act equally apply to both men and women without discrimination. However, cases such as *Esther Mwiimbe v The People*²¹⁰ demonstrate how the law does not consider that domestic violence against women could be in the form of psychological violence which may cumulatively provoke a woman over a long period of time owing to years of being disrespected or insulted. The law in this regard clearly sets the man as the standard against which women should be measured even when they suffer oppression from men in their homes.²¹¹ In Scandinavia, the degree to which the man is used as the standard against which crime is prosecuted is lesser in that their laws capture the vulnerability of women in cases of domestic violence²¹². Nonetheless, they too are somewhat formal owing to the fact the attitudes of the police and other related bodies are still in a process of shifting from patriarchal thinking and reasoning when dealing with cases of domestic violence against women. In a response to an Article contending that the attitude of Swedish police towards violence against women had changed for the better, a certain victim wrote back stating that the implementation of legislation to protect women are great on paper to address the problem but are mere window dressings to appease the politicians and fool the world that Sweden has addressed the seriousness of the domestic violence. She said that in her situation, provided recordings and photographs of her husband hurting her. This was the second time her husband hurt her. The investigators never obtained the report from the doctor that examined the victim and the photographs that the police received from her were overexposed so that one could no longer see anything and on that basis the case was dismissed. In this victim's view, there are

²¹⁰ (1986) ZR 15.

²¹¹ C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*. Pages 32-36, at 35.

²¹² C A MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourse on Life and Law*. Pages 32-36, at 35.

real huge gaps in the attitudes against the victims of domestic violence and the implementation of the legislation to protect women.²¹³

In light of cultural feminism, the findings on Sweden and Norway in chapter three do not reveal the embracing of cultural feminism by the law. The two countries have not tried to change their various institutions so as to accommodate patriarchal values of women as being patient, enduring and nurturing to appoint where women victims have to live through the domestic violence and accept it as part of their lives. In Norway and Sweden, the critique of cultural feminism that the authenticity of the 'values of women' is questionable by virtue of them having been conceived in patriarchy, holds true.²¹⁴ Therefore, Sweden and Norway have moved away from embracing the subordination of women in the home, including through acts of violence by men, to enacting laws that are not founded on patriarchy. In Zambia, however, the dual legal system creates uncertainties as to what law should generally apply to cases of domestic violence against women. That most people in Zambia are governed by customary law does not help matters either, seeing that most people would rather resolve family disputes in local courts that have already been established as patriarchal.

The postmodern theory in explaining the laws of the Scandinavia and Zambia is only relevant to the extent that it addresses issues of cultural differences in the Scandinavia and Zambia. In other words, postmodern theorists believe that attacking oppression of women requires contextual judgment that recognises and accommodates the particularity of women's experience.²¹⁵ To this effect, Zambia having a dual legal system may have to take a slightly different course in reforming its laws on domestic violence. It cannot be ignored that the Sweden and Norway have achieved such great heights in enacting legislation that is almost elaborate regarding domestic violence because of their culture and development levels.

In terms of radical feminism, Sweden and Norway have applied more of it than Zambia has. Radical feminism calls for a re-thought of the law in which the very roots of the law should be plucked out and a new foundation laid down, free of patriarchy.²¹⁶ However, this can only come

²¹³ L Nylen, 'Sweden's Response to Domestic Violence', FBI Law Enforcement Bulletin (November, 1999). <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=180663>. (Accessed on 22nd March, 2011).

²¹⁴ M D A Freeman, Lloyd's Introduction to Jurisprudence. Page 1125.

²¹⁵ M M Munalula, Women, Gender Discrimination and the Law: Cases and Materials. Page 37.

²¹⁶ M M Munalula, Women, Gender Discrimination and the Law: Cases and Materials. Pages 356-357.

with change of attitude by people from perceiving society in a patriarchal manner.²¹⁷ Thus, the change of law in such manner disqualifies the man as the standard against which women's equality under the law should be measured and in turn, such law will truly reflect substantive equality as opposed to formal equality or a mere cosmetic change to the law. In Zambia, radical feminism has barely been appreciated. For instance, to take the case of *Rosalyn Thandiwe Zulu v The People*,²¹⁸ the High Court found that there was no provocation because in its view, the previous assaults on the appellant by the deceased were too remote. Given this line of thinking, the court was of the view that the action by the appellant of picking up a pistol and shooting her husband amounted to murder. In that case the appellant had shot dead her abusive husband and was convicted of murder and sentenced to death by the High Court. However, on appeal to the Supreme Court, she was acquitted on the plea of self-defence. In other words, the Supreme Court also dismissed provocation as a defence merely because the appellant did not meet the requirements of the defence of provocation which are that she acted immediately after being provoked and used force that was proportional to his attack. However, the defence does take into consideration the fact that women are weaker and usually smaller than their male counterparts. To say the least, the defence of provocation is of a male standard.

4.4 CONCLUSION

This chapter compared the findings on Zambia as discussed under chapter two with those on Sweden and Norway as discussed under chapter three. The results are, therefore, that in the context of the four feminist theories relevant to this essay namely the liberal, the cultural, the postmodern and the radical theories, Sweden and Norway are way ahead of Zambia in combating domestic violence through law. While the two Scandinavian countries have a considerable number of provisions in their respective laws that criminalise domestic violence against women in clear words, Zambia still has unclear provisions that merely attempt to address or force to fit within their requirements, domestic violence. Worse still, Zambia does not have any specific legislation on domestic violence although for a while, there has been a proposed Sexual Offences and Gender Violence Bill still under debate before parliament. In terms of attitude of the police and other law enforcing bodies, Zambia is still operating at a patriarchal level, whereas Swedish and Norwegian governments even finance seminars in which patriarchal attitudes of individuals in law-enforcing

²¹⁷ M M Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*. Pages 356-357.

²¹⁸ (1981) ZR 341.

agencies are being changed.²¹⁹ This is not to say that Sweden and Norway have successfully achieved their goal of combating domestic violence radically. However, Zambia can still learn from Sweden and Norway as it endeavors to combat domestic violence against women.

²¹⁹ Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Norway's Seventh Periodic Report. http://www.regjeringen.no/upload/kilde/bld/rap/2006/0004/ddd/word/297365-7th_cedaw_report_15_september_2_- med_forside-copy.doc. (Accessed on 16th February, 2011).

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 CONCLUSION

From the foregoing, it can be concluded that it is indubitable that domestic violence against women is a problem in every society of the world as even the most commended country in having achieved gender equality in the public, Sweden, still has blots of inequality in the private or home.²²⁰ Women are still subordinated by men in their homes and suffer at the fists of their husbands, brothers and fathers. It is also unquestionable that, in light of feminist jurisprudence, the world is organised in a patriarchal manner that emphasises male supremacy and which patriarchy is demonstrated through the values, norms and laws of society. Thus, the law and the very rationale behind it are patriarchal.²²¹

Taking the situation in Zambia, there is no specific law that can be pointed to as enacted for the sole concern of domestic violence against women. While laws such as the Penal Code, the Criminal Procedure Code, the Matrimonial Causes and the Local Courts Act try to capture domestic violence in some of their provisions, the said provisions do not adequately cater for domestic violence against women as they are only of general application. This means that the provisions being patriarchal cannot escape the fact that they automatically create the man as the standard against which all that will be perceived as reasonable behaviour will be measured. Further, the attitude of some law-enforcing officers and judges towards women that are victims of domestic violence still reflect a great deal of patriarchy and this does not encourage women victims to report domestic violence. Sometimes these women cannot report domestic violence for fear that the perpetrator will go after them or fear of losing financial security. Generally, the state does not like to interfere with private issues of the home and so it is reluctant to intervene as was the case in Martha's case discussed under chapter two.

The situation in Zambia can be compared to that obtaining in two of the Scandinavian countries, Sweden and Norway, which both have clear provisions in their laws that criminalise domestic

²²⁰ L Alvarez, 'Sweden Faces Facts on Violence Against Women', 30 (March, 2005).
http://www.nytimes.com/2005/03/29/world/Europe/29iht-letter-4909045.html?_r=1. (Accessed on 14th December, 2010).

²²¹ M D A Freeman, Lloyd's Introduction to Jurisprudence. Pages 1131-1132.

violence against women in a somewhat elaborate fashion. Currently in Zambia, marital rape is not a crime although Sweden and Norway criminalised marital rape in their laws. Further, Swedish and Norwegian laws have provisions that place obligations on law enforcement bodies in that they should deal with women victims of domestic violence in a manner that does not make them shun the law. Their governments also fund organisations such as women's shelters and free legal service houses. The laws also provide for restraining orders that can be ordered against a perpetrator of domestic violence that threatens the safety and life of the victim. However, this is not true for Zambia.

This essay has endeavored to critically analyse the influence of feminist jurisprudence on Zambian law relating to domestic violence. The essay began, in chapter one, by giving a general background to feminism and domestic violence against women as a problem women face worldwide. Chapter two analysed various Zambian case and statutory law that relates to domestic violence against women and the results of the analysis showed that Zambian laws do not adequately address the issue of domestic violence against women. As a point creating a standard, chapter three analysed Swedish and Norwegian law relating to domestic violence against women and the results of the analysis revealed that the two countries have enacted provisions in certain laws that specifically address domestic violence against women. However, it was also revealed that domestic violence in Sweden and Norway still remains a problem. Chapter four compared the findings on Zambia with those on Sweden and Norway and established that Zambia can learn a lesson from the situation in the Scandinavia in addition to its own plan of combating domestic violence against women as suggested under chapter five. Chapter five gave a general conclusion of the essay and recommendations Zambia could consider in its fight against domestic violence against women.

5.1 RECOMMENDATIONS

In order for Zambia to achieve its goal of combating domestic violence against women, it is necessary that a few changes be made and implemented. This effort should be both by the state and the Zambian society at large. The discussion in this section covers the changes that should be made before domestic violence against women can be seen to be fought. Seeing that the whole of feminism is an attack on the law as being patriarchal, and that the same is true for Zambia, it is only logical that the most prudent approach to take in changing the law is the radical way.

However, this radical approach cannot operate in a vacuum, but will depend on how other theories of feminism are applied can be applied within Zambia. The recommendations, thus, are as follows:

- (a) First, the liberal approach has to be fully appreciated and utilised by Zambia in the long process of changing the law on domestic violence against women. This approach entails the enactment or amendment of laws by the legislature, which will accord women an opportunity to stand side by side with men in making decisions. While the liberal approach to changing the law clearly sets the man as the standard of equality, and hence patriarchal, it still has an important role to play in changing the law. This stage is, important because once elected or put in positions of decision-making, women in the formal sector who are equally affected by men's oppression in their own homes will be able to push for laws so that they too are liberated from men's oppression. Now that women will have a say in decision making, they will be able to identify with their problems of oppression locally so that feminist jurisprudence is not all just a foreign concept. This should be buttressed by efforts by the government to implement policies that recognise the rights of women as human beings, even in the home.

- (b) Secondly, once women are in the formal sector and are able to classify what they feel comprises oppression by men in their homes in light the Zambian Society, their voice will be heard and will lead to possible change in the society's attitude towards domestic violence against women. At this point, the society will thus be employing the post-modern theory that suggests that every society having its own peculiar situation of oppression should be considered in its own regard and not adopt, to the letter, every step employed by another society suffering women's oppression. Since cultures are different, the same process followed in one society may not work for another. This also means that liberal changes to the law should usher Zambian women themselves into these positions of decision making so they advocate a change that will benefit them personally as well as other women within the Zambian context. However, there has to be support from both the state and the society at large and the women's role will mostly be influential. In other words, adopting the post-modern theory will enable Zambia to enact laws that respond to the problem of domestic violence, with the Zambian culture in mind; as opposed to enacting laws that are out of touch with the Zambian reality.

- (c) Thirdly, after the adoption of the liberal and postmodern theories, the Zambian government, the women and the rest of society should be able to make way for radical change in the law in that, these parties will be able to advocate for changes in attitudes of people and they will use the law itself in achieving this. Therefore, measures such as enacting laws that will mandatorily require the inclusion in the school curriculums from as early in school as basic education, compulsory subjects that will instill values against domestic violence within the children. This has the potential to cause the same level of fear of sanctions for crimes such as murder or dangerous driving. These compulsory subjects should run throughout one's education life including tertiary education. Further, mandatory training should be undertaken by all persons that wish to serve in law enforcement agencies, the judiciary and other related bodies, that will ensure a full appreciation of the seriousness of domestic violence and that such violence may at times end in death, which is not any different from murder. At this point, what would have been employed is radical feminism and it is important because it makes the rethinking of the law and change of patriarchal attitude possible; and in a binding way as the law itself is used an instrument of social change.
- (d) Fourthly, for people that may not have the opportunity to go to formal schools, as would be the case under (c) above, measures should be taken where the entire community is sensitised in the simplest possible language of the price to pay for domestic violence. This too, falls within the ambit of radical feminism. In addition, domestic violence against women should be discouraged from the simple understanding that everyone has rights which are inalienable, and that whether they be married or not, those rights are never diluted by their marital status so that they can be subjected to discriminatory and inhumane treatment.
- (e) Fifthly, when people have finally appreciated the gravity of domestic violence against women through radical changes in (c) and (d) above, cultural feminism can, then on come into play by appreciating the role of men and women within the society as the society and the law then would have distilled patriarchy.

- (f) Since law can be used as an instrument of change to itself, perhaps the first step Zambia can take if it anticipates a society that will conquer domestic violence against women is by enacting the Sexual Offences and Gender Violence Bill, which elaborately provides for domestic violence and does not compromise the seriousness of such violence by equating it to other public crimes as provided for under other laws such as the penal code.

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