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The Making(s) of Law

Postmodern feminist perspectives on local court Justices
under Zambian customary law

Supervisor: Karsten Åström
Examiner: Per Wickenberg

Author: Ida Agering

Abstract

This thesis is the result of a Minor Field Study (MFS) on the judges, the so-called Justices, working in local courts in Zambia, where unwritten customary law is applied. The analysis is based on in-depth interviews, in order to explore the role of the Justices within the structure of customary law and their role in the discrimination against women that the law allegedly generates. Theoretically situated within postmodern feminist legal theory, the analysis leans on deconstruction of the legal structure and the Justices' discourse, after having established the constitutive power of law in terms of gender identities. The findings of the empirical study show that the Justices take part in the (re)creation of customary law, by having a certain room for interpretation of the customary practices, indicated among other things by their variance on many issues. *Who* the Justice is may have an effect for the outcome of a case. Since customary law constitutes one authoritarian force by creating incentives and by valuing actions and attitudes, the Justices have a potential influence on the general status of women in society (concerning issues such as marriages, attitudes towards excelling women and proprietary rights).

Keywords: *Zambia, customary law, judge, justice, deconstruction, discourse, gender.*

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Foreword

This thesis is a result of a field study conducted in Zambia in September and October 2008, within the Minor Field Study (MFS) program, funded by the Swedish International Development Agency (Sida). I wish to thank the organization Group Focused Consultations (GFC) in Mansa that accepted me as their guest and helped me to access both areas and persons crucial to the study. A special thanks to Mr. Field Phiri and Ms. Margret Chibela. I would also like to thank Johanna Bergman-Lodin and Franz-Michael Rundquist at the Department of Social and Economic Geography at Lund University for the support and for believing in my idea. I am also grateful to my supervisor, Karsten Åström, for interesting discussions and for all the great advice.

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	International Covenant on Economic, Social and Cultural Rights
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit (German Technical Cooperation)
ICCPR	International Covenant on Civil and Political Rights
LLB	Bachelor of Laws
LRC	Legal Resource Center
LRF	Legal Resource Foundation
MFS	Minor Field Study
NGO	Non-governmental organization
OMCT	World Organisation Against Torture
UDHR	Universal Declaration of Human Rights
UN	United Nations
YWCA	Young Women's Christian Association
ZLDC	Zambian Law Development Commission

1 Introduction

In its latest country report on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1999, the Zambian party (1999:59) wrote:

Customary law and practice, which dominate personal law, are patriarchal in leaning and therefore largely biased against the woman. There are gender biases emanating from the fact that customary laws are unwritten; administered by a male-dominated local court system of untrained justices who come from a patriarchal background. (...) [T]o a considerable extent, in practice, women's equality with men before the law is eroded in customary law and practice, particularly in the area of matrimonial and property laws.

The master thesis before you originates from this quote. The gender inequality as such came as no surprise; women are subordinated in various contexts in every country of the world, in one aspect or the other, for different reasons. What this section of the report did was to point to the connections between gender biases and three factors: the *customary law*, the *local courts* and the *judges* in the local courts, the so-called Justices. It gave me the idea to study a close-up of one small segment of the Zambian society and look into this connection in detail. The report also seemed to give proof of introspection and an openness to recognize the problems which gave me a hint of assurance that arranging such a study would be feasible.

I conducted my field work during eight weeks in September and October 2008. The roles of the Justices were scrutinized through conducting in-depth, semi-structured interviews, which were complemented by reference interviews with a number of informants. The research findings are primarily based on the in-depth interviews with these thirteen individuals. Geographically, the study was conducted at six different local courts, one in the South of Zambia and five in the North. By deconstructing the components of the context of Zambia concerning customary law and practices, it was possible to further investigate the power relations and power groupings in this

structure. The Justices were chosen as respondents because they represent and personify the social structures and processes in the Zambian legal system, but also because, by interviewing them, a voice was given to their individual experiences, which adds a subjective or human dimension to the large complex of problems of women's discrimination. Zambia has ratified several of the major international conventions stemming from the United Nations (UN), such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights (the African Charter). However, in order for these instruments to be applicable in Zambia, and relied upon in court, the Parliament needs to enact legislation, so-called domestication, which has not been effected. This goes against the standards for example in CEDAW Article 24, whereby the Zambian government are to adopt all necessary measures aimed at achieving the full realization of the Convention.

Revisiting the quote above, several reasons for the gender biases were identified. These are *one*, customary law deals with personal law, matrimonial law and property law; *two*, the customary law is unwritten; *three*, the local court Justices are to a vast majority male; *four*, the Justices are untrained; and *five*, the Justices come from a patriarchal background. My analysis (r)evolves around these explanatory factors and on how relevant and important as explanations they seem to be.

1.1 In the framework of development

An implicit question in the discourse on international development is whether the law can be used as an instrument for change. One's answer to that question determines the choice of politics concerning interference in a legal or institutional structure, with the purpose of bringing about development or, to use a less polemic term, change. If one believes that law *can* be used as a tool, which emerged as the predominant view in the 1960s, it appears logical that, in order to modernize society, one has simply to 'modernize' the legal system, a task the industrialized countries in the West saw as

their mission, at that time. 'Development' has many aims and even more strategies. Its practitioners are motivated by both theoretical and ideological convictions. Development tends to be *in relation to* something else; a situation should rather be like the situation observed in another part of the world. This is the essence of the nowadays prevalent North-South dichotomy, or the Western hegemony. The West is industrialized, technologically complex and 'developed' and other countries should follow. In a broad sense, however, one can suggest that development also enfolds a utopian idea of better livelihoods for peoples everywhere. There is a general agreement within the international community that certain issues and policies such as peace and security, gender equity, health, education, rural development and so on are crucial for poverty reduction and increased capabilities for the individual. These international standards, manifested in conventions and other legal instruments, are spread to countries all over the globe, for implementation and enforcement. However, many of these policies and standards do not reach the poor farmer, the former soldier or the factory worker, in the sense of having any effect on his or her livelihood.

1.2 What to research and why?

In literature, it has repeatedly been stressed that it is important to seek the reality through empirical studies. Being influenced by feminist theories that, generally speaking emphasize the need for empirical legal theory, I am advised to look at history and social conditions systematically to see how the nature of law has been shaped in a certain time and place (Cotterrell, 2003:217). Frug points at the importance of sociolegal research on the use or non-use of law in patterning social relationships and shaping social identities (Frug, 1992:128-131). It should be clarified at this point that the general and basic definition of feminism(s) adopted here is a belief that women are subordinated or oppressed (in some way) in society and that we must work towards ending this subordination (Davies, 2002:203).

One of the claimed benefits of empirical research on subordination of women, is that new profiles of women's lives can be developed that give a more thorough understanding of the role that law plays in their lives (Hellum & Stewart, 1998:97).

Hellum and Stewart suggest to focus on both the structure and the individual. To focus on the individual, the actor, is useful in order to obtain a dynamic and processual understanding of gender and legal change in the context of societies where state-law interplays with other normative orders. Therein lies an assumption that social and legal change takes place through interaction between human beings as individuals or groups and not through some seemingly abstract medium such as ‘The Law’. This perspective is not to imply that neither men nor women are seen as completely free to change the rules affecting their social positions, which in its turn inform their gender relationship. The social or family structure, the legal, the religious, as well as the economic structures are limiting forces (Hellum & Stewart, 1998:100-101). All types of authorities have their specific representation of normative ideas which has implications for the framing, representation, and implementation (or non-implementation) of law (Moore, 2005:353).

The *raison d'être* of this thesis is primarily an informative one; I wanted for my own part to gain understanding of a legal setting that was unfamiliar to me, and after having completed the study, I now want to inform others about what I learnt and found fascinating. It has a status of a political commentary, starting out from an idea of democracy and what to make of it (Moore, 2005:358), and the underlying message of this work is based on my conviction is that the status of women has to improve (in Zambia as elsewhere in the world). I acknowledge that the enterprise of improving the status and achieving gender equality (whatever that is defined as) is both complex and problematic. This study enters the scene where I wish to prove the complexity by showing ‘how things are’, in a study on a small section of real life, how I came to understand it, there and then. If this is the potential *use* of this study as such, I wish to elaborate further on its (internal and academic) *purpose*.

1.3 Purpose

There is a lack of updated research on customary law in Southern Africa, on the influences *of* the local judges, the so-called Justices, and on the influences *on* them. The main purpose of the field study was to collect empirical data within its correct

context. To gather, compile and analyze data of the time- and space-specific attitudes and values of Justices would enrich the current debate on rural development and, as mentioned earlier, broaden our understanding of problems actually faced. The situation of women under customary law constitutes the entry point to this study and I have focused on the issue of women's rights and women's empowerment, since gender inequality is such a fundamental impediment in many areas. This also represents a dimension where the local courts have great influence over the individual's life. My purpose is not to criticize and impose suggestions of changes of features that 'are wrong' – it is rather to point at problematic areas for the achievement of gender equality, after having described the critical components of the legal regime, with all its agents, and the status of women therein.

The 'role of the Justices' is in other terms the joint picture of how important part they seem to be playing when customary law is transformed from abstract notion to practice, based on the data that I collected and what I deemed relevant. Through interviews with the Justices, I explore their attitudes and their level of awareness of issues of gender equality; how they relate to themselves, to the legal system and to the customary law. My aim was to delineate *who* they are – their 'personas' – the position that they hold in the system, and I was mainly concerned with how independently or dependently they act as Justices, i.e. their level of autonomy. Expressed differently, my main research question is: *What is the role of the Local Court Justices within the structure of customary law and, consequently, what is their role in the discrimination against women that the law allegedly generates?* On the road to a conclusion on this issue are a few intermediate questions. First, it is relevant to consider who else apart from the Local Court Justices might play an important part in making or maintaining the customary law and customary practices, on an institutional level; in other words: Who are the custodians of customary law? Second, in order to portray the Justices: How do they express awareness of gender-related issues such as women's rights, gender equality and the critique of the customary law? Third: What are their attitudes towards change of the customary law?

1.4 Delimitations

However much I wanted to anchor my study with the women in rural Zambia, with those who are most affected by gender inequalities and burdensome customary practices in the day-to-day life, I had to realize that this was beyond its possible scope. Various spokespersons that I selected for interviews, such as representatives from different civil society organizations, a social welfare officer and a public prosecutor, served as my informants, assuring me that my priorities corresponded with the concerns of Zambian women in their lived realities. As a result, the conclusions cannot include anything about the changes to be made in order to meet these women's subjective needs and desires. All the dimensions of law – which necessitates to stipulate a definition and philosophical meaning of law's components – of cause and consequence, are too many to elaborate. Instead, I will end up in a discussion concerning the problematique involved in wanting to change the social norms and the sociolegal structures and what these changes imply.

Several additional interesting topics were identified, that I leave for future followers to take on. One is the relation between law and a subjective sense of justice, as experienced by individual women or men in local court proceedings. Yet another theme is to analyze, comparatively and diachronically, the local court case records and to explore the language used therein.

After having described, in the following chapter, the specific context that customary law operates within, Chapter 3 explores the theoretical influences on the study, whereas Chapter 4 reviews its methodological aspects. The findings of the empirical study are accounted for in Chapter 5, interwoven with comments thereon, which are, finally, concluded by some additional thoughts, in Chapter 6.

2 The Zambian context

This chapter is divided into three parts, contextualizing the local court Justices and the customary law in Zambia, in order to give a background to the subsequent sections. The first focus is on the *law* which, in a broad definition, creates the final normative sense of what you ‘ought to’ or ‘ought not to’. The second focus is on the *courts* and the actors involved on different levels in the judicial system, including the traditional leaders – the Chiefs – that still are very powerful, especially in the rural areas. The third focus is on the *cases* at the local courts, which entails a description of the major concerns with the treatment of women under customary law, an explanation of the term repugnancy, and an account of the conflict between customary law and the Constitution. In all, the aim is to outline the historical, social, cultural, economical and, not the least, *legal* location of where my study was conducted.

2.1 Legal pluralism, customary law and the colonial past

Zambia became independent from British rule in 1964 with Kenneth Kaunda as its first president. The history of colonialism is impossible to escape, its traces are apparent everywhere, not the least, in the legal reality of Zambians today. Menski reminds us that ‘[t]he colonial impact went well beyond law reforms and the construction of new official laws. It also affected the psyche of many Africans, who were made to feel inferior by white-dominated discourses about globalization, eurocentric policies of legal regulation and social reform, as well as the latent general contempt of black people, their cultures and their achievements’ (Menski, 2006:467). The past is present, one could say, in the very foundation upon which society now stands, as an effect of the era of brutal Western intrusion percolating through the air of times.

2.1.1 The origins of the legal framework

The pre-colonial era tells the story of the origins of the judicial system in the area that comprises today's Zambia. The positions of chiefs, kings and village headmen were established to administer justice and order – based on a law of nature – after the migration of the Bantu people to Central Africa, around one thousand years ago. The communities grew larger and more complex, which called for structured political and social authority. Many of these kingdoms, existing separately and independently during this period, compose the predecessors of the country's indigenous groups today, the 72 tribes¹. The *customary law* constitute the traditions and the customs of these tribes, transmitted orally from the ancestors. The Zambian Law Development Commission (ZLDC), which is a body under the Zambian government, has looked into the customary law on a national level in a systematic way, as the first initiative of this kind. This has resulted in two reports, the “Report on the Review of the Local Courts System Project” and the “Report to the Minister of Justice on the Restatement of Customary Law Project”. According to these, customary law is ‘a set of rules and values by which the indigenous people of Zambia conduct their social activities or day-to-day lives’ (ZLDC, 2002:11). There are distinctions in rules and values between these groups of ‘indigenous people’; nonetheless, as showed by research of the ZLDC, there is a trend of copying from each other, which is giving rise to a slow but clear harmonization of common principles of customary law in the country. Hence, there are greater differences between the systems depending on lineage (matrilineal, patrilineal or bilateral) than depending on the tribe (ZLDC, 2002:45).

In addition to customary law, there is the statutory law, also called written, received or official law, which is a product of the colonial era. This period, which in Zambia took the shape of British *indirect rule*, was initiated in 1889, when Rhodes, the millionaire British businessman and owner of the British South Africa Company, sent out expeditions to the Chiefs in the areas of today's Zambia, Zimbabwe and Malawi, to make treaties. Colonial relations were largely economical (which was determinant factor between direct and indirect rule), thus, when Europeans engaged in trade they

¹ There is some confusion about the exact number of tribes; depending on who you ask and which books you read, there are 72 or 73. I finally settled for the number given by the Research Officer of the House of Chiefs in Lusaka, who is conducting research on the history of the Chiefs [2008-10-17].

had to square with the local ruler, the Chiefs, who were paid salaries from taxes collected from their chiefdoms. Indirect rule through a local ruler (as the extended arm of the colonial administration) was the simplest and cheapest way for the Western powers to obtain economic control (Furnivall, 1987:118).

Zambia's received law includes the statutes in force in England up until August 17, 1911, which is the date of the commencement of the 'Northern Rhodesia Order-in-Council'. Statutes in force in England after August 17, 1911 apply to Zambia if specifically made applicable by an enactment of the Zambian Parliament (ZLDC, 2002:46). Statutes enacted by the Zambian Parliament after independence are usually placed in the category of received law, probably for reasons of its British oriented pattern (ZLDC, 2002:46-47). In colonial times, the received law, was intended to apply in civil and criminal matters to Europeans only, and public law for both Europeans and Africans in. The indigenous customary law was left to apply for Africans as this primarily regulates personal, and mostly family-related, matters, such as marriages, divorces, and inheritance and property issues (ZLDC, 2002:46). This is the origin of the dual system.

2.1.2 Legal pluralism

The co-existence of official national laws and the unofficial laws, norms, traditions and practices is embraced in the term *legal pluralism*² that I allow myself to take a moment to say a few words on, since this is a feature commonly associated with a postcolonial legal system and often ignored in the legal traditions of former colonizer countries. Legal pluralism is 'a fact of life everywhere' (Menski, 2006:82, c.f. Twining, 2000:246; 166) and law has been international in its scope at least ever since Roman times. The development of law has been influenced by, and intimately coupled with, the expansion of trade (Luckman, 1987:87). However, in Western societies, the positivist approach to law has been dominating for such a long time that

² For debates and theories on legal pluralism, see authors such as Menski (2006), Tie (1999), Moore (2004), Cotterrell (2002) and Twining (2000). Postmodern theories of legal pluralism, see Sally Falk Moore (1978), Anthony Allott (1980), John Griffiths (1986) and Masaji Chiba (1986; 1989) (Menski, 2006:107-121).

most people, subconsciously, assume that ‘law’ is generated centrally by the state and the state alone, written down in authoritative books, and flawlessly applied by the courts. In this imperfect image, Menski claims, we assume that state-made law is privileged and ideally just ‘good law’ (Menski, 2006:33). Luckham notes that the general difference between the European legal systems and those in so-called Third World countries, is that the homogenization of legal ideology in Europe arose out of an economic and political interaction between states that were being formed at more or less the same time. In a country like Zambia, legal ideologies were, on the contrary, directly imposed by internationally dominant states (Luckham, 1981:87). As emphasized by Sally Falk Moore – one of the most influential postmodern legal anthropologists – social reality never offers a single set of rules, clearly defined, unattached, and without contradictions or ambiguities, but rather a setup of sometimes conflicting or competing ‘rule-orders’ and other choice-making, discretionary or manipulative mechanisms influencing people’s behavior (Moore, 2005:353).

2.1.3 The Zambian customary law

A strength in customary law is its dynamism and adaptability to socioeconomic conditions and aspirations of the people (ZLDC, 2002:ii). However, since the law is unwritten it risks creating uncertainty and inconsistency about its content, and about what the norm has become, given the somewhat contradictory fact that it takes long for change to happen (ZLDC, 2002:iii; 12).

Spiritualism (including rituals and beliefs) is the original philosophical basis of the Zambian traditional sociopolitical organizations. So was secrecy, with the belief that information should be released to people as and when they were ready for it (ZLDC, 2002:30). It has been acknowledged though, that the lack of openness regarding those fundamental spiritual secrets has impeded the promotion of the African form of civilization (ZLDC, 2002:32). In the current changed setup, the spiritual dimension now falls under the realm of fundamental rights, establishing that each person has the right to choose their spiritual path. In this aspect, the ZLDC finds that there is a conflict between the African and the Western philosophy of law. It is not completely

clear for instance, to what extent the concept of human rights could be attributed to the West alone; it is said that most world legal systems have some sort form of concept of fundamental human rights (ZLDC, 2002:33-34).

2.2 The courts

During colonial times, the administration believed that the co-existence of the two legal systems called for a dual judicial court system. The British put in place so-called native courts, presided by Chiefs, to administer local customs and traditions of the indigenous people, thereby controlling the Africans without involving themselves in the settling of disputes among the indigenous people through the customary system that they did not understand. It was also a way of dealing with ethnic diversity within the territory (ZLDC, 2006:17). At independence, great changes were made to the legal structure. The native courts were brought under the Judiciary and reconstructed as 'local courts' under the Local Court Act of 1966. The first objective for abolishing the native courts was to remove the derogative word 'native'; a further objective was to include non-indigenous people under its jurisdiction (ZLDC, 2006:20).

The local courts, close to 470 in total in Zambia today³, are the lowest courts and hear civil cases under customary law. These courts are by far the most common courts in Zambia and deal with cases mainly involving a dispute between two persons and the majority of cases concern marriages, divorces, maintenance, succession, inheritance and property. Being so common, they cater for 80 percent of dispute resolution, they are much closer to people than other courts. They have relaxed rules of procedure and minimal court fees and no expensive lawyers, thereby ensuring maximal access in particular for the rural poor (which, on the other hand, means that no lawyers are there to help the individuals). There are rules limiting the powers of the local courts, e.g. imprisonment exceeding 12 months is beyond their jurisdiction. The court system is further composed of the Magistrate Courts, hearing cases under statutory law and

³ At times it is difficult to obtain accurate statistical information. A number that I came across several times from 2003, was 452 (ZLDC, 2006:38). The stated number of 470 was given by the Director of Local Courts, Mr. Jacob Chibwe in an interview [2008-10-21].

appeals from the local court; the High Court, listening to appeals from, and supervising, the Magistrate Courts; and, finally, the Supreme Court, listening to appeals from the High Court.

2.2.1 Two courts for customary law

There is a problem of competition for jurisdiction between the traditional courts and the local courts, noted by ZLDC (2006:52):

Although an institution of a hybrid nature, priding itself as being part of the received judicial structure, the local courts have remained substantially dispensing customary law, and traditional courts have refused to let go of their inherent position as experts in indigenous customary law matters.

The traditional courts were originally established as a part of the traditional government system, as mentioned earlier. As such, the people were familiar with the courts and they were generally accepted (ZLDC, 2006:12). A tacit intention when the local courts were established in 1966 was to outlaw and replace the traditional courts, which has not happened (ZLDC, 2006:9). In the villages and the rural areas, one will find that disputes may also be heard by headmen and Chiefs who sit with assessors (at the traditional courts), and not by the local courts. Among the Laws of Zambia, there is even a Chiefs Act, recognizing the traditional rulers, thereby acknowledging the traditional governance of which the traditional courts are an integral part (ZLDC, 2006:52).

A great advantage that the local courts have is their constitutional recognition as part of the Judiciary, thus having the backing of the state machinery in enforcing their judgments. The greatest advantage of the traditional courts, on the other hand, is their accessibility by virtue of being near the people. Interviews with women have shown that they prefer the traditional courts. According to the findings of ZLDC, traditional courts are sometimes even perceived as more orderly, as they are guided by tradition, whereas the local courts do not apply the procedure laid out in a Local Court Handbook that they are provided with, which is breeding a chaotic situation. When

instituting the local courts, they were also supposed to apply statutory law, besides the customary law, which has not happened in a meaningful manner because of lack of professional training of the local court staff. (ZLDC, 2006:10).

2.2.2 The local court Justices and the Chiefs

It is not a requirement for local court Justices to be professionally trained in the law, rather, they are mostly non-professionals, and most often male – a few years ago the share of female Justices was just below five percent (ZLDC, 2006:81). Today the qualification standards state that they should be retired civil servants with good knowledge of the customary law of the area and minimum 35 years old. However, some are almost illiterate and most local court Justices are 50-75 years old (ZLDC, 2006:14). One of my interviewees told me about colleagues who received help from the court clerk to write, ‘some of them were not even able to write’ (7:537).

There is also reason to mention the *Chiefs*, being important authorities in the Zambian society, especially in customary law. There are about 286 chiefdoms, which are geographical areas where one Chief has the position of traditional or tribal leader. ‘More than ten’ are female Chieftenesses⁴. Twenty-seven representative Chiefs are elected to the House of Chiefs, an advisory body to the Parliament, created under provisions of the Constitution. Before the government enacts a law which affects the traditions and customs of Zambia, the House of Chiefs should be consulted. According to the Research Officer at the House of Chiefs, this process is vital for any change in custom and tradition is made into binding law. The House of Chiefs is also informed of the laws that have been passed, particularly those that may require the participation of the Chiefs for maximum impact⁵.

The image of a Chief, certainly the one dispersed in the Western world, is one of an old man within a traditionalist and an archaic, reactionary institution. Reality, as complex as it is, shows another picture. It is not rare that Chiefs are well-educated and

⁴ The Research Officer of the House of Chiefs [2008-10-17].

⁵ [2008-10-17].

open to new ideas. As claimed by the ZLDC, the gender insensitivity of the local courts and the traditional courts for example, is, for better or for worse, just about equal (ZLDC, 2006:13).

2.3 The cases

I will now look into the status of women under customary law and what type of cases that the local courts, in general, deal with which might vary throughout the country, due to local specificities⁶. Matrimonial cases has from ZLDC:s research generally shown proof of discrimination on basis of gender. Women have no real choice, their wishes are subjected to those of their parents, guardians or those of their husbands – and they are treated as minor by the local courts, ‘perpetuating the persistence of customary law’ (ZLDC, 2006:82). According to the findings of ZLDC, there is an equal number of female litigants, both in local courts and in traditional courts. However, the cases commenced by women were predominantly on matrimonial causes (divorce, maintenance, marriage interference, non-payment of lobola and insults). This may be an indicative of the fact that most women might not be aware of the full scope of the various rights they have, or that they mainly operate in customary law (ZLDC, 2006:80).

2.3.1 The status of women under customary law

The position of the woman is fundamentally weakened by her limits to owning property and land, making her economically dependent on someone else. An unmarried woman (dependant on her father) may acquire land, which she would lose at the time of her marriage. Another major issue is the commodification of women through the payment for making the marriage effective, the lobola, which can be measured in cattle (heads of cattle) or in money. At divorce, the lobola has to be paid

⁶ It is far from clear how common many of these practices are; some might have been part of the customs and lives on as a myth without anyone actually performing them, others might still be there while authorities believe they discouraged them.

back, which makes many women stay in their marriages because her family is unable to pay. The age limit for getting married differs in statutory and customary law. If one chooses to marry under statutory law (which few do), one needs to be at least 21 years old, in special circumstances 16. In customary law, the age is 'maturity' which can be a significantly lower age. As concerns the special circumstances, the father has the decisive say and the mother only in his absence. The woman also needs her parents' permission to get married. She will have difficulties to be granted a divorce on grounds of adultery committed by the husband (because of polygamy, which is there despite the underlying disapproval even among those practicing it), while the man can be successful in applying for a divorce on adultery. Marital rape is further something that both customary law and statutory law fail to condemn (OMCT, 10-11).

There are customary practices that have been challenged and actually modified, or are in the process of modification. One of those is property grabbing. When the husband dies, it happens that the family of the husband takes the belongings, grabs the property, of the deceased and his family. This is not allowed and the situation is improving due to the Intestate Succession Act that is nowadays in place; the reason that it sometimes still occurs is explained as lack of education and information. The background of this custom is the old view that the woman was not allowed to own anything. A second practice that has changed is sexual cleansing. It was believed that, when one spouse dies, the one remaining of the married couple has to have sex with someone from the family of the deceased, in order for his or her soul to be cleansed of the spirit of the deceased and to become free to move on. This is a tradition that the state intervened to change, by urging the courts not to enforce when an order of the court for performance of the cleansing was being sought. Nowadays, the sexual ritual has been replaced by one involving reciting of verses, putting on beads and of white color in the face. The argument used for the changing this was the spreading of HIV/AIDS. Considering the risk that the deceased was HIV-positive, it is probable that the remaining spouse also is. Having sex with another person exposes this one to a great risk. Zambia is one of the countries most marked by the pandemic of HIV/AIDS, with a large number of unrecorded cases since many people do not get tested regularly. It seems that it is acceptable to exchange one cultural tradition for another, on medical grounds, without the spiritual value being lost in the process.

2.3.2 Repugnant practices under customary law

The Local Courts Act, 12:1⁷, establishes the limits of customary law as applied by the local courts. Its Paragraph (a), also known as ‘the repugnancy clause’, reads:

A local court shall administer the African customary law, applicable to any matter before it, in so far as which law is not repugnant to natural justice, morality or incompatible with any written law.

The problematic part of this provision is to decide the definition of ‘natural justice’ and ‘morality’. ZLDC see it as a problem that it leaves the meaning to the subjective determination of each judge or magistrate (ZLDC, 2002:246). I will come back to this issue in Chapter 5; however, at this point, I wish to point at a few practices under customary law that have been deemed repugnant, most often they go against provisions in the Penal Code. One of my interviewees gave me a few other examples. Besides working as a local court Justice, she was also a facilitator in training clerks and messengers working in local courts. At these workshops, the participants shared their views on some customary practices, from different parts of the country. One person had described that a dead woman’s body was not to be buried if lobola had not been paid when she was alive, until the husband paid. Another person told the story of how a man, who wants to marry, asks four strong men to assist him to abduct a girl. The girl is caught without her wish and is then taken to the house of the man and has to have sex with him. Yet another account of repugnant practices is, in a certain area, when burying the Chief, two persons are buried alive together with him (Kasonde, 2005; 2006). The repugnancy clause is not only vague; it for instance stands in contrast to one provision in the Constitution, Article 18 (8), that protects the fundamental rights and freedoms of the individual. In the following, we shall see that there is more friction in the relations of customary law and the Constitution.

⁷ Chapter 29 in the Laws of Zambia.

2.3.3 The conflict between the Constitution and customary law

The Constitution was amended in 1996, as to explicitly include women in the Preamble when recognizing the equal worth of men *and women* (who were not included prior to 1996) in their right to ‘participate, and freely determine and build a political, economic and social system of their own free choice’. It was also added that ‘words and expressions importing the masculine gender includes females’⁸. Voices have been raised to make changes to the Constitution, among other things concerning the ambiguous stance on its relationship to customary law. A committee is put in place but there is no fixed timeframe for this project (especially since the President Mwanawasa, who took on an active role herein, passed away in 2008).

Of interest in this context is the Constitution’s Article 23 (4), stating that its anti-discrimination provision ‘shall not apply to any law so far as that law makes provisions...(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law’. In addition, Article 23 (4) (d) explicitly excludes all matters under customary law from the protection against discrimination. In other words, the Constitution allows customary law to ‘deal with’ any of its matters without having to consider the provisions in the Constitution that aim to protect the fundamental rights and freedoms of the individual⁹. This regardless of the fact that the Constitution is the supreme law of Zambia and that Article 1 (3) (of Part I) provides that any laws inconsistent with the Constitution are null and void. Where does this contradiction in terms derive from? It is the exception of the application of British personal law to Africans that continued even after independence, which has culminated in the current Articles 23(4) (c) and (d) of the Constitution (ZLDC, 2002:46-47). By these explicit exceptions, allowing for widespread discrimination against women under personal and customary law, undermines the aforementioned supremacy of the Constitution and renders it difficult to solve conflicts between the constitutional rights and customary law.

⁸ Article 139 (13) of Part XIV.

⁹ Article 23 (of Part III) aims at the protection against discrimination on grounds of race, tribe, sex, place of origin, marital status, political opinions, color and creed. See also Article 11.

Yet another debatable topic is the country's status in terms of international human rights instruments, where Zambia is a party to a number of international and regional human rights conventions that have not yet been domesticated. This is a direct breach of the provisions of the conventions, requiring State Parties to take appropriate measures to eliminate discrimination against women and embody the principle of equity in their national constitutions and legislation¹⁰. The commitment to these internationally agreed obligations are thus merely a chimera¹¹.

¹⁰ These provisions are for example found in Articles 2(a), 2(f), 3 and 24 of CEDAW.

¹¹ I am grateful to LRF for providing me with an excellent overview of the Zambian context concerning the customary law, with the "Women's Rights in African Customary Law. A Publication of the Women's Rights Project", LRC – Legal Resource Centre. This publication was the outcome of a conference held in 2001.

3 The theoretical framework

The Zambian local courts are the courts of first instance where unwritten, customary law is applied. The Justices apply the law by being knowledgeable in the customs and traditions, rules and norms of that area and that community. A prevailing attitude is that the Justices are the voice of the law and do not take an active part of the interpretation, nor leaving their mark on the outcome of the decisions and verdicts. My hypothesis is that the *persona* of the Justice has a part (some part) in the outcome of the law, in its (re)creation and direction into the future. I make this claim while still acknowledging that they are operating in a context and influenced by undeniable forces of societal frames. Noting that the customary law treats women unequally and discriminates against women, makes it interesting to explore what role the Justices bear in this. Their personal attitudes have, in my hypothesis, an important role.

To examine this, one needs theoretical grounds to stand on. My point of departure, as well as my hypothesis, is already marked ontologically and epistemologically, which also has determined the methodological frames. In this chapter, I will map the theoretical influences framing the topic. It becomes clear that theories and methods are entangled in a mutual, back and forth kind of way.

3.1 Postcolonial feminism, poststructuralism and postmodernism

The theoretical situatedness is at an intersection of *feminism*, *poststructuralism* or *postmodernism* within *legal theory*. Legal theory, is the field, while, I would say, and the feminist and poststructural/postmodern influences are perspectives on how to take on that field. The overall setting being a Southern one has consequences, for example in the postcolonial influence on feminism and a more visible emphasis on legal

pluralism. These three theoretical origins extend and overlap and at the nexus is where issues of this study will be analyzed.

3.1.1 A critical legal theory

Critical theories of law include realism, Critical Legal Studies, feminism and race theory. These have contributed in demystifying the positivist stance of seeing law as neutral, apolitical and amoral. The common ground of the critical theories is the conviction that law can be neither apolitical nor amoral since it represents a dominant view. One of the first major critics of law was Marx, who saw that law was in the hands of those whose interests it expressed (Moore, 2005:28). He saw the economy as the basis of societal structure and law as a way of the dominant classes of society to hold in place a system of class exploitation. Law, according to Marx, has an ideological function since it shapes society in which we live, due to its ability to shape our social practice and social thought (Cotterrell, 2003:212-214). The focus of Critical Legal Studies was to start asking questions about who exercises power through law and what the consequences were of such exercise. There is also the question of for whom law speaks and whose voices and experiences are excluded from legal expression (Cotterrell, 2003:211). In short, the different critical legal theories address the political aspects of law – the legal is political. It is through the critical legal studies movement that the postmodern critique has made its way into the legal discourse.

3.1.2 Postmodernism and poststructuralism

When outlining the postmodern appraisal of law, Tie cites Goodrich maintaining that ‘law has an ‘unconscious’ that is class-based, racist and masculinist’ (Tie, 1999:115). Law, in its Western manifestations, cannot be separated from its particularist viewpoints; from the history of bourgeois individualism, masculinist oppression of the feminine, and exclusion of the foreigner from the protection of state-law. These viewpoints have repeatedly disowned, repressed and silenced the socially

marginalized (Tie, 1999:115; 120). As Davies puts it, '[a]n understanding of the philosophical foundations of Western thought is an understanding of the philosophical foundations of patriarchy. Law holds a central place here, because of its role in ordering society, formally and informally' (Davies, 1996:3-4). In Cotterrell's words, 'potentially *anything* about law might become contested because law lacks secure foundations to put at least some matters beyond the possibility of disagreement. No objective criteria of truth or value provide an unchallengeable basis of legal or social knowledge' (Cotterrell, 2003:237-238).

3.1.3 The feminist palette

In the previous section, I briefly introduced the postmodern or poststructural feature of feminist legal thought. Before continuing on that path, I will remain shortly on the variety of feminisms and point at a slight schism relevant to the context. Two archetypal wings are liberal feminism and radical feminism that arrive at completely different conclusions as to how to alter the subordination of women, depending on what is deemed the relevant issues in this enterprise. *Liberal feminism* treats law as a theoretical given and nothing is said about its conceptual foundations. In other words, the notions and ideas embedded therein are accepted. Societal change (i.e. striving towards gender equality) is promoted without challenging the frameworks of established normative legal theory and demands that law in practice conform to its ideals, of equality, equal pay, rule of law and so on. However, it is seen as counterproductive to stress equality in areas of law concerning women's lives, inescapably and concretely unlike men's, namely sexuality and reproduction. This feature of liberal feminism of recognizing gender differences has been criticized, since it has become obvious that law in practice only mirrors normative legal theory's blindness to any patterned differentiation of the social (Cotterrell, 2003:215-217). A typical question that this perspective raises is on how far the emphasis on difference should be stretched. *Radical feminism* stands in opposition to the liberal position, declaring that law itself is gendered and that gender inequalities are rooted on a deeper, fundamental level, in the very patriarchal structures of society (Cotterrell, 2003:223). Inspired by Marxism, Catharine MacKinnon (1989) emphasizes the

domination and exploitation between the sexes. Like Marxism, MacKinnon's radical feminism claims a higher truth beyond the variety of individuals' experiences, when advocating for a women's perspective as a claim to truth. MacKinnon has been criticized though, for drawing on essentialism in her theory, assuming the existence of one single female perspective (Cotterrell, 2003:225). The question in this outlook is rather the one of how far the sameness should be emphasized.

The critique, including debates on sameness and difference, has pointed at how legal theory, especially apparent in the discussions on international human rights law and on the very concepts of rights and equality, is built upon Western liberal foundations and is of androcentric character (excluding the people of the South for instance). Anleu notes that both liberal and radical feminist approaches to legal theory also 'tend to treat women and men, or male and female, as mutually exclusive, internally homogeneous categories, thereby downplaying complex class, cultural, ethnic, national regional and other differences' (Anleu, 2000:69). Romany (2001:57) is one of many who have criticized this in relation to human rights:

For a black woman, however, there is a need to approach international human rights discourse and practice from a decompartmentalized location that politicizes the criteria for the theoretical knowledge upon which it is based.

One of the major advances of the structuralist revolution in thinking about language was that it completely discredited the assumption that language reflects a pre-existing world. Instead, language is seen to construct and shape the world (Davies, 1996:52). Finley looks at the history of jurisprudence where the 'primary linguists of law' have almost exclusively been men – white, educated, economically privileged men. Defining law in their own image and giving it meaning, consistent with their understandings of the world and of people 'other' than them, has excluded or marginalized the voices and meanings of these 'others'. Since their language neither was challenged, it has thus been seen as natural, inevitable, complete, objective, and neutral (Finley, 1993:571). The language of individuality and neutrality keeps law from talking about values, structures, and institutions, and about how they construct knowledge, choice, and apparent possibilities for conducting the world (Finley, 1993:574). She (1993:571) urges therefore that:

it is an imperative task for feminist jurisprudence and (...) for anyone concerned about what the impact of law has been, and will be, on the realization and meanings of justice, equality, security, and autonomy of women (...) to turn critical attention to the nature of legal reasoning and the language by which it is expressed.

Both liberal and radical feminisms thus seem insufficient in addressing, in a complexity-sensitive way, a situation such as the *Zambian customary law and the women under its jurisdiction*¹². Turning therefore to the contributions of postmodern feminism, and taking account to the aforementioned message of Finley, I will now direct attention specifically towards the world through language.

3.2 The constitutive power of law

The constitutive power of law encompasses the phenomenon of creating or producing identities of those subject to its scope. The focus here is on the individual, the subject; but various power centers are profoundly present in this process. One merit of postmodern feminism in this context is the view that there is no general category of ‘women’, and that it is crucial, when talking about identity, to avoid essentializing it. Defending essential gender differences merely recreates these constructions and thereby sustains existing discourses of power, is the claim of postmodernists (Weisberg, 1993:532). A second merit is that we should see ‘experience’ as being always the experience of particular historical and social contexts.

3.2.1 What law creates

The postmodernist critique of ‘foundationalism’ questions the possibility of knowledge, it includes the knowledge about ‘women’ – although, Bartlett notes, it sometimes is problematic to insist on a rigid categorization of people into either man

¹² I embrace a broad and informal meaning of the term ‘jurisdiction’ to target the mere (passive) sense of, in some way, being governed or influenced by a set of norms or rules.

or woman. The critique insists that the subject (female/male) has no core identity but is constituted through multiple structures and discourses that in various ways overlap, intersect and contradict each other (Bartlett, 1993:561). One such structure is the legal system with its embedded legal discourses, composing a ‘signifying system’ in how it orders the world into categories, determines the way we interpret things, and attaches consequences to certain sorts of interactions (Davies, 1996:52). As a signifying system, law relies upon other signs – of language and cultural meanings – to do its own work of construction. The subject (and the construction of gender) then emerges as a cultural product of social discourse as an operation of power (Weisberg, 1993:532). Davies (1996:53-54) continues:

For instance, equal opportunity legislation often says something like ‘discrimination on grounds of sex is unlawful’. Such a law responds to and relies upon a discursive and political context which divides people into two sexes, and attaches a great deal of significance to this division. If there were no ‘sex’ pre-existing such a law, it would have no meaning. If we ever reach a point where sex has no significance, at least in those areas the legislation is designed to address, it will become irrelevant. The signifying function of law then, can never be separated from the signs of linguistic and cultural orders, and the pretence of the law that it is in some way above or different to social constructions often entrenches, instead of rectifying social inequalities.

The main idea emphasized is that sex is a category that shapes the way we think, and thereby also the way we act (Davies, 1996:54). Butler, writing extensively on the constructedness of various aspects of ones identity, states that the category of sex is not only descriptive, but normative and a regulatory practice in that it produces the bodies it governs (Butler, 1993:1). If the law says that I am female, it makes my anatomy socially significant, and requires me to act in a particular way, or take the consequences. Not acting in that way entails not being ‘truly’ female (Davies, 1996:54).

Law’s inability to appreciate difference (coupled with its ‘ultimate power to determine, define and exclude’) is in Davies’ opinion, one of the foundations for legally-sanctioned oppression (Davies, 1996:41). Smart adds that law is coupled with what might be called a ‘masculine culture’ and that taking on law, feminism is taking on a great deal more as well. She is not suggesting we can simply abolish law, but we

can resist the move towards more law and the creeping hegemony of the legal order (Smart, 1989:5). Law should remain an important focus for feminist work – not in order to achieve law reforms (although some may be useful), but to challenge such an important signifier of masculine culture (Smart, 1989:2).

3.2.2 What creates law

A second perspective is on the normative quality of the law; how the law seeks (consciously or unconsciously) to steer people in a certain direction and give incentives to promote certain actions and a certain behavior. Here, as we have seen, postmodernism has opened up the scene to asking more questions on the ‘location’ of whatever is studied, adding on several dimensions – for instance locations concerning the individual as such, the socioeconomic position (class), gender/sexuality, ethnicity, culture; as well as the structure within which the individual is situated, the historical, geographic, societal, and so on. From a sociolegal perspective, it becomes relevant to explore who and what produces and reproduces the normative system, which these forces or power centers are, i.e. where ‘the law’ comes from. The starting point, in the spirit of postmodern legal pluralism, would be to assume a system of multiple forces and layers of law, wherein the local court Justices in my study potentially constituted one such force. A number of authors call for a broad view of ‘law’ and a reconsideration of the concept of ‘law’ itself (e.g. Twining 2004; Menski 2006; Tie 1999; F and K von Benda-Beckman 2006). A postmodern outlook begs for deeper awareness of ‘interlegality’ to help in understanding how ‘law’ functions in a pluralistic global context (Menski, 2006:28-29).

As part of the postmodern critique of law, Tie claims that the whole nature of judgment is called into question since the act of legal judgment is a contingent exercise, whereby the direction of law will depend on lawyers’ employment of the law and judges’ judgments within it (Tie, 1999:120). Davies claims, in the same spirit, that the naïve thought that judges simply apply the law has an enormous popular hold (Davies, 1996:40). Departing from the observation that decisions can always be reached, despite, or actually owing to, gaps in law and the room for

interpretation. She opposes the assumption that there is a system of norms which transcend human interactions. Such a view neglects the dynamic of repetition which maintains legal assumptions and institutions (Davies, 1996:40). She continues:

[E]very ‘application’ is in some sense also a re-creation of the law. And no ‘creation’ can exist in a vacuum, as though no law preceded it. In particular the thought that judges are non-political instruments or technicians of law casts law as the neutral arbiter and organizer of social relations, instead of the force which defines the limits of acceptable hierarchy and privilege.

Foucault was a pioneer in his theories on subjectivity and the direct and unavoidable link between knowledge and power (Hunt & Wickham, 1994:12; Smart, 1990:196). Power is exercised through the production and dissemination of truth, and truths – or ‘truth-claims’ – are generated by discourses, through exclusion of other competing truths. This is why it is interesting to direct attention to the sites of knowledge production, whereby power relations may be uncovered (Hunt & Wickham, 1994:11; 13). In the words of Smart (1989:4), who is influenced by Foucault:

It is important to acknowledge that the usage of the term ‘law’ operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses which by comparison fail to promote such a unified appearance.

3.2.3 Deconstructing the binary oppositions in law

A major postmodernist project seeks to deconstruct binary oppositions in language, law and other institutions. This is a way of revealing the hierarchical gender arrangements, hidden behind universalist notions such as ‘reason’, ‘knowledge’ and ‘self’ (Weisberg, 1993:532). As Smart and many feminists have argued, binary opposites such as male/female, masculine/feminine, objectivity/subjectivity, good/bad, rationality/emotionality, culture/nature, active/passive and truth/falsehood do not simply construct an understanding of difference, they construct different values (Smart, 1990:204). Deconstruction, introduced by Jacques Derrida, is in Cotterrell’s words ‘neither a method, nor a technique, but an event, a transcending of the limited

understandings of modern thought in various ways, though without the possibility of reaching any complete knowledge or understanding' (Cotterrell, 2003:239). The benefit of using deconstruction in legal theory is that it enables to reveal the forgotten, controversial political choices embedded in law, showing that its doctrines are based upon a group of foundational concepts and principles. What is treated as fundamental always depends on what seems less so (Cotterrell, 2003:240). Holding an idea in our minds, we hold both the idea *and its opposite*. You need both to understand any of the two, but one of the two is often privileged, in the sense that there is a tendency to think that the 'privileged' idea may exist independently as foundational and can do without its opposite. The opposite is in fact needed to give the idea its meaning. I believe that deconstruction is an interesting concept to include when reflecting over Zambian law through the interviews of the Justices; how, when they talk, they express a sense of 'good or bad' in relation to opposites such as written/unwritten law, codification/non-codification, rich/poor women, guidelines/no guidelines (autonomy), past/present.

Concluding this part, the vintage feminist slogan 'the personal is political' adds to the picture that 'the legal is political', and, in a postmodern, poststructural tone, valuing discourse: the rhetorical is political.

4 Method

My research questions target *one part* of a larger context that is resulting in an unequal treatment of women. The part chosen contains the legal processes on a local level, where I chose to explore the role the local court Justices play. It is not my intent to single out these Justices to blame them for all evil that is happening to women; they are one part of a structure and at the intersection of a multitude of social, political, economic and cultural processes in society, like any other individual, a product or construction of these processes¹³.

4.1 The interviews

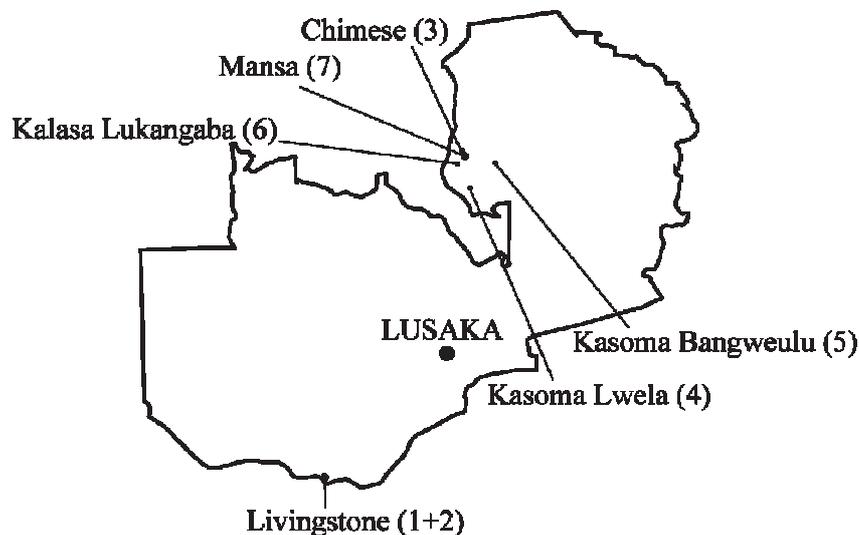


Figure 4.1 Map over Zambia where interviews with Justices were conducted.

¹³ I refer to interviews with the Justices by indicating the interview number (1-7) followed by the line(s) in the transcription. The reference interviews are referred to by indicating the date when it was made following the format [YYYY-MM-DD]. See Appendix A for a list over the interviews.

4.1.1 Sampling and performing the interviews

Using a qualitative research method, the study was conducted by making seven interviews with thirteen local court Justices in total. Two interviews, with four Justices participating, took place in the Southern part of the country at Livingstone local court (in Southern Province). The other five interviews, with nine Justices in total, were conducted in the Northern part of the country, mainly in and around the area of the Mansa District (in Luapula Province). The setting varied from being an urban to a rural one. The interviews 1 and 2 took place in Livingstone which is the main tourist town in the whole of Zambia. Interview 7 was also situated in town; in Mansa, which is one of the nine Province capitals in the country. Interview 3 was situated close to town, and, in addition, the Justice working there use to work in Mansa local court. Interview 4 was in the most remote area that I visited, whereas both interviews 5 and 6 were conducted in quite remote and rural areas. The reason why two different areas of the country were chosen was to avoid the risk of studying one single case (staying in one area) that might be deviant in its context, considering the large number of tribes in Zambia, all claiming to have their distinct customs. The Justices in one area could have their specific set of values, reproduced within the group of Justices of that place, but unfamiliar to Justices elsewhere. Studying two areas, differences and similarities in attitudes could be observed. In this sense, one could say that the study has a comparative character. However, the comparison of the Justices' respective statements and attitudes was made to distil a joint result of the empirical data collected, in order to draw conclusions within its limited scope.

Two of the interviews were conducted with only one Justice and me; at all the other interviews they were two or more. Initially, I would have preferred to meet them all individually; however, this was not feasible, since they shared one office and were available on one single appointment. I did not feel that it was a drawback though, since the Justices were comfortable and seemed to speak their minds regardless of being a group. In this way, I was also able to meet more Justices than I had planned. Sitting in a group, in their office, there were distractions at times, either with visitors or with Justices needing to excuse themselves. The interview at Livingstone local court was made with four Justices, but most of the time at least one of them was

absent. This interview was also interrupted for various reasons, and resumed the day after.

The interviews were semi-structured (semi-standardized), consisting of key questions or issues that were to be discussed, leaving conversational room, in order to allow the interviewees to express own attitudes and concerns in a personal way¹⁴. Of particular interest in the analysis are discourse and rhetoric. The analysis is focused on what the Justices talked about, as well as how they reasoned. One female Justice was recently employed and during the interview that was conducted with her and her two fellow colleagues (Interview 5), she hardly spoke at all. At another interview, in the remote area of Kasoma Lwela, a man who had started working at the court four days earlier (but not as a Justice), participated in the interview and was quite dominant. I have not put too much weight into his words. At a few occasions, I engaged a translator and it happened that he took part in the discussion, adding his own views. These were included as additions in terms of facts and explanations, but disregarded as part of the deeper analysis.

4.1.2 Language issues

I found the language to be a limitation only in one interview, where I noticed the Justice was a slightly hesitant and a little unclear in his answers. I could feel a frustration at times, when the translation was significantly shorter than the interviewees' responses in Bemba, which made me engage a second translator to listen to a few sections of two interviews afterwards, to cross-check the answers. Another thing I noticed was how all my interviewees gladly gave lengthy practical examples anchored in real life, rarely speaking in abstract, theoretical terms. Most of them could also account for past events with great sense of detail, which was fortunate for me.

¹⁴ For interview guides, see Appendix B and Appendix C.

4.1.3 Reference interviews

In addition to the Justices, I met with a number of key actors and representatives from different organizations and authorities¹⁵. In Livingstone, I met a representative of the pro bono legal advice organization, Legal Resource Foundation (LRF), and one representative from Young Women's Christian Association (YWCA). The former was knowledgeable in the specific area of legislation, whereas the latter had excellent insight into the problems in the women's day-to-day lives. In Mansa, I met one social welfare officer, one public prosecutor and the board of Mansa District's Women's Development Association, a community-based organization with strong links to the rural communities through visits, workshops and discussion sessions. These organizations and persons were consulted to make sure that I was focusing on the relevant issues, according to those representing the 'affected'. I also visited one Chief and his council, the Research Officer of the House of Chiefs in Lusaka and the Director of Local Courts, to hear the most authoritative and official representative of that section of the Judiciary. I also need to mention my fortunate encounter with the Zambia Law Development Commission (ZLDC) in Lusaka, an office, that quite recently conducted thorough studies both on customary law and on the local courts. The extensive reports, with extremely helpful descriptions and explanations, constitute my main source of information to the chapter on the Zambian legal system and customary law.

4.1.4 The Justices as experts

There are some specific issues to consider while conducting interviews with Justices, representing the legal institution in Zambia, so-called elite interviews (or expert interviews). First of all, it is worth to consider who the Justice is. The Justice is both an expert and a private person and during the interview, it is important to be attentive to the changes of roles and the presence of both roles in the talk (Flick 2006:165). Both roles are interesting, since their attitudes on gender might originate from either a private level or a professional one.

¹⁵ For a complete list of the interviewees, see Appendix A.

4.2 The analysis

After having transcribed the interviews with the Justices, the analysis was done through identifying themes in the interviews and analyzing the discourses on these themes. I structured the analysis by grouping sections of the ‘talk’ in so-called thematic coding (Flick 2006:307). The coding is done by focusing on each of the respondents, grouping and regrouping parts of the text, to reveal a fuller context as well as to reveal contradictions. (Flick 2006:307). Further, the results of the thematic codings of the respective respondents are brought together and compared with the others.

4.3 The encounter between me as a researcher and the Justices under study

When transcribing the interviews, I realized that I sometimes asked leading questions, sometimes even rhetorical questions. I was very careful not to do this, but I later realized that I managed to do it anyway. Unconsciously, we all have our preconceptions and our individual situatedness, or self-definition. It is therefore important to seek to contextualize the study, designed by me, and the essay, produced by me – and acknowledge the multiple layers of influences merely by being a part of the world. It is, in other words, important to disclose ‘my’ world, in other words though the subjective filter of me. For instance, I feared at times that the Justices changed because I was there. I suspected that they assumed to know what I wanted to hear. Having no personal experience of the living in the Zambian society and governed by the customary laws and practices, I am probably biased in more than one way. The study was an encounter between me as a researcher (with my interests and ideas) and the Justices, the subjects under study (Jensen & Lauritsen, 2005:63-64). I was a stranger in the field, with no real possibility to blend in, being a white, young woman from the global North. My presence is acknowledged.

5 Results, analysis and discussion

Already at my first interview with the four Justices at the local court in Livingstone, I felt assured that I would be able to receive valuable information from this type of interviews. They were very open and frank, and happy to describe their reality to me as a stranger to their beliefs. This image was confirmed throughout the rest of the study. In Kasoma Bangweulu, the Justices made a courtroom full of people sit and wait for I do not know how long, just to conclude our interview, which I realized when I had to leave the chambers through the door that opened to the front of the court, by the bench, and at least one hundred eyes stared at me.

I contrast the reality that the Justices described with what I learnt from interviewing my so-called informants, which, interestingly enough, often gave me another picture. It happened more than once that the Justices would say something that was in complete contradiction to what was experienced outside the Justices' chambers. In general, the Justices took great pride in their work and saw the great importance and authority in what they were doing. Representatives from civil society, on the other hand, criticized the local court for upholding a biased system that is discriminating against women, and the Justices for being uneducated.

In order to establish the role of the Justices within the structure of customary law, and their role in the discriminatory feature of this system, I will use my theoretical tools as outlined in the previous chapters. As highlighted earlier, a crucial question is 'what creates law', where I will seek to endorse my claims that the act of a legal judgment is a contingent exercise, and that the Justices do not simply apply the law (that there, on the contrary, is room for interpretation, i.e. a space for interpretation). As indicated earlier, my hypothesis is that the Justices *do* have a part in the outcome, and thereby the creation and recreation, of the law. But which part?

5.1 Background of the Justices and the courts studied

The length of service as Justices among my interviewees ranged, evenly distributed, from just recently employed, to up to eighteen years at a local court¹⁶. It was unclear in two cases for how long they had been employed, because these Justices were absent during that part of the interview, but from the context, I understood that in both cases it was more than two years, and most probably more than five. Their professional backgrounds varied; four had backgrounds as teachers or head mistress or headmaster, one had been a farmer, one a police officer of senior position, one clerk officer, one accountant licensing officer, and two had mixed backgrounds from 'various departments', as well as having been a priest, civic leader and dairyman supervisor and a 'sports organizer'. The Justice who had worked as a farmer was working at the most remote location that I visited. Three Justices told me that they were studying law, whereof one was aiming for a LLB which is a five year program as distance learning. The appointment procedure was discussed in six of the seven interviews and they all recounted for a similar routine. A vacant position is advertised, the applicants apply and go for interviews before the Provincial Local Courts Officer, who writes a recommendation to the Judicial Service Commission in Lusaka of three candidates, whereafter one is selected. It was unclear to what extent the candidates collected recommendation letters from the Chiefs in the area, something that would point at a link of loyalty between the Justices and the Chiefs. Only in one case, the Justices clearly stated this (6:24-26)¹⁷; in the other interviews, the details were left out. The Director of Local Courts acknowledged that it *used to* happen, that the Chiefs recommend who sits on the bench, but nowadays no. Ever since he joined the office in 2006 he had 'not encouraged' that, even discouraged it¹⁸. However, the Research Officer of the House of Chiefs in Lusaka, said that, in principle, the Chief was present in the interviews for appointment¹⁹. Hence, one can note that it is unclear to what extent this is still being practiced. It does not seem, however, to be considered a problem by the Judiciary to the extent that its elimination is actively sought.

¹⁶ 18 years; 15 years; 14-15 years; 10 years; 7-8 years; 6 years; 2-3 years; 9 months; 8 months; just started; and two who had worked there for at least 2-5 years.

¹⁷ One of the Justices at this court was employed quite recently, eight months earlier, and even though it was the 'senior one' who mentioned the recommendation letter, this Justice did not object.

¹⁸ [2008-10-21].

¹⁹ [2008-10-17].

5.1.1 The most common cases

When asked which cases that were most common (where women were involved) at that specific local court, the Justices mentioned around four or five each that came to their minds. All mentioned divorces, and some specified that they were on the increase²⁰. In three cases, ‘marriage issues’ were noted to be common, which could include quite a few different aspects, but at least the sharing of property (after a divorce or the death of one spouse), child maintenance and the case where the husband (most often) deserts the family. Other common cases were compensation for assaults, wife battering, virginity damage²¹, adultery, theft and land dispute cases.

In five out of six local courts I visited, cases involving witchcraft were said to be common. However, there are different purports of such a case; one being ‘compensation for witchcraft accusation’, which means that a person, having been called a witch by someone else, goes to court to be compensated for this. Witchcraft is not suppose to be recognized by the local courts; however, at several occasions, I heard about it, from the Justices or from civil society organizations. It appears as a way of explaining events, as a part of the ancient beliefs. One Justice mentioned that issuing letters for people that they need when going to a witch finder is not allowed ‘according to our law’, the Witchcraft Act. We continue (7:258-285):

I: Is witchcraft a problem, or is witchcraft not a problem, as you see it (...)?

K: There are concerns, most especially deep in the rural areas.

I: I met one Justice from Kasoma Lwela and they said that it was a big issue; that there came a lot of cases of witchcraft.

K: Yes, Kasoma Lwela yes, that’s deep in the rural area yes.

I: And also that a lot of women use witchcraft to kill their husbands.

²⁰ In one interview I was told that an equal number of divorce cases were brought by women as by men (5:91-94).

²¹ I was unfamiliar with virginity damage before coming to Zambia. It is where the first man who has sex with the girl/woman has to pay something to the girl, or, more often, to her parents (i.e. for taking the virginity). In some areas (it is unclear how common it is) you always have to pay, but it is only taken to court when the man refuses to pay. The practice has been contested, whereas some Justices are saying that the payment should be used for the girl’s school fee or school material, and not go to the parents (6:292-313).

K: Ah no, those are just beliefs. (...) There are these mysterious beliefs, that's why they say this time that women use witchcraft. You know, according to the beliefs, the past beliefs, (...) [a woman puts something in the] nshima and the husband eats (...) he can suffer from the chest and he can die on that one, even from a fever. So, whatever, because it's up in their minds. It's up in their beliefs. It's not true. (...)

I: Because I also heard that there was a case here in Mansa actually, with a businessman and that a woman, the wife, had killed the husband with witchcraft.

K: It's not true. It's because of poverty, you know, Ida, it's because of poverty. They want to grab what that man has left. They want to grab. So they'll put something...

I: ...Poison... So it's not witchcraft... I actually don't know where the line is drawn...

K: Witchcraft is there but to me, I don't believe. Even when I was sick, some people were saying 'no, don't go and resume work, you know, people – most of you fellow Justices – they don't like you, because the community likes you, you deal with the cases, you look at natural justice (...), you will die'. And I said no, why I was sick, because I put on weight, I developed high blood pressure, fever – it's not witchcraft, it's what I tell you. Now at least I have reduced weight, I'm feeling okay, it's not witchcraft. They keep on saying that. It's just a belief, but me, I don't believe.

Concerning the witchcraft, I agree with the point that she makes, that the beliefs seem to be more frequent in the rural or remote areas. In Livingstone, the Justices told me that witchcraft was big area once upon a time; some eight years ago they could have witchcraft cases every week, but so far (during the first eight months of 2008), they had not had one single case, even though, one of the Justices mentions, they 'have the right to hear witchcraft'. He continues and reasons, linking this change to people having become 'civilized' (1:173-181):

B: So witchcraft used to be very common, although now it's almost... I think people are getting civilized now. It's not so common. You don't hear people complaining about witchcraft.

I: Why do you think that people don't complain about witchcraft anymore?

B: The young people don't care about such things. People in my age used to worry a lot about it, but the young people no. They are interested in cell phones, (laughs) television, things like that.

5.1.2 The GTZ training

Despite the divergence I encountered among the Justices, a topic that appeared at all interviews was concerning a training that the Justices had received in 2003. It was the German Technical Cooperation (GTZ) through the German government, in collaboration with the Zambian government, that organized and funded workshops for local court Justices throughout Zambia, on human rights, women's rights and discriminatory practices in customary law. A few of the Justices mentioned children's rights as well (to make them consider 'the best interest of the child'). In one interview, one Justice said that the training had touched upon the issue of polygamous marriages and monogamous marriages, and that they had emphasized to refrain men from marrying too many wives, since it was a tragedy to have for example four wives and failing to maintain them all (5:486-490). In the same interview, the Justice also recalled that they learned about 'the Bill of Rights, the customary law, the African Charter, the United Nations Charter' (5:524-526). The training must have made some impression on the Justices, since some of the Justices even remembered the name of the German woman who was one of the facilitators – 'Cathrine came, she was a white woman' (3:141). Danida and the Danish government took over the responsibility for this training initiative after some time, and the idea is that clerks and messengers working at the local courts are supposed to get trained in human rights and customary law, along with Justices throughout the country for another round. Talking to the Director of Local Courts, he admitted that there was a lack of funding and that they now relied on foreign funds to cater for educating the Justices. There are over one thousand Justices which makes them the largest section of the Judiciary, to compare with the Magistrates at the higher courts, who are around thirty in total. The inadequate funding by the government and the centralized system of keeping funds also results in administrative constraints (ZLDC, 2006:84). All the people that I talked to from the civil society organizations, the pro bono lawyer, the public prosecutor and others, brought up the low educational level of the Justices, their lack of training in law and the lack of requirements on that type of qualification when appointing Justices. One should bear in mind though, that, at independence in 1964, fewer than one thousand Zambians had completed secondary school. Considering that most Justices are born in the 1940s and 1950s, and that the Justices now outnumber those

with higher education in 1964, it should not be unexpected that there is more to desire in terms of level of schooling.

5.2 Awareness of gender-related issues

I was surprised, after the first two interviews, that the Justices seemed to have what I would call quite a traditional approach to gender roles and division of labor within the household; yet at the same time, they discussed human rights and women's rights with me, which gave me the impression that they were aware of these issues. The awareness that I sought was concerned with how well they were able to step out of their professional roles and place the Zambian customary law in perspective to the outside world. How well could they critically turn the gaze inwards towards their own system? My initial surprise was actually more of a confusion over the split picture and complex reality that I was facing. The fact that I *struggled* to understand how these two traits – which for me were clashing – was *per se* an interesting realization of my own narrow-mindedness. Grasping a wider spectrum, the Justices seem to carry the baggage of both their ancient respective tribal traditions, and the history of colonization and Christianization (which might have led to a slight desire to align with everything that is Western). Carrying all this around in the present, they find themselves trapped in a structure much larger than themselves, of expectations and authoritative forces and limitations in terms of resources and capabilities, rendering it difficult to simply step out. These ideas could be illustrated by a quote (2:89-98):

You know, if you are just leaning on one side, culturally, that's all you are looking [for]. Then someone comes to tell you that, although this is your culture, there are human rights involved in this too. You will realize that, although we are dealing with culture here, the rights of the people, the litigants, the people coming to court, should also be protected. Because human rights were not something that we talked about. No. When I started here [around 15 years ago], I could see messengers handcuffing people here. But now they can't do that, because we've been told 'no, no, no, if you arrest someone, let them walk. You don't handcuff them'. That's part of the training.

5.2.1 Buzz words

Certain words and concepts that are frequent in discussions on gender equality and human rights appeared in my conversations with the Justices, without me necessarily bringing them up. Besides what has previously been said about the GTZ training, those concepts were for instance *natural law* (5:236); *not repugnant to natural justice* (1:374; 3:144; 7:187) *repugnance* (1:446), *repugnant* (5:233) *repugnant by customary law* (6:355); and *immorality* (1:446)²². All these appear for example in the repugnancy clause in the Local Court Act 12:1 (a), saying that the court shall ‘administer the African customary law, applicable to any matter before it, in so far as which law is not repugnant to natural justice, morality, or incompatible with any written law’. Other such expressions which stood out, appearing in four of the interviews, was *women are also human beings* (4:341; 7:414); *she’s a human being* (5:466); and *a female is a human being just like me* (6:211). I found these expressions notable, since it is nothing I have ever heard before; it sounded like something the Justices might have heard from somewhere and not made up themselves. Finally, the use of *gender* also caught the eye occasionally (emphases added):

I: There are not that many female Justices, are there, in Zambia?

K: No, no. They have just started recruiting.

I: Ah, so before there were no...

K: Nobody. It’s because of *gender issue*. (7:23-26)

I: (...) How did they explain to you the reason for the syllabus and the training workshops? What were the arguments for you participating in that?

A: I think the need there first was to deal with issues involving women – *gender*. You know especially on the women’s side. And that the emphasis, always, any case you deal with, considers the plight of women. (2:55-60)

These ‘buzz words’ and expressions seemed at times to be used – or, rather, dropped – as merely to signal a knowledge of their existence, leaving their meaning and content unclear, undefined and unproblematized, as they arguably are, I believe, in common language in most parts of the world. The Justices’ own, individual perceptions of the substance of notions such as human rights, gender, and so on, fall

²² Additional references have been left out; there were numerous ones especially on ‘natural justice’.

outside the scope of this study, but the mere room for interpretation should be noted and incorporated in the larger whole.

5.2.2 Gender roles at home and in professional life

Asking the Justices about things that they see as ‘not so good’ with customary law today, in terms of the position of women, the discussions went in different directions. I wish to point at one occasion, where the reasoning of two (male) Justices remained ambiguous. First, we talked about whether or not customary law discriminates against women. One of them cannot call to mind any discrimination, whereas the other says that women complain about polygamous marriages, which nowadays, according to them, is accepted in law (meaning that it is not an offence towards the wife to get a second wife). I ask them if that is a type of discrimination (5:365-383):

Jam: No it can't be a discrimination because it is an understood item. It originated from a long, long time ago and people are even accustomed, because it has been in existence *since* our patriarchs, a long, long time ago. So we know about it. We learn about it from our homes. (...)

I ask if there is discrimination at all and if so, in what sense. He points at the previous limitations for girls in access to education, and at the goal of the government to have 30 percent women in Parliament today, saying ‘we understand that, as Justices’ (5:372-383). The Justice says that he understands it ‘as a Justice’; it remains unclear if he ‘understands it’ as a person, outside his profession. We continue talking about the private life and how the situation is at home. The other Justice explains that, in their culture, he as a husband cannot cook while the wife is there; it is the job of the wife. They continue (5:420-431; 461-473):

Jam: Domestic work is mostly confined to a woman, a girl, women and girls. Then, a man has his own role to play, with boys also. Making houses, moulding bricks, cultivating, etc etc. That is a line drawn.

Joh: And in addition to that, we have in our homes what we call ‘division of labor’. Yes. My wife can come into my labor *if* I am sick, or *if* I am away. And I can go into

the labor of my wife, if *she* is sick or if she has gone away. But if we are both present, no.

(...)

I: Do you think that will change?

Joh: Yes. Gradual change is coming here, gradual change is coming here. For example, if I go in the field with my wife, we do all the work, come back – I *cannot* let my wife draw water for me, cook for me, while I am seated. No.

I: You would not do that?

Joh: No. No! She's a human being! If my wife cooks, I have to draw water; if my wife draws water, I have to cook. Yes, the change is coming in gradually. (...) But in typical villages, in typical villages, eh, you cannot see any change.

Jos: It cannot change.²³

Jam: It will take too long.

Joh: It will take long.

They are aware and know about the issues involved in the discussion on gender roles in general. It is not evident that this is mirrored in their actions and personal opinions though. In this court for instance, they had clear opinions on women's stereotyped roles in at home. Are the attitudes on one (deep, personal) level connected to attitudes on other levels? The personalities of the Justices constitute one layer in the filter that they form when traditions, the customary law and the requirements or demands of the state are remodeled and processed into verdicts, decisions and statements on what the customary law 'is'. In the interview in Livingstone, it becomes difficult to know if one of the Justices genuinely supports increasing the rights of women, when he admits that 'all of us' (women too?) are selfish, and that he 'wouldn't give away *any* of my human rights'. The women have to fight for their rights and put pressure on the men, 'it's up to you people' (2:183-187). When I ask him if he does not believe that the human rights conventions would be for the benefit of men as well, he answers by asking a question, directed towards himself, as much as towards me (2:190-191):

B: Society will benefit. Society will benefit. Oh yes... But you wonder why there is so much resistance. Why? What do you think?

²³ 'Jos' is the female Justice who has been silent for most of the interview. In this discussion, she adds the complaints of women, that they have to do double work, in the field and at home. She ends her addition with 'That is *our* main complaint' (5:434-460, emphasis added). One can wonder if she has been affected personally by these gender roles, or if she identifies with her fellow women to the extent of considering herself a part of a certain, larger category of 'women', who, as a group, have a certain complaint.

5.2.3 Women as ‘the Other’

Several of the Justices talked about women as a group, different from men, in characteristics, in roles and in the type of change that is affecting them now. This way of defining women without their participation in this exercise of defining, does not simply construct an understanding of difference, as has been discussed in a previous section, they construct different values. I felt that they had a lot of opinions on women. They had a lot to say. However, I observed a lack of vigilance and caution in the discussions; all women were placed in one category. There is a stark non-participatory tradition of women in customary law; its authorities and pronouncers have, since forever, been male. This lack of participation and lack of voice has most probably affected the creation of traditions. By not ‘being there’, the woman has become ‘the Other’. One example of ‘othering’ in my interviews was how several Justices saw the emancipation of women as ‘their thing’ which had nothing to do with the men; ‘they have been oppressed, so now they rise up and fight back’ (5:336-337). The male Justices could admit their own selfishness, as hinted previously when the Justice told me that ‘it’s up to *you people*’ (emphasis added). This corresponded to the female Justice in Mansa’s understanding of the matter, and her experience that her male colleagues ‘bend on customary beliefs’ because they are dealing with a woman (7:193-194). She continues (7:202-217):

K: You know these men, they are selfish. (...) [H]ere in Mansa – Mansa District – I’m just one female local court Justice. (...) I know where my fellow women and children... (...) which [practices] are not good for us. So we are looking forward to that the government, at least at every court, if there can be female local court Justice. (...) We female local court Justices, we deal with justice. It’s true, it’s true! And sometimes, (laughs) [there are] problems with my fellow Justices, because they want to say, ‘this case, she’s a woman’ so they don’t look at the justice, they just want to look at our beliefs. (...) Because they are being brought from, they are being recommended by the Chiefs of those traditional courts, where a woman is still inferior.

As concerns the lack of female Justices, the Justice in Mansa told me that she heard of people preferring a woman to a man, including the judge in the Magistrate's Court (7:608-613):

K: Because they prefer even that their cases are heard by female Justices...

I: The parties?

K: Yes, the parties. They prefer. The other time they were [saying] 'Ahh... we are lucky' (laughs). Even the Magistrate phoned: 'Mami, when are you coming to assist your fellow women, we have cases which are on appeal. I wish you were here and you could have tried to advise your fellow Justices, male Justices'.

That the lack of female representation in local courts has a significant impact on the interpretation of customary law has also been maintained in a shadow report of OMCT to the United Nations Human Rights Committee. Added to this the fact that participants in proceedings before local courts are not entitled to legal representation, is also claimed to often have a prejudicial impact on the ability of the parties, in particular women, to present their claims (OMCT, 2007:9-10). I dare say that the situation would change if there were more female Justices in the local courts. Clearly though, it does not have to do with if the Justice is a man or a woman but whether the person takes in consideration the equal worth of the people coming to court, disregarded of gender. Increasing the number of (skilled) female Justices must be accepted by the male colleagues, otherwise they risk being silenced and reduced to a figure on paper. One of the Justices in Livingstone seemed to accept and respect the female judges in town, even though they were not only judges, they were *female* judges (2:316-319):

A: We have only two judges for Livingstone [High Court] and they are both female. I don't know whether we are lucky or not.

I: What do you think? Does it make a difference?

A: They are both my friends so I'll say we are lucky.

At the same court they use to have a female colleague who unfortunately passed away. One of the Justices had noticed a difference in how that woman perceived a court situation differently from him (1:127-136):

B: In fact, we need women more, because most of fellow women [who] come here (laughs), they come here very depressed, and they need a woman to talk to them. But for us men, we get surprised to see someone cry in public...

A: Mmm.

B: ...so we need women.

I: Yes... Did you notice a difference working with a woman as a Justice?

B: Yes. She understood the women more. She would go and tell us: 'Can we adjourn?'. So we would adjourn, come into this place here and she would say: 'That girl is breaking down'. Left to ourselves, we wouldn't notice such things.

It should be noted though, that the Justice here manages to essentialize men, in the same manner as women, by saying that 'we' as men, we do not have these abilities, because we are men. The sensitization workshops they received has made them consider women in a new manner, and opened up for 'noticing' things related to women more. At least that is something. One could express a slight dissatisfaction, however, with the adoption of a statement such as 'women are also human beings', since it, at the same time, affirms that *they have not been*. By virtue of its truthiness reiterated through time (up until now), its opposition – that women are not human beings, and that 'human beings' are men – speaks with much more force.

5.3 Attitudes towards change

It would be wrong to assert that all the Justices were fully positive towards the entire customary law and all the customary practices as they stand today, just as little as they were completely inclined towards unconditional change. I asked them about change and therefore we talked about change. I doubt that these aspects of the visible dynamics of the law constituted an everyday preoccupation of theirs. A change in cultural behavior could also be difficult to account for, being 'inside' the cultural setting and therefore lacking perspective. A few issues are nevertheless noteworthy. Witchcraft has already been mentioned. There the change is explained by education mainly, or as one Justice said, by becoming 'civil' (1:175). The attitudes of the individual Justices on witchcraft were difficult to map, they would rather talk about how the court answers to it.

5.3.1 For medical reasons

As described earlier, the practice of sexual cleansing was changed by the government discouraging the local courts to enforce such a practice, with the reason being the spreading of HIV/AIDS. At all the interviews, when talking about change, the Justices mentioned this and none objected to its change as such. The so-called Circulars from the High Court with their guidelines seem to be accepted. Some Justices pointed out that sexual cleansing still was being practiced in some rural areas, where the Chief was the higher authority (5:268; 1:425-439). An interesting addition was made by one Justice (1:472-480, emphasis added):

I: Do you think that this is a way, or that this causes the customary law to change? If they put pressure on the Chief to change, I don't know... what they say in the villages?

D: Well I think on that one, it's not all traditional laws the Chiefs are advised to stop, no. *It's only where it involves this with AIDS.* You see where they must advise to stop.

The female Justice in Mansa hoped for change in the case where customary law conflicts with statutory law and sets the minimum age for a girl to get married at 'puberty', often being much lower age than 21 as proscribed in written law. Once again, the need for such a change was based on medical grounds; that the younger girls' bodies do not handle pregnancy and delivery well. She believed that the continued education of the Chiefs could help in protecting the girls (7:226-241).

5.3.2 For memory reasons

One Justice at a local court outside Mansa was very concerned about codification of the customary law. His studies of law for an LLB most probably had the impact on him to value the written sources of law. Again and again, he picked up his pack of papers and started citing and referring to various Acts and paragraphs. The benefit of

codifying the customary law was according to him that it would be a guide for the Justices so that they both had somewhere to refer to and would not need to keep it all in their heads. ‘Because it is difficult to remember’ (3:202-212). The rationale was, for him, that it would secure the foundations of the law in ‘natural justice’ and prevent any discriminatory practices of customary law (since it is in conflict with written law and the Constitution) (3:238-260). At another court, the Justices also saw the benefit of how they could learn about the customs of other tribes in the country through codification (5:571-595). In contrast to this, staying on the topic of codification, yet another Justice found that customary law would be ‘extremely difficult’ to codify, because of its dynamic nature – that it is changing all the time (2:215). He understood codification as universal; as one uniform rigid set of rules applicable in the whole of Zambia. He reasoned that the customary law changes constantly; however, it is based on traditions that, in my original understanding of it, comes from long-lived patterns of ancient beliefs. He seemed to have made a valid connection between orality and dynamism and thereby making the statement on its opposites that the written is rigid, which has been true in the case of the Constitution from 1996, that has proven to be difficult to change. He continued to add that you cannot codify it because of the variations throughout the country (2:215-222).

5.3.3 For reasons of judicial equality

As a result of the GTZ training, one Justice meant to say that the court has started to protect the interest of the woman, promoting her rights as a human being. This development has changed men’s behavior towards the women and their wives, since they have understood that the courts are not always on their side (6:170-190). A different way of avoiding disputes at the courts is to change the law and not make an act an offense anymore. This has been done in the case of marriage interference, one Justice described to me, where – due to the formal acceptance of polygamy – it no longer is considered an offence. It should be noted that it is unclear whether this is a nation-wide change, or only local, even though the Justices at this court told me that the government had ‘blocked it’ (5:634-635). They seemed happy about it, because it had meant that the court had less cases, since the women could no longer sue their

husbands for having affairs: ‘peace prevailed in the communities’ (5:636). On the other hand, the cases of assault in these villages had increased, meaning that the women were still not too happy to see their husbands their without being able to do anything about it (5:639; 5:47-656).

At another local court, the Justice had noticed that there was a change around 2005 or 2006 when a Circular from the High Court insisted on equal sharing of the property and the marital house after a divorce. In the past, the land and the property would always go to the man, but today you are supposed to share (7:98-102). A number of the Justices also mentioned a slightly changed attitude towards inheritance issues, that the woman should get something as well, which is established for in the Intestate Succession Act. The courts appear to be taking the interests of women into consideration now more than previously. The woman I met from YWCA in Livingstone voiced a concern to this regard. When she had some time off from the office, she sometimes went down to the local court and attended the court session. It was not rare that the Justices noted her presence and even commented, in a pleasant way, upon it to the court, saying that ‘civil society is here today, we better watch out’. They would also advise the parties to go to her if they needed help. But the fact that her presence would make a difference worried her a little, meaning that the Justices are in need of a ‘constant reminder’ of the equal rights of all²⁴.

5.4 What creates customary law

There is a lack of checks and balances of the decisions of the local courts, since most people do not appeal to the Magistrate’s Courts, and since cases rarely are reviewed by the Provincial Local Courts Officer. Together with a potential need for a ‘constant reminder’, the ‘law’ – what becomes the law – depends on the functioning of the court and on how the law and the cases are processed there. In this section, the focus is on this process.

²⁴ [2008-09-11].

5.4.1 The sources of law²⁵ and instructions

The Justice that was studying for an LLB relied on the written sources again and again since he found it hard to keep the unwritten law in his head. He was an exception among the Justices I met, even though, as indicated, many of the others saw benefits in a codification. I was told that I as a stranger would not – could not – grasp this unwritten culture (5:223-227):

Then we also deal with customary law. Because we are natives of this area, we know... something which you couldn't understand, you yourself. For instance, as I said a man is entitled to marry more than one, that is the customary law. Yes. Which you cannot understand properly. But we being the natives, we know the origin of that.

The beliefs set aside, since I agree that I could not fully 'understand' the beliefs and their origin (although I respect the existence of beliefs as such), I compared how the Justices talked about what (else) they relied upon in their decisions. The answers I got were that they received instructions from the High Court (the Circulars), a Code of Conduct from the government, a Local Court training syllabus, training from NGOs, the Local Court Handbook, the Local Court Act, the Witchcraft Act, the GTZ training, the Constitution and the Bill of Rights. All the Justices mention at least a few of these as guiding them. To what extent they verified their content of these 'sources' against the facts of a case before them seemed to vary a great deal. One Justice said that he consulted the Local Court Act if it was a new and special case he had not handled before (6:77). Another Justice claims that they 'don't just do things without consulting our guidebooks', having stated just before (5:351-354):

We simply follow what is stipulated in law. Yea, we don't go outside of law. If it is to say about that dispute, we consult our Local Courts Handbook, our Local Courts Act, to see to that matter.

²⁵ It is quite problematic to engage in a topic on the *source of law* since it might, and should I believe, evoke lengthy debates – as it has by philosophers, social scientists, anthropologists, lawyers and others, all with their own complete theoretical and methodological spectra to deal with the authority of the law. I will deal with its source for the local courts, as it was discussed in my interviews, articulated by the interviewees. The topic, on a theoretical level, is far too vast to include in this essay.

Another Justice told me that they work from where they have understood the case, the nature of the case, and the information from the complainant. They would refer to the Local Court Act when they ‘feel’ to (6:75). At the same court, I was given a rather remarkable explanation, that I have heard when discussing African legal systems in general, but which I did not hear from the other Justices in the study. He was guided by a sense of bringing about harmony, peace, love and reconciliation within the community, and he asks himself ‘what does the law demand in such case is done?’ (6:340-344). A while later, he adds (6:380-385, by help of the translator):

[T]he Constitution is the overall law where even these other sets of laws are being driven from. It’s us ourselves who agreed to make the Constitution. And therefore, since we have agreed that we should have the Constitution in place and it’s the overall guide, we cannot forget about it. (...) So we can never leave the constitution away, and at the end of the day, what we do, is being umbrellad by the Constitution.

I also asked them about whether or not there was a conflict between customary law and the statutory law, since I knew that there was a fundamental contradiction in the Constitution which allows for the customary law to overrule the Bill of Rights in the cases which are most common at the local courts. The Justices gave me contradicting answers, that more or less gave the impression that they very rarely sit down and read the acts and the handbook carefully.

[A]ccording to the Zambian constitution it does not conflict with other laws on the ground. Because usually, before they come up with the Constitution, a research will be done and a consultation will be done in all the provinces, what are our customs, what are our beliefs, what are the right things that can guide us. And then they come up with the Constitution. (6:391-395)

A: Yes yes yes. All those we take into consideration. Natural justice, repugnancies, where you find that certain things are not allowed, something that is repugnant to morality,... All those things, we take them into consideration.

I: Even if you think that is against the customary practices, or are there never any conflict?

A: There is nowadays usually no conflict. (1:379-384)

I can imagine a form of filling up the content of law from the bottom, starting at the local level, with customary law. Only where gaps and ‘vacuums’ appear, one resorts to the ‘higher level’ of law, if necessary. This might be why the international conventions rarely, if ever, are invoked in court, since the chance of a gap remaining all through the chain of laws is very small.

5.4.2 The custodians of customary law

In my reference interviews, after having discussed about the discriminatory trait of customary law, I asked about the role of the Justices and the role of the Chiefs in this. The public prosecutor said that the main duty of the local courts and the Justices were to interpret the customary law, which was also repeated by one Justice: ‘we are only assigned to interpret customary law’ (1:504-505). Where it comes to customary law, there needs to be continuity; it must have been practiced (applied), and it must also be ‘reasonable’. But when it comes to deciding what is reasonable, the prosecutor thought that the instance defining the vague concept of repugnancy’ was at the discretion of the Justices. The fairness and level of justice of the proceedings in the local courts depend on the Justice presiding. He was of the opinion that they were not guided enough, there were no restrict rules, giving the Justices too much freedom²⁶. The complaints received by the LRF in Livingstone were that the Justices could say at any time ‘this is the customary law’; the justice you get from the local courts can sometimes be fair, but sometimes not fair. The local courts are not regularly checked to see if they are handling the cases properly and it is difficult for a lawyers to effect change through the local courts, since they are not allowed²⁷. The woman from YWCA Livingstone saw the Justices as the custodians of customary law, whereas one of the Justices said that the Chiefs were the custodians (3:294-295). Many people voiced concerns about the influence of the Justices, but they all saw the Chiefs as being very authoritative in their areas. As an example, the Social Welfare Officer in Mansa told me that in order to succeed in changing a practice in the rural area, you

²⁶ [2008-10-28].

²⁷ [2008-08-08].

must start by sensitizing the Chief and the council, since the Chief are in charge of law and order in the chieftdom and could simply say ‘I don’t want this in my area’²⁸.

Therefore, it seems that both the Chiefs and the Justices are custodians of the customary law, even though they play slightly different roles and speak from slightly different directions in society, the Justices being employed by the government and the Chiefs coming from another type of decent.

When asking about the powers of the Chiefs over the local court, the answers were more or less saying that the Chiefs sometimes wanted to take over cases (7:223-225) and saying that some cases, such as land and witchcraft, were under his jurisdiction (5:309-310; 5:320). In Livingstone, they said (2:284-292):

B: No. In fact, the Chiefs have nothing to say with the local courts. *Nothing*. They have no power at all. This is a matter for the Judiciary only. No Chief.

I: But do you feel that the Chiefs have an influence on how the customary system and the customary practices develop?

A: There is always a conflict between the customary law of the courts and the Chiefs. Even the [local] courts that are in the villages, they have a problem with Chiefs, because the Chief wants the people to do things his way. And we should do things in the way of the Judiciary. So there is a conflict there between the law of the land and the traditional rulers.

5.4.3 Dependency or autonomy

Besides focusing on what they base their decisions on, it also becomes interesting to look at their level of awareness of themselves. Here follows a section that I find points at a lack of self-observation and how one Justice has difficulties to step out of his role and critically assess the customary law. He avoids the subject and either cannot or does not want to express an opinion on this (5:515-544):

I: Who decides how people should behave?

Jam: Who decides?

²⁸ [2008-10-26].

I: Yea.

Jam: Who decides? Mm. It is the government. That is, the Constitution. Yes. Because the Constitution is the supreme law in Zambia. The Constitution. It's the supreme law.

I: But how do you look upon the relationship then, between the Constitution and the customary law?

Jam: We have learned about the Bill of Rights, the customary law, the African Charters, the United Nations Charter, such organizations, we have touched all those things. At the workshop, we dealt with all those charters.

I: Okay.

Jam: Even CEDAW, it was also included. Yes.

I: But in your own personal opinion, what is the relation between the Constitution and the customary law?

Jam: My own opinion... The relationship, you say?

I: Mm. Which [one] is, I don't know, better, or which is more useful or applicable, and things like that?

Jam: Well in our local courts we practice both. Because if they come with a complaint relating to the Constitution, then we deal with that one according to the law. Now if it comes according to customary law, say a marriage, where someone did not pay dowry or some spouse has died, we follow the customary law. How do these people, the tribes, cleanse... Previously, they use to cleanse. And now, what are they supposed to do... Now the relationship is common, because even the Parliament knows about these customary laws, they even amend them in Parliament. If they say 'No this is not suiting our Zambian culture, our Zambian so so so' – they amend it. In Parliament. So, even the government is aware very much of the customary law. Right from the Parliament. (...) Now the relationship is very difficult to define it. It's very difficult, according to my opinion.

The same Justice gave, at another occasion, the impression of not seeing himself as a person, only as a Justice, in the sense of voicing the law, when discussing witchcraft cases (5:297-298, emphasis added):

[C]ases like witchcraft disputes... Those cases are, because, *in courts*, we don't believe in witchcraft, because *the law* does not approve that.

When accounting for the grounds of their decisions, one Justice simply stated that 'it's on my own experience' (4:42). Another one says (3:148-151):

Solely the Justice is the only people allowed, according to our judiciary system in Zambia, our legal system, the one presiding over the case, who will decide the case, (...) any aggrieved party is allowed to appeal, if he is not satisfied with the judgment.

A: [W]e don't consult anyone. No one should consult us over matters that have come to court. So the decisions we make are entirely independent decisions. If we go wrong, we have got it wrong. (laughs) And the only person I can consult is him, because we work two in court.

I: Okay, do you sit together in the..?

A+B: Yes, we sit together.

B: So I can consult him. So if he has views contrary to mine he will say so. Then we can discuss. Until we arrive at a decision. But *no one*, [not] even the Chief Justice, he can only do so if he's amending any part of the Local Courts Act. If he's amending. And that will be a nation-wide instruction. (1:105-115)

The Justices are emphasizing their independence to the extent that I wonder if they are worried of getting the reputation of easily bribed, which is a problem expressed by everyone I spoke to, except the Justices themselves and the Director of Local Courts. An interesting situation arises when the Justices disagree on how to decide in a case. Their presence and the room for their personas to appear become evident. When I try to ask one Justice about if they have opinions on the customary practices (being either right or wrong), he settles for the answer that they do have some freedom (1:352-358):

[O]ne is free to exercise, to exercise eh discretion. It's permissible. If one does not agree... Now, for instance where it comes to cases, if in a certain case there is some disagreement. You have to discuss issues until you come to a logical conclusion. It's allowed you know, examining things in its depth. You make considerations. I think that is the essence of putting up three [Justices], or two [Justices], sitting in the local court, sitting in an open court. It is for such issues to be discussed. At length. Until a consensus is reached.

At another court, the final decision was apparently not always in the form of a consensus. The Justice there told me of how a colleague of hers could actually simply be unwilling to discuss and could refuse to change his mind. To cope with this attitude, she 'misbehaved' in her own way, by telling the losing party to appeal, and on which grounds (7:430-456):

K: Ah, sometimes we differ.

I: What happens then?

K: What happens when you differ on a certain case is that you say 'let us adjourn it'. It will come up for another time. Each one of us will go and research, then we come back. And sometimes, because when you are deciding a case, the clerk, the one who writes (...) is there when deciding a case, we are three. In certain courts, there are three local court Justices, whereby if one differs to the other two, we carry the two; (...) when you are two and you differ, you ask even the clerk to join. There are some Senior Presiding Justices who are selfish and say 'no me, I will write A, B, C, D'. Then if I don't agree to that one, I don't sign on that case, that I've agreed, no. I only tell them that me, I don't agree to this decision, because of my points, pa, pa, pa, pa. So you decide alone. That's what we do.

I: Do the parties then receive information about this that one of the Justices...

K: No, no, they don't. We just inform them about the right to appeal.

I: Yea, because (...) if you could encourage them to appeal...

K: But sometimes I misbehave, myself (laughs), should I say misbehave?... When I say no, this one what she has decided, because she is a female, when they go, I call them, I say 'you appeal this case, these are the points, the grounds of appeal, you appeal'.

I: That has happened?

K: Sometimes yes. And they [appeal]. And they all won their cases. *All* of them. I exercise my right to the gender. Mm... Because when (...) you just tell them (...) you can fight, I tell the clerk 'can you call that person, please. I've seen that she's afraid to appeal that case. Because she was being intimidated in the court. Ask her, or ask him to appeal. That is your duty, to assist them to appeal'.

Most of the Justices probably see themselves as the voices of customary law. Quite a few Justices seemed to prefer not to separate themselves as persons constantly making choices, from their functions as Justices, as embodiments of customary law. Two Justices showed clearly that he reflected upon his own role; the rest did not, in my opinion. The first one was the female Justice criticized other (male) Justices, which the others did not do. The second one was the law student Justice who was a little critical to the whole system that he contextualized much more than any of the others did. The level of introspection was thus generally low among the Justices I met. The obvious reason is the lack of legal training and higher education in general. If you only know what you see, you only see what you know.

5.5 Conclusion: The role of the local court Justices

Are the local court Justices in fact ‘the law’? Alongside the Chiefs, in that case, but the Justices as such constitute an institution to a larger extent, and are not as thwarted as the Chiefs, it seems. The paramount critique against the Chiefs keeps its distance; the Chiefs are treated with a kingly respect (despite the amount of resigned critique), while the Justices are seen as ordinary persons – although in a respectful position – but replaceable in another way, merely voicing the customary law. The discussions with the Justices alone do not affirm this claim; it is from the assembled information, from different locations, that this idea of the Justices being a part of ‘the law’ emerged. A few points support this claim. First, the level of autonomy of the Justices; second, the customary law being unwritten; third, the divergence among the Justices; fourth, the absence of monitoring mechanisms (and an absence of threats of reprisals), and; fifth, the fact that the government is unable to exercise control through training since there is a lack of funds. As a result, the decisions of the Justices, i.e. the outcome of a case before the court, depend on *who* the Justice on the bench is. Meeting the Justices, I came one step closer to finding this out. They are open to new influences and appreciative of all the training they get and they are far from being rigid defenders of conservative traditions when these are proven unjust. Change is a fact of life, when you are living in a social and legal structure that has undergone fundamental upheavals the past one and a half century. Moreover, by virtue of being a component in the state machinery of a sub-Saharan country, the Justices would have to struggle not to be affected by the political and cultural pressure from the global North. They have become more aware of issues such as gender equality and the critique against customary law; however, their detailed understanding of the implications of these concepts in theory, as well as in practice, remains uncertain. Some aspects of their respective customary practices are considered good, while some changes are considered potentially beneficial, either for the local court, or for the people in the community. All in all, I would say that the Justices are not *the* custodians of customary law; but they are, as an institution, one large piece of the puzzle. They are not the source, nor the main authority of customary law (that I would identify as both the Chiefs and the complex norm layers in the community and family

etc.), but they process, reiterate and have the power to shape the version of customary law as it stands at a certain point in time and place. The mere power, or space to differ and vary in outcomes and final decisions (after internal disagreements and discussions among the Justices) indicates that they have a potentially important role within the system. Therefore, they also constitute an important component in the discrimination of women, as has been stipulated by various civil society organizations, women's representatives and international bodies. A 'Justice activist', such as the woman in Mansa, *could have* an enormous impact for subjective sense of justice (or confidence in the judicial equality) for the woman, on an individual level. The Justices could, in other words, range from being visible to invisible in the development or reproduction of the law.

The implication of the Justices' making of customary law through their decisions in court is that the status of women in society is in their hands to shape. The equal worth of men and women in a home setting (concerning marriages, attitudes on excelling women, proprietary rights and so on) has great importance for an overall gender equality elsewhere. The chain of thought is that the Justices take part, consciously or unconsciously, in creating customary law; customary law constitute an authoritarian force within the larger structure; and the structure shapes the people and their identities, by its constitutive power of giving incentives, and of valuing and defining actions and attitudes. Thus, *the making of law* and *the makings of law* meet on the same arena. One could claim that the customary 'law' does not exist in itself, only its manifestations of it through pronouncements of judgments by the joint voices of conflicting interests, authorities and intentions, understood in a multidimensional context of history, society and culture.

6 Final discussion

I search for another word for ‘complex’ to describe why one should not put all Justices together in one group and look at the situation in categorically. Because reality is not ‘either black or white’. Synonyms such as ‘complicated’, ‘elaborate’, ‘mixed’, ‘tortuous’ and ‘misleading’ might help to illustrate how difficult it is to explain how something *is*, while at the same time emphasizing that things are not what they *seem* from a distance, and that one should resist to settle on one explanation, determination, definition and so on. Is there an answer? Can the Justices misinterpret the law or simply ‘go wrong’? If there is no book to verify and check the answers to the questions, then who has the right to oppose the decisions of the local courts? If there is no correct answer to what the customary law ‘is’, then it cannot go wrong. As long as they stay within the frames set by some principles in the Local Courts Act and Circulars from the High Court, the Justices are on the right path. What tells me that my personal, utterly normative convictions, are more valid than anyone else’s are? One thing that one can do though is to look at the framework and have an opinion on that. Using the catalogue of provisions in CEDAW as an example to lean on, one can point at noncompliance with a number of its established standards.

6.1 A feminist’s dilemma

A first step in my analysis was to show that the structure is not to be taken for granted, as a given circumstance. Deconstructing the customary law system and exposing its components in terms of actors and authorities renders it less unattackable and immune to critique (of its effects *and* of its foundations). In the deconstruction process lies also the uncovering of explanatory factors. Assuming an underlying discontent with the state of things, the next step in the analysis would be to identify which elements that are ‘not good’. It is problematic however, to thereafter go with the instinct to simply call for change, and I will explain why this is so. First of all,

there are different views on what is wrong, and any process of change would need to be a participatory one and inclusive of all stakeholders. Any end result, when all interests and demands have been considered, would be a compromise and, at the best, reflect a balance between the stakeholders. In other words, there would never be an apolitical or universally accepted solution. Linked hereto is the problem that not all stakeholders have a voice. The voiceless, for instance the ‘subaltern’ as coined by Gayatri Spivak (1988), are often those who would gain the most of being included, if only so, for the reason (of this heterogeneous group) of previously having been excluded from the dialogue. Perhaps one could more accurately say that the ‘democratic process’ would gain the most of including these voices, since total participation is the ultimate form of democracy. For the time being, it is crucial to include those who bare their voices and in this process, explore what justifies that they represent the voiceless. Further, change as such appears to be a fantasy – especially in the field of ‘law’ – where final changes in behavior on the ground rarely correspond with the intended ones on a hypothetical, ideological and theoretical level. Theories most certainly do have their merits, but, as I observed in Zambia, it became difficult to separate on theoretical grounds, possible initiatives aiming towards a promotion of gender equality (lifting the women to the level of entitlements to that of men), from initiatives aiming at altering the structure in its foundations. As noted earlier, it is a delicate task to criticize the foundations of law for being patriarchal and biased, while at the same time calling for reforms and added women’s rights. Staying within the existing legal structure implies accepting it (and that it was modeled with the man as its norm), thereby empowering it (Smart, 1989:160-161). Similarly, it is a fantasy to wish for a revolution, an upheaval resulting in the total equality between men and women to the point that categorizing people according to gender attributes before the law becomes irrelevant. Solutions aiming at altering a patriarchal structure are constraint by specific circumstances, factors and limitations of the real context. In a country like Zambia, legislation targeting equal pay or maternity leave for instance, would be useless since the majority of the female population would not be affected by such provisions, and would even less know about them. Changes to the structure, I suggest, would include changing the authorities and the different normative sources in society, including in civil society. Looking at what is done, or what is being discussed, it seems as though all the means possible are being explored. A large number of community-based organizations (that have knowledge of the particular needs of an

area) have taken upon themselves to sensitize and give legal education to the women and men in the communities, to the Justices and others. There is a revision process of the Constitution in place to address its flaws (even though it is very slow and non-inclusive). There is a target of having 30 percent women in Parliament (where the laws are made); and campaigns are promoting a positive attitude of encouraging girls to attend school. In other words, initiatives are taken on different levels and by all means possible. The structure is the target, but the rules of the game are those of the structure in place, which confuses the distinctions made in theory. Once again, the complex reality defies sharp distinctions and simple definitions. It then becomes a delicate task for a feminist to decide what strategies to promote. For my own sake, I stop at the deconstruction exercise, which in itself is of great educational value, without imposing solutions in a context that I am not familiar with. A dilemma related hereto is relying on globalization for endorsement in the struggle to *save* oppressed women in different parts of the world, includes a great risk. Evidently global mobilization of women's movements have contributed to the empowerment of women; however, focusing on a global unification of rights systems disqualifies the local and permits the flaws and Western inclination embedded in the global uniformization of law (c.f. Loomba, 1998:191-192). The ZLDC pointed at one problem with criticizing and changing customary law that also becomes relevant to take into consideration in this process. As a traditional system, the customary law is the basis of the Zambian identity as a people, and a disapproval of some of it has been feared as likely to be seen as denial of that identity (ZLDC, 2002:50).

6.2 An aid dilemma

The fact that customary law is unwritten and dynamic might result in decisions and judgments being *ad hoc* more often than if the law would consist of a mandatory checklist. There is nothing wrong with decisions being sensitive to case-specific circumstances; it could even increase the level of fairness or justness. But if it the character of the Justices – who he or she is – turns out to be of importance for the outcome, what standards are legitimate to require in terms of personal characteristics? There is not necessarily a lack of law students in Zambia, and even though the

Judicial Service Commission probably would prefer to recruit a Justice with higher education, those students study to become lawyers, focusing on the written law. If those who study law are not interested in working at the local courts, the Justices for the near future will continue to be trained on the job. The availability of training depends on funds and the availability of funds is highly volatile, considering that the nation-wide training drive that the Justices talked about was conducted in 2003. The Director of Local Courts explained that they rely on foreign funds as they did for the training in 2003. The ideological dilemma that emerges, from a Northern outlook, is if it is better to let Zambia generate its own knowledge and expertise, or if donor countries should step in and contribute with funds. This issue mirrors the recurrent debate in discussions on international development on whether or not rich countries should give aid. In the first case, the level of sustainability is potentially higher, since the country would have to establish a complete in-house system and a working infrastructure. The disadvantage is that it would take many years to get in place, since there *de facto* are no funds. In the second case, training could be available earlier and of have a more extensive scope. The weakness of this alternative is the insecurity of relying on the benevolence and on the financial situation of other countries. Another weakness is the risk that a donor country designs a training program of irrelevant, inapplicable or unproblematized topics, resulting in a vocabulary of empty buzzwords with changeable meanings. And without the incentives of creating a national infrastructure of providing training, Zambia could simply continue hoping for aid, maintaining the Justices' proficiency level low and unreliable. The choices compose an ethical dilemma since, in my opinion, it would be desirable that Zambia could institute its own system, on its own terms and answering to its own needs. It would also be favorable to not be dependent on other countries, avoiding being 'in debt' in one way or the other. At the same time, holding on to this idealistic vision is to support losing at least one whole generation of untrained Justices, which would have consequences for the pressing project of challenging the gender biases in the legal system and in society as a whole. Each day without training, the Justices will pass judgments on the same grounds as before, perpetuating the subordinated status of women. Without coming to a conclusion, I put faith in all the community-based civil society organizations, addressing the gender biases in the complexity-sensitive way that is needed.

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Appendix A: Interviews

Justices

Interview 1: Livingstone Local Court (4 male Justices), September 8, 2008

Interview 2: Livingstone Local Court (4 male Justices), September 9, 2008

Interview 3: Chimese Local Court (1 male Justice), September 19, 2008

Interview 4: Kasoma Lwela Local Court (1 male Justice), September 23, 2008

Interview 5: Kasoma Bangweulu Local Court (2 male Justices; 1 female Justice), October 2, 2008

Interview 6: Kalasa Lukangaba Local Court (2 male Justices), October 9, 2008

Interview 7: Mansa Local Court (1 female Justice), October 10, 2008

Informants

Legal Resource Foundation, Livingstone (1 male), September 8, 2008

Young Women's Christian Association, Livingstone (1 female), September 11, 2008

Chief and others, Kosta Village (group of men), September 24, 2008

Mansa Social Welfare Officer, Mansa (1 male), September 26, 2008

Public Prosecutor, Mansa (1 male), September 28, 2008

Mansa District's Women's Development Association, Mansa (the board, mixed group), September 30, 2008

Research Officer of the House of Chiefs, Lusaka (1 male), October 17, 2008

Director of Local Courts, Lusaka (1 male), October 21, 2008

Appendix B: Interview guide: Justices

1. Background information (name, title, years of service, educational background, process of appointment).
2. What are the most common cases, concerning women, that you deal with?
3. Are there situations where both statutory law and customary law are applicable?
4. Sources of law. Do you receive instructions, guidelines, policies etc. guiding you on how to decide a case?
5. How are your cases documented?
6. Are the customary practices same or different throughout the country? Would a case be decided in the same or a different way at another court?
7. Are you familiar with the critique from CEDAW a few years ago?
8. Has there been any training programs or information campaigns?
9. Have there been changes that you can think of, in customary practices?
10. Do you think it is possible to change the customary practices?
11. Are there any customary practices that you feel needs to change?
12. Are there any differences between rich and poor women coming to court?

Appendix C: Interview guide: Informants

The questions in the reference interviews varied according to the profession of the interviewees. The following questions constituted the core. The interviews with the Chief, the Research Officer of the House of Chiefs and the Director of Local Courts focused on gathering information related to their particular positions and did not follow this guide.

1. Background information (name, title, profession).
2. What are the main problems, as you see it, concerning customary law and women?
3. Are there any benefits of customary law, for women?
4. Who has the responsibility in this context to act?
5. Are there situations where both statutory law and customary law are applicable?
6. What role do you feel the local court Justices play? What is their influence?
7. Do you know if the Justices receive instructions of any kind on how to decide in a case? (Sources, pressures) Or do they decide on their own discretion?
8. Are you familiar with the critique from CEDAW a few years ago?
9. Have there been changes in the attitudes towards issues of discrimination against women?
10. Do you think it is possible to change the customary practices?
11. Are there any differences between rich and poor women coming to court?