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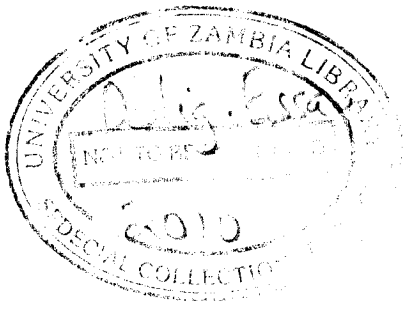

The Penal Code (Amendment) Act, 2005, Does the Intention of Parliament Harmonize with the Practice of Courts?

By

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Course: L410 (Directed Research)

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An obligatory essay submitted to the School of Law of the University of Zambia in partial fulfilment of the requirements for the award of the degree of Bachelor of Laws (LLB).

The University of Zambia
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February 2010.

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I recommend that this Obligatory Essay prepared under my supervision by

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The Penal Code (Amendment) Act 2005, Does the Intention of Parliament harmonise with the Practice of Courts?

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DECLARATIONS

I George C. Musonda, computer number 89159683 do hereby declare that I am the author of this Directed Research Paper entitled,' **The Penal Code (Amendment) Act 2005, Does the Intention of Parliament harmonise with the Practice of Courts?'** I further declare that it is the work of my own ingenuity and that due acknowledgment has been made where other people's work has been used. I truly believe that this research has not been previously presented in the School of Law for academic work.

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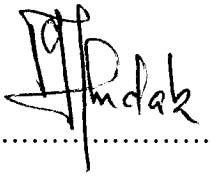
Signed:  Date: 09/04/2010

DEDICATIONS

This essay is dedicated to my wife Alice Chishala Musonda, and my children Chota Musonda, Ng'andwe Musonda and Bupe Musonda.

You have been the source of inspiration both in good and bad times. To Bupe, your unceasing questions even in matters beyond your comprehension are a sign of good things to come, and may my step in this school lure you in and even work harder. I love you all.

I also dedicate this essay to all those who have devoted their time and energy in trying to find the lasting solution in curbing child sexual offences. It is said Rome was not built in one day, soldier on and we together shall triumph!

ACKNOWLEDGMENTS

Sincere acknowledgment is made to the following people and organisations.

Zambia Civic Education for the use of their Resource Centre.

Rtd. Judge K. Chanda for his educative supervision received through out the writing of this essay.

Mr. A. Mwanza of Criminal Registry of the High Court for Zambia for easy access to judgments.

Children In Need for accepting an interview with me.

The Child Protection Officer under UNICEF for her interview with me as well.

The Zambia Police Victim Support and Police Crime Statistics Officer for the provision of up to date statistical data on the subject of sexual offences.

To my family for surrendering a computer to me for the sole purpose of writing this essay and their understanding of how involving the work was thus sharing very little time with them.

To all those who might have rendered a service to me in one way or another, I extend my sincere gratitude.

George C. Musonda

February 2010.

ABSTRACT

An increase in reports of child defilement has been described as unprecedented in the history of Zambia. It is an out break to the extent that Civil Society has been advocating for mandatory death penalty for the offenders while courts have resorted to imposing long jail sentences on the convicts. Interestingly, the Supreme Court, in a long time, has upheld a life sentence imposed on a twenty four year old defiler of Mazabuka district, by the Livingstone High Court[1] in Southern Province.

Generally speaking, child defilement is recognised only when the child is taken away from the parents or guardians by the accused for the purpose of having canal knowledge with the victim. However, it is common knowledge that many young girls have been defiled in rural areas by way of early marriages. While in the former only one person is directly involved, the later scenario has several parties, each one contributing in one way or another, with the full knowledge that the wife to be is below the legal age for marriage. One wonders whether moral principles bordering on sexual intercourse with the child differ from tribe to tribe or religion to religion because morality is capable of affecting society injuriously and this is what gives the law locus standi in the matter.

Therefore, the paper has presented answers to questions such as; what was the major impediment in Judges' not imposing mandatory life sentences[2] on the convicts as provided for in the Principle Act before amendment? Why has the Penal Code (Amendment) Act 2005, settled for a specific term of years sentence[3] and only makes life imprisonment optional? Has Parliament been clear enough on the need to expressly declare child defilement cases as those of strict liability so that there is no need to establish culpability? Is liability strict to relieve the prosecution of the necessity to prove mens rea in relation to one or more of the elements of the actus reas? Has the Penal Code Amendment Act 2005 lived to its expectations of reducing and eventually eradicating child defilement cases?

[1] Zambia Daily Mail, 3rd February, 2010, page 3.
[2] The Penal Code Act, S. 138(1).
[3] The Penal Code (Amendment) Act, 2005, S. 138(1),(2).

These and many more questions have provided a legal solution as to whether Courts have interpreted the law on child defilement as intended by Parliament.

The essay looks also at how both morality and the law abhor the act and this has been demonstrated in the way the public or society at large and the Courts have responded in an effort to halt the scourge. The essay argues that Parliament intended among other things that the Act be applied on a broader basis by casting the net wider so to speak in order to make other people culpable other than the principle offender. This is more so in traditional under age marriages. There should be a striking balance in matters of sex with an underage child between the rights and interests of society and those of the individual wanting to marry the child. It has also been recognised that the Marriage Act[4]is not firm enough by including consent for marriages of girls below the age of twenty one without stipulating specifically the minimum prohibitive age[5]. In conclusion, the essay has suggested further amendment to the Act by including sections targeting parents and guardians who recklessly and negligently omit their parental responsibility leading to the child being defiled. There should be a section as well to include the provision for public shame and reproach for child defilers. This way, it will serve as a reflection of community values by isolating the blameworthy deserving of punishment thus morality will then be what every right minded person presumes to consider immoral. The essay has five chapters, and each chapter deals with different elements in criticising the Act and later provide suggested solutions in strengthening of this seemingly effective piece of legislation.

I now end by stating that there is no limit as to the number of times that the law can be reviewed and amended because society has to be regulated so as to remove any traces of harmful conduct by any member of that society. The society members have no reason to see things differently. Most of the communication is with other members of society in which experiences have been largely homogenous and so all effort is needed to ensure that all members of the particular society view matters in the same way.

[4] The Marriage Act, CAP 50 of The Laws of Zambia, S.33.
[5] Ibid. S. (17), (33).

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Chapter One: Who is a Child?

1.0 Introduction.

Zambia has in recent years experienced a sudden explosion in the number of children especially girls being sexually defiled by their close relatives, neighbours, teachers and clergy men among others with local media being at the centre of uncovering the sordid tales.[1] The following statistics attests to the above observations.[2]

Period	1999	2000	2001	2002	2003	2004	2005	2006	2007
Rape	313	424	340	198	156	175	121	169	230
Defilement	263	306	366	865	815	899	930	1003	994

From the above, it is to be noted that reported defilement cases have been rising steadily while reported rape cases have been decreasing. Other defilement cases remain unreported because they are secretly handled within the families behind the public eye. In 2002, the report by the African Network for the Premium and Protection against Child Abuse and Neglect (ANPPCAN) and the United Nations Children's Fund East and Southern Africa Regional Office (UNICEF – ESARO) detailed the horrific sexual abuse that children in Kenya and all over Africa are forced to endure at the hands of parents, teachers, and sex trade customers.[3] In the light of the above alarming statistics, the general public and civil society demanded for laws that will be able to

[1] Times of Zambia, 15 March 2008.
[2] Zambia Police Victim Support and Police Crime Statistics Office, Simon E. Kulusika "Text, Cases and Materials on Criminal Law in Zambia," UNZA Press, 2006.

[3] Zachary Ochieng,"The Vicious Circle of Sexual Exploitation", News from Africa, August 2002.

deter would be offenders as opposed to the existing provisions of the Penal Code at that time. In his paper entitled, **The African child in perspective; too young to be defiled in an era of HIV/AIDS,** Mr. Chishimba S Zulu, concluded with a recommendation that stiffer punishment of up to life imprisonment will deter perpetrators from defiling children and that the call by the Republican President for Parliament to introduce laws to give stiffer punishment to child defilers should be the focus of advocacy work to Parliamentarians.[4]

In 2005, the Zambia Parliament repealed and replaced sections 138 to 147 of the Penal Code, Chapter 87 of the Laws of Zambia with the aim of providing for heavier and stiffer penalties for child defilers. It provides that *"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction,* ***to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life****. Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to* ***imprisonment for a term of not less than fifteen years and not exceeding twenty years****".*[5] One point worthy noting is that the repealed and replaced section provided that, "*any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to* ***imprisonment for life.*** *Any person who attempts to have carnal knowledge of any girl under the age of sixteen years is guilty of a felony and is liable to* ***imprisonment for fourteen years.***[6] Comparing the two provisions, the Principal Act provided for **imprisonment for life** without any option, for defiling a girl child. The Principal Act seemed to have offered a greater protection for a child compared to the provision of the Penal Code (Amendment) Act, 2005 which has an option for a **specific term of years.**

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[4] International AIDS Conference, 2004 July 11 – 16; 15: Abstract number ThPeC7548.
[5] The Penal Code (Amendment) Act S.138(1)(2)
[6] The Penal Code Act, S.138(1)(2)

Since age is the key factor in defilement cases, in this chapter therefore, the author will define what defilement is and then look at who the 'child' is as defined by various statutes providing for child protection both at the international level and the Zambian level. The author will also investigate various existing statutes and conventions to determine the person responsible to protect the child from sexual abuse and whether these person(s) can be described as parties to the crime when the 'child' in their custody is exposed to sexual relationship either with their consent or without. Each statutory description of a child will then be followed by a brief comment regarding its weaknesses brought about by other provision within that specific law.

Chapter two will consider the Courts' response to both the Principal Act and the Penal Code (Amendment) Act, 2005 together with other relevant legal instruments aimed at protecting a child. The chapter will then demonstrate how ***Magistrates and judges have exercised their discretionary powers*** in convicting and sentencing offenders and whether these measures were as legislated by Parliament since Parliament makes the law and Courts have the duty to properly interpret the same law.

Chapter three will analyze the concept of strict liability and whether Parliament intended child defilement to be classified as such.

Chapter four will look at how morality can shape the law to meet the modern challenges of human rights and whether the concepts of human rights have a bearing in sentencing the offender.

Chapter five will offer the general conclusion.

1.1 Statutory Definition of Child Defilement.

Defilement of a child is defined as *having unlawful carnal knowledge or attempting to have unlawful carnal knowledge of any child.*[7] A child is any *person of any sex* below the age of sixteen years.[8] The Principal Act's definition of a child excluded a boy child because it expressly stated that *"any person who unlawfully and carnally knows* ***any girl under the age of sixteen years*** *is guilty of a felony and is liable to imprisonment for life".*[9] Therefore a boy child remained at risk of being defiled with the defiler getting away with a lesser offense.

1.2 An unlawful Canal Knowledge.

From the definition, the carnal knowledge must be unlawful and it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married. In Rex v Chinjamba,[10] a villager Fulai Njamba married a girl under the age of sixteen years and lived with her as a man and wife. It was held that it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married despite the fact that the girl is under sixteen years of age.

The definition in itself leaves room for traditional under - age marriage advocates to marry off girls as young as fourteen years as long as the marriage is 'lawful'. This provision weakens the intended purpose of the Act[11] to protect a child from defilement more especially in rural areas where early marriages are the order of the day. It is with no doubt that Parliament did not intend

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[7] Ibid

[9] The Penal Code, Act Chapter 87, S. 138(1)(2).
[10] (1949) NRLR 384
[11] The Penal Code (Amendment) Act, 2005.

to discriminate the beneficiary of the Act[12] between a rural child and an urban child, and therefore whoever gives away a child into marriage as long as that girl is a child in terms of the Act[13] commits a criminal offence and that person together with the principal offender should be held liable as parties to the offence.[14] Since the act is illegal, and if it is proved that the child of just below sixteen years of age was willing to get into marriage as is the case mostly in rural marriages, and that the child was reasonable enough to know what she was engaging herself in, then that child should be treated as part of the illegality. In Murphy v Culhane[15] it was held that a man who takes part in a criminal affray may well be said to have being guilty of such a wicked act as to deprive himself of a cause of action. In the same vein, a girl who willingly and knowingly consent to a marriage prohibited under the Act[16] commits an offence and should receive a measure of punishment so as to deter would be offenders. Applying this solution to the problem of early marriages as long as the girl is just about sixteen years old will result in three parties been convicted namely; the principal offender, whoever participated in the marriage arrangement and the girl herself. It is well established by psychologists that at fifteen years of age, though not sexually fully developed, a girl child can reason like a grown up person and be able to resist unwanted sexual advances. This is evidenced in the type of house chores that a girl of fifteen years can accomplish without close supervision.

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[12] Ibid
[13] Ibid
[14] Ibid S. 21(a-d)
[15] (1976) 3 W.L.R. 458
[16] Ibid

1.3 Child under the Marriage Act.

It is of interest to note that the Act defines the age of the child the same as the Penal Code. It states that," A marriage between persons either of whom is under the age of sixteen years shall be void".[17]

However, just like other statutes under consideration, there is no firm adherence to the prevention of a child's sexual abuse because other sections within these statutes give way to consent as a waiver where age is concerned.[18] In this instance the Act provides that,' if either party to an intended marriage, not being a widower or widow, is under twenty one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Zambia, of the mother, or if both be dead or of unsound mind or absent from Zambia, of the guardian of such party shall be produced and shall be annexed to the affidavit required under sections ten and twelve……'[19] This means that consent from those responsible over the child's affairs is enough to override the need for the prescribed age in a marriage. Reading this provision together with the Penal Code Act as amended contradicts the intention of Parliament. Age is a deciding factor in one engaging in sex and therefore the issue of consent does not arise. It is strict and needs no further alterations!

[17] The Marriage Act, S.33
[18] Ibid. S.17.
[19] Ibid.

1.4 The Zambian Constitution's Young Person.

The Zambian supreme law defines a young person as any person under the age of fifteen years.[20] This definition comes under the article providing for the protection of young persons from exploitation. It states that:" All young persons shall be protected against physical or mental ill – treatment, all forms of neglect, cruelty or exploitation".[21]

Exploitation is the taking advantage of a situation or a person for one's own ends[22].

This provision no doubt includes sexual exploitation. One interesting observation is that the amended penal code defines a child as one below the age of sixteen while the constitution covers the age below fifteen. Under the Zambian legal system, if any other law is inconsistent with the constitution that other law shall, to the extent of inconsistent, be void.[23] This inconsistence in the age of the subject intended to be protected, though seemingly immaterial may technically work to the advantage of the defiler who might argue that a sixteen year old child is excluded and thus rendering the Penal code's child definition faulty.

1.5 The Child under the Treaty.

Zambia like many African Countries ratified the United Nations Convention on the Rights of the Child (CRC). The convention is not a mere policy statement or declaration of children's rights made on behalf of states but consists of legally binding international obligations. By ratifying the

[20] The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Art. 24(2),(4).
[21] Ibid. Art.24(2).
[22] Collins New School Dictionary.
[23] The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Art. 1(3).

convention, such states agree to become legally bound to ensure that children will enjoy all the rights guaranteed under the convention and so are its citizenry.

The importance of this convention is that inadequacies in the domestic provisions of state parties will be made known to the United Nations agencies specialized in the rights of a child through reporting mechanisms.[24]

The convention defines a child as all persons under the age of eighteen, and leaves provision for attaining of majority age early.[25] States parties are expected to protect children from physical harm or mental harm and neglect, including sexual abuse and exploitation. Zambia having ratified the convention in 1991 has thus shown commitment to the improvement of the welfare of the child, however no domestication has been done yet and this presents difficulties by all law enforcement agents to fully realize the convention's intended goals.

1.6 The Child and the Charter.

In its preamble The African Charter on the Rights and Welfare of the Child recognizes that the child due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires ***legal protection*** in conditions of freedom, dignity and security.[26] The child for the purpose of the Charter is every human being below the age of 18 years.[27] The Charter specifically abhors and prohibits all sexual exploitation of a child by an expression that," State parties to the present Charter shall

[24] Convention on The Rights of The Child. Art. 37.
[25] Ibid. Art. 1.
[26] African Charter on the Rights and Welfare of the Child - Preamble
[27] Ibid. Art. 1.

undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent

(a) The inducement, coercion or encouragement of a child to engage in any sexual activity;

(b) The use of children in prostitution or other sexual practices

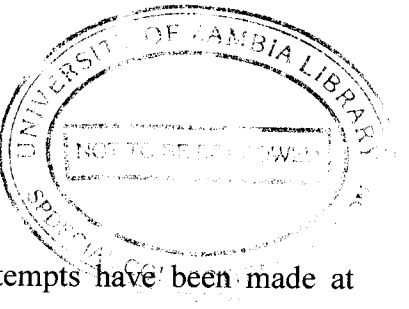
(c) The use of children in pornographic activities, performances and materials[28].

Of particular interest is the Charter's provision on parental responsibilities where it states that parents or persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty to ensure the best interest of the child are their best concern at all times[29]. Unfortunately cases of defilement exist even where the child is under the guardian's protection. In one instance, the child's grand mother surrendered her to the man who subsequently defiled her for having drunk the man's beer.[30] It is therefore the responsibility of the law to apportion the blame on both the defiler and the guardian and sentence them accordingly in contravening the above parental care of duty. In Donoghue v Stevenson,[31] Lord Macmillan stated that, "the law takes no recognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to

[28] Ibid. Art. 27.

[29] Ibid. Art. 20.
[30] The Post, May 12, 2008.
[31] (1932) All. E.R. Rep. 1

each other. The criterion of judgment must adjust and adapt itself to the changing circumstances of life". The ever reported cases of child defilement should instill good judgment in those entrusted with the guardianship of these vulnerable children leaving no defense of pure accident. Therefore, in the author's view, there should be no more than one definition of who a child is in the context of age when it comes to defilement cases, except that those under fifteen years and entirely under their parents and guardian responsibility should be treated differently from those above fifteen who are personally responsible and able to consent.



1.7 Conclusion

In the foregoing discussion it has been established that several attempts have been made at national, regional and international levels to provide for protection of a child by giving an age description of a child. The constitution of Zambia and the United Nations Convention on the Rights of The Child specifically mentions protection against **exploitation** while the Penal Code as amended clearly isolates defilement as opposed to the wider meaning word of exploitation. Technically, conflicts exists between the Constitution and the Penal Code concerning the age of the child to be protected, but under the United Nations Convention of the Rights of the Child, there is a provision for one attaining majority age early. Similarly, in this regard, when reforming sexual offences in Europe, it was observed that the European commission found that it was a contravention of Article 8 (respect for private life) and Article 14 (non – discrimination) to have different ages of consent for heterosexuals and homosexuals[32]. This led to a change of English

[32] Sutherland and Morris v UK [1998], E.H.R.L.R. 117.

law, in rendering the age of consent the same for all persons[33]. Therefore, different age definitions in different statutes concerning sexual maturity are a source of concern in this paper. There is need for an urgent legal reform in this area to completely reconcile age definition in all enabling statutes in the protection of a child so that all these statutes are brought in conformity with the provision of the Constitution with no exception whatsoever such as consent or otherwise. This must even involve overriding previous authorities emanating from court decisions.

[33] Sexual Offenses (Amendment) Act 2000,S.1.

Chapter Two: The Penal Code (Amendment) Act, 2005 and the Courts' Response to Public Opinion.

2.0 Introduction

The law of the country may fail, for a time, to represent public opinion owing to the lack of any legislative organ which adequately responds to the sentiments of the age. Law and social order dictates that a modern man in an industrial society should be different from man in a pre industrial society. He should respond to the provisions of the law and if he does not, then the law or himself need to be examined and analyzed fully for any missing elements. Public opinion governs legislation and therefore it means that laws are there to be maintained or repealed in accordance with the opinion or wishes of its inhabitants.[34] The ever increasing cases of child defilement are a sign of failure of earlier legislation.

On 17th October 2005, Parliament amended the Principal Act by repealing sections one hundred and Thirty six and one hundred and thirty seven. The Principal Act read as follows: "*any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felon and is liable to* ***imprisonment for life.*** *Any person who attempts to have carnal knowledge of any girl under the age of sixteen years is guilty of a felony and is liable to* ***imprisonment for fourteen years.*** The Penal Code (Amendment) Act, 2005 now reads: *"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction,* ***to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.*** *Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to* ***imprisonment for a term of not less than fifteen years and not exceeding twenty years***".

[34] A.V. Dicey, Law and Public Opinion in England: London, Macmillan (1963), p13.

Initially, for the substantive offence of actual defilement, Judges and Magistrates were expected to impose a fifteen year jail sentence not withstanding the proviso to explain the available defense to the offender. The Principal Act provided for life imprisonment for any person having carnal knowledge of a girl under the age of sixteen years and yet the following cases will demonstrated that under this Act, offenders only served lesser sentences. It is true that where the section of the penal code prescribing the criminal conduct set the maximum, but without indicating the minimum, the judge exercises his or her discretion to impose a sentence of his or her choice within the range prescribed.

2.1 Weakened Educative Deterrence

In Chipendeka v The People[35], the offender when called upon to plead said that he had carnal knowledge of the girl under the age of sixteen years. He was sentenced to two years imprisonment. In Mwaba v The People[36], the appellant was convicted of defilement and sentenced to three years imprisonment with hard labour. Theses sentences were less severe and the accused had the opportunity to take advantage of the provisio as a complete defense. In Diamond Kapwepwe v The Queen,[37] the appellant was convicted before a class II Court of defilement contrary to section 119(1) of the Penal Code and sentenced to five years. Section 119(1) as a proviso stipulated that;" Provided that it shall be sufficient defense to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years". The Magistrate did not attempt to explain to the accused the significance of the proviso and as a result the conviction was quashed and

[35] (1969) ZR 82
[36] (1974) ZR 264
[37] (1952) NRLR 168

sentence set aside by the High Court. Despite short sentences imposed on defilement offenders prior to the amendment of the Act, convicts escaped these sentences on appeal because most Magistrates did not explain to them the need to defend themselves by way of the proviso. The proviso was in actual sense a subtraction to the effectiveness of the well intended child protection provision by the Principal Act as enunciated in Jovan Phiri v The Queen[38]. The accused was convicted by the Resident Magistrate on five counts of defilement of a girl under the age of sixteen years contrary to section 119 of the Penal Code. The accused had pleaded guilty to all counts, being sentenced to a total of three years with hard labour. Prior to sentence and whilst the court was not in session the magistrate had been supplied with a welfare report containing hearsay statements as to character. In due course, the case came before the High Court for confirmation of the sentence, where upon it was noticed that there was no entry on the record to show whether or not the proviso to section 119 of the Penal Code had been explained to the accused before the plea was taken. The conviction on all five counts was quashed and the sentences imposed set aside. Many magistrates overlooked this provision and yet it was the intention of Parliament to offer an accused the opportunity to defend himself. Another point worth taking note is that defilement cases were not as common by that time as the case is now hence the lenience in sentencing by the Courts.

2.3 The Failure of Incapacitation Theory.

But it is worthy to mention here that, even before the amendment was done to the Principal Act, Judges started realizing that the intention of Parliament in protection of a girl child demanded at least a measure of disablement to restrain such persons from further harmful

[38] (1955) NRLR 342

activities. Where punishment is disabling or preventive, its aim is to prevent a repetition of the offence by rendering the offender incapable of its commission. While the most effective method of disablement is the death penalty, imprisonment has also a deterrent value and serves also a temporary preventive measure. Though some men appear to be beyond the reach of any correction influences, they can not just be abandoned as totally unfit for punitive treatment of some sort. Therefore, with this realization, Judge Kajimanga sentenced Stephen Hara to twenty five years imprisonment with hard labour in 2004. The facts of the case in The People v Stephen Hara[39], are that the accused defiled a girl under the age of sixteen years on 25th October 2003 in Lundazi of Eastern Province. He pleaded guilty to the charge and was convicted accordingly by the subordinate court of the first class at Lundazi. The trial court committed Stephen Hara to the high court for sentencing. The Judge then proceeded as follows," I have considered the record and the mitigation given by the accused. I agree with the lower court that although the accused is a first offender and readily admitted the charge and therefore deserves lenience, the offence he committed is very serious and there is need to exclude him from the society for a longer period. I consider that a man of thirty nine years to defile a young girl of eleven years causing pain to her private parts is an abominable act in our society which must be condemned in the strongest terms possible. Such condemnation would be meaningless if the accused is not given a custodial sentence which is commensurate with his barbaric act. I accordingly sentence Stephen Hara to twenty five years imprisonment with hard labour". Similarly, when sentencing a 41 year old man to 60 years imprisonment with hard labour for defiling his grand daughter, Kitwe High Court Judge Lloyd Siame urged the church to take a leading role in sensitizing people and not sit quietly over the rising cases of defilement. He also said that the convict does not deserve any lenience whatsoever and must be kept away from young girls[40]. With the Penal Code (Amendment) Act, 2005 in force, the absence of the proviso to section 13 of the Penal Code enabled judges to prescribe long prison sentences for child defilers.

[39] High Court Case HJ/07/2004
[40] The Post Newspaper, Wednesday May 21, 2008 – page 7.

Some judges still feel that the amended law is still inadequate to deter would be offenders. In The People v Daniel Shula,[41] the accused had unlawful carnal knowledge of Veronica Sakala a girl under the age of sixteen years on 14th August 2004. He was later on convicted by the Magistrate on 13th February 2006. In sentencing the convict, Justice G.S. Phiri observed that the girl was a child aged eight years and obviously sexually undeveloped. He further stated that, ' having taken into consideration all the circumstances of this case, I will award the convict a prison sentence of twenty five years with hard labour. The convict has the right of appeal against the sentence. How I wish the amended law had provision for public reproach and shame upon such convicts as part of the deterrence. I would have ordered that convicts be paraded for Media photographs.'

The desirability of uniformity and consistency in sentencing cannot obviate the fact that even the most basic sentencing principles are not prescribed or stated with persuasive authority.[42] Therefore, in Zambia the courts have pursued the general deterrence in imposing sentences on those who committed serious offences. The general deterrence is considered useful as it makes the threat of punishment real. It also claims that where there is notable increase in the specific crime, or has caused public disquiet, more severe penalty need to be imposed in order to prevent or curb the crime in question. It is often said that every time a crime is committed the theory of deterrence is weakened. The courts' response to defilement cases is thus a confirmation of the above theory of deterrence. Under this theory, it is the threat of punishment that deters people from committing crimes. At the legislative level, Parliament lays down penalties to threaten those who might contemplate crime. At the sentencing level, offenders are punished in order that others will be discouraged from committing crimes; this punishment is held up as an example of what will happen if others engage in similar activities. Similar exemplary sentences were imposed to suppress attacks on ethnic minority groups in Notting Hill in 1958,[43] to prevent the sudden increase of muggings on elderly people in the early 1970s.[44] In 1985 concern over the rise of football hooliganism led to an exemplary sentence of life imprisonment for riotous assembly outside a football ground, though this sentence was reduced to three years

[41] PB/05/04, Case No. HPS/25/2007.
[42] Frankel, M.E., 'Lawlessness in Sentencing', 41 Cin. L. Rev. (1972), 4 – 10.
[43] (1958) Crim.L.R.709.
[44] Storey (1973) 57 Cr.App.R.840

imprisonment on appeal.[45] The following table indicates the progressive sentencing under the two provisions and yet the Penal Code (Amendment) Act 2005, has not adequately protected the child against defilement in as far as sentencing is concerned.

Year	Term of Imprisonment	Case Reference	Act Applicable
2007	25 years with H.L	HPS/06/2007	(Amendment) Act, 2005
2007	20 years with H.L	HPS/27/2007	(Amendment) Act, 2005
2007	25 years with H.L	HPS/25/2007	(Amendment) Act, 2005
2006	25 years with H.L	HPS/22/2007	(Amendment) Act, 2005
2006	15 years with H.L	HPS/24/2005	(Amendment) Act, 2005
1969	2 years	ZR 82	Principal Act
1974	3 years with H.L	ZR 264	Principal Act
1952	5 years	NRLR 168	Principal Act

2.4 Defilement in the Context of Statutory Marriages under Consent.

The ineffectiveness of the Penal Code (Amendment) Act 2005 is due to its narrow interpretation. Both the Penal Code (Amendment) Act 2005 and the Marriage Act have the same definition of a child. The Penal Code makes the age of a child as a deciding factor in defilement cases but under

[45] Whitton, The Times, November 9, 1985.

the Marriage Act, it is the element of lack of consent that transforms sexual intercourse into a crime despite first making it an offence to marry a child. This consent is not by the child herself but by the parents or guardians. It should be borne in mind that consent involves a voluntary decision taken by someone who has control over what follows. The British Sexual Offences Bill of 2003[46]stipulates that,"for the purpose of this part, a person consents if he agrees by choice and has the freedom and capacity to make that choice". But a sixteen year old girl lacks legal capacity to consent to an act of sex, and permitting a third party to do so on her part is illegal. In fact Parliament hard a firm realization that a child had no capacity to consent hence the need for the parents or guardians to do so. This is a clear circumvention of the law prohibiting sex with a child. There is no lawful sex with a child and to this effect the British reformed sexual offence no longer contains the phrase "unlawful".[47] It appears as if the Chinjamba[48] case had its authority from Sir Matthew Hale who wrote that," but the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent the wife hath given herself in this kind unto her husband which she cannot retract".[49] However this erosion or circumvention of the law became a full scale attack in the House of Lords decision of R[50]where it was held that whatever status Hale's proposition might have had, the common law had to evolve in the light of the changing social, economic and cultural developments. He further stated that the notion that by marriage a wife gives her irrevocable consent to her husband under all circumstances and irrespective of her health and how she happens to be feeling at the time is in modern times unacceptable. The belief is that it is clearly unlawful to have sexual intercourse with anyone

[46] Clause 77
[47] Sexual Offences Act 1956, S.1

[48] Ibid
[49] History of the Pleas of the Crown (1736) Vo.1 at page 629
[50] (1992) 1 A.C. 598

without her consent. It is therefore fitting that those involved in consenting to the marriage of a less than twenty one years girl are charged with procuring defilement as provided for that, "any person who by threat or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either in Zambia or elsewhere ..... is guilty of a misdemeanor.[51]

2.5 Conclusion

The positive response by the legislature in amending the Principal Act in so far as the removal of the proviso is concerned has given the Courts powers to met appropriate jail sentences on offenders and this in due course is expected to effectively deter would be child defilers. From the table of sentencing above, it is very predictable that long sentences will continue to be imposed on offenders but for the Penal Code (Amendment) Act, 2005 to be an effective piece of legislation, there is need not to apply it in isolation. It should be re - enforced with other sections of the Act. One striking observation is that defilement is mostly now being committed by semi illiterates or traditionalists who believe in early marriages. If the law is applied to the full extent within subordinate courts, then even as these people visit urban areas they will have been sensitized to desist from defiling children. This would create unconscious inhibition against committing defilement and thus serve to educate the public as to the proper distinction between good and bad conduct. The narrow view of defilement will be expanded in promoting good morals not only according to tribal beliefs but according to the law of the land which does not recognize ignorance as may be pleaded in some parts of the Nation. The Marriage Act consent should be done away with as it serves to weaken the law that it is intended to protect.

[51] The Penal Code Act. S. 141 (a)

Chapter Three: Child Defilement – a Case of Strict Liability.

3.0 Introduction

The determination whether an offence is one of strict liability lies in the wording of the statute by the legislature[52]. Having regard to the purpose of the Penal Code (Amendment) Act 2005, the exclusion of the specific statutory defense that the defendant believed on reasonable grounds that the girl was above the defining age, demonstrates conclusively that Parliament's intention was that child defilement is a criminal offense of strict liability.

The doctrine of strict liability was established in an English case of R v Prince[53] where the defendant ran off with an under age girl. He was charged with an offence of taking a girl under the age of sixteen out of possession of her parents. The defendant knew that the girl was in the custody of the father but believed on reasonable grounds that the girl was aged eighteen. It was held that knowledge that the girl was under the age of sixteen was not required in order to establish the offence. It was sufficient to show that the defendant intended to take the girl out of the possession of her father. Had the accused taken much care, he would have avoided his criminal act of taking the girl away. He exhibited recklessness in his behavior.

Therefore a defense of mistake of fact regarding the legal age of consent does not apply. 'It is common learning' said one of the judges of King Edward IV, 'that the intent of a man will not be tried, for the devil himself knoweth not the intent of a man'[54]. In this instance the sole question

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[52] CVM Clarkson & HM Keating, 'Criminal Law – Text and Materials'(2003), page 222.
[53] (1875) L.R.2. C.C. 154.
[54] Y.B.17 Edw. IV. 2.

the Courts entertained was whether the defendant did the act complained of. Whether he did it ignorantly or with guilty knowledge was entirely immaterial. However, there is a general recognition that criminal responsibility is too serious a thing to be imposed upon an innocent man simply for the sake of avoiding a difficult inquiry into his knowledge and intention. Nevertheless, had the accused not performed a prohibited act of unlawful carnal knowledge, the victim would have not been defiled; and this is in accordance with the principle of factual causation. Causation can not, in this case be broken by mere mistaken fact as to the legal age of a victim. It therefore follows that if the accused performed the prohibited act knowingly and or recklessly, then an inquiry should be made in the state of his mind.

3.1 The State of the Accused's Mind.

The accused conduct must be voluntary if he is to incur liability. This view was supported in the statement that to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not make the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of criminal conviction without being morally blameworthy[55]. Notions of responsibility and mens rea presuppose that there is freedom of will. The freely choosing will or mind decides between one course of action and another. The concept

[55] Herbert L Packer, 'Mens Rea and Supreme Court' Sup. Ct.Rev.107 at 109.

of responsibility is based on the philosophical proposition of self determinism[56]. One must accept that man could have done otherwise, that he could choose to obey, in order to find him morally blameworthy. Mens rea, the means by which the blameworthy are traditionally and primarily identified, is dependent upon this philosophical stance[57]. That being the case, the intention of Parliament with regard to this Act[58]was not to provide for any obvious defense for the accused but to determine whether the prohibited act has been committed. Therefore, for the Courts to insist that in order to establish the guilty of the accused the prosecution must satisfy the Magistrate upon each and every ingredient of the offences charged is erroneous. This is because strict liability is justified on the basis of the harm done. Lord Russel in R v. Lemon[59]was faced with a similar situation. The facts of the case are that a magazine aimed at homosexual readers, Gay News, published a poem and accompanying drawings describing and depicting in detail various acts of sodomy and fellatio upon the crucified body of Christ. A prosecution for blasphemous libel was brought. The Editor, Lemon claimed inter alia, that while he had knowingly published the poem and drawings, he had no mens rea as to its blasphemous nature.

Lord Russell ruled that," why then should this house, faced with a deliberate publication of that which a jury with every justification has beheld to be a blasphemous libel consider that it should be for the prosecution to prove, presumably beyond reasonable doubt, that the accused recognized and intended it to be such or regarded it as immaterial whether it was? I see no ground for that. It does not to my mind make sense and: I consider that sense should retain a function in our criminal law. The reason why the law considers that the publication of a

[56] Cf. Kenny, Freewill and Responsibility (1978), pp. 22 – 34.
[57] CMV Clarkson and HM Keating, Criminal Law Text and Materials (2003),p. 218
[58] The Penal Code (Amendment) Act, 2005.
[59] (1979) A.C. 617 H.L

blasphemous libel is an offence is that the law considers that such publications should not take place. And if it takes place, and the publication is deliberate, I see no justification for holding that there is no offence when the publisher is incapable for some reason particular to himself of agreeing with a jury on the true nature of the publication".

What judge Russell means in this case is that while some crimes such as murder and criminal damage require the production of consequences or results, others such as theft and rape merely require a course of conduct. In this vein, the mental element is the intention to have sexual intercourse with a girl, and knowledge of or recklessness as to her lack of consent. The question is whether the accused was aware of the risk that the girl was not consenting. If he could careless he was reckless and this must give rise to criminal liability. Unfortunately, consent does not arise in child sex offences proving that the accused was reckless from the start and does not deserve any defense.

3.2 The Nature of the Doctrine of Strict Liability.

Sexual offence as those of strict liability was further advanced in the case of B v Director of Public Prosecution[60]. Facts are that a juvenile incited a girl under the age of fourteen years to perform an act of oral sex. Upon convicted, he appealed that he believed the girl to be over fourteen years. It was held on preliminary point of law that the terms of s.1(1)[61] imposed strict liability and a mistaken belief as to the age of the victim could not amount to a defense. The

[60] (1998) 4 All. ER 286
[61] The Indecency with Children Act, 1960

judge emphasized that having regard to the purpose of s.1(1) of the Act[62]which was to offer protection to children under the age of fourteen, whether or not the defendant knew of the age of the victim, and to meet the lacuna in the Sexual Offences Act 1956 whereby a defendant who had incited a child without force or threat, relying on their innocence to perform acts of indecency, escaped conviction, there were no grounds for implying into the section a defense founded on mistaken belief or lack of knowledge of the victim's age. The inclusion of the specific statutory defense, that the defendant believed on reasonable grounds that the girl was above the defining age in ss 6 and 19 of the Act[63]demonstrates conclusively that Parliament did not intend that defense to be available to other offences where there was no such provision. Furthermore, it could not be said that, having expressly provided for a limited defense to the less serious offence in s.5 of the Act[64], Parliament had to be assumed to have intended that a similar defense should be available for the more serious without express provision. It followed that the justices had been correct to hold that the defendant had no defense to the charge, and accordingly the appeal would be dismissed.'

The accused wanted to know the correctness of the ruling by way of an appeal assuming for the sake of argument that the he genuinely believed the girl to be over fourteen thus affording him a defense. The justices ruled that the terms of s1. (1) imposed strict liability and a mistaken belief as to the age of the victim could not amount to a defense.

From judge Rougier's ruling, it is clear that correct statutory interpretation by the courts will

[62] Ibid
[63] The Sexual Offences Act 1956.
[64] Ibid.

determine offences of strict liability. The Penal Code (Amendment) Act 2005 as read together with the Principal Act does not provide for any defense bordering on the reasonable belief that the girl was of a certain age in the eyes of the accused. The offence is strict and it is therefore not correct for the courts to lay the burden on the prosecution to prove that the victim was below the age of sixteen. The possibility of this could be seen in other imminent writers' views in matters that are not even expressly classified as those of strict liability. In this regard, in one of his articles,[65]Professor Kenneth K. Mwenda outlined that in Zambia just like many other common law jurisdiction, the burden of proof in criminal law cases generally lies on the prosecution as celebrated in Woolmington v. Director of Public Prosecution[66]. The general rule is that he who asserts must prove. The standard of proof here is such that the prosecution must prove beyond reasonable doubt that you have committed the offence as demonstrated in Miller v. Minister of Pensions[67]. It is worthy noting that even if there are very good laws on the statute books, as long as the implementation of those laws is weak, their purpose will remain a pipe dream. He further goes on to suggest that a possible way out of this conundrum, would be to introduce legislative changes that shift the burden of proof from the prosecution to the accused. And once the burden of proof has been shifted to the defense, it would no longer be a question for the prosecution to prove beyond reasonable doubt that the accused committed the offence. All his discussion was centered on corruption and if his idea is that in corruption cases, the standard of proof should be lowered, what more in offenses against the person?

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[65] The Post, 10th November 2009, page 18 - 19.

[66] (1935) AC 462

[67] (1947) 2 All E.R. 372.

If the courts feel that interpreting the Act[68]as that of strict liability would have disastrous effects on the rule of law and the constitutionally guaranteed presumption of innocence, then there is need to enshrine in the Republican Constitution in the Bill of Rights the exception to the general rule, stating therein, unequivocally and explicitly, that notwithstanding whatever is contained in the Bill of Rights, the exception to the presumption of innocence applies only to offences relating to sexual acts. To illustrate, in the case of Van der Tang v. Spain[69] the European Court ruled in a matter involving continued pre trial detention that such detention can only be justified, 'if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty'.

At this point, it is now necessary to compare the wording of the British statute and the Zambian one.

3.3 Comparing the British and Zambian Statutes on Sexual Offences.

Not withstanding the replacement of the common law by the Penal Code, the relationship between English and Zambian criminal law has always been close and the change to the Code did not fundamentally alter the criminal law. As a result, the general rule of construction of the

[68] The Penal Code (Amendment) Act, 2005.
[69] (26/1994/473/554) of July 13, 1993, par. 55.

Penal Code was stated in the first Code that: 'This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England[70].' Therefore the similarities in the two statutes implies that the interpretation by British Courts applies to the Zambia legal system. The English statute states as follows, ' Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to the sum not exceeding (the prescribed sum) or both. The Penal Code (Amendment) Act, 2005 reads: *"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction,* ***to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life****. Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to* ***imprisonment for a term of not less than fifteen years and not exceeding twenty years****".* There is a striking similarity in the drafting of the two statutes. Just like the Zambian statute, the English statute does not contain a specific statutory provision for any defense based on the genuine misapprehension as to the age of the child. It just talks about the act itself and the age of the victim thus rendering the two statutory provisions similar in their intentions. This being the case, the researcher now considers the ruling of Judge Rougier in the B v Director of Public Prosecution[71]. He thus said,' our first duty is to consider the words of the Act; if they show a clear intention to create an absolute offence, that is an end of the matter. Sometimes the words of

[70] John Harchard and Muna Ndulo,"Readings in Criminal Law and Criminology in Zambia"(1994) page 11.
[71] (1998) 4 ALL ER 286

the section which creates a particular offence make it clear that mens rea is required in one form or another. In such cases, there has for centuries been a presumption that parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea, there is a presumption that in order to give effect to the will of parliament, we must read in words appropriate to require mens rea. It does not in the least follow that, when one is dealing with a truly criminal act, it is sufficient merely to have regard to the subject matter of the enactment. One must put oneself in the position of a legislator. It has long been the practice to recognize absolute offences in this class of quasi criminal acts, and one can safely assume that, when parliament is passing new legislation dealing with this class of offences, its silence as to mens rea means the old practice is to apply'.

Based on Rougier J's ruling, this implication stems from the principle that it is contrary to a rationale and civilized criminal code, such as parliament to have presumed to have intended to penalize one who has performed his duty as a citizen to ascertain what acts are prohibited by law and has taken all proper care to inform himself of any facts which would make his conduct lawful. Where penal provisions are of general application to the conduct of ordinary citizens in the course of their every day life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention

of parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care. It is for this reason that parliament removed the proviso to section one hundred and thirty eight and in the process interfering with the presumption of innocence which is no greater than necessary. In Europe, since the coming into force of the Human Rights Act 1998, the English courts have considered the status of a few strict liability offences and have held that they are not per se incompatible with the European Convention[72].The unwarranted injustices being done to innocent and defenseless children need to be addressed with the strong arm of the law. The defiler can not claim to have any rights to sexually abuse a child but the child has rights to be legally protected due to the needs of his or her physical and mental development[73]. The violation of a child's innocence attracts very grave stigma, and the protection of children from sexual abuse is a social and moral imperative. To conclude his observation, Rougier J further stated that,' even where a statute is concerned with such an issue, the presumption of men rea stand unless it can also be shown that the creation of

[72] Muhamad (2003) 2 W.L.R. 1050, Kearns (2003) 1 Cr. App. R.7
[73] African Charter on the Rights and Welfare of the Child – Preamble.

strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. I deduce from all these statutory provisions that it is the clear intention of parliament to protect young children and to make it an offence to commit offences against children under a certain age, whether or not the defendant knows of the age of the victims, and that it was intended that, save where expressly provided, a mistaken or honest belief in the victim's age should not afford a defense. In my judgement it is not open to the courts to create a defense in circumstances such as the present where parliament clearly intended that no such defense should be available. If one approaches the Sexual Offences Act 1956 on this basis, parliament's intention on a number of occasions are clear. It is obvious, for instance, for the same kind of reasons as those that appealed to Blackburn J. in R v Prince, that the offense of committing unlawful sexual intercourse with a girl under the age of thirteen must be an offense of strict liability. Other sections of the Act have different mens rea requirements[74]'. From the above, it is well established that sexual offences with children are clearly categorized as matters of strict liability.

[74] (1998) 4 All ER 286.

3.4 Conclusion

The conclusion to which the doctrine of strict liability leads is that the presence or absence of the guilty mind is unimportant. Traditionally, the requirement of the guilty mind is written into the actual definition of a crime. The crime in that no guilty intention, no crime. The accused's negligence is to the effect that he did not take care as to the physical and emotional harm the victim will suffer as a consequence of his act. Where parliament says nothing about the nature of these offences, it is up to the courts to imply as a general rule in relation to statutory sexual offenses which are truly criminal and carry a serious stigma. Generally the presumption is that if a defendant satisfies an evidential burden as to a defense of honest belief in a person's age, if that age is critical in the determination of guilty or innocence, the prosecution should have the legal burden of disproving that claim to the criminal standard of proof. This difficulty can be cleared only if parliament could state in no uncertain terms that defilement cases are of strict liability.

Chapter Four: Law and Society – Legal Moralism.

4.0 Introduction

Criminal law has a moral content because many actions prevented by the criminal law such as theft and violence to the person are undoubtedly moral wrongs. Having sexual intercourse with a minor is therefore a very serious moral wrong. Immoral conducts offend the spirit of the community and since we live in groups and communities, the central core of morality is concerned with how to co – exist and co-operate with others.

Generally, the moral and legal independence which characterizes each family in each society serves to restrain the demand that one of its members be handed over to face justice, and this is more especially so in rural areas. In such societies, individuals have very limited knowledge concerning the illegality of early child marriages. In urban areas, to a lager extent, child defilers are not normal and health human beings. It is thus important to note that since child defilement has become the monopoly of the abnormal and degenerate, or even the mentally unsound, the fact must be ascribed to selective influence of a system of criminal justice based on a sterner principal of reformation. In order to overcome this, one legal writer stated that what is required is to designate the sum total of rules, conventions, and patterns of behavior as the body of custom, and when this is done, there is no doubt that society feels a strong respect for all of these norms, and promotes a tendency to do what others do, what every one approves of, and if not drawn or driven in another direction by his appetites or interests, the individual will follow the binding of custom rather than any other course. The force of habit, the good of traditional command and sentimental attachment to it, the desire to satisfy public opinion – all combine to make custom be

obeyed for its own sake[75]. With the growing number of defilement cases mostly concentrated in semi illiterate societies, and where statutory provisions concerning child defilement is almost unheard of, it is necessary that civil societies offer training in this area to responsible people of each particular society in order that the above norms are recognized and respected by the citizens without much emphasis on the legal punishment.

4.1 The Influence of the Rights of the Accused on the Court.

Courts are reluctant to sentence child defilers without strictly following the legal laid down procedure. It is well recognized that both the accused and the victim have rights to be protected even in instances where the accused has expressly admitted being guilty. However if the doctrine of strict liability is applied to cases where there is no doubt that the case was committed, it is unnecessary to put emphasis on the offender's rights because he has acted irresponsibly. In a liberal society where political freedom is valued people must be free from criminal liability and punishment unless they voluntarily break the law[76]. A morally responsible agent is one who understands the social norms to which he is subject and can understand and accept the responsibility for wrongdoing. Such an agent can understand the communicative enterprise of punishment in a way that young children and the insane can not[77]. If a child is so vulnerable to the extent that he can not appreciate and let alone understand his rights, then inequality does arise and in order to balance the scales of justice, the rights of the accused must be lowered in terms of court procedure. What the courts should look for is whether the prohibited act has been

[75] Bronslaw Malinowski, " From Crime and Custom in Savage Society", London (1926) pp 51 - 68
[76] Duff and von Hirsch, "Responsibility, Retribution and the Voluntary: A response to Williams", (1977) C.L.J 103 at 109
[77] Ibid.

committed and making corroborating evidence and other procedures complimentary. In Chanda v The People[78], despite the offence being committed, the ruling was centered on the offender and not on the seriousness of the offence. Facts are that on 7th October 1968, in the subordinate Court of the First Class for the Kitwe District, the appellant was convicted of defilement of a girl under the age of sixteen contrary to section 119(1) of the Penal Code. On the same day, he was sentenced to three years imprisonment with hard labor of which eighteen months was suspended on certain conditions. He appealed against the conviction on one point that he was not represented in the trial and that at no time did the magistrate the magistrate explain to him his statutory defence as laid down in section 119(2) of the Penal Code. In his ruling Whelan J said that he did not consider it safe to allow the conviction to stand. The conviction was quashed and the sentences imposed set aside. The most shocking miscarriage of just is in the case of the People v Alex Mwanza[79]. In this matter the accused was charged with defilement and that on 18th December 2008, he had carnal knowledge of the girl under the age of sixteen. He pleaded not guilty to the charge. According to the evidence adduced by the aunty of the victim, the girl had bruises and a swollen vagina after the alleged defilement. Delivering judgment in the matter, magistrate Simusamba said the victim also gave evidence and that to rely on it, that particular evidence needed to be corroborated with sworn evidence. The magistrate further said that the medical report produced in court concluded that the victim was carnally known although the hymen remained intact. He stated that the medical doctor who compiled the report ought to have explained his findings especially that the hymen was intact. In the absence of a reasonable explanation, the magistrate said the evidence had failed to corroborate. The magistrate noted that

[78] (1969) ZR 58 H.C
[79] The Post Newspaper, Friday January 8, 2010, p7.

in the view of the facts before him, the accused needed to be given a benefit of doubt thereby acquitting him accordingly.

The two cases above demonstrate that an accused can escape the wheels of justice on technicalities. This is a complete departure from the provision that due to the needs of the child's physical and mental development particular care should be taken with regard to health, physical, mental, moral and social development and requires ***legal protection*** in conditions of freedom, dignity and security.[80]The Charter specifically abhors and prohibits all sexual exploitation of a child by an expression that," State parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent

(d) The inducement, coercion or encouragement of a child to engage in any sexual activity;

(e) The use of children in prostitution or other sexual practices

(f) The use of children in pornographic activities, performances and materials[81].

Offences against a person are more serious and any attempt to carnally know the child should be fully investigated and if there is any doubt in the immediate evidence available or any omissions done, then a re trial must be ordered. This was well celebrated in Chilekwa v The People[82] where it was apparent that the appellant did not take plea and that the charge was not even read to the appellant in the case of defilement. In this instance, the Supreme Court did not only set aside the ruling but ordered a re trial. This ruling restored rights of both the accused and the victim for a

[80] African Charter on the Rights and Welfare of the Child - Preamble
[81] Ibid. Art. 27.

[82] (1949) NRLR 293

fair and just trial to take place. In fact a child should have more protection than an adult. In South Africa the Constitution gives more rights to children as a special category surpassing the rights enshrined in the Convention on the Rights of the Child[83]. Even disclosing the identity of the child under eighteen years is a criminal offence because it is provided that 'no person shall publish in any manner whatever information which reveals the identity of the accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen[84]'. Therefore, seeking corroborating evidence when facts are clear that the accused attempted or defiled a child is not only the miscarriage of justice but an act that is morally wrong. The child is bound to live with this knowledge of having been abused as observed by Judge J.A. Banda in The People v Samuel Chafukwa,[85] where he stated that, 'of late there has been almost an out break of defilement cases which has caused an outcry across the country. It is believed that those cases cause trauma to the young victims throughout their lives.

4.2 Death Penalty and Morality

Death penalty is the most effective method of disablement and when punishment is disabling or preventive, its aim is to prevent a repetition of the offence by rendering the offender incapable of its commission. Civil societies and other interested groups in Zambia have been agitating for death penalty in defilement cases but today in a modern society, the death penalty is been utilized less and less frequently to such an extent that the whole field of punishment is now found to consist in the suppression of ones freedom of movement for limited periods of time or

[83] The Criminal Procedure Act, S.154(2)b
[84] Ibid. S.154(3)
[85] HPS/24/2005, Case No. SP4/44/04.

for life. Some judges feel they can not sentence a convict to death on moral grounds. Similarly, those holding political power to allow executions to take place refuse to do so in that they do not support this kind of punishment despite it being legally provided for in the statutes. These personal views by the judiciary and the executive tend to water down the real intention of criminal justice. In this regard, one legal writer had this to say, ' I resent the apostles of punishment for its own sake allocating to themselves words like moral and justice and implying in consequence that those who scorn their metaphysics are amoral or at least unconcerned with moral values. Surely, the feeling of concern for the offender as a human being; the desire to save him from a criminal career and to help him redeem himself as a member of the human family; the even wider concern to prevent others from falling into criminality by searching out the influences and conditions that produce those frustrating and embittering defeats, degradations and humiliation of the human spirit that turn a man against his fellow men; the effort, therefore, to give men those advantages that will help them to keep their feet on the right path is not a less moral ideal than that which knows only one measure of morality, an eye for an eye and a tooth for a tooth[86]'. From the writer's point of view, it is clear that the mood and reaction of the public with regard to the treatment of crime and criminals is the test of the civilized society. A calm recognition of the rights of the accused and even a convicted criminal against the state is a misplaced meaning of good morality. However, it has been well recognized by courts that although child defilement is a serious offence, it is important that the proportionality theory of the principles of sentencing be applied to all accused ones. The proportionality theory links punishment to the seriousness of the offence whereas under the rehabilitative ideal there are no like cases. Each case has to be determined on its own merits. In the rehabilitation theory, the

[86] H. Weihofen, 'Retribution is Obsolute,' National Probation and Parole Association News, XXXIX (1960) 1-4.

emphasis is that the sentence should depend, not on the offence, but on the offender. This theory leads to wide spread sentencing disparity which breaches the fundamental principal of justice that people be accorded equal treatment before the law. Those who receive death sentences and subsequently executed can not be said to have the opportunity of being rehabilitated. It is very rear to hear of those who have served their sentence on child defilement returning back to the same act. Therefore death sentence in this regard is not surely a solution to the scourge. In the same vein incapacitation applies only to offenders for whom neither deterrence nor rehabilitation works. As Lawton L.J noted in the case of Sargent[87]that these offenders will go on committing the same crimes or different crimes as long as they are able to do so. In those cases the only protection which the public has is that such a person should be locked up for a long period. If a convict of child defilement commits another defilement offence after serving, then the next option is incapacitation. In an English case of R v Hatch[88]the appellant aged forty six pleaded guilty to four counts of buggery of boys aged ten or eleven, two counts of gross indecency and two counts of indecent assault on a male. He was sentenced to life imprisonment and he appealed against the sentence. The Crown accepted that the boys were willing partners in the acts of buggery but that the record of the offender gave very serious cause for concern because when he was sixteen years old, he was put on probation for an offence of indecent assault with five year old boy. At twenty one years later, the offender was convicted for indecently assaulting a boy of seven years old and was again put on probation. Thereafter at different times but when he was twenty three, twenty six, twenty nine, thirty four, thirty eight and forty one years old he served different jail sentences for either indecent assault on boys or buggery on boys. During the last term of imprisonment the appellant had received psychotherapeutic treatment but felt it had not

[87] (1975) 60 Cr. App.R.74
[88] (1977) 1 Cr. App.R. (s)

helped. After being subjected to medical examinations the appellant was found not to suffer from mental illness, mental impairment or psychopathic disorder. The court found out that the likelihood is that the offender will continue to exhibit the potential for the foreseeable future for the behavior which appears to have characterized him in the past.

In the judgment it was mentioned that although the appellant was not suffering from a mental illness or disorder, he was strongly attracted sexually to young boys and positively enjoys controlling the situation. Not only was he committing very serious offences but also his record showed that he had manifested perverted sexual tendencies at least for the whole of his adult life. In conclusion the court said that there was no treatment for his disorder. He was and would continue to be a real danger to young boys and thus was likely to continue to commit sexual offences against them in the future. His appeal was dismissed. This is the demonstration of proportionality theory which links punishment to the seriousness of the offence. As opposed to death penalty it is morally right that the offender's right to life is preserved and society will learn something from this sought of punishment. Therefore, a person who is contemplating defiling a child will be deterred by the positive threat that he will suffer the same punishment as others have suffered. Punishment thus creates unconscious inhibitions against committing crimes and serves to educate the public as to the proper distinction between good and bad conduct.

4.3 Conclusion

Punishment with the aim of reforming or rehabilitating the offender has constituted one of the most ambitious developments in penal theory. The aim is to secure conformity, not through fear which is the more limited object of deterrence, but through some inner positive motivation on the part of the individual. The process has been described as improving the offender's character so that he is less often inclined to commit offences again even when he can do so without fear of the penalty. The origins of the rehabilitative idea are inextricably linked with the humanitarian movement for prison reform. Adopting this more humane response can help soften strict law and order attitudes. It is therefore important to advocate a system of punishment which combines deterrence with reformative features. This can be achieved by imposing punishment by for example for a period of solitude which would induce remorse, repentance and reform. This has worked before in the United States of America where the first penitentiary was created by the Quakers in Philadelphia in 1973 in order that prisoners could pay penance for their sins and thereby become cleansed[89]. The object was to make offenders better persons capable of being re integrated into society rather than simply purging their sins and thereby repaying their debt to society, which is more limited object of expiation. It is in the light of the above that even life imprisonment as provided for [90]is inappropriate to first offenders who may have the opportunity to be rehabilitated, however, child defilement accompanied by willful infection of a child with HIV/AIDS calls for life imprisonment to such reckless offenders under the doctrine of strict liability.

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[89] Walker,"Punishing, Denouncing or Reducing Crime' in Reshaping the Criminal Law ",(1979) p 393.

[90] The Penal Code (Amendment) Act, 2005, S. 138(1).

Chapter Five: General Conclusion and Recommendations

5.0 Introduction

The foregoing chapters have established that the Penal Code (Amendment) Act 2005 is a well intended piece of legislation, however, it should not be applied in isolation because in so doing, only the offender will be punished leaving out other parties who could have had parental responsibilities because they have the primary responsibility of the upbringing and development of the child and the duty to ensure the best interest of the child are their best concern at all times[91]. The parent or guardian who recklessly contributed to the offence must be made to work off his or her guilty under the doctrine of expiation. This is a way of paying a debt to society so as to be reconciled with that society. This can be looked at in the light of voluntary assumption of responsibility or reliance doctrine. There is a common law duty of care where there is a relationship of reliance between defendant and victim. Thus if someone voluntarily assumes responsibility for another person then they also assume the positive duty to act for the general welfare of that person and maybe liable for omissions which prove fatal. In R. v Dobinson[92]the common law husband and wife were of low intelligence. One day they were visited by a lady called Fanny and took her in providing her with a bed but over the following weeks she became ill. She did not eat properly, and developed bed sores. Eventually she died of blood poisoning as a result of infection. The defendants had not obtained any medical assistance for Fanny although they had known that she was unwell. The defendants were convicted of manslaughter. The Court of Appeal held that the defendants had been under a common law duty to care for Fanny. This duty had arisen from their voluntarily assuming the responsibility for looking after her, knowing

[91] African Charter on the Rights and welfare of the Child, Article 20.
[92] (1977) 2 All ER 341

that she was relying on them. The defendant's failure to discharge this duty was the cause of the victim's death. Similarly, any parent or guardian has the same responsibility and if while drinking beer and leaving the child un attended to or sending the child unaccompanied to do chores in areas where the child exposes itself to sexual offenders, that parent or guardian has breached the duty of care and the infliction of punishment on these people will instill a sense of responsibility in them so as to take full parental responsibility for the defenseless child.

5.1 Public Reproach and Shame

As a way of discouraging others in engaging themselves in defiling children, the law should be amended to include the provision for public shame and reproach. This could be done by parading the convicted offenders before the media as an educative deterrence. In an America case of State v Meyer[93]an offender was required as a condition of his probation sentence to place bold signs at all entrances to his family farm stating: 'Warning! A Violent Felon Lives Here. Enter at Your Own Risk.' This kind of shaming will further deter would be offenders to proceed with their intentions because their character will be known through out the nation as very irresponsible citizens. In the United States persons convicted of drunken driving were required to put special bumper stickers on their cars[94]or wear a pink fluorescent bracelet publicizing their conviction[95]. We all want to maintain good reputation in our societies and therefore the above measure will prevent bad intentions in men to defile a child.

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[93] 176 III. 2d 372
[94] Goldschmitt v State, 490 s.2d 123 (Fla. 1986)
[95] Ballener v State, 210 Ga. App.627, 436 S.E.

5.2 When is Defilement a Case of Joint Offenders?

One specific area in which enforcement of section 138(1) is a failure is in early marriages or under age marriages which are mostly done traditionally. In certain instances chiefs have nullified such marriages and only in few circumstances that the perpetrators are punished to do community service work as girls are redirected to schools. The chiefs' efforts are almost unrecognized and the scourge goes on unabated. In this criminal action, there are several parties involved, some directly while others indirectly. Both parents of the girl child and that of the man are directly involved while other family members help in the preparation of the marriage ceremony. Therefore all these are parties to the crime as joint offenders. In order to protect the child from these traditional marriages, it is proper to invoke the law that deals with parties to the crime. In this case the law provides that when an offence is committed, each of the following persons is deemed to have taken party in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say, every person who actually does the act or makes an omission which constitutes the offence; every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; every person who aids or abets another person in committing the offence and any person who councels or procures any other person to commit the offence[96]. In terms of paragraph (d) of subsection (1), such a person may be charged either with committing the offence or with counseling or procuring its commission. A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his

[96] The Penal Code, S.21

part, is guilty of an offence of the same kind and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission[97]. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence[98]. When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence is committed in the way counseled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. In either case the person who gave the counsel is deemed to have counseled the other person to commit the offence actually committed by him[99].

This branch of law on parties to the crime has confined itself to crimes such as theft, burglary and others crimes excluding child defilement in early marriages. Child defilement done in the name of traditional marriages of a child is not a lesser offence. As alluded to earlier, offences against the person himself are more serious than those affecting properties in that they directly affect the person himself. In this matters the child as the victim has to face trauma of having being defiled and she may develop a negative and resigned attitude in life that will tend to affect the way she will be relating to people of the opposite sex. Therefore, it is important that the liability created is apportioned among all those who had knowledge of the early marriage arrangement and execution. This was the approach taken by English law so as to make those who

[97] Ibid
[98] Ibid. S.22
[99] Ibid. S.23

help in the commission of offences be liable for the full crime. Such liable offenders who are accessories are liable to be tried, indicted and punished as if they committed the crime themselves. In R v Clarkson[100]the defendant was convicted of aiding and abetting the rape of a woman in an army barracks. The defendant entered a room where a woman was being raped because he heard the woman screaming. He remained there without giving any help. It was held that had he been involved in the planning of raping the woman, he would have been liable because a person must voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it though he might reasonably be expected to prevent or at least to express his dissent. In the same vain, all those involved in the marriage arrangement of the girl child embarked on a joint unlawful enterprise and they should be liable for the direct and agreed consequences of that joint enterprise. Implementing the above measures will lessen traditional early marriages and as time go on, elimination will be achieved.

[100] (1971) 55 Cr. App.R.445

5.3 Conclusion

The foregoing chapters have established that the child is adequately protected against offences of defilement under several legal instruments. However more is required to consolidate the provisions of the Penal Code (Amendment) Act, 2005 and this should be done by incorporating in subsidiary legislation.

The first chapter opened by giving statistical evidence revealing that there has been a steady increase in child defilement cases both before and after the amendment of section 130 to 147 of the Penal Code. The Principle Act provided for life imprisonment without any option for child defilers while the Penal Code (Amendment) Act, 2005 has an option for a specific term of years. The chapter looked at the repealed legislation to examine why life imprisonment was not handed down to any offender amidst current public opinion that all defilers should either be imprisoned for life or sentenced to death. It was observed that the seemingly mandatory provision for life imprisonrnent was some how weakened by the proviso to section 138 of the Penal Code. The chapter also looked at the statutory definition of child defilement and this was clearly stated before looking at the main legislations concerned with the welfare of a child, by defining who the child is in the context of the age. The following are the legislative observations which were made in respect of each legal instrument under consideration.

The Marriage Act

Forbids any marriage between persons either of whom is under the age of sixteen years but in another sections of the Act, it provides that where written consent is obtained, marriage can be

granted. This waiver is retrogressive as it defeats the very purpose of the Act forbidding marriages of persons under the age of sixteen years.

The Zambian Constitution

The Zambia Constitution which is the supreme law of the land provides for protection of a child from exploitation, which no doubt includes sexual exploitation. However, it defines the young person as one who is under the age of fifteen years, while the Penal Code (Amendment) Act 2005 puts the age of a child at sixteen. This inconsistence in the definition of the age of the child may technically be exploited by the defendant who might argue that a sixteen years old child is excluded by the Constitution. This is because, if any law is inconsistence with the Constitution, that other law shall to the extent of the inconsistence be void[101].

The chapter also highlighted the provisions in the two international legal instruments, namely the United Nations **Conversion on the Rights of the Child** and **The African Charter on the Rights and Welfare of the Child**. Both legislations looked at the child's rights and how these should be protected. One point that came clearly in the Charter is its provision on parental responsibilities[102] where it states that the parents or persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty to ensure the best interest of the child are their best concern at all times. This then entails the apportionment of the liability on the parents or guardians if they recklessly contributed to the defilement of the child.

[101] Constitution of the Republic of Zambia, Article 1(3).
[102] The African Charter on the Rights and Welfare of the Child, Article 20.

Chapter two concentrated on examining the reasons behind the failure of the Principle Penal Code to impose mandatory life imprisonment for child defilers where no option existed for a specific term of years. It was discovered through case law that the impediment to this was the proviso to section 138 of the Penal Code because this acted as a full defense in matters of defilement concerning the age of the victim. Offenders got away with very minimal periods of sentences and in some cases on technical issues of procedure, Courts either quashed the conviction or redirected the matter for a retrial as was the case in Diamond Kapwepwe v The Queen[103]and in Jovan Phiri v The Queen[104]respectively. This was a source of frustration on the part of the victim.

The chapter also discussed that even before the amendment was done to the Principle Act, Courts had started responding positively to the public out cry that stiffer penalties be meted on child defilers [105]. In passing sentences, Judges' comments highlighted the seriousness of the offence of child defilement and the need to strengthen legislation so that strong warning is send to those contemplating committing this crime in what ever form. These comments have strong indications that the Courts interpretation of the amended Act goes beyond the traditional practice and that it is of the strict liability nature.

Chapter three looked at the need for offences of child defilement to be expressly classified as those of strict liability. This came about with the removal of the proviso to section 138 of the Principle Act. By strictly analyzing the statutory definition of child defilement, the intention of Parliament in amending the Principle Act shows that it is the offence of strict liability. In Sweet v

[103] (1952) NRLR 168
[104] (1955) NRLR 342
[105] Stephen Hara v The People, HJ/07/2004

Parsley[106]Lord Reid ruled that ; 'where a statute clearly creates an absolute offence, there is an end to the matter, but such cases are very rare. It has long been the practice to recognize absolute offences in the class of quasi criminal acts – that is, acts which are not criminal in any real sense but which in the public interest are prohibited under a penalty – and one can safely assume that when Parliament is passing legislation dealing with this class of offence, its silence as to mens rea means that the old practice is to apply. But when one comes to acts of a truly criminal character, the situation is very different, and where the statute is silent as to mens rea there is a presumption based on many centuries' common law practice that to give effect to parliament's wishes the Courts should read in words appropriate to require mens rea unless the relevant circumstances clearly indicate otherwise.' Additionally Lord Diplock in the same case said that;' where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the Court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care by those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act.' Applying these observations to the matter under discussion, the intention of Parliament in amending the principle Act shows that it is the offence of strict liability. It is therefore unnecessary for Courts to spend time and other resources in the name of court procedure as they adjudicate in defilement cases. A full realization by the Courts that defilement falls under offences of strict liability will serve the Court's time and resources so as to speed up the hearing of these cases. If these cases are heard, determined and sentences imposed within a reasonable time period, society will recognize the disgust with which such conduct reflects on the law. If

[106] (1969) 1 All ER 347, HL

one understands why cases of defilement are expressly dealt with by the Courts, one can begin to see the seriousness attached to the rights of the victim. In so doing, the substantive rules can start making sense and the thinking of society will thus change for the good of all citizens.

5.4 Recommendations

1. The Penal Code (Amendment)Act, 2005 should further be repealed to expressly include sanctions to be imposed on other parties to the crime other than the perpetrator himself more especially in traditional early marriages.

2. The Act should not only impose criminal sanctions but monetary sanctions as well for the victim's physical pain and mental torture.

3. The Act should specifically have a section to provide for public reproach and shame so as to notify the entire nation how irresponsible and dangerous the convicts are to the society.

4. All magistrates should be re educated on the need to handle defilement cases with the strictness that they deserve so as to instill fear in the would be defilers.

5. The judiciary and civil society should launch an effective campaign to sensitize citizens more especially in rural areas and urban compounds on the need to respect the law and the importance of reporting defilement cases.

6. The Marriage Act should be repealed to completely remove the requirement of consent in marrying a child below the age of twenty one.

Bibliography

1. Chishimba S. Zulu, "International Aids Conference, 2004 July 11 – 16": Abstract number ThPeC7548.

2. A.V. Dicey, "Law and Public Opinion in England", London, Macmillan (1963), p13.
3. Frankel. M.E," Lawlessness in Sentencing", (1972) at 4 -10.

4. C.V. Clarkson & HM Keating," Criminal Law – Text and Materials", London, Sweet & Maxwell, (2003).

5. Herbert L Packer, " Mens Rea and the Supreme Court", Sup.Ct.Rev.107 at 109

6. Bronislaw Malinowski, " From Crime and Custom in Savage Society", London, (1926) pp 51 - 68

7. Walker H, "Punishing, Denouncing or Reducing Crime in Reshaping the Law", (1979) at 393.

8. H. Weihofen, "Retribution is Obsolute", National Probation and Parole News, XXXIX (1960) pp 1,4.

9. Ronald J. Rychlak, " Society's Moral Right to Punishment: A further Exploration of the Denunciation Theory of Punishment", London, Thompson, (1990).

10. Rummney P," The Review of Sex Offences and Rape Law Reform: Another False Dawn?" London, Cambridge, (2001).

11.T. Pikard, " Culpable Mistake and Rape relating Mens Rea to the Crime", University of Toronto Law Journal, (1980).

12. T. Sellin, " The Law and some Aspects of Criminal Conduct in Aims and Methods of Legal Research", London (1955).

13. Schulhofer S, " Unwanted Sex: The Culture of Intimidation and the Failure of the Law", University of Sussex, (1998)

14. Zsuzsanna Adler, " Rape – The Intention of Parliament and The Practice of the Courts", London,Sterling Publishers, (1982).

15. C. M. Campbell & Paul Wile," Law and Society – Reading in the Sociology of Law", Great Britain, The Chaucer Press, (1979).

Newspapers References

1. The Times of Zambia, 15th March 2008 at 3.
2. The Post, 21st May 2008 at 7.
3. The Times, 9th November 1985, London.
4. The Post, 12th May 2008
5. Zambia Daily Mail, 3rd February 2010, at 3.