A CRITICAL ANALYSIS OF THE CURRENT LAW ON OFFENCES AGAINST MORALITY IN ZAMBIA: IS THE LAW IN TOUCH WITH REALITY IN DEALING WITH ALL OFFENCES AGAINST MORALITY OR IS IT BIASED TOWARDS THE MORE “PRONOUNCED” OFFENCES OF RAPE AND DEFILEMENT WHILST SIDELINING THE OTHER EQUALLY DISTRESSING OFFENCES IN THE SAME CATEGORY

BY

SANGWANI NYIMBIRI

UNZA 2011
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An Obligatory Essay submitted to the school of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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April 2011
DECLARATION

I, Sangwani Nyimbiri, computer number 27006018, do hereby declare that the contents of this dissertation are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so. I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

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Entitled

A CRITICAL ANALYSIS OF THE CURRENT LAW ON OFFENCES AGAINST MORALITY IN ZAMBIA: IS THE LAW IN TOUCH WITH REALITY IN DEALING WITH ALL OFFENCES AGAINST MORALITY OR IS IT BIASED TOWARDS THE MORE “PRONOUNCED” OFFENCES OF RAPE AND DEFILEMENT WHILST SIDELINING THE OTHER EQUALLY DISTRESSING OFFENCES IN THE SAME CATEGORY

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ABSTRACT

This dissertation examines the current law on offences against morality in Zambia. It further considers whether the current law is in touch with reality in dealing with all offences against morality or is it biased towards the more “pronounced” offences of Rape and Defilement whilst sidelining the other equally distressing offences in the same category. The dissertation specifically looks at the inherent inadequacies in the current law. It goes further and makes an analysis as to whether the evidential and procedural requirements that are present in the current law have actually contributed to the inefficiency of the law governing offences against morality. It also looks at whether the aspects of private morality and immorality have a bearing on how the current law is enforced the issue of the legal enforcement of morality is also considered. The dissertation through research found that there are a lot of inadequacies inherent in the current law governing offences against morality. It was further found that there are some evidential and procedural requirements that ultimately impede the efficiency of the law thereby rendering the current law toothless. One notable evidential requirement that was found to be impeding the efficiency of the law is the requirement of corroboration. The research also established that, generally, criminal law has a role of enforcing some aspects of morality. The criminal law also has a tendency of criminalizing and enforcing only that conduct that is actually visible to the outside world, and would leave alone conduct with no public facet. A phenomenon, that Lawrence Friedman has termed, the “Victorian compromise”.

Consequently, the research makes various recommendations that would help in curbing the rise of sexual related offences that are couched under the part, in the Penal Code, dealing with offences against morality. The research recommends that some evidential and procedural requirements for the prosecution of offences against morality be abolished. Further, the research recommends that broad-based public awareness campaigns concerning sexual and domestic violence should be carried out to enlighten people what really constitutes sexual violence and that they are at liberty to report such crimes to the relevant authorities. It is also recommended that law enforcement personnel and members of the judiciary should be well trained so as to properly address issues concerning offences against morality. Finally it has been recommended that Judges and Magistrates should be judicially active when dealing with offences against morality and that it should be looked into by the legislature and the Judiciary that all offences against morality are equally enforced.
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April, 2011
DEDICATION

To my father, Sangwani Lameck Nyimbiri, mother, Sarah Zimba. Thank you for the undying love that you showed me. You taught me that I can achieve whatever I set my eyes upon and you instilled in me a sense of self belief. I can never thank you enough for everything you did for me. MAY YOUR SOULS REST IN ETERNAL PEACE.

To my brother, Wiza Daniel Nyimbiri, sister, Misozi Nyimbiri. You are a symbol of God’s true power and faithfulness. I will always love you. May the Almighty God richly bless You.
TABLE OF STATUTES

Penal Code Amendment Act No. 15 of 2005

The Penal Code, Chapter 87 of the Laws of Zambia

The Subordinate Court Act, Chapter 28 of the Laws of Zambia.

The Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia
TABLE OF CASES

A. Banda v The People (1977) Z.R. 4 (S.C.)

Chisanga v The People Z.R. 93 (S.C.)

Emmanuel Phiri and Others v The People (1978) Z. R. 79 S. C.

Emmanuel Phiri v The People (1982)Z.R (SC)

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Kenneth Kalunga v The People (1975) Z.R. 72

Knulter v DPP [1973] HL


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R v Cheung Shu Wai [1994] 2 HKC 174

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R v Yohani Mporokoso (1939) 2 NRLR 152

Robert Kalimukwa v The People (1971) Z.R. 85 (H.C.)

Shawmwa and Others v The People (1985) Z. R. 41

Shaw v DPP (1962) HL.


Wilson Mwenya v The People (1990) S. J. (S. C.)
# TABLE OF CONTENTS

## CHAPTER 1

### INTRODUCTION
1.1 General Introduction ............................................................................. 1
1.2 Introduction ......................................................................................... 1
1.3 Statement of the problem ..................................................................... 1
1.4 Definition of concepts ......................................................................... 2
1.5 Research Objectives ........................................................................... 3
1.6 Scope of the Study .............................................................................. 4
1.7 Purpose of the Study .......................................................................... 4
1.8 Hypothesis ......................................................................................... 4
1.9 Significance of the Study ................................................................... 5
1.10 Methodology ..................................................................................... 5

## CHAPTER 2

### THE CURRENT LAW GOVERNING OFFENCES AGAINST MORALITY IN ZAMBIA

2.1 Introduction ........................................................................................... 6
2.2 An analysis of the offences of Rape, Defilement, Incest and Abortion as provided for in the laws of Zambia ......................................................... 7
2.3 Other offences against morality .............................................................. 12
2.3 Conclusion ............................................................................................. 17

## CHAPTER 3

### EVIDENTIAL AND PROCEDURAL REQUIREMENTS: IMPEDIMENTS TO EFFICIENCY OF THE LAW

3.1 Introduction ........................................................................................... 18
3.2 Procedural and Technical Requirements for the Prosecution of offences against Morality: Corroboration ................................................................. 18
   3.2.1 Corroboration ................................................................................. 18
   3.2.2 The Historical Reasons for the Corroboration rules ..................... 22
   3.2.3 Criticisms of the Corroboration Rules .......................................... 22
3.3 Consent ................................................................................................... 27
3.4 How the Courts have contributed to the inefficiency of the Law ........... 29
CHAPTER 4

PRIVATE MORALITY AND IMMORALITY: THE BIAS CONCERNING OFFENCES AGAINST MORALITY IN ZAMBIA

4.1 Introduction ......................................................................................... 33
4.2 The Legal Enforcement of Morality ......................................................... 34
4.3 The Victorian Compromise: The Bias involving offences against Morality .............................................................. 38
4.4 Social perceptions of offences against Morality:
   How they affect the enforcement of these offences ........................................ 41
4.5 Conclusion .......................................................................................... 43

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction ......................................................................................... 44
5.2 General Conclusions ........................................................................... 44
5.3 Recommendations ............................................................................. 45
5.4 Conclusion .......................................................................................... 48

BIBLIOGRAPHY

1.0 Books .................................................................................................. 49
2.0 Journals ............................................................................................. 49
3.0 Reports ................................................................................................ 50
4.0 News Papers ........................................................................................ 50
5.0 Papers .................................................................................................. 51
6.0 Internet Sources .................................................................................. 51
CHAPTER ONE
INTRODUCTION

1.1 General Introduction
This chapter covers the basic aspects of the research. These being the introduction, statement of the problem, definition of concepts, research objectives, Scope of study, purpose of the study, hypothesis. Significance of study, and methodology.

1.2 Introduction
Criminal law plays a distinctive role in society, including the following: to deter people from doing acts that harm others or society; to set out the conditions under which people who have performed such acts will be punished; and to provide some guidance on the kinds of behavior that are seen by society as acceptable.\(^1\) The question that the law should be used to penalize immoral behavior has been endlessly debated. A classic example of the debate is that between Professor Hart and Lord Devlin in the 1960s. It is noted that Devlin argued that a society is entitled to use the criminal law against injurious behavior; that there is a common morality which must be protected by the criminal law to ensure the cohesion of society. This position has been adopted in Zambia and is evidenced by the dedication of Part XV of the Penal Code\(^2\) to deal with and criminalize offences against morality. It can therefore be concluded that generally, criminal law has a moral content.\(^3\) For example, offences involving rape, defilement, incest violate and attack personal integrity of the victim and they are therefore considered immoral.

1.3 Statement of the Problem
It is a notorious fact that offences against morality are ever on the rise in Zambia. It is as though these offences have not been criminalized in the local penal laws. It is against this background that the writer undertook this research. The law does not seem to be in touch with reality in trying to curb these heinous offences because if it was, these crimes would have been on the

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\(^2\) Chapter 87 of the Laws of Zambia

decline. In general the law does not seem to address these offences in such a way that their prevalence may be reduced. As if the inadequacy of the law were not enough successful prosecution is made extremely difficult by the complex procedural and evidential requirements which do not favor the prosecution. Further, Inasmuch as the law does not seem to adequately address all these offences, it seems the law is biased towards curbing the offences of Rape and Defilement while sidelining other equally distressing offences such as Abortion and Incest. This is evident from the case law available and generally the disparities between prosecuted cases of Rape and Defilement on the one hand and those of Abortion and Incest on the other.

1.4 Definition of Concepts

Crime: An act that the law makes punishable, the breach of a legal duty treated as the subject matter of a criminal proceeding.\textsuperscript{4}

Criminal Law: The body of law defining offences against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders.\textsuperscript{5}

Criminal: One who has committed a criminal offence or one who has been convicted of a crime.\textsuperscript{6}

Morality: Conformity with recognized rules of correct conduct.\textsuperscript{7} The character of being virtuous, especially in sexual matters.\textsuperscript{8}

Sexual Offence: an offence involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality.\textsuperscript{9}


\textsuperscript{5} B.A. Garner (ed) \textit{Black's Law Dictionary}.

\textsuperscript{6} B.A. Garner (ed) \textit{Black's Law Dictionary}.

\textsuperscript{7} B.A. Garner (ed) \textit{Black's Law Dictionary}.

\textsuperscript{8} B.A. Garner (ed) \textit{Black's Law Dictionary}.

\textsuperscript{9} B.A. Garner (ed) \textit{Black's Law Dictionary}. 
Private Morality: A person’s ideals, character, and private conduct, which are not valid governmental concerns if he individual is to be considered sovereign over body and mind if the need to protect the individual’s physical or moral well being is insufficient to justify governmental intrusion.\textsuperscript{10}

Public Morality: the ideals or general moral beliefs of a society.\textsuperscript{11} The ideals of or actions of an individual to the extent that they affect others.\textsuperscript{12}

1.5 Research Objectives
The ultimate objective of this study is to critically analyze the current law on offences against morality in Zambia and to assess whether the Law is in touch with reality in dealing with all offences against morality or is it biased towards the more “pronounced” offences of Rape and Defilement whilst sidelaying the other equally distressing offences in the same category. The following are the specific objectives of the study:

1. To give a general overview of the current law on offences against morality in Zambia.

2. To highlight the procedural and evidential requirements in the prosecution of these offences (Offences Against Morality) and how they affect the prevention of these offences.

3. To examine whether or not the law is biased towards prevention of Rape and Defilement whilst marginalizing the other offences.

\textsuperscript{9} B.A. Garner (ed) \textit{Black’s Law Dictionary}.
\textsuperscript{10} B.A. Garner (ed) \textit{Black’s Law Dictionary}.
\textsuperscript{11} B.A. Garner (ed) \textit{Black’s Law Dictionary}.
\textsuperscript{12} B.A. Garrier (ed) \textit{Black’s Law Dictionary}.
1.6 Scope of the Study
The writer examined the adequacy and consequently the effectiveness of the law governing offences against morality in general. The writer attained this goal by investigating the procedural and evidential requirements concerned in the prosecution of these offences. The writer in trying to look at the procedural and evidential requirements critically looked at the provisions relating to the offences of Rape, Defilement, Abortion and Incest. These provisions were looked at for illustrative purposes. The other offences were also looked at but not in great detail.

1.7 Purpose of the Study
The study was pertinent and timely considering how the offences against morality have risen in the recent past. The prevalence of these offences motivated the writer to examine the laws relating to offences against morality. The examination was carried out by way of looking at the procedural and evidential requirements involved during the prosecution of these offences. The writer observed that inasmuch as the law is not addressing the prevalence of offences against morality in general, there also seems to be a bias between Rape and Defilement on the one hand and the rest of the offences in the same category on the other hand. Offences such as Abortion and Incest seem to be marginalized despite their alarming prevalence. The law should be able to adequately address this anomaly. This study has invariably highlighted this bias and some recommendations have been made so that these offences can be effectively curbed. The study generally aims at making useful suggestions and recommendations with regards the law governing offences against morality.

1.8 Hypothesis
The law governing offences against morality in Zambia does not seem to be in touch with reality owing to the high prevalence of these offences. Some offences, such as abortion, have become so rampant such that one may doubt the criminality of such offences. The law also seems to be biased towards protecting some offences while sidelining the other equally dreadful offences.
1.9 Significance of Study

The study will be very much useful to the policy makers who have found it difficult to address the rampant cases of Rape, Defilement and even Abortion. Further the study gives an insight as to how the current law should be reformed in order to address the obvious problem by keeping the law in touch with reality. In determining whether or not the law is biased towards preventing Rape and Defilement while giving a blind eye to the other offences in the same category, law reformers will be able to take a wholesome approach in trying to reduce the prevalence of offences against morality in Zambia. Ultimately, the findings of this study will help in trying to reduce the rampant offences against morality thereby benefiting the weak in society who include women and children who are the major victims.

1.10 Methodology

This study mostly embraced desk research although some field investigations were also undertaken. In conducting this research, literature from national and international sources was collected and used. In particular, this desk research was done through the collection of secondary data from relevant law reports, books, journals, dissertations, obligatory essays as well as the internet. The desk research was complemented by experiences and studies undertaken by various institutions which included the Police Service (Victim Support Unit), Women in Law in Southern Africa (WLSA) and the Young Women Christian Association (YWCA).
CHAPTER TWO

THE CURRENT LAW GOVERNING OFFENCES AGAINST MORALITY IN ZAMBIA

2.1 INTRODUCTION
This chapter will concern itself with the discussion on the present status of the law on offences against morality in Zambia. The chapter will elucidate the inadequacies of the law on offences against morality in Zambia. It is important to note from the onset that this chapter will go into detail in dealing with the offences of Rape, Defilement, Incest and Abortion. This is not to say that these are the only offences against morality in Zambia, but this will be for illustrative purposes only. As a way of concluding this chapter an analysis will then be made on the law concerning Offences against Morality in Zambia.

It is imperative at this point, to define two concepts that will be used in this chapter to make an analysis of the current law on offences against morality in Zambia. The two terms are; Actus Reus and Mens Rea. The two are the constitutive elements of any crime or criminal offence. It is a notorious fact that the law does not punish someone for entertaining wild or immoral thoughts; neither does it punish anyone for mere intentions. The law will only punish someone for prohibited conduct. This prohibited conduct or act is what is referred to as the actus reus. It has been defined as whatever act or commission or state of affairs as laid down in the definition of a particular crime charged in addition to any surrounding circumstances and any consequence of the act or omission as the definition of that particular crime requires.\(^\text{13}\) The other element is the mental element or the mens rea. The mental element in crime is one other most important concept of substantive criminal law.\(^\text{14}\) The mens rea is whatever state of mind that an offender must be proved to have as required by the definition of the offence charged.\(^\text{15}\) The mens rea also includes the fault elements such as negligence and objective recklessness which do not necessarily depend on the state of mind of the offender. It is important to note at this point that


\(^{15}\) S.E. Kulusika, Text, Cases and Materials on Criminal Law in Zambia, UNZA Press, Lusaka, 2006. Page 52
these two elements of a crime will be used to help make a critical analysis of the offences against morality in Zambia.

2.2 **AN ANALYSIS OF THE OFFENCES OF RAPE, DEFILEMENT, INCEST AND ABORTION AS PROVIDED FOR IN THE LAWS OF ZAMBIA.**

It has already been stated in the earlier chapter that sexual offences in general are covered in the Penal Code\textsuperscript{16} under a section titled “Offences against Morality.” Nevertheless, a clear response from the Government and the judicial authorities to prevent and punish these acts has not yet been provided. This is evident from the prevalence of these offences throughout the country. Some of the most common offences are Rape, Defilement, Incest and Abortion.

**RAPE**

Rape is one of the most horrific events anybody can experience. According to the British Crime Survey, it is the crime that women fear more than any other.\textsuperscript{17} According to the Penal Code a person who is considered to have raped someone is:

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

It is evident at this point that the mental element (\textit{mens rea}) for this offence is the intention to have sexual intercourse. It is also apparent that there are two elements that would undoubtedly constitute the \textit{actus reus} and these are; ‘unlawful carnal knowledge’ and ‘without the consent’ of the victim. In \textbf{R v Yohani Mporokoso}\textsuperscript{18} Robinson Ag, C.J., stated that, in order to establish a rape it is necessary to prove penetration or partial penetration. This makes it clear that it is essential for sexual intercourse to take place for the offence of rape to be proved. In fact even

\textsuperscript{16} Chapter 87 of the laws of Zambia


\textsuperscript{18} (1939)2 NLR 152
mere penetration would be enough for the offence to be proved. The case of \textit{R v Olugboja} \textsuperscript{19} illustrated that the aspect of consent is also essential in the establishment of the offence of rape. Some scholars have argued that the question of consent is a question of fact and is subject to be contested before the court. \textsuperscript{20}

\textbf{DEFILEMENT}

The Zambian Laws have no apt definition of what defilement is. However, section 138 of the Penal Code (Amendment Act No.15 of 2005) states 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 15 years and may be liable to imprisonment for life." \textsuperscript{21}

This provision does not assist much as to the definition of the term defilement but it does assist in providing the constitutive elements of the offence of defilement. It is apparent at this point that the \textit{actus reus} of the offence of defilement is; there must be unlawful carnal knowledge (sexual intercourse) and that must be with any child. A child has been defined by the Penal Code as a person below the age of sixteen years. \textsuperscript{22} As regards the fault element or the \textit{mens rea}, intention or recklessness will suffice. \textsuperscript{23} Section 138 of the Penal Code\textsuperscript{24} further provides that; 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 fourteen years and not exceeding twenty years. It further provides that any person who prescribes the defilement of a child as cure for an ailment commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and may be liable to imprisonment for life. Subsection 4 also makes provision to the effect that a child above the age of twelve years who commits an offence under

\textsuperscript{19} (1982)QB 320(CA)


\textsuperscript{21} Act Number 15 of 2005, Chapter 87 of the laws of Zambia.

\textsuperscript{22} Section 131A


\textsuperscript{24} Chapter 87 of the Laws of Zambia
subsection (1) or (2) is liable, to such community service or counseling as the court may determine, in the best interests of both children.

INCEST

Sections 159 and 161 of the Zambian Penal Code criminalize incest whether committed by male or female family members. Section 159 provides:

(1) Any male person who has carnal knowledge of a female person who is to that person’s knowledge his grandmother, mother, sister, daughter, grand-daughter, aunt or niece commits a felony and is liable, upon conviction, for a term of not less than twenty years and may be liable to imprisonment for life.

(2) Any female person who has carnal knowledge of a male person who is to that person’s knowledge her grand-father, father, brother, son, grand-son, uncle or nephew commits a felony and is liable, upon conviction, for a term of not less than twenty years and may be liable to imprisonment for life.

(3) For the purposes of this section, it is immaterial that carnal knowledge was had with consent of the other person.

(4) Any person who attempts to commit incest commits a felony and is liable to imprisonment for a term of not less than ten years and not exceeding twenty-five years.

Section 161 provides:

(1) Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, uncle, nephew, son or grand-son to have carnal knowledge of her knowing him to be her grandfather, father, brother, uncle, nephew, son or grand-son, as the case may be, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life:

Provided that a female child commits an offence under this subsection is liable to such community service or counseling as the court may determine in the best interests of the child.

(2) Any male person of or above the age of sixteen years who with consent permits his grandmother, mother, sister, auntie, niece, daughter or grand-daughter to have carnal knowledge
of him knowing her to be her grandmother, mother, sister, aunt, niece, daughter or grand-daughter, as the case may be, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life:

Provided that a male child commits an offence under this subsection is liable to such community service or counseling as the court may determine in the best interests of the child.

According to studies conducted by Women in Law in Southern Africa (WLSA) and the Young Women’s Christian Association (YWCA), incest is a pervasive problem in Zambian society. The studies undertaken by the Young Women Christian Association (YWCA) and those by Women in Law in Southern Africa (WLSA) highlight the fact that incest is a crime that largely goes unreported in Zambia. Many victims are afraid of the consequences of reporting perpetrators of incest and, frequently, there is unwillingness amongst other family members to take action even in cases where they know that children are being abused. The fact that the person committing the incest is often an economic provider serves as an additional disincentive to the reporting of this crime as members of the family are afraid of losing their only income as a result. Even in cases where victims do report the crime, the generally unco-operative attitude of law enforcement officials and the judiciary and the lack of procedural protections for victims lead to many cases of incest being withdrawn. The social and procedural obstacles faced by victims of incest in Zambia were clearly apparent in a recent case of a complaint lodged by a nine year old girl who had reportedly been raped by her father. The court rejected the case due to the fact that, subjected to the pressure of a public hearing, the girl was incapable of testifying about her experience. In dismissing the case, the judge declared that given that the girl had been unable to testify under oath, she did not appear to be “sufficiently intelligent” for the court to accept her written statement.

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27 Times of Zambia. “Unreported sexual offences worrying women’s law body”
ABORTION

It is imperative to note from the onset that neither the Penal Code\textsuperscript{30} nor the Termination of Pregnancy Act\textsuperscript{31} give an apt definition of abortion. As regards abortion the Penal Code provides that:

“every woman being pregnant who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used, commits a felony and is liable, upon conviction, to imprisonment for a term of fourteen years.”\textsuperscript{32}

The Termination of Pregnancy Act\textsuperscript{33} interestingly provides that; a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if he and two other registered medical practitioners, one of whom has specialized in the branch of medicine in which the patient is specifically required to be examined before a conclusion could be reached that the abortion should be recommended, are of the opinion, formed in good faith-

A. that the continuance of the pregnancy would involve-
   i. risk to the life of the pregnant woman; or
   ii. risk of injury to the physical or mental health of the pregnant woman; or
   iii. risk of injury to the physical or mental health of any existing children of the pregnant woman;

greater than if the pregnancy were terminated; or

B. that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

\textsuperscript{30} Chapter 87 of the Laws of Zambia
\textsuperscript{31} Chapter 304 of the Laws of Zambia
\textsuperscript{32} Section 152 (1)
\textsuperscript{33} Section 37
2.3 OTHER OFFENCES AGAINST MORALITY

Abduction and indecent assaults are also criminalized under Sections 135-137 of the Penal Code and these crimes are punishable by prison sentences ranging from seven to fourteen years. The offence of indecent assault is provided for by section 137\textsuperscript{34} of the Penal Code Act Cap 87 of the Laws of Zambia which provides that:

(1) Any person who unlawfully and indecently assault any child or other person commits a felony and is liable upon to imprisonment for a term not exceeding twenty years.

(2) It shall not be a defence to a charge for indecent assault on a girl under the age of 12 years to prove that she consented to the act of indecency.

(3) Any person who is found in any building or dwelling house or in any verandah or passage attached thereto or in any yard, garden or other land adjacent or within the cartilage of such building or dwelling house not being a public place

(a) for the purpose of and motives of indecent curiosity gazing at or observing any other person or a child who may be therein while in the state of undress or semi-undress; or

(b) with intent to annoy or indecently to assault any child or other person who maybe therein; commits an offence and may be liable upon conviction to imprisonment for a term not less than two years and not exceeding five years.

Sections 140 and 144 of Chapter 87 of the Zambian Penal Code criminalize “procuring defilement of women by threats or fraud or administering drugs” and “detention with intent or in a brothel”. Sections 146 and 147 of the Code provide that male and female persons living on the earnings of prostitution or aiding and soliciting for prostitution shall be guilty of a misdemeanor. Section 146 specifically provides that:

(1) A person who-

(a) knowingly lives wholly or in part on the earnings of prostitution; or

(b) in any public place, persistently solicits or importunes for immoral purposes;

commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years:

Provided that a child who commits an offence under subsection is liable to such community service or counseling as the court may determine in the best interests of the child.

\textsuperscript{34} Penal Code Amendment Act Number 15 of 2005
(2) Where a person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such manner as to show that the person is aiding, abetting or compelling the prostitution with any other person, or generally, that person shall, unless the person shall satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.

In 1997, the Special Rapporteur on the sale of children, child prostitution and child pornography noted that Zambia had one of the highest levels of child prostitution in Africa. The Special Rapporteur stated that the large number of children working as prostitutes in Zambia was a direct consequence of structural adjustment programmes which had increased unemployment and poverty thereby forcing many children into prostitution in order to provide income for their families.  

It is evident after looking at the provisions of the law with regards offences against morality in Zambia that the law does not adequately provide safeguards to curb these offences which are ever on the rise. The insufficiency of the law as regards sexual offences in Zambia is manifest from the small number of convictions that are secured against sexual violence offenders. To this end, the Zambia Human Rights Report of 2003 revealed that between 1991 and 2002 out of the forty seven thousand cases of rape reported; only thirty percent resulted in conviction of the offenders.  

One of the most apparent weaknesses of the current law on offences against morality is the fact that the law does not aptly define the offences outlined. Most of what the current law does is give the constitutive elements of the offence without really giving an exact definition of what the offence is. Offences such as defilement, indecent assault, abortion and sexual harassment are not clearly defined. Giving apt definitions of some of these offences would help in creating clarity thereby making the process of prosecution relatively easy.

One might argue that the laws governing offences against morality are adequate but alternatively one might also argue that the reality of enforcement is entirely different; there is a bias against the victims. The endemic problems of the criminal justice system and discrimination are other

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shortcomings in the delivery of justice. These problems often lead to failure to investigate, prosecute and punish the offenders of offences against morality. As a result the victims have little recourse to the justice system, while the perpetrators face little disincentive to abuse again.

The failure of courts in Zambia to apply appropriate sanctions to persons convicted of crimes involving sexual violence against women and girls is reportedly widespread and has been the subject of protest by local human rights organizations on several occasions. Of cardinal concern is the information contained in the government report which states that the judiciary often reflects on existing social stereotype when adjudicating cases of sexual violence against women and notes that there have been instances in which judges have discounted the testimony of rape victims on the basis that the women were “indecently dressed.”

There is evidence to suggest that in spite of the heavy penalties provided for under the Penal Code, the perpetrators of rape are often punished with little more than a small fine, thus sending the message that rape is not considered by the Judiciary a constitute a serious criminal offence which should be met with an appropriately severe punishment. In addition, the application of customary law, particularly in cases of “defilement” has led to these crimes commonly being settled through the payment of money to the victim’s family rather than being pursued through the criminal justice system, thereby reinforcing the idea that the rape of women and girls is an offence against family status rather than constituting a serious criminal offence against the victim herself.

38 J. B. Muchelema “Economic Battering”, Page 14
It is also important to note that case law has shown that statutory law does not seem to reconcile itself with the existing customary law with regards offences against morality. The law in Zambia is such that both African customary law and statutory law are administered in the courts notwithstanding the fact that the former will only be applied in instances where it does not go against good conscience or it does not go against existing statutory law. Section 16 of the Subordinate Court Act specifically provides:

“…nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require.”

One instance were statutory law seems to clash with customary law is in the case of defilement. It is a notorious fact that customary law does not necessarily set a lower limit as to the minimum age at which a girl should get married. It is therefore common to find girls who are well below the age of sixteen being married. The law clearly provides that “any person who unlawfully and carnally knows any child commits a felony and is liable upon conviction, to a term not less than 15 years and may be liable to imprisonment for life”. 44 What the law on offences against morality does not do is to specifically criminalize defilement of a child under the ‘pretence’ of marriage under customary law. Under customary law a girl can be married off as long as she has reached puberty. One who marries a girl under the age of sixteen and carnally knows her does not commit a criminal offence in Zambia. In fact the courts of law have upheld this position. In Sibande v The People45 the court categorically stated that in Zambia it is not generally unlawful for a man to have carnal knowledge of a girl under the prescribed age if he is lawfully married to her. The court further held that if there is evidence that the parties were married according to customary law the onus would be on the prosecution to negate that suggestion. But it is not

43 Chapter 28 of the Laws of Zambia.
44 Section 138 of the Penal Code (Amendment Act Number 15 of 2005)
45 (1975) Z.R. 101 (S.C.)
enough for an accused simply to say "we are married" or even "we are married according to customary law"; he must at least say "we are married according to customary law because we did this and this", and it would then be for the prosecution to show that the events alleged (assuming they were accepted) did not constitute a valid marriage according to customary law.

In **R v Chinjamba** 46 a villager married a girl under the age of sixteen years of age and lived with her as husband and wife. The accused, who was the village headman knew of these facts and took no steps to prevent or report the matter. He was charged for being an accessory after the fact to unlawful carnal knowledge of the girl under the age of sixteen and convicted. The Court held that it was not unlawful for a man to have carnal knowledge of the girl to whom he is lawfully married to. It should be pointed out at this point that the reasoning of the courts in these cases may seem logical on the face of it when in fact the logic employed has grave consequences and implications. It is common knowledge that most typical marriages involving girls below the age of sixteen are usually imposed on the girls. They do not really consent to these marriages. The parents usually give consent on behalf of the young girl. These girls may end up being abused in these marriages with no recourse to the courts of law. This is one major weakness of the laws concerning offences against morality in Zambia.

The current law on offences against morality has failed to recognize the unique nature of these offences. These offences are more ‘private’ or ‘personal’ in nature with regards to the victims. Offences such as Defilement, Incest or Abortion are often underreported due to the fact that the victims are often stigmatized and the perpetrators are usually people known to the victims.

The complex procedural conditions established under the law governing offences against morality also adds to the general weaknesses of the law. For example, the complex procedures under the Termination of Pregnancy Act 47 have led many women wishing to terminate pregnancies lawfully to do so unofficially and it is reported that large numbers of women in Zambia die every year as a result of complications arising from illegal abortions.

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46 (1949) NRLC 384  
47 The procedures being those relating to the procurement of an abortion.
2.3 Conclusion

It is evident from the preceding discussion that the Penal Code does provide for Offences Against Morality. The question that is often asked today is why these offences continue to rise despite them being criminalized by the Zambian penal laws. The nature of these offences is such that they corrode the morals of the society and they have devastating and grave effects on the victims. The above discussion has tried to look at some of these offences and it has further tried to take note of some of the weaknesses that are inherent in these laws. It is apparent at this point that there are several reasons that contribute to the escalation of offences against morality in Zambia. It has been noted that lack of apt definitions of some of the offences has made it difficult to try and prosecute these crimes. It has also been shown that statutory law and customary law have failed to reconcile leading to the ‘unnoticed commission’ of some offences such as Defilement and Incest. Another issue that has been noted above is the unique nature of some of these offences that fall within this category which the law has failed to address. It has also been noted that procedural requirements also make it difficult to successfully prosecute these offences. These last two issues will be looked at in depth in the next chapters.
CHAPTER THREE
EVIDENTIAL AND PROCEDURAL REQUIREMENTS: IMPEDIMENTS TO EFFICIENCY OF THE LAW.

3.1 INTRODUCTION
The previous chapter concerned itself largely with the task of analyzing the current law with regards to offences against morality in Zambia. This chapter will be concerned with the examination of the different evidential and procedural requirements of offences against morality and how these procedures affect the successful prosecution of these offences.

It is important to note from the outset that the manner in which sexual offence trials are conducted and the effectiveness of the current rules and procedures leave much to be desired. It should be ensured that a proper balance is struck in protecting and promoting the rights and interests of all concerned parties. This has been a subject of debate over the past years. It is also imperative to note that in the long run these procedures and rules have contributed to the escalating levels of sexual offences in Zambia. It is apparent at this point that most of the offences engulfed in Chapter XV of the Penal Code are sexual in nature.

3.2 PROCEDURAL AND TECHNICAL REQUIREMENTS FOR THE PROSECUTION OF OFFENCES AGAINST MORALITY: CORROBORATION.

Procedural and technical requirements have always been a setback in the Zambian penal laws. These procedural and technical requirements have proved to be a hindrance to the efficiency of the law especially the law relating to offences against morality. Case law has shown that these requirements are a mere set back with regards to the law governing offences against morality. In the case of Ndalama v The People\textsuperscript{48} the appellant was convicted of the defilement of three girls, two of them aged 15 and one aged 14. He denied the charges but admitted having had sexual intercourse with the girls but said that they looked mature and that he had paid them money. The court did not explain to the appellant the proviso to section 138 of the Penal Code,

\textsuperscript{48} (1976) Z.R. 220 (S.C.)
namely that if he had reasonable grounds to believe and in fact believed that the girls were over the age of 16 it would have been sufficient defence to the charges. The court did not explain to the appellant the proviso to section 138 of the Penal Code consequently, the appeal was allowed and the sentence and conviction were set aside. This case is a clear illustration of how some procedural and technical issues may prevent justice to prevail. The failure by the court to explain to the appellant did not necessarily mean that the appellant was innocent. Such technical issues have plagued the offences in chapter 15 of the Penal Code. This has consequently resulted in very few convictions for genuine cases brought before the courts.

It should be noted however that in some instances, parliament has moved in to try and remedy some of these procedural flaws that are inherent in the Zambian penal laws. In 2005 the Penal Code (Amendment) Act was passed and it tried to address some of the procedural flaws. For example before the amendment of the law in 2005 with regards the offence of indecent assault the law provided that:

"it shall be a sufficient defence to any charge under this subsection 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 twelve years." 

This proviso, as is apparent, gave offenders a leeway to argue that the victim consented and they reasonably believed that the offender was above the age of 12. This, as the Penal Code provided then, would be a sufficient defence for the offender and it would thus lead to an acquittal. This provision is no longer available in the Penal Code after its amendment in 2005.

### 3.2.1 CORROBORATION

In most offences against morality there is a requirement that the evidence adduced by the prosecution must be corroborated. In fact the provisos of sections 140 and 141 of the Penal Code provide that no person shall be convicted of offences there under upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused. It is therefore clear that the general position in Zambia with regards

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89 Section 137 of the Penal Code, Chapter 87 of the laws of Zambia
sexual offences is that an accused person will not be convicted without the evidential requirement of corroboration.

The term corroboration was defined by the court in the case of *Nsouf v The People*. In this case the court held that corroboration is independent evidence which tends to confirm that the witness is telling the truth when she says that the offence was committed and that it was the accused who committed it. The court further stated that corroboration must not be equated with independent proof; it is not evidence which needs to be conclusive in itself. Where the evidence of a witness requires to be corroborated it is nonetheless the evidence of the witness on which the conviction is based; the corroborative evidence serves to satisfy the court that it is safe to rely on the evidence of the witness.

The requirement that evidence must be corroborated in order for a conviction to be made is not so easy to establish and yet it is a requirement for the conviction of some offences against morality. For example, in order for one to be convicted in the offence of procuring a child or any other person for prostitution the evidence of a witness must be corroborated. Section 140 of its proviso, which criminalizes this offence, states that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused. The same proviso appears in the offence of procuring defilement by threat, fraud or administering drugs.

Case law has also shown that it is a requirement that in sexual offences there must be an element of corroboration before an accused person can be convicted. This fact is very clear from the case of *Emmanuel Phiri v The People* were it was held that in a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to warn itself is a misdirection.

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50 (1973) ZR,103
51 The Penal Code, Chapter 87 of the Laws of Zambia.
52 As provided for in Section 141 of The Penal Code, Chapter 87 of The Laws of Zambia.
55 (1982) Z.R (SC)
It should be noted at this point that corroboration is one rule of evidence that makes successful prosecution of sexual offences complicated. It is for this very reason that these offences are ever on the rise in Zambia. Some scholars have rightly observed that one reason why rape and other sexual offences may be difficult to prove is the need for evidence to corroborate the complainer's own evidence.

As already stated, corroboration is evidence which substantiates the truthfulness of other evidence in a material particular. In criminal cases, it must verify or be likely to confirm the guilt of the accused. Two issues arise in respect of corroboration. The first issue is what types of cases require corroboration. The second issue is what kinds of evidence constitute corroboration.

As a general rule, evidence given against a defendant does not need to be corroborated. A defendant can generally be convicted on the uncorroborated evidence of a single credible witness, provided that the judge is satisfied, beyond reasonable doubt, of the defendant's guilt. However, in certain cases, corroboration rules have been established. The corroboration rules were formulated in the interests of the accused, with the aim of avoiding wrongful convictions in three types of cases, namely, (i) the evidence of accomplices; (ii) the evidence of the complainant in sexual offences; (iii) the evidence of children. It should be noted that it is a well established rule of law that in sexual cases judges are required to warn themselves of the dangers of convicting on the uncorroborated evidence of the complainant.54

The corroboration rules apply in two ways. In some cases, corroboration is required by law. This means that a defendant cannot be convicted if there is no corroboration. For example the proviso in section 140 of the Penal Code makes it clear when it provides that:

“...no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.”

In some other cases, a corroboration warning must be given: the judge must remind himself or warn himself of the danger of convicting on uncorroborated evidence. Cases in this category

include rape and indecent assault. Provided that a warning is given, a defendant can be convicted even if there is no corroboration. In the case of *Emmanuel Phiri and Others v The People*, a less technical approach as to what corroboration was taken. The court in this case stated that it was enough to adduce evidence of "something more" namely circumstances which though not constituting corroboration as a matter of strict law, yet satisfy the court that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice implicating the accused person.

3.2.2 THE HISTORICAL REASONS FOR THE CORROBORATION RULES

Traditionally, the evidence of victims of sexual offences has been regarded as peculiarly susceptible to fantasy or fabrication, perhaps motivated by frustration, spite or remorse. The corroboration rules were intended to reduce the danger arising from the fact that complaints of sexual offences are easy to make but difficult to refute. There is said to be an additional danger that sympathy for the complainant as a witness may prevent the judge from evaluating the evidence dispassionately.

The case of *Shamwana and Others v The People* was quoted with approval by the Supreme Court of Zambia in the case of *Wilson Mwenya v The People*. The court stated in that case that Corroboration or supporting evidence is a requirement that seeks to guard against the danger of deliberate false implication by singly or jointly fabricating a story against the accused.

3.2.3 CRITICISMS OF THE CORROBORATION RULES

a) Discrimination against victims of sexual offences

It has been argued that the corroboration rules work particularly to the disadvantage of victims of sexual offences. Although the rules do not differentiate between the gender of the victims, nevertheless, the majority of victims of sexual offences are female. It has been suggested that the reasons for the existence of the corroboration rules in sexual cases are unfair to women in

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56 (1985) Z. R. 41
57 (1990) S. J. (S. C.)
general, and to complainants in particular. It has also been argued that the common law practice of the judge warning himself before convicting on uncorroborated evidence suggests that the victim is not trusted from the beginning thereby discriminating the victim.

b) Inflexibility

Inflexibility arises from the fact that in every case, irrespective of the reliability of the victim's evidence, the corroboration rules apply. Where corroboration is required as a matter of law, the defendant cannot be convicted if there is none. Where a warning is required, a standardized warning must be given that it is dangerous to convict in the absence of corroboration. The judge may be simply confused by the fact that such a warning should be given in a case where the evidence is strong and would not require corroboration but for the corroboration rules.

c) Complexity

The judge must remind himself of these principles and apply them to the facts before him.

Evidence amounts to corroboration only if it is independent evidence implicating the accused. As a result, many things which show, or might be thought to show, that the complainant is speaking the truth do not corroborate her in law. For example -

1. a complaint made by the victim shortly after the alleged offence does not amount to corroboration since it is not independent evidence
2. the victim's description of her alleged assailant's facial characteristics does not corroborate her subsequent identification of the alleged offender
3. the distressed condition of the complainant can amount to corroboration only in exceptional circumstances, since it does not usually implicate the defendant. An exception would be where (for example) a bystander testifies that the accused approached a child and that, shortly afterwards, he saw the child in a distressed condition
4. the existence of physical injuries can amount to corroboration of the complainant's evidence implicating the defendant in some cases but not in others.
The nature of the defence case may also affect the way in which the corroboration principles apply. For example, if the defendant to a rape charge denies having had sexual intercourse with the complainant, medical evidence of traces of the defendant's semen may corroborate the allegation. (But if a distressed victim cleaned herself after the incident, such medical evidence may be unavailable.) If the defendant admits that sexual intercourse took place but alleges that it was consensual, evidence of his semen traces would not corroborate the allegation of lack of consent, but serious bruising, or torn or blood-stained clothing may do so. (A victim who remained passive through fear and did not suffer injuries may not be able to produce any corroborative evidence.)

d) Anomalies

Anomalies arise because the corroboration rules are an exception to the general principle that it is the quality, rather than the quantity, of evidence which should count in a criminal trial. As a general rule, a judge is not prevented from convicting on the unsupported testimony of a single credible prosecution witness, even if it is contradicted by several witnesses for the defence.

Where corroboration is required as a matter of law, a lack of corroborative evidence must lead mechanically to an acquittal even where the judge is satisfied beyond reasonable doubt that the accused is guilty of the alleged crime. This is considered to be a glaring anomaly and contrary to the interests of justice.

A good example of such anomaly and how even judges may misapprehend the meaning of corroborative evidence can be found in the case of *R v Cheung Shu Wai*[^58]. The complainant in the case was 9 years old at the time when she was allegedly sexually abused by her mother's boyfriend who was staying with them at the relevant time. The defendant was charged with and convicted of, amongst other things, rape. The prosecution adduced evidence from a Mr. Yau, who shared a holding cell with the defendant and who was told by the defendant that he had sexual intercourse with the complainant. The defendant, when convicted, appealed against the conviction on the ground that the judge was wrong to treat the evidence of Mr. Yau as corroboration of the complainant's evidence. The conviction was ultimately quashed even though

[^58]: [1994] 2 HKC 174
the judges of the Court of Appeal were of the view that it was unlikely that the jury would have thought that a ten-year old girl would have consented to intercourse in the circumstances she described. Further, although evidence which simply adds to or supports other evidence can be corroboration, it was nevertheless held that Yau's evidence was only sufficient to prove intercourse but insufficient to corroborate rape.

In the case of a sexual offence in which consent is in issue, evidence both of the fact that a complaint was made by the alleged victim shortly after the offence, and of the substance of the complaint, is admissible as showing the consistency of the victim's conduct with her testimony and as being inconsistent with consent. This was the position of the court in *Mwelwa v The People*59. However, a complaint of this kind cannot amount to corroboration because of the technicality that corroborative evidence must be independent of the victim. Therefore, when it is necessary to decide whether the complainant had consented to intercourse, the complaint is treated by one standard but when consent is not raised by the defence and need not be proved or disproved, the same complaint will be treated by another standard. This adds to the burdensome task that the corroboration rules impose on the judge, who has to explain the difference in treatment and the necessity for the difference.

It is evident at this point that the statutory requirement and the common law practice are really two sides of the same coin. The statutory requirement provides that a person cannot be convicted unless the witness is corroborated. The common law practice requires that a warning of the danger of convicting on uncorroborated evidence be given where the witness is not corroborated. The corroboration required under the statutory provisions is often exactly the same kind of evidence the lack of which would automatically trigger the requirement for a warning where the common law practice applies. It is therefore not justifiable that the current law should put so much emphasis on the requirement of corroboration when in fact even a mere warning would be enough to convict. The danger of always requiring corroboration may prove to be very cumbersome for the prosecution. It was stated in the case of *Nsafu v The People*60 that corroboration must not be equated with independent proof; it is not evidence which needs to be.

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59 (1972) Z. R. 29 (H. C.)
60 (1973) Z.R. 287 (S.C.)
conclusive in itself. The court further stated that where the evidence of a witness requires to be corroborated it is nonetheless the evidence of the witness on which the conviction is based; the corroborative evidence serves to satisfy the court that it is safe to rely on that of the witness. It is therefore evident that it is still the evidence of a witness that is very cardinal in securing a conviction. It is for this reason that it is not logical to acquit a person on the mere basis that the evidence has not been corroborated.

There are a lot of developed jurisdictions were the requirement for corroboration has been abolished because it was seen as an impediment to the law involving sexual offences. In England, the corroboration rules in respect of sexual offences were abolished by the Criminal Justice and Public Order Act of 1994. The courts in England have instead adopted some guidelines which include:

1) It is a matter for the judge's discretion what, if any, warning is appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case.

2) It might be appropriate for the judge in some cases to warn the jury to exercise caution before acting on the unsupported evidence of a witness. There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable and not because the witness falls into any particular category.

3) If any question arises as to whether the judge should give a special warning, it is desirable that the question be resolved by a discussion with counsel in the jury's absence before final speeches.

4) Where a warning is considered necessary, it should be as part of the review of the evidence and the Judge's comments as to how the jury should evaluate it, rather than as a mechanical legal requirement.

5) It is for the judge to decide the strength and terms of any warning that the circumstances of the case may require.

In the Australian Capital Territory and Victoria, the trial judge is prohibited in most cases from giving a traditional corroboration warning. However, in these jurisdictions the judge may still give a warning upon the basis of the particular facts and circumstances which may affect the reliability of the witness in question.
In New South Wales, South Australia, Tasmania and Western Australia, a corroborating warning regarding the evidence of an alleged victim of a sexual offence is not required by any rule of law or practice. In these jurisdictions, a trial judge may still give such a warning but it is an error for a trial judge to caution a jury in terms which relate the warning to complainants in sexual cases generally as distinct from the complainant in the particular case.

In New Zealand, the requirement for a corroborating warning was abolished in 1985 and if a judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words is required.

It is evident from the experience of some of the world’s leading jurisdictions that, the requirement of corroborating may be a hindrance to the successful prosecution of offenders of offences against morality of which most of these offences are of a sexual nature.

3.3 CONSENT

One of the important principles of the law with regards sexual offences is that the law should protect everyone's right to make their own sexual choices. Compelling someone to take part in a sexual act denies this right. Liability for sexual offences against adults generally requires that the victim did not consent. Where the complainant and the accused know each other, particularly in the context of a previous or current intimate relationship, the issue of consent is particularly complex.

It has been mentioned in the previous chapter that consent is not defined in the Penal Code and the judges are expected to apply what they consider to be the ordinary meaning of that word. No one should have to be involved in sexual activity unless they consent to it. Yet the present law does not say what consent means. There should be a detailed definition of what consent is and what it is not. The law should make it clear, for example, that anyone who has sex because of threats of violence has not given consent. In most jurisdictions, the prosecution must prove that sexual penetration took place without the consent of the complainant. These are the physical elements of the offence. In a number of jurisdictions a further element, the mental element, must also be proved in relation to consent. The mental element is the state of mind of the accused which must be established beyond reasonable doubt before the accused can be convicted. The
prosecution must prove that the defendant knew that the complainant was not consenting, or was reckless as to that consent.61

Trials for rape, in particular, often hinge on whether the victim consented or not. It is up to the prosecution to prove there was no consent. What legally constitutes consent has evolved through case law and is judged not to be present when it was achieved by ‘the use of force or fear of force (including threats to third parties), the victim was unconscious (including sleep), there is fraudulent misrepresentation of the act as not sexual, there is impersonation of another (a complainant’s husband), the complainant is fundamentally mistaken as to the nature of the act, the complainant did not have understanding and knowledge to decide whether to consent or resist (age, disability, illness) or the complainant was so drunk or drugged they could not consent’. Many academics and activists have sought to define (the absence of) consent in much broader terms than the legal definitions.

It is the victim who must prove non-consent. Proof of non-consent must come in the form of visible injuries sustained while the victim tried to fight off her attacker.62 This might not always be easy to prove as was suggested by Doyle, C. J in the case of Ngoma v The People63. In this case the appellant was charged with the offence of indecent assault and the evidence given was that a woman was approached by the accused while she was walking near the railway beards and pushed to the ground and in fact raped. During the course of the struggle the appellant is alleged to have stood on her leg and unfortunately broke it. She also had certain scratches. The appellant’s defence was not that he did not have intercourse but that it was by consent. If it was by consent, the injuries would not have occurred unless they could plausibly be said to have occurred in some other manner. Doyle, C. J. observed that clearly as a matter of pure theory injuries of this nature could occur in probably half a dozen different ways. They would certainly occur by a fall, as the doctor said; they could possibly occur from stepping out of a moving

motor car. One could think of a lot of ways. But what was in issue in this case was: did she receive these injuries in some manner after the appellant had left her intact.

Not only must the victim show that she did not consent through visible injuries sustained but he victim must also have made an early complaint. All these issues are not required in the other offences. Some scholars have observed that that as a rape complainant, the woman is denied subjectivity, constructed as the other through an array of evidential requirements. Primarily, the victim is subject to a corroboration warning which requires the judge to tell the jury that they must be careful if they are to convict on her uncorroborated testimony because she may have concealed motives for bringing these charge. Further, only in rape does the defendant (usually the male subject) retain his shield, his protection against the court’s taking his previous convictions into account if he attacks the character of the complainant. As if this were not enough, it is open to the defendant in a rape trial to apply to the court for the complainant’s sexual history to be put in evidence.

In the case of *Kalebu Banda v The People*, a rape case, the failure to obtain medical evidence when there was a duty to do so means that the court must proceed as if a doctor had testified that he had examined the prosecutrix and found no evidence that force was used nor any evidence of intercourse. This clearly shows that there exists a rebuttable presumption that the victim was not raped if medical evidence has not been obtained. This may be too much a burden for the prosecution to successfully disprove.

### 3.4 HOW THE COURTS HAVE CONTRIBUTED TO THE INEFFICIENCY OF THE LAW

It is evident at his point that procedural and evidential technicalities have contributed greatly to the inefficiency of the current law on offences against morality. It goes without saying that the courts have also played a role in this regard because they have failed to sentence convicts

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65 (1977) Z.R. 169 (S.C.)
accordingly. Most of the people convicted of these heinous offences are given compassionate sentences thus making these sentences an ‘incitement’ to continue committing these offences. Case law has suggested that the courts have failed to sentence accordingly. In the case of **Obert Kalimukwa v The People**\(^{66}\) Silungwe A. J. stated that:

>“I have not the slightest hesitation in upholding the magistrate's decision, namely that what the appellant did to the prosecutrix in the instant case constituted the crime of attempted rape. I therefore see no sound reason for disturbing that decision. Accordingly the appeal against conviction fails. As regards sentence, the accused was a first offender. The offence of attempted rape carries a maximum penalty of imprisonment for life. I have considered that the sentence of 12 months' imprisonment with hard labour, six months of which was suspended was not excessive in the circumstances. I will not interfere with that sentence, so the appeal against sentence also fails”.

It is clear from what the court stated in this case that the court sympathized with the offender in this instant case. It is very difficult to see how a 12 month sentence would deter would be offenders. Such a sentence seems to suggest that the courts are not committed to the cause of curbing these offences.

In the case of **Robert Kalimukwa v The People**\(^{67}\) On the 22nd July, 1971, the appellant, Robert Kalimukwa, was convicted at Kalabo by the senior resident magistrate, Mongu, of attempted rape, contrary to s. 115 of the Penal Code, Chapter 6 of the laws, the allegation being that on 17th June, 1971, at Kalabo, he attempted to have carnal knowledge of Judith Mulenga, a woman, without her consent. He was sentenced to twelve months' imprisonment with hard labour, six months of which was suspended for a period of two years from the date of sentence on condition that the accused should not be convicted of an offence of this nature. It is evident that that such a sentence would not deter would be offenders and it is not sufficient for such a grave offence. This has continued to be the trend by the courts in Zambia.

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\(^{66}\) (1971) Z.R. 85 (H.C.)

\(^{67}\) (1971) Z.R. 85 (H.C.)
In the case of *Kenneth Chisanga v The People*\(^{68}\) the Appellant pleaded guilty before the Subordinate Court of the First Class at Ndola, to the offence of rape contrary to Section 133 of the Penal Code, Cap 87 of the Laws of Zambia. The particulars of the offence were that, on 21st March, 2003, the Appellant did unlawfully have carnal knowledge of one Annastazia Mbati Chipeta without her consent. The trial Court sentenced the Appellant to 60 months imprisonment with hard labour. The case record went up before the Ndola High Court for review in unclear circumstances but it was clear that the trial Court had not committed the case to the High Court for sentence. On review the High Court sentenced the Appellant to 15 years imprisonment with hard labour. The Appellant appealed against the sentence. The reasons given by the High Court for enhancing the sentence were that the offence was very serious; that as of late the offence of rape had become prevalent, and that women needed protection from such people as the Appellant. The court felt that it had a duty to impose a deterrent sentence. After having given such positive reasons for the enhancement of the sentence the Supreme Court reversed the decision of the High Court on the strength of *Kalunga v The People*\(^{69}\) which stated that:

> "It is not proper to enhance a sentence simply because the appellate court, had it tried the case, would have imposed a somewhat greater sentence just as the appellate court will not interfere with a sentence as being too high unless the sentence comes to the court with a sense of shock. Equally, it will not interfere with a sentence as being too low unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence."

It is clear at this point that even some of these procedural rules have not helped the high levels of offences against morality in Zambia. The courts have failed to engage in judicial activism. It is clear from the case above that the rape offence should have been given a stiffer sentence as rightly observed by the High Court. It is very difficult to see how the sentence maintained by the Supreme Court could deter would be offenders.

In the case of *A. Banda v The People*\(^{70}\) the appellant was charged with indecent assault on a female. The court commented in passing that on the facts alleged and accepted by the magistrate,

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\(^{68}\) Z.R. 93 (S.C.)

\(^{69}\) (1975) Z.R. 72

\(^{70}\) (1977) Z.R. 4 (S.C.)
the offence was quite clearly an attempted rape and should have been so charged. This is yet another clear indication that that the courts have been reluctant to the call of eradicating the ever escalating levels of offences against morality in Zambia. These cases are being handled almost as though they are not on the rise in Zambia. It is important to not at this point that in 2006, the Victim Support Unit at the Lusaka Police Division registered 124 cases of rape, 6 cases of attempted rape and 34 cases of indecent assaults on females. Additional complaints were filed in 2006 on cases that occurred in 2005: 58 cases of rape, 8 attempts of rape and 15 indecent assaults. Out of these reports, 72 resulted in arrests, 54 were brought to court and 87 are being investigated. The Young Women’s Christian Association (YWCA) reported in November 2006 that its shelter in Lusaka received every week, 8 girls and 10 adult women who were raped. With such alarming statistics it is expected of the courts to heed to the call and sentence offenders accordingly.

3.5 CONCLUSION

It is apparent from the preceding discussion that there are several impediments to the successful prosecution of offences against morality. Some of these are evidential requirements while others are merely technical or procedural requirements. It has been noted above that the amendment to the Penal Code in 2005 tried to remove some of these obstacles. It must be stated however that some of these requirements remain inherent in the current law. This chapter has highlighted how the evidential requirement of corroboration has contributed to the inefficiency of the current law in Zambia. It has also been observed that several common law jurisdictions have done away with the evidential requirement of corroboration so as to lighten the heavy burden that has been placed on the prosecution in sexual offences. The chapter has also discussed the issue of consent which is also difficult to prove especially in cases of rape and indecent assault. It is also clear that the courts have played a role in the escalation of offences against morality in Zambia. They have, generally, not adhered to the sentences provided for in the law. They have often been compassionate on the offenders when it comes to sentencing. The case law cited above has clearly illustrated this point.

CHAPTER FOUR

PRIVATE MORALITY AND IMMORALITY: THE BIAS CONCERNING OFFENCES AGAINST MORALITY IN ZAMBIA

4.1 INTRODUCTION

It is evident at this point that the previous chapter concerned itself with the examination of the different evidential and procedural requirements of offences against morality and how these procedures affect the successful prosecution of the offences against morality. This chapter will however concern itself mainly with the relationship between law and morality and how the two can be harmonized in criminal law. The chapter will further look at how the ‘private’ or ‘personal’ natures of some of the offences against morality have affected the efficacy of the current law. The chapter will also go further and examine whether the ‘personal’ nature of some of the offences has led to an inherent bias in the current law.

It is important to note that in modern Western political and legal thought, the subject of legal enforcement of morality is narrower than the literal coverage of those terms.\(^2\) That is because much legal enforcement of morality is uncontroversial and rarely discussed. Disagreement arises only when the law enforces aspects of morality that do not involve protecting others from fairly direct harm. More precisely, people raise questions about legal requirements (1) to refrain from acts that cause indirect harms to others, (2) to refrain from acts that cause harm to themselves, and (3) to refrain from acts that others believe are immoral. It is evident at this point that some of these questions may be asked when it comes to looking at offences against morality. Abortion for example can be argued to only affect the girl or woman who has aborted, therefore the law should not intervene in the’ private’ life of the individual. Further, most of the offences in part XV of the Penal Code deal with immorality, a question may be posed; What is the basis for this

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immorality? Why should the law criminalize immorality when the levels of morality differ not only from person to person but also from community to community?

From the onset, it is clear that issues of law and morality have been at 'odds' with each other. Many people argue that not everything that is illegal, for example, parking on a wrong spot, is immoral; not everything that is immoral, for example, breaking a friendly promise, is illegal. Some scholars have argued that morality is 'personal' to the individual; while law must be 'universal' to society. It is at this point that one may ask: should the law enforce morality?

4.2 THE LEGAL ENFORCEMENT OF MORALITY

The famous Wolfenden Report on prostitution and homosexuality interestingly asserted that:

"[The function of criminal law] "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of physical, official or economic dependence."

"It is not ... the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined."

"... Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business."

It should be noted from the outset that there are different philosophical theories that exist when it comes to the question of law and morality. It is important to note that the natural law school of thought dominated until the nineteenth century, beginning from the ancient Greek period. The natural law school discussed what law is but it never really discussed law as an empirical formula, and never made strict separation between what law is and what law ought to be. Natural law thinkers view the law as being made by man's mind consciously, as opposed to law made as a result of morality lacking the conscious element. The Natural law thinkers have always
considered the principles of morality as higher law and they look at manmade law as contempt and ridicule. Law and morality have always been at loggerheads with each other. The positivists on the other hand, led by Bentham and Austin, deliberately keep justice and morality out of the purview of legal system. Their formalistic attitude is concerned with law as it is and not law as it ought to be. They emphasize law from the point of source and implementation. So, the natural law system depends upon the standards and yardsticks of morality to formulate any law, whereas the positivist system of law depends upon the conscious and deliberate attempt of law making.

In a nutshell the natural law theory holds that along with the positive law there exist certain ideal principles or values to which the positive law should correspond if it is to be regarded as genuine law. Positivists on the other hand holds that to be valid law, all that is required is that it should ensue from a competent legislator after following the prescribed process, natural law theory requires in addition that such law, to be valid, must conform to some ideal principle (which may emanate from morality, reason, God, or some other such source).

The question of whether the law ought to enforce morality, as seen from above, has been an issue of philosophical debate for some time. Some scholars such as John Stuart Mill have asserted that the only justification for limiting one person's liberty is to prevent harm to another. This basically represents a starting point in the discussion on law and morality. It should be noted however that his principle is not universally accepted within the philosophical community and certainly is not applied in the real world.

In any debate on law and morality, the Hart-Fuller debate does not go without mention. Lord Devlin, a British judge, responded to the then-recently published Report of the Committee on Homosexual Offences and Prostitution (the Wolfenden Report) which advocated decriminalizing consensual homosexual activity between adults in England. The drafters of the Wolfenden Report asserted that, unless the legislature was willing to equate crime and sin, there must remain a realm of private morality and immorality which is not the law's business. Devlin interpreted the Committee's position to mean that no act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation. He disputed this position and argued that a society is a community of ideas including ideas about morality, that devoid of shared ideas on politics, morals, and ethics no society can exist. Since
recognized morality is essential to society then society may use the law to conserve morality in the same way as it uses it to safeguard anything else that is fundamental to its subsistence. Legislation against immorality is not only permissible but necessary to prevent the breakdown of society, in the same way that society may protect itself from subversive activities by prohibition of treason. The criminal law exists for the fortification of society, not for the protection of the individual. In Devlin's view, a society's morality is determined by the view of a reasonable man. Morality can be based on repugnance and therefore society's general abhorrence of homosexuality is a sufficient foundation for the legal prohibition of homosexual activity. Privacy can be balanced against the public interest in the moral order so that even private consensual conduct can be prohibited. In an essay entitled "Morals and the Criminal Law," Lord Devlin wrote:

"Society means a community of ideas; without shared ideas on politics morals and ethics, no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate.

"For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price."73

Devlin's relatively simple argument has been met with much opposition. The first response came from H. L. A. Hart, an American professor, who disputed Devlin's thesis saying that it assumes that immorality jeopardizes society, when in fact there is no evidence of that proposition. While Hart conceded that some shared morality is essential to the existence of society he questioned Devlin's leap from there to the proposition that a change in society's morality is tantamount to destroying it, that society is equal to its morality, because that implies that the morality of a society cannot change, or rather that if it does one society is actually disappearing, and being replaced by another. According to Hart, Devlin's argument amounts to an assertion that law should preserve existing morality, not that legal enforcement of morality is a good in and of

itself. By contrast, Hart asserted that society cannot only survive individual differences in morality but can profit from them, though he does not specify exactly how it might profit.

Finally, he asserted that even if there is a valid argument for the legal enforcement of morality, Devlin's argument as to how that morality should be ascertained is flawed. He argued that no one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified. Hart's view of the connection between society and society's morality is more flexible than Devlin's. A society's morality can change without the society disappearing and democracy does not require the enforcement of uniform morality, as Devlin suggested.

In place of Devlin's justification for the full enforcement of morality, Hart developed his own argument for the partial enforcement of morality based on a distinction he drew between immorality which affronts public decency and that which merely 'distresses' others based on the knowledge that immoral acts are taking place. In Hart's view society may, for example, outlaw the public expression of bigamy or prostitution, because such could be considered an affront to public decency, as a nuisance, while it would not be justifiable to outlaw purely private manifestations of these types of behavior, or of consensual homosexual behavior in private, even though some might claim to be distressed by the private behavior as well. At this point Hart viewed it as a matter of balancing the distress from the knowledge that something immoral is taking place with individual liberty.

It seems to be evident at this point is that the law cannot completely do away with the aspect of morality. It is a notorious fact that in any developed legal system morality always has its role to play in criminal law. It has long been the duty of the courts to prohibit immorally wrong behavior that affects the communities. The cases of **Shaw v DPP**[^74] and **Kneller v DPP**[^75] show how the judiciary is willing to uphold morality even when novel cases come up. In **Shaw v DPP** Viscount Simonds asserted that:

[^74]: (1962) HL
[^75]: [1973] HL
"In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for."

It is therefore clear that the court will prohibit behavior they think will be a detriment to the society. The big question is "Who should say?" what should be prohibited, should it be Parliament or judges? Furthermore, what things should they prohibit? It can be deduced form the sentiments expressed in the above case that law and morality are intertwined. The inner morality is not something superimposed on the power of law, but it is an essential condition of that power itself. It is, in other words, a precondition of good law.

4.3 THE VICTORIAN COMPROMISE: THE BIAS INVOLVING OFFENCES AGAINST MORALITY.

It is evident at this point that there is quite a strong connection between law and morality. It is well established that there is a connection between law and morality. It is also clear that their domains are clearly not entirely identical - for example, it may be morally wrong to lie to one's parents, but it certainly is no business of the law.

Sex crimes that are sometimes labeled consensual are numerous. Such offences include incest between adults and even prostitution. In each case, criminalization is controversial, at least in part because of the issue of consent. If two adults agree to participate in a private sex act, one may ask; what harm can justify state intervention to criminalize that conduct? Some scholars have asserted that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." However, Justice White asserted, in 1986, that "[v]ictimless crimes . . . do not escape the law [even] when committed at home," and held that private consensual sodomy could be criminally prohibited by state".  

38
It is important to note that there has been a significant shift in the conception of sexual conduct. There has been an assertion of privacy in law and culture around sexual conduct that includes a claim of legitimacy to freely chosen sexual expression that does not affect third parties. In some jurisdictions these offences have been tied together under the heading; consensual crimes. The term consensual sex crimes; therefore, carries with it more than a descriptive character. The term connotes a claim of legitimacy for the sex acts in question, meaning a claim of right to engage in the acts without interference from the community in the form of legal prohibition, or even in most cases social prohibition. The term consensual, more precisely, is used to negate the notion that the crimes cause harm, making them victimless crimes. Without a cognizable harm, criminalization may be illegitimate.

What legal historian Lawrence M. Friedman has termed the Victorian compromise\(^76\) necessitates attention at this point. The most enduring complaint about consensual sexual activity has been the offence to those who come into incidental contact with it. At the same time, even before the sexual revolution of the 1960s there was widespread acceptance of the inevitability of frequent sexual activity, such as prostitution, considered immoral according to religious and community norms.\(^77\) Thus criminal law has developed the "Victorian compromise": the law would criminalize only that conduct that was actually visible to the outside world, and would leave alone conduct with no public facet. This compromise appears in the details of a number of criminal statutes governing sexual conduct.\(^78\) For example, the Penal Code on prostitution is drafted so that solicitation and streetwalking are illegal, but the actual private exchange of sex for money is not mentioned in the law. Section 146 (1) (a) and (b) provide that:

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\text{A person who- (a) knowingly lives wholly or in part on the earnings of prostitution; or (b) in any public place, persistently solicits or importunes for immoral purposes; commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years.}
\]

This also reflects the English common law approach to prostitution. Further many adultery and fornication statutes in the United States require that the conduct be "open and notorious," or


\(^{77}\) L. M. Friedman, *American Law in the 20th Century*.

\(^{78}\) L. M. Friedman, *American Law in the 20th Century*. 

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prohibit cohabitation with a member of the opposite sex rather than actual sex acts. These offences are similar in nature with those found in part XV of the Zambian Penal Code. It must be pointed out at this point that the Victorian compromise has been viewed both as realistic on the one hand, and as hypocritical on the other. The compromise also removes from the table the specter of law enforcement inquiring in private activities of individuals. If evidence of the crime is not apparent in public, then there is no crime to be investigated. It must be added that all in all the Victorian compromise explains the realities in the Zambian penal laws today.

Rape, defilement and to some extent indecent assault are routinely enforced. However, the rest of the offences against morality that include incest between adults, abortion and prostitution are not. Laws that are rarely enforced are often called dead-letter laws, and they give rise to problems in both the criminal and the civil law. In the criminal law context, rarely used laws provide opportunities for prosecutorial abuses through selective prosecution. Criminal laws are supposed to be invoked even-handedly, based only on the violator’s commission of the prohibited activity, and not on particular offences only. Violations of dead-letter laws may be prosecuted occasionally when the perpetrators are famous or unpopular otherwise offenders usually go unpunished. It is a notorious fact that the offence of abortion is continuously committed today and yet very few cases reach the courts of law. In fact there are very few convictions for such offences.

It is therefore clear at this point that inasmuch as others might argue that the Victorian compromise is hypocritical; this compromise seems to be the reality regarding offences against morality in Zambia today. The law seems to be inherently biased towards those offences that have a public facet such as rape and defilement while seemingly ignoring other offences that have a ‘private’ facet such as abortion and incest. This bias is also evident in the scarcity of prosecutions for offences such as prostitution, incest and abortion on the one hand and the prevalence of prosecutions involving rape and defilement. It is a notorious fact that offences such as abortion and incest are as rampant and prevalent as rape and defilement and yet the law does not seem to put this fact into perspective.

Rape and other forms of sexual violence against women are widespread in Zambia and, despite the fact that there are provisions in the Penal Code which criminalize sexual violence including
rape and defilement; these are inconsistently and unevenly applied. According to official statistics, over 4,700 cases of rape were reported in Zambia between 1991 and 1998 and of these, approximately 30 percent resulted in conviction and five percent in acquittal while the remainder were either dismissed or left unresolved.\(^7\)

It is evident that any comprehensive morality includes restraints against harming other people. Murder, assault, theft, and fraud are immoral. In any society sufficiently developed to have a law distinguishable from its social morality, this law will forbid murder, assault, theft, and some forms of fraud. As H.L.A. Hart pointed out, law and social morality will constrain much of the same behavior. This does not mean, of course, that the law will enforce every aspect of morality that concerns preventing harm to others. Law is a crude instrument, requiring findings of uncertain facts, with rules backed by a limited arsenal of coercive sanctions. Many immoral acts that hurt others are unregulated by the law. Nevertheless, no one doubts that, in principle, protecting others from harm is an appropriate task for legal rules. Exactly what protection these rules should extend is a matter of prudential judgment or some kind of balancing of morally relevant factors.

### 4.4 SOCIAL PERCEPTIONS OF OFFENCES AGAINST MORALITY: HOW THEY AFFECT THE ENFORCEMENT OF THESE OFFENCES

Popular perceptions of rape, defilement and basically all other offences against morality can certainly be seen to be based on misinformation. Soothill and Walby\(^8\) conducted an analysis of the media reporting of sex crime and found that ‘the popular imagery of rape as represented in the newspaper typically involves strangers, madmen, multiple attacks and reckless women, some of whom brought it on themselves’. The role of rape victim’, in particular, is highly stigmatized, with a tendency for society to view rape victims as ‘damaged goods’\(^9\) with a ‘degraded status’.

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Narrow and sensationalist media coverage helps perpetuate the myth of most sex attacks being committed by strangers. Consequently, it may be difficult for a woman raped by a man known to her to identify herself as having been raped. ‘Stranger rapes’ may also be perceived as more serious than those involving known perpetrators, despite the fact that the latter also involve a breach of trust.\textsuperscript{83} Certainly, many victims of sexual attacks do not acknowledge themselves as having been ‘raped’.

Sexual violence impacts on the lives of many Zambians. However, the vast majority of people who are sexually assaulted avoid engagement with the criminal justice system, perceiving it as inappropriate to their needs or fearing the additional trauma of the legal process\textsuperscript{84}. According to the Victorian Law Reform Commission\textsuperscript{85}, rape has the lowest reporting rate of any crime. Rape and other forms of sexual violence against women are widespread in Zambia and, despite the fact that there are provisions in the Penal Code which criminalize sexual violence including rape and defilement; these are inconsistently and unevenly applied. According to official statistics, over 4,700 cases of rape were reported in Zambia between 1991 and 1998 and of these, approximately 30 percent resulted in conviction and five percent in acquittal while the remainder were either dismissed or left unresolved.\textsuperscript{86}

The relationship between reporting and convictions has become a self-perpetuating cycle, one that maintains both at unacceptably low levels. Of the cases that do enter the criminal justice system, very few reach trial, which means that a tiny fraction of all reported sexual offences result in convictions. On the other hand, low conviction rates, traumatic experiences in court, and

\begin{itemize}
  \item K Soothill, and Walby, S. \textit{Sex Crime in the News}, Page 141
  \item Victorian Law Reform Commission, 2004.
\end{itemize}
high rates of withdrawal from criminal justice processes contribute to low rates of guilty pleas and low reporting (VLRC 2004).

The criminal justice system should be accessible to everyone who is subjected to a serious crime. People who are sexually assaulted deserve to be treated with dignity and respect, no less than victims of other crimes. Their contribution to the public interest in reporting crime and ensuring that it is prosecuted should be recognized. Instead, current deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence.

4.5 CONCLUSION
It is evident from the preceding discussion the law cannot be completely liberated from morality. It is in fact one of the functions of the law to make sure that it upholds the moral standards in the society in which it operates. In a way, the law actually reflects the level of morality in a particular community. It must be noted however that the relationship between these two concepts is controversial especially when it comes to looking at what extent the law is supposed to criminalize immorality. All in all what is important to note is the fact that the law has a role to play in the enforcement of morality. The preceding chapter has also shown that the law seems to be inherently biased towards offences that have a public facet and seemingly ignores those that have a private facet. It is also clear that the Victorian compromise as adopted by the legal historian Lawrence M. Friedman seems more realistic and is true to the Zambian situation. It has also been shown that the social perceptions of the offences against morality have affected the enforcement and reporting of these offences. It is therefore safe to state at this point that offences against morality are not evenly enforced for the reasons cited above.
CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION
The aim of this chapter, like every other concluding chapter in a research, is to draw some conclusions from the findings of the research and based on these conclusions provide some pertinent recommendations on the topic at hand with the aim of changing the situation prevailing at present. This chapter consequently draws conclusions from the discussion on the current law on offences against morality in Zambia and whether the law is in touch with reality in dealing with all offences against morality or is it biased towards the more “pronounced” offences of rape and defilement whilst sidelining the other equally distressing offences in the same category. The chapter further, makes recommendations as to how the situation in Zambia can change with regard to the prevailing situation.

5.2 GENERAL CONCLUSIONS
From the preceding chapters, it is apparent that there are several reasons that contribute to the escalation of offences against morality in Zambia. It has been noted that lack of apt definitions of some of the offences has made it difficult to try and prosecute these crimes. It has also been shown that statutory law and customary law have failed to reconcile leading to the ‘unnoticed commission’ of some offences such as defilement and incest. Another issue that has been noted is the unique nature of some of these offences that fall within this category which the law has failed to address. It has also been noted that procedural requirements also make it difficult to successfully prosecute these offences.

There are several impediments to the successful prosecution of offences against morality. Some of these are evidential requirements while others are merely technical or procedural requirements. It has been noted that the amendment to the Penal Code in 2005 tried to remove some of these obstacles. It must be stated however that some of these requirements remain inherent in the current law. Further it has been shown that the evidential requirement of corroboration has contributed to the inefficiency of the current law in Zambia. It has also been
found that the courts have played a role in the escalation of offences against morality in Zambia. They have, generally, not adhered to the sentences provided for in the law. They have often been compassionate on the offenders when it comes to sentencing. Case law has clearly highlighted this shortcoming by the courts.

The law cannot be completely liberated from morality. It is in fact one of the functions of the law to make sure that it upholds the moral standards in the society in which it operates. In a way, the law actually reflects the level of morality in a particular community. It must be noted however that the relationship between these two concepts is controversial especially when it comes to looking at what extent the law is supposed to criminalize immorality. All in all what is important to note is the fact that the law has a role to play in the enforcement of morality. It has been found that the law seems to be inherently biased towards offences that have a public facet and seemingly ignores those that have a private facet. It is also clear that the Victorian compromise as adopted by the legal historian Lawrence M. Friedman seems more realistic and is true to the Zambian situation. It has also been shown that the social perceptions of the offences against morality have affected the enforcement and reporting of these offences. It is therefore safe to state at this point that offences against morality are not evenly enforced in Zambia.

5.3 RECOMMENDATIONS

1) ABOLITION OF SOME PROCEDURAL AND EVIDENTIAL REQUIREMENTS

It is worth noting that the complex procedural conditions established under the Termination of Pregnancy Act have led many women wishing to terminate pregnancies to do so unofficially and it is reported that large numbers of women in Zambia die every year as a result of complications arising from illegal abortions. The simplification of the procedures under the Termination of Pregnancy Act should be considered in order to ensure that women do have effective access to its provisions, thereby, reducing the complications and consequences of undergoing unprofessional and illegal abortions.

Further, corroboration has been shown to be a hindrance to the successful prosecution of offences against morality in Zambia. It is therefore plausible to conclude that one reason why
rape and other sexual offences may be difficult to prove is the need for evidence to corroborate
the complainer's own evidence. It has already been shown that the statutory requirement and the
common law practice are really two sides of the same coin. The statutory requirement provides
that a person cannot be convicted unless the witness is corroborated. The common law practice
requires that a warning of the danger of convicting on uncorroborated evidence be given where
the witness is not corroborated. The corroboration required under the statutory provisions is often
exactly the same kind of evidence the lack of which would automatically trigger the requirement
for a warning where the common law practice applies. It is therefore not justifiable that the
current law should put so much emphasis on the requirement of corroboration when in fact even
a mere warning would be enough to convict. The danger of always requiring corroboration has
proved to be very cumbersome for the prosecution. Developed jurisdictions that include England,
New Zealand, Australia, and Wales have already abolished the corroboration rules with respect
to sexual offences. Zambia should therefore follow suit.

2) AWARENESS CAMPAIGNS
It is imperative to note that attention must be paid to the factors that currently prevent women
and girls in Zambia from lodging complaints in relation to sexual and domestic violence. These
factors include traditional social beliefs concerning the subordinate status of women in family
relationships as well as the lack of specialized training amongst law enforcement personnel and
members of the judiciary who frequently mirror prevailing social stereotypes concerning sexual
and domestic violence and, as a result, often actively discourage women and girls from making
complaints. The author would like to suggest the development of broad-based public awareness
campaigns concerning sexual and domestic violence, if possible in conjunction with local human
rights organizations. This will consequently enlighten most people as to what really constitutes
sexual violence and that they are at liberty to report such crimes to the relevant authorities. It
would also be important to enlighten these authorities on what sexual violence so that they may
be able to admit complaints brought before them.
3) LAW ENFORCEMENT PERSONNEL AND MEMBERS OF THE JUDICIARY SHOULD BE WELL TRAINED

Law enforcement personnel in Zambia are, in general, ill-equipped to handle complaints from women and girls alleging that they have been victims of rape and other forms of sexual violence. The discriminatory attitudes of many police and members of the judiciary have led to a lack of confidence in the law enforcement response to acts of sexual violence against women and thus to the subsequent under-reporting of rape and other forms of violence against women in Zambia. In relation to the training of law enforcement personnel and members of the judiciary, the author recommends that comprehensive training on responding to complaints of domestic violence be provided to all personnel currently in service as well as to potential police officers and judges in the context of their basic training. The author also strongly recommends that the Victim Support Unit (VSU) which currently deals with cases of sexual and domestic violence should be provided with adequate resources in order to guarantee its effective functioning and that the number of officers allocated to the Unit be increased.

4) JUDICIAL ACTIVISM

The author is very concerned by the fact that even though heavy penalties are provided in the Penal Code for acts of rape and other sexual crimes. These minimum penalties are not adhered to by the judges and magistrates. The judges and magistrates should therefore take it upon themselves to ensure that they sentence convicts in line with the provisions of the law. The case law cited in the previous chapters has shown that the perpetrators of rape are often punished with little more than a small fine, thus sending the message that rape and other sexual crimes are not considered by the judiciary to constitute a serious criminal offence which should be met with an appropriately severe penalty. The author would therefore recommend that guiding principles be issued to all judges and magistrates at the local and district court levels concerning sentencing in cases of rape and sexual assault and that consideration be given to appointing greater numbers of female Judges and Magistrates.
5) A CALL FOR EQUAL ENFORCEMENT OF OFFENCES AGAINST MORALITY

It is evident at this point that the criminal law has developed the "Victorian compromise": the law criminalizes only that conduct that is actually visible to the outside world, and would leave alone conduct with no public facet. The law seems to be inherently biased towards those offences that have a public facet such as rape and defilement while seemingly ignoring other offences that have a 'private' facet such as abortion and incest. This bias is also evident in the scarcity of prosecutions for offences such as prostitution, incest and abortion on the one hand and the prevalence of prosecutions involving rape and defilement. It is a notorious fact that offences such as abortion and incest are as rampant and prevalent as rape and defilement and yet the law does not seem to put this fact into perspective. The author therefore recommends that as the legislature looks at amending the law concerning offences against morality, this should be kept in mind. The law as it stands creates a feasible bias. Some offences are prosecuted while others of a more private nature are left inactive.

5.4 CONCLUSION

In conclusion, this research paper has attempted to show that the current law on offences against morality in Zambia is not adequate. It has further attempted to show that the law is not in touch with reality in dealing with all offences against morality and that it is biased towards the more "pronounced" offences of rape and defilement whilst sideling the other equally distressing offences in the same category such as abortion and incest. It is worth noting that the offences against morality are ever on the rise in Zambia and it is about time that the law and policy makers saw to it that these offences be curbed. The victims of these offences are often left emotionally and psychologically disturbed. It should be noted that these offences will continue to be on the rise not until there is consented effort to curb them by the enforcement authorities, the law makers, the judiciary and the general public. Not until this is achieved, these offences will continue to haunt the Zambian society.
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