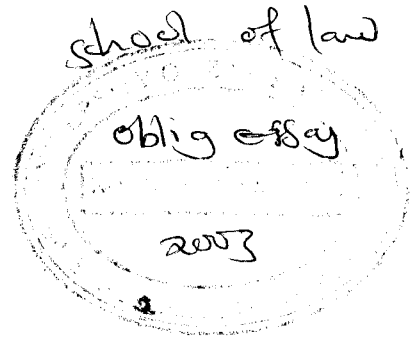


**DEFILEMENT AS A SEXUAL OFFENCE IN ZAMBIA: WHY THE INCREASE  
IN DEFILEMENT CASES TODAY?**



BY  
BERTHA MUSONDA CHILESHE

UNZA

2003

**TITLE**

**DEFILEMENT AS A SEXUAL OFFENCE IN ZAMBIA: WHY THE INCREASE  
IN DEFILEMENT CASES TODAY?**

A research paper 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).

BY: BERTHA MUSONDA CHILESHE. COMPUTER No. 97134261

UNZA

OCTOBER 2003

**THE UNIVERSITY OF ZAMBIA**

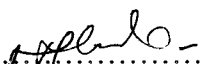
**SCHOOL OF LAW**

I recommend that the directed research prepared under my supervision by Bertha Musonda Chileshe (Computer No. 97134261)

Entitled:

DEFILEMENT AS A SEXUAL OFFENCE IN ZAMBIA: WHY THE INCREASE IN DEFILEMENT CASES TODAY?

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing obligatory essays.

  
.....  
Dr M. Munalula  
(SUPERVISOR)

Date.....1.12.03.....

## DEDICATIONS

*This paper is dedicated to my late father Mr. Paul Chileshe who always used to encourage me to work extra hard in school in order to prepare adequately for the future and to my darling mother for her unending true love and for being a source of inspiration which has helped me to soldier on.*

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To my angel of a mother Mrs. Annie Chileshe, thank you for believing in me and being there for me always. Thank you for having my best interests at heart all the time. You are my source of inspiration and I will always love you.

To my late father, I wish you were alive to see me realise my dream.

To you all I say thank you and that you will always be special to me.

May the almighty God bless you always.

BERTHA MUSONDA CHILESHE

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Draft Protocol to the African Charter on Human and People's Rights

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## CHAPTER ONE

### INTRODUCTION

The fact that children could suffer defilement at all should come as a terrible shock. Defilement is an ugly reality in this world. This is a crime for which there should be no excuse. The dependency and vulnerability of children should render them immune from the atrocities adults inflict on them.

Their very innocence should put them beyond reach. Yet defilement is endemic: children of very tender age are defiled almost everyday by their own relatives, such as their fathers, uncles, brothers, cousins, family friends and strangers. In addition to this list are people like teachers, clergymen, peacekeepers, district administrators and government officials. Some are victims many times over, to injustice and impunity that allows it to continue.

Defilement is not only a social or cultural issue but also a human rights violation, which the State has an obligation to take effective steps to prevent. Children are by reason of their physical and emotional immaturity, dependent on their families, and the community and more widely, on political and economic power to safeguard their well being. As a matter of fact, children have a right to protection from sexual exploitation.

Defilement allegations were on the one hand in the past interpreted as malicious. On the other hand, most cases went unreported and unpunished because the girls were too ashamed to tell anyone what happened to them. In addition to this, even when the

children are willing to make a complaint, and have recourse to the necessary legal advice and assistance they may be intimidated not to testify or report to the police by the perpetrator, parents or relatives. They also find it difficult to sustain their allegations particularly when there are only two witnesses-the victim and the perpetrator as in many sexual abuse cases.

In Zambia defilement is defined under the Penal Code in Section 138(1). However the Penal Code is not the only advocate for an end to defilement cases. There are also other advocates such as international conventions to which Zambia is a party like the CRC, Non Governmental Organisations (NGO's) like YWCA, VSU, Women For Change, Orphanages and secondary schools that have introduced sex education in schools.

The offence of defilement is on the increase in many parts of the world especially in Africa and this has given rise to international concern. Many countries worldwide have shown the importance they attach to children's rights by ratifying and acceding to the United Nations Convention on The Rights of the Child (CRC), which is the first and only international convention that has the best interests of the child addressed exhaustively to give real meaning to the child.

The purpose of this paper is to analyse defilement as a sexual offence in Zambia and to examine why there is an increase in defilement cases today despite the fact that there is legislation that exists, which makes defilement an offence with a maximum penalty of life imprisonment. The legislation enacted by Parliament was intended to protect children from defilement but cases occur everyday.

The first chapter is an introduction of what the essay is about and how the subject matter of defilement will be examined in the various chapters of the essay. It also has a methodology and the objectives of study.

The second chapter will concentrate on definitions of the concepts from different sources and works. It will be an overview of defilement as a sexual offence. Of particular interest are the definitions of defilement under the Penal Code, perpetrator and child.

In the third chapter the paper will analyse the different provisions of the law that seek to protect the girl child from defilement such as the Penal Code and the Juveniles Act.

The chapter will also look at the international conventions to which Zambia is a party that protect the girl child from defilement such as the CRC and CEDAW and to what extent Zambia complies with these conventions. The chapter will also look at the other forms of protection apart from the law that exist to protect girls and NGO's like YWCA, which provides drop-in centres and shelters, the VSU, orphanages and schools.

The fourth chapter will critically analyse the role of the proviso to Section 138 in the protection of the girl child and to what extent the law enforcement is adequate in this protection. The chapter will also examine the role of the police in their enforcement of Section 138 of the Penal code and the required evidence to prove a case of defilement in a court of law. Another issue analysed in the chapter is the cultural myths and customary law marriages as contributing factors to the evil of defilement.

Lastly the fifth chapter will summarise the observations and findings of the research and will then close by making recommendations for more effective protection of the girl child against defilement.

## **1.1 OBJECTIVES OF STUDY**

The research seeks to analyse the legal framework for defilement in order to provide recommendations that are in the best interest of the child, for the protection to be more meaningful to the child. The research is being conducted at a time when defilement cases are on rampant increase and there is a demand to impose punishments such as castration, amputation of the perpetrator's private parts or death penalty. It is an offence that is being talked about almost everyday because defilement affects the most vulnerable in society and is a serious human rights violation. It is important to identify what makes people commit this crime before determining the solutions to the problem.

## **1.2 METHODOLOGY**

The research was conducted by way of reviewing relevant pieces of legislation and literature available on this particular subject including in different obligatory essays, conducting very informant interviews with people more familiar with this particular subject who deal with it on a day-to-day basis.

There have been a number of people who have conducted studies on defilement and this work is expressed in obligatory essays, reports, proposals or on the Internet. Some obligatory essays referred to were written by James Banda in 1998 and Mwape Bowa in 2001. Other works are reports by the YWCA, VSU, WILDAF Zambia and Ms Matilda Kasanga. Other issues on this subject were obtained from the newspapers such as Times of Zambia and The Post.

## CHAPTER TWO

### DEFILEMENT; A GENERAL OVERVIEW

The purpose of this chapter is to define the different terms that are the subject matter of this dissertation. To effectively and efficiently define the terminologies or terms, various sources will be utilised. To start with, the terms relevant to the study of defilement in Zambia, which require definition, are defilement, child, perpetrators, victim and carnal knowledge. After defining the terms, an overview of the terms will be discussed. The chapter will be concluded with a mention of areas in which defilement cases are most prevalent.

#### 2.0 CONCEPTUAL FRAMEWORK

##### 2.1 Defilement

The Penal Code Act, Cap 87 of the Laws of Zambia provides that,

“Any person who unlawfully and carnally knows any girl under the age of 16 years is guilty of a felony and is liable to imprisonment for life.”<sup>1</sup>

An attempt to defile is also an offence and is a felony under the Penal Code.

“Any person who attempts to have unlawful carnal knowledge of any girl under the age of 16 years is guilty of a felony and is liable to imprisonment for 14 years.”<sup>2</sup>

In addition to this, Osborn’s Concise Law Dictionary defines carnal knowledge as,

“Penetration to the slightest degree by the male organ of generation into the vagina.”<sup>3</sup>

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<sup>1</sup> Section 138(1)

<sup>2</sup> Section 138(2)

<sup>3</sup> 8<sup>th</sup> Edition edited by Leslie Rutherford and Sheila Bone.

Blacks Law Dictionary defines carnal knowledge as,

“The act of a man having sexual bodily connections with a woman; carnal knowledge of a child is unlawful sexual intercourse with a female child under the age of consent..... While penetration is an essential element, there is ‘carnal knowledge’ if there is slightest penetration of the sexual organ of the male..... It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient.”

In the unreported case of *The People v Taurai*<sup>4</sup>, the definition of defilement was given by the Magistrate when she said that,

“Defilement is constituted when a person unlawfully has carnal knowledge of any girl below the age of 16 years.”<sup>5</sup>

According to Black’s Law Dictionary,<sup>6</sup> to defile is to debauch, deflower or corrupt the chastity of a woman.

Other attempts made to define defilement in a study conducted by Mrs Gertrude Shin kanga<sup>7</sup> in different parts of the country yielded a number of definitions such as:

- Sexual activities or behaviour perpetrated by an older person towards a child with or without the child’s consent, for the sexual gratification of the adult or older person.

- Incest
- Fondling the child
- Making the child fondle the perpetrators genitals
- Showing one’s nudity to a child
- Oral sex activities

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<sup>4</sup> SP2-91 of 2001

<sup>5</sup> This was an attempt to define defilement by Ms M. Chanda, the Senior Resident Magistrate at the Chikwa Courts.

<sup>6</sup> Henry Campbell Black, 1968, Revised 4<sup>th</sup> Edition.

<sup>7</sup> Coordinator of the Young Women’s Christian Association in 1998

- Adults having sex with children below 16 years
- Slapping a child on the buttocks
- Proposing sex to a child or using suggestive language with a child
- Raping a young child \*
- Any contact between a child and another person from fondling to rape, with or

without force

- An older or more knowledgeable child or an adult using a child for sexual pleasure.

The Standing Committee on Sexually Abused Children (SCOSAC) <sup>8</sup> offers an exhaustive definition, which embodies other definitions and defines defilement as,

“ Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has, by design or neglect of their usual societal or specific responsibilities in relation to the child, engaged or permitted the engagement of that child in any activity of a sexual nature which is intended to lead to the sexual gratification of the sexually mature person. This definition pertains whether or not it involves genital or physical contact, whether or not there is discernible harmful outcome in the short term.”

The above definitions except the Penal Code make no specific reference to the girl or boy child. However, for purposes of this essay reference will be to the girl child. The Penal Code creates offences of sexual abuse pertaining to boys and girls specifically. Any man who unlawfully has sexual intercourse with a child or girl under 16 years is guilty of defilement. It is of no relevance and no defence that the girl consented. A child is presumed to be incapable of consenting to having sexual intercourse.

In *R v Tyrell*,<sup>9</sup> it was held that,

“A girl under the prescribed age can't be guilty of inciting a man to have unlawful sexual intercourse with her or of aiding and abetting the commission of the offence in relation to herself.”

<sup>8</sup> Standing Committee On Sexually Abused Children (SCOSAC) (1984) "Definition of Child Sexual Abuse"

<sup>9</sup> [1894] 1 Q.B 710

It follows therefore that from the latest definition by SCOSAC it is defilement even though the child initiated it.

In the attempt at making defilement a crime the Penal Code further provides that,

“ Any person who, being the owner or occupier of premises or having or acting or assisting in the management or control thereof, induces or knowingly suffers any girl under the age of twelve years or to be upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, is guilty of a felony and is liable to imprisonment for five years.”<sup>10</sup>

“Any person who, being the owner or occupier of premises or having or acting or assisting in the management or control thereof, induces or knowingly suffers any girl above the age of twelve years and under the age of sixteen years to resort to or be upon such premises for the purpose of being unlawfully or carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, is guilty of a misdemeanour.”<sup>11</sup>

However, to these instances it is a significant defence if the accused had reasonable cause to believe and did in fact believe that the girl is of or above the age of consent.

## 2.2 Child

The United Nations Convention on the Rights of the Child (CRC) to which Zambia is a signatory defines a child as, “every human being below the age of eighteen years.”

The African Charter on the Rights and Welfare of the Child (ACRWC) also regards a child as every human being below the age of eighteen years. However in Zambia a child is any person below the age of sixteen years.

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<sup>10</sup> Section 142

<sup>11</sup> Section 143

The Longman Dictionary of the English Language defines a child as,

“A young person, especially between infancy and youth; a childlike or childish person or a child not yet of (a legally specified) age.”

In Zambia there is no single child code. This means that the different legislation provide different definitions of who a child is and it follows therefore that the protection awarded by an Act or provision of the law is dependent upon the specific age limit provided by the particular Act or Statutory provision.

### 2.3 Perpetrators

The Black's Law Dictionary in defining perpetrator states that,

“Generally, this term denotes the person who actually commits a crime or delict, or by whose immediate agency it occurs.”

A perpetrator may be a stranger, a clergyman, a teacher, an uncle, brother or father, a neighbour, baby sitter, family friend, cousin or foreign aid workers, such as United Nations peace keepers. Statistics reveal that 90 to 97 percent of the child sexual assault offenders are males and 75 percent of the reported child sexual assault victims are girls. In addition to these statistics it has also been noted that 75 percent of the child sexual offenders are relatives or friends and 15 percent are strangers.<sup>12</sup>

For instance, in a case involving a clergyman, a 24-year-old Pastor with Christian Brethren Church was jailed for defiling a 7-year-old girl. The Pastor was found guilty of defiling the girl each time he visited the girl's parents in the name of conducting prayers and casting of demons from the girl's mother.<sup>13</sup>

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<sup>12</sup> Child Protection Council Fact Sheet 5

<sup>13</sup> Zambia Daily Mail 20<sup>th</sup> November 1997 "Sexy Pastor jailed"

Another example is in the case of a teacher who defiled a schoolgirl on July 20 1994. He was alleged to have had unlawful carnal knowledge of a girl under the age of sixteen years. He was arrested after a tip-off and remanded in prison. He denied the charge. He later applied for bail saying he kept money and examination papers for grade seven and nine at his school but the application was denied.<sup>14</sup>

The abusers use their power or authority over a child and take advantage of a child's trust and respect to exploit her for sexual purposes. The perpetrator may use tricks, bribes, threats, and, or physical force to make the child take part in sexual activity.<sup>15</sup> For instance a girl's mother sued Mr Zimba for "damaging" her daughter. The girl stated that Mr Zimba sexually abused her on two occasions when her mother was in Kafue when Zimba defiled her. He overpowered her and warned her that he would bewitch her family if she told any body so she kept quiet.<sup>16</sup> In another case of *The People v Kebron Nchimunya*,<sup>17</sup> a 12-year-old girl was being abused from the time she was 9 years old but had not reported all along because she was scared that the perpetrator was going to beat her.

Most abusers are people the child knows very well as already stated. It has been noted that 73 per cent of the offenders are known to the victim<sup>18</sup> and are aged between fifteen and twenty-five.<sup>19</sup> Therefore it is important to note that though the perpetrators may be upstanding members of the community and respected for their work with mentorship of children, every complaint brought by a child must be taken very

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<sup>14</sup> Local Court Case

<sup>15</sup> Southern African Region Police Coordination Conference (SARPCCO) Training: Policing Violence against Women and Children. A manual prepared by the Institute for Security Studies for the Southern Africa Police Force.

<sup>16</sup> Girl's mother V Zimba. 1994 Local Court case reported in the newspaper.

<sup>17</sup> SSP2-249 of 2003. This is an on going case in the Subordinate Court. The next hearing will be on 3<sup>rd</sup> December.

<sup>18</sup> Child Protection Council Fact Sheet 5

<sup>19</sup> Australian Bureau of Crime Statistics

seriously because even these people are capable of being sexual abusers. This is so because the perpetrators may go to great lengths to discredit a child's complaint.

#### 2.4 Victim

Longman Dictionary defines victim as, "one who or that, which is subjected to oppression, hardship, or mistreatment."

In this case it is the girl child who is subjected to the oppression, hardship or mistreatment of a sexual nature for the sexual gratification or satisfaction of the perpetrator. Victims are the people who best understand the real effect of defilement. Therefore we can deduce that defilement has a direct and potentially permanent impact on the victim's self-esteem. The impact is even greater when the offender is someone trusted and respected. For instance a paedophile priest.

Defilement cases occur in both rural and urban areas. In an interview with the Victim Support Unit Director,<sup>20</sup> it was revealed that the crime is more prevalent along the line of rail. This is so because though there is more civilization along the line of rail, the socio economic aspect in the country is the contributing factor. The mere fact that most young men within the households are not engaged in any meaningful enterprises, they engage in drug abuse and heavy drinking which in turn leads them to committing defilement.

The crime is committed mostly by the age group of 15 to 25 years of age because they know the child is defenceless. However even those between the ages of 30 to 50 do defile young girls because of certain traditional beliefs such as cleansing due to the

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<sup>20</sup> Mr. P Kanunka

belief that defiling a girl will purify them of, for instance AIDS, or because of beliefs that defilement will bring good luck and boost their business enterprises.

## CHAPTER THREE

### THE LAW AND OTHER FORMS OF PROTECTION OF THE GIRL

#### CHILD FROM DEFILEMENT

##### 3.1 United Nations Convention on the Rights of the Child (CRC)

Zambia is a state party to the CRC and is under obligation to ensure that the rights of the child enshrined in the CRC are guaranteed domestically. This is so by virtue of the principle *pacta sunt servanda*.<sup>21</sup> Article 34 of the CRC provides that,

“State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- b) The exploitative use of children in prostitution or other unlawful sexual practices;
- c) The exploitative use of children in pornographic performances and materials.”

Article 19 of the same Convention more generally covers protection from all forms of physical or mental violence and specifically mentions sexual abuse as well while in the care of parental, legal guardian, or any other person who has the care of the child.

This provision states that,

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

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<sup>21</sup> This is a rule according to which State parties to a Convention must respect the agreements concluded between them. It is also a partial explanation of the binding force of international law.

### 3.2 The Constitution

In addition Article 24 of the Republican Constitution provides for protection of the child from exploitation of any kind. This includes exploitation of children for sexual gratification.

### 3.3 Juveniles Act

Still another addition is the Juveniles Act<sup>22</sup>, which in Sections 47, 48 and 49 provides for offences committed by persons who have custody, charge or care of a girl under the age of 16 years, encouraging, causing or facilitating or allowing sexual activity with such children. However this Act does not itself provide for the offences involving direct sexual activity between any child and offender.

### 3.4 Penal Code

In addition, the Penal Code in Section 138 provides for the protection of the child against defilement. It provides that,

“Any person who unlawfully and carnally knows any girl under than age of 16 years is guilty of a felony and is liable to imprisonment for life.”<sup>23</sup>

“Any person who attempts to have unlawful carnal knowledge of any girl under the age of 16 years is guilty of a felony and is liable to imprisonment for 14 years.”<sup>24</sup>

### 3.5 The African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child in Article 21 also provides for protection of the girl child. It provides that,

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<sup>22</sup> Chapter 53 of the Laws of Zambia

<sup>23</sup> Section 138(1)

<sup>24</sup> Section 138(2)

(1)“States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- a) Those customs and practices prejudicial to the health or life of the child; and
- b) Those customs and practices discriminatory to the child on the grounds of sex or other status.

2) Child marriages and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.”

This Charter contains and recognises the rights contained in the CRC and it would be wise to use this Charter as the guiding principle for law reform in Zambia.

### 3.6 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is another international Convention that aims at protecting women and girls. Article 16(2) provides that,

“The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

This provision of CEDAW is aimed at preventing men having carnal knowledge with girls below consent age, which is 16 years in Zambia. Zambia is a State party to this convention and is therefore obliged to observe its provisions.

### 3.7 Draft Protocol to the African Charter on Human and People’s Rights

Similarly the Draft Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa in Article 6 provides that,

“State parties shall ensure that men and women enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:  
b) The minimum age of marriage for women shall be 18 years.”<sup>25</sup>

### 3.8 The Police

In addition to the Statutes on the protection of the girl child, the Zambia Police also provides protection by arresting the offenders and taking them to court. The following tables reveal the statistics of defilement cases reported, the arrests made, convictions, acquittals and so on. The following statistics were obtained from Zambia Police headquarters with regards defilement cases in Lusaka and in Zambia as a whole from the year 2000 to March 2003 for Lusaka cases and from 2002 to March 2003 for cases in the provinces. Statistics for April to date have not yet been compiled.

Year	Reports	Arrests	Carried Forward	Total	Withdrawn	Convictions	Acquittals	Withdrawn	Pending	Total
2000	57	39	18	39	8	21	0	0	10	39
2001	368	262	106	262	11	53	9	37	152	262
2002	870	320	146	724	17	243	10	29	425	724
2003	37	24	13	24	0	-	-	0	0	24

Table 1.

Year	Lusaka	Southern	Eastern	Luapula	Central	Western	Northern	North Western	Copperbelt	Total
2002	462	57	42	11	91	14	56	9	128	870
2003	146	13	5	1	19	5	0	9	17	209

Table 2

<sup>25</sup> As adopted by the meeting of Government Experts in Addis Ababa on 16 November 2001.

From the given tables it can be seen that the defilement cases are rampant and are on the increase.

However, in addition to the different statutes both domestic and international that seek to protect the girl child from defilement, the Zambia Police through the Victim Support Unit (VSU) also offers protection.

The Victim Support Unit was established specifically to handle issues involving acts of violence against women, children and the elderly, and to handle issues involving people who are related to each other which were previously regarded as domestic problems. The Victim Support Unit is mandated to give sympathy, empathy and counselling to victims of crimes of rape, defilement and to ensure that perpetrators of such crimes are arrested and prosecuted in the courts of law.

From the Lusaka Province statistics alone in Table 1, it can be seen that, from the 870 cases reported in 2002, 320 arrests were made, of these 243 were convicted and 425 were still pending. This clearly indicates how much Zambia Police through the VSU tries by all means possible to offer protection to the girl child. Though not every offender was brought to book, at least some were. This shows and clearly indicates the effort to enhance protection of the girl child. The arrests made by the police and the convictions made by the court show a commitment in the protection of the girl child.

### **3.9 Non-Governmental Organisations (NGO's)**

Non-Governmental Organisations (NGO's) such as the Young Women Christian Association (YWCA), which operates a drop in centre where they offer counselling to

victims of child sexual abuse and their families and also carry out educational work to enlighten members of the community about this problem also contribute to the protection of the girl child from defilement. The YWCA coordinates with the VSU. YWCA has mounted a nation wide, public education campaign on violence against women and children and maintains statistics to monitor the incidence and the types of violence.<sup>26</sup>

Women in Law and Development in Africa (WILDAF) also play a key role in the protection of the girl child. WILDAF provides necessary direction, coordination and facilitation of such a sustained and multi-pronged approach to violence against women and children. Gender violence has been a focus of concern for WILDAF since its inception. WILDAF is of the view that gender violence is an integral part of Zambian tradition and custom.

WILDAF has been directly involved in ensuring that the girl child is protected from violence. For instance in August 2000 it was part of a Technical Committee on strengthening laws, enforcement mechanisms and support systems for violence against children which includes defilement. Later on in the same year WILDAF was part of a Government delegation to the SADC Heads of State Conference on Gender Violence.<sup>27</sup>

WILDAF in their effort to eradicate gender violence, which includes defilement, came up with a number of strategies and activities. Under Strategy Two WILDAF was to mount a strong advocacy and public education campaign on the negative impact of violence on women's human rights and on social and national development

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<sup>26</sup> Proposal to carry out an Education and Advocacy Strategy on HIV/AIDS and Violence against Women and Girls by Women in Law and Development in Africa (WILDAF) Zambia.

<sup>27</sup> Ibid.

as a whole in order to change attitudes towards violence against women and children.

In order to achieve this, the following actions were proposed inter alia:

- (1) To produce, translate and disseminate user friendly IEC materials using various media including radio, drama or theatre, puppetry, to publicise gender violence and violence against children as a social evil.
- (2) To encourage reporting and prosecution by restricting the withdrawal of actions to the DPP and limiting the option of civil offences where a crime has been committed.
- (3) Publicise the availability of already protective provisions under the Penal Code.
- (4) Hold and publicise bi-annual gender violence tribunals.

Under Strategy Three the activity to be taken was to create a strong network with both local and donor partners to lobby for the enactment and implementation of the law reforms to protect women and girls from gender violence and HIV transmission in both the private and public sphere. Some of the actions proposed were:

- 1) Lobby for the drafting and enactment of the Violence against Women Act to strengthen and consolidate protection currently provided by other laws such as the Penal Code.
- 2) The Act should change the conception of sexual offences, which presume that the complainant is lying. It should expand the range of sexual offences in line with the current manifestations of such offences and should stipulate minimum and stiffer penalties or compensation as well as provide for protective orders.
- 3) Lobby for the constitutional protection against gender violence to ensure that it is clearly prohibited.
- 4) Lobby for a police hotline to report incidences of domestic violence or child abuse.

Under Strategy Four the activity was to provide or facilitate training for all levels of medical, adjudicating and law enforcement personnel on issues related to investigating and prosecuting violence against women and girls. Some actions proposed to be taken were:

- 1) Prepare guidelines in conjunction with the Police VSU's on how to handle sexual offences
- 2) Lobby Ministry Of Health (MOH) and Central Board of Health (CBOH) to sensitise medical personnel to the special implications of treating victims of gender violence
- 3) Coordinate capacity building through the incorporation of issues of gender violence in the training of lawyers, court personnel, adjudicators and police.

Zambia is a signatory to the SADC Declaration on Gender and Development Addendum. To implement its commitments to eradicate violence against women and children the Government set up a Technical Committee to look into the issue in 2000. The Committee was to make a report and feed into a National Workshop that took place in November 2000, and was co-facilitated by the Commonwealth Secretariat in an integrated approach to combating violence against women in Zambia. The Technical Committee comprised of both civil servants and NGO's and was mandated to determine the causes of violence against women and children with a view to reviewing the content structure and efficacy of laws, enforcement mechanisms and support systems dealing with such violence. The Committee recommended that the problem of violence against women required an institutionalised, integrated approach reflecting effective coordination and collaboration between the various stakeholders. By setting up this Technical

Committee, the Government showed a keen and very supportive interest in trying to eradicate the problem of violence against women and girls. This is a clear indication of protection being offered to the girl child against violence, particularly, defilement.

### 3.10 Orphanages

There are also orphanages set up to look after girl children. Though the main purpose of these orphanages is to look after orphans who are homeless, in a way they do offer protection to the girl child because under the custody of the orphanage girls are protected and kept away from the streets where they may be defiled repeatedly.

In an interview with the Coordinator of City of Hope Orphanage,<sup>28</sup> it was revealed that the orphanage has a total number of 75 girls under their custody out of which 35 are under the age of 16 years. When asked why girl children were kept at the City of Hope, one of the major reasons was in order to prepare them for social life. It was further revealed that the girls have sex education every Monday and that a qualified nurse conducts these lessons. The reason for conducting these lessons is because there are a number of children at the orphanage who have been abused sexually.

The specific measures taken by City of Hope to protect girls from defilement are, holding meetings with girls to educate them about sexual abuse, continued teachings on dangers of having sex outside marriage and before marriage so that those who were once abused do not fall in the same trap again. In addition to this girls are kept busy with progressive programmes to avoid them idling.

Some other examples of orphanages are Kasisi, Insakwe in Ndola and Kabwata orphanage in Lusaka.

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<sup>28</sup> Mr Makina from Social Welfare Tyres

### 3.11 Secondary Schools

The Zambian Secondary School syllabus has a provision for sex education.<sup>29</sup> In this syllabus girls have an opportunity to be educated about sexual matters and are also educated specifically about sexual abuse. That is, what amounts to sexual abuse, what steps to take when this happens, for example how to protect themselves from sexual abuse and so on. This is also a form of protection offered to the girl child from possible occurrences of defilement, which may occur because the child has been left alone with an uncle or any other person who may possibly abuse the girl child.

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<sup>29</sup> One such school is Fatima Girls' High School in Ndola rural.

**CHAPTER FOUR**  
**CAUSES OF DEFILEMENT**

There are various means and forms of protection offered to the girl child like the ones discussed in the previous chapter. However, despite these forms of protection there are still cases of defilement occurring in Zambia today. The reasons for this are numerous. The following are some of the reasons.

**4.1 DEFENCES**

**4.1.1 Section 138 (2)**

The Penal Code Act in Section 138(2) provides a defence to cases of defilement. It provides that,

“Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of 16 years.”<sup>30</sup>

In *Ndalama v The People*<sup>31</sup>, the appellant was convicted of defilement of three girls; two of them were aged 15 and the other one was aged 14. He denied the charges, admitted having had sexual intercourse with the girls but said that they looked mature and he paid them money. The court did not explain to the appellant the proviso to Section 138(2) of the Penal Code, namely that if he had reasonable grounds to believe and in fact believed that the girls were over the age of 16 years it would have been a sufficient defence to the charges. In the Appeal Court it was held that the purpose of explaining the proviso is in order to make clear to the accused the defence that is available and the explanation must be given to the

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<sup>30</sup> Chapter 87 of the Laws of Zambia

<sup>31</sup> (1976) ZR 22

accused when the knowledge of the defence will be of some use to him. The appeal was thus allowed and the defiler was set free.

In *Mwaba v The People*,<sup>32</sup> the appellant was convicted of defilement after the trial and sentenced to three years imprisonment with hard labour. The record disclosed that the trial Magistrate did not at any stage of the proceedings; explain to the appellant the statutory defence available to him under the proviso to Section 138(2) of the Penal Code. It was held that it is a rule of practice that where it appears that an unrepresented accused person may be intending to plead guilty to a charge of defilement the proviso to Section 138(2) must be explained to him. It was further held that even where an accused person pleads not guilty the defence in the proviso must be explained before plea or at some early stage in the proceedings so that the accused may have the opportunity to direct his Cross-examination of the prosecution witnesses to the question of the girl's age. The appeal was thus allowed due to the fact that the proviso was not explained and the defiler was set free.

Due to the proviso under Section 138(2) many people who defile young girls escape unpunished. This contributes to the rise in the number of defilement cases today in that the offenders are able to secure acquittal and go without punishment because of their belief that the girl was above 16 years. Regardless of the fact that the perpetrator reasonably believed that the girl was older than 16 years of age, the damage is done to the victim and she will be tormented and traumatised for the rest of her life while the offender gets away without being punished and to him

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<sup>32</sup> (1975) ZR 264

this has no effect on him for the rest of his life. The girl may look older than her age but she certainly does not know the consequences of it. It is the responsibility of the adult to know what is wrong and not to make excuses or alibis for the crime. Blaming the victim, just because of her appearance with regards to her suspected age, is an inability to take responsibility for the perpetrators own behaviour.<sup>33</sup>

Sometimes the perpetrators may use this defence even when they know the girl was younger than they claim. In the unreported case of *The People v Doubt Chipasha*,<sup>34</sup> the accused had told the court that he believed the girl was his age mate and that they were both born in 1983. The girl who was not above 16 years as the perpetrator had claimed walked into court and it was established that in actual fact she was below 16 years of age. In the event that the victim does not go to court and the perpetrator has put up a defence of thinking the girl was above 16 years, the court is likely to believe him.

In *R v Prince*,<sup>35</sup> it was held that,

“Belief, even if reasonable, that the girl was over 13 years is no defence.”

The Zambian law and courts should develop this attitude towards the belief as to the girl's age. It should be no defence that the perpetrator thought that the girl was above 16 years old.

In as much as every accused person is entitled as of right to be told about the proviso to Section 138(2), it only works to the advantage of the accused and to the detriment

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<sup>33</sup> The internet on [www.geocities.com](http://www.geocities.com)

<sup>34</sup> SSP2-210 of 2001

<sup>35</sup> [1875] LR2 CCR 154

of the victim. This sexual abuse is a violation of human rights but the defence allows for violation of human rights without any punishment being imposed on the perpetrators.

Any person's human rights end where another person's human rights begin but the rights of the victim do not seem to have a beginning as far as this defence is concerned while the perpetrators rights do not seem to have an end under the circumstances. This is a clear case of violation of human rights as long as this defence is put up and the perpetrator is excused. Section 138 of the Penal Code was designed to protect girls from defilement. It was not intended that girls for whose protection it was passed should suffer under it without the perpetrator being punished for offences committed upon them.

The role of law in society is to afford the common man and any citizen with the opportunity to seek redress of wrongs, to declare his or her rights and to stand before a court of justice and ask for justice to be done. The law should take the interests of both parties to heart and balance the conflicting interests. It should not only protect or safeguard the interests of one of the parties to a dispute but must safeguard the interests of both parties otherwise it fails in its role as a regulator of social conduct.

Violence against girls violates women's fundamental human rights and freedoms as guaranteed by the Constitution and international instruments. It is the most pervasive human rights violation worldwide. Rights violated under CEDAW include the right to life: the right to equality and equal protection of the law, the right to liberty and

security of the person and the right not to be subjected to torture or other cruel, inhuman and degrading treatment or punishment.<sup>36</sup>

Child sexual abuse is in flagrant violation of the UN Charter, the UDHR and the most elementary principle of morality.

The fact that it should appear before the court that the accused had reasonable cause to believe, and did in fact believe that the girl was above 16 years, is a matter of discretion to be exercised by the Magistrate or Judge. This means that they can exercise this discretion in favour of someone who knew that the girl was under the age of 16 years, especially if the girl does not even go to court and this is what may increase the number of defilement cases. In other words the wrongful exercise of discretion, which may be mistakenly or intentionally exercised to the advantage of the perpetrator, may potentially increase the rate of defilement cases.

#### 4.1.2 Customary Law Marriages

The other defence, which contributes to the frequent occurrence of defilement cases, is marriage under customary law. In customary law and tradition the physical development of an individual determines whether they can be regarded as a child or an adult. Therefore physical development entails the attainment of puberty and undergoing initiation ceremonies particularly for girls. Adulthood is further marked by the ability to procreate and a person who has a child at whatever age is considered an adult.

Puberty usually takes place much earlier than a girl's eighteenth birthday and as a consequence early customary marriages are not uncommon in Zambia despite the

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<sup>36</sup> Proposal to carry out an Education and Advocacy Strategy on HIV/AIDS and Violence against Women and Girls by WILDAF Zambia.

existence of statutory law provisions making marriage illegal before a certain age and providing penalties for defilement of girls below 16 years irrespective of their consenting to sexual relations.<sup>37</sup> The concept of early marriages conflicts with the principle of consent in that a child even though she may have reached puberty may lack the ability to make a mature decision in her best interests.

Under customary law a man can marry a girl under 16 years as long as she has attained puberty and all the requirements for the customary marriage are met. Once the girl is married the man can have sexual relations with her. Under customary law the man who marries a girl under the age of 16 years and has sexual relations with her is at no peril of prosecution under Section 138 of the Penal Code since he lawfully has sex with his under 16-year-old wife.

In *The People v Chinjamba*,<sup>38</sup> a villager, Fulai Njamba married a girl under the age of 16 years and lived with her as man 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 with being an accessory after the fact to unlawful carnal knowledge of a girl under the age of 16 and he was at first instance convicted. On review it was held that it was not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married despite the fact that the girl is under 16 years of age. Woodman J; said,

“ At the time when the carnal knowledge took place there was a valid marriage subsisting between Fulai Njamba and the girl in question

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<sup>37</sup> Section 33(1) provides that a marriage between persons either of whom is under the age of sixteen years shall be void. In addition the Penal Code in Section 138 makes carnal knowledge with a girl below the age of 16 years a felony and a person guilty of this crime will be liable to imprisonment for life. Section 136 provides that the taking of any unmarried girl under the age of 16 out of the custody of her parents or guardian who has legal care over the child an offence. Section 137 provides for the indecent assault of a girl under the age of 16 years as being a crime with a penalty of imprisonment of up to 14 years.

<sup>38</sup> 5 N.R.L.R. 384

according to native customary law. The carnal knowledge must be unlawful and it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married.”

This ruling has never been overruled by any other ruling to the contrary to make the having of carnal knowledge of a girl less than 16 years in a traditional setting a crime. Therefore having carnal knowledge of a girl below 16 years is excusable if one puts up a defence of being married to the girl under customary law. The ruling was upheld in *Sibande v The People*,<sup>39</sup> when the magistrate said:

“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. Lawfully here means that both the parents and the girl have consented to the marriage.”

In another case a businessman had married a woman, and at some time during their marriage the woman’s young sister went to visit them. During her visit the man told his wife he would give her K8,000,000.00 for sleeping with her sister. According to the church tradition if a man slept with a girl related to his wife who was there to visit or stay with them, she would also become the wife. Later on another 13 year-old sister to the businessman’s wife came to visit. Again the man promised the wife K8,000,000.00 for sleeping with her young sister and thereby making her his third wife. One day an argument broke out and his first wife demanded her husband to settle the deal. When the sister who had become the third wife overheard she discovered that her older sister had sold her off to her husband and she reported the case to her school where she had dropped out and informed them why she no longer attended school. The school authorities then reported the case to YWCA who went and took the girl away from her purportedly matrimonial home and returned her to

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<sup>39</sup> (1975) Z.R. 101 (S.C)

school. The girl is in the care of YWCA. When the man was charged with defilement, he said according to their church tradition the girl in question was his wife.

When this case was taken to court the Local Court awarded the girl K70, 000.00 for compensation but YWCA has decided to take the case further than compensation.<sup>40</sup>

This clearly contradicts Section 138(1) of the Penal Code in that defilement does not seem to exist under a traditional setting provided the perpetrator claims or believes to be married to the girl. Besides when this usually happens that a girl below 16 years has been defiled, most parents due to fear of embarrassment negotiate for the man to marry the girl so that even if the case goes to court the defence of marriage under customary law will be raised or they will say a customary marriage is under way.

Statutory law recognises customary law as long as it is not repugnant to natural justice or morality or incompatible with the provisions of any written law.<sup>41</sup> This provision clearly stipulates that if customary law is inconsistent with any written law or is repugnant to natural justice then it should not be administered. But in practice, what happens is that customary law marriages prevail over this provision of the law because they are allowed to be used as a valid defence to a charge of defilement and gender positive aspects of statutory marriage are often ignored in favour of negative customary law interpretations.

When we speak of justice we talk of the fairness and impartiality of the law.

Therefore the law should be fair and impartial in all cases. But in actual fact there is no natural justice because the victim of defilement is disadvantaged in that on her part there is no natural justice working in her favour by virtue of a perpetrator who seeks

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<sup>40</sup> The Apostolic Faith of Mandevu in Lusaka practices the church tradition. A counsellor at YWCA Lusaka main office disclosed the facts of the case.

<sup>41</sup> Subordinate Courts Act Section 16

refuge in the defence of customary law marriage being excused and going away with no punishment. Even where the child does not consent to this marriage, as long as the parents want her to get married to avoid embarrassment they will force her to get married.

This defence is practically being allowed to override the children's rights and best interests. Section 138 of the Penal Code was intended to protect the girl child from defilement but then there is more being done to excuse the perpetrator and put the child under more harm by allowing the defence of customary law marriage to prevail.

The CRC guarantees to the child the freedom of expression and to have a say in matters affecting them. However in a cultural setting, children are not consulted about whether or not dowry should be paid in respect of their marriages and the amount of such lobola. They are not even allowed to take part in negotiations that take place among family members concerning their marriages.

The betrothal and marriage of a girl shall have no legal effect, and all necessary action, including legislation shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.<sup>42</sup> Despite the fact that Zambia is a State party to CEDAW and is obliged to implement it in domestic laws, this is not done.

Violence against women and girls is permitted by the Constitution. It permits the application of gender biased customary laws. The State facilitates and legitimises the subordination of women to men. The family, church and community endorse male superiority. Customary law and Statutory law institutions including the constitution

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<sup>42</sup> CEDAW Article 16(2)

support or facilitate social attitudes and perceptions of male superiority. Thus there are few avenues for challenging such assumptions and institutions.

#### 4.2 COURTS' INCAPACITY

Magistrates' powers of sentencing defilers are restricted and because of this most of them pass light sentences. The maximum period of imprisonment, which may be imposed by a Magistrate, depends on the class to which he or she belongs. The present classes and their respective maximum sentencing limits are as follows:

Principal Resident Magistrate	- 9 years
Senior Resident Magistrate	- 9 years
Resident Magistrate	- 7 years
Class I Magistrate	- 5 years
Class II Magistrate	- 3 years
Class III Magistrate	- 3 years <sup>43</sup>

These are the maximum periods, which may be imposed for one offence. Therefore, a convicted defiler can get up to a maximum of 9 years imprisonment in a Magistrates court. Where the sentence is to exceed 9 years the defiler may be committed to the High Court as per Section 217 of the Criminal Procedure Code. More often than not the Magistrate would rather pass the sentence himself despite this provision of the law. Minimal sentences are regularly imposed. In a cited case, the High Court had to call for judicial review after a self confessed rapist was given a trivial punishment. The man, an air force officer was sentenced to one day's imprisonment and the

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<sup>43</sup> Magistrates Handbook. 6<sup>th</sup> Edition (1991) by E.J Swarbick at page 19

equivalent of one hundred dollars by the presiding magistrate after being convicted of raping an eighteen-year-old school girl.<sup>44</sup>

In Kitwe a man who admitted having defiled his brother's three-year-old daughter left in his care while the mother went to attend a funeral was jailed for five years with hard labour by a Kitwe magistrate.<sup>45</sup>

In another instance a security guard was jailed for six years for defiling a 10 year old girl after giving her some bubble gum and asking her to follow him to a bush in Kabulanda Township.<sup>46</sup>

In still another incidence, in Solwezi, a magistrate sentenced a 19-year-old youth to two years imprisonment with hard labour and six strokes of the cane for defiling a 12 year-old grade seven schoolgirl.<sup>47</sup>

This paves way for a large chasm between the actual sentences and the maximum sentence a defiler can get which is life imprisonment. The maximum sentence of life imprisonment is indicative of the seriousness of the crime and the abhorrence of society towards it. What causes the problem in the inconsistency is the mere fact that there is no minimum sentence provided by the Penal Code and so the Magistrates exercise their discretion and pass sentences as they deem fit as long as they do not exceed the maximum sentence set for them. But even then Magistrates rarely, if at all impose the maximum sentence that is set for them.

Passing very minimal sentences on convicted defilers is not consistent with an idea of maximum sentence of life imprisonment. The mere fact that the maximum sentence is not imposed entails an increase in the occurrence of the offence because the

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<sup>44</sup> The Post Newspaper, Tuesday January 9, 2001

<sup>45</sup> Times Of Zambia Newspaper 12<sup>th</sup> April 1995

<sup>46</sup> Times Of Zambia 'Guard goes in 6 years for Defilement.' 13<sup>th</sup> March 1996

<sup>47</sup> Times Of Zambia 'Solwezi defiler sent to prison.' 17<sup>th</sup> December 1997

perpetrators are given the thought that even though they are found guilty they will only be in prison for a very short period of time which won't have a grave effect on their lives. In other words the minimal sentences do not reform the perpetrator in a way that will make them not repeat the same crime or deter would be offenders because the sentence is bearable. The leniency of the Magistrates is therefore a contributing factor to this problem due to the lack of uniformity in the sentencing, which in turn fails to reflect the seriousness of the crime. The weak sentencing policies are blamed for a rise in violence and sexual offences.<sup>48</sup> This is so because the lenient sentencing is a reflection of weak enforcement of the law. There is need for Courts to be gender sensitive. They need to understand the complexities of prosecuting sexual offences particularly the negative impact of the process on the prosecutor or victim.<sup>49</sup>

Hatchard and Ndulo argue that:

“Normally the punishment imposed on an offender should not go beyond that which is deserved for the crime committed. However, the need to deter would be offenders might lead to courts to impose heavier sentences than would normally be the case. This is so when a particular offence has become increasingly common and it is in the public interest to deal severely with such offenders.”

Considering the fact that defilement cases have become increasingly common and is in the public interest, there is need for the courts to deal severely with the perpetrators by imposing heavier sentences unlike the minimal sentences, which the Magistrates impose.

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<sup>48</sup> NGO Commentary on GRZ combined 3<sup>rd</sup> and 4<sup>th</sup> report to CEDAW. WILDAF Zambia; May 2002

<sup>49</sup> Ibid

### 4.3 ROLE OF THE POLICE

The public prosecutors who carry out the prosecutions under Section 138 of the Penal Code are policemen. They are not however qualified lawyers and are often insensitive in their approach.

The victim is often blamed for the occurrence of the offence and stigmatised, discouraging women from reporting.<sup>50</sup> As a result of this the victims of defilement do not report cases, which in turn contributes to the rise in defilement cases. The attitude of the police instils in the victim the fear that no one will believe, the fear of being blamed for the assault and the fear that she will not be treated fairly all of which later makes the victim unable to tell the whole story to the police.

The other contributing factor is the mere fact that the police are unable to keep up to date records of the rate at which defilement cases are occurring. This is because they are sometimes unable to apprehend the perpetrators due to different reasons or because they have a 'you asked for it' attitude if the girl was wearing a short skirt or was out late at night, which puts off the victim from pursuing the matter any further. Over the period of 1999 to 2003 there were available statistics only from 2002 and 2003 for defilement cases reported in the various provinces. There were none for the previous years. Their availability would help in the analysis of the occurrence of defilement cases and the effectiveness of the police in bringing defilement perpetrators to book. It is hard to see how the problem can be solved if the police retain a negative attitude. Keeping up to date statistics will enable the police see the seriousness of the crime and its frequency in occurrence. This in turn will enable the

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<sup>50</sup> Proposal to carry out an Education and Advocacy Strategy on HIV/AIDS and Violence against Women and Girls. WILDAF Zambia.

police play an effective role in trying to put an end to the persistence of defilement occurrences.

Another aspect is the fact that police interviewers must take into account the fact that not all children have verbal skills to describe the abuse in a logical and consistent manner in the event that the statements are inconsistent. Usually the child's language in the story instils in the police an attitude of not believing the child or being irritated by the fact that the child cannot be consistent in her story. This may scare the child away from reporting anymore. The child should not be blamed because it is always the perpetrator who is 100% legally responsible for defilement. The poor environment and management of children in police stations discourages reporting and contributes to the culture of silence.

Government has not done much to ensure that the police are sufficiently trained in matters of child abuse. Besides the VSU in the police, there is no other specialised body to deal with the problem. The police attitude towards enforcing the law leaves much to be desired. They are reluctant to investigate, arrest and prosecute male offenders whether husbands, brothers or other relatives who perpetrated violence and engaged in sexual abuse. They usually advise against prosecution and usually tell complainants to settle the matter outside court. For instance in the case involving Chief Mpezeni, the police were reluctant to investigate the case. Commenting on the reluctance of the police, Ms Florence Chibwasha the Publicity Secretary of NGOCC said that,

“There are no sacred considerations before justice and I wonder why the police are dragging their feet to record a warn and

caution statement from Mpezeni. We expect Mpezeni to be arrested but why are the police taking so long to move in?"<sup>51</sup>

#### 4.4 CUSTOMARY LAW PRACTICES

The customary law practices that exist like sexual cleansing contribute to the increase in defilement cases. For instance, among the Tonga people, upon the death of a spouse a young girl is used to "sexually cleanse" the widower in the belief that he may be set free from the deceased's spirit.

Current law in Zambia does not prohibit the use of children in pornography as provided for in Article 34(1) of the CRC. The people in Chinyunyū paraded two girls half naked to perform an initiation dance during the International Literacy Day.<sup>52</sup> Commenting on this, Dr. Nevers Mumba said that, "defilement is being enhanced by age-old cultural beliefs."<sup>53</sup> He also said that it was abnormal and as government they are against it. He later on requested that the people responsible for parading the two girls be brought to book. Dr Mumba also attributed the rise in defilement cases to the fact that some women are over submissive to their husbands despite the bible not saying so and always keep quiet on issues of defilement in the hope of being loved more.

Some cultural practices and traditions contribute to the infringement of children's rights in Zambia. The traditional practices such as rituals and traditional healing are also contributory factors to the rise in defilement cases. There is a belief that when a person infected with the HIV/AIDS virus has carnal knowledge of a virgin or a minor

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<sup>51</sup> Post Newspaper 'Police Probe Chief Mpezeni For Defilement' September 24 2003 .

<sup>52</sup> Post Newspaper 'Castrate Defilers - Cherise.' October 4<sup>th</sup> 2003

<sup>53</sup> Ibid. Dr Mumba is the Vice President of Zambia.

that person will be cured of the virus. This is the advice that these people with the HIV/AIDS virus are given by traditional healers. When charged with defilement, the perpetrators put up this defence that a traditional healer advised them to do so. In actual fact no one has truly proved that this is a cure.

The fact that women have accepted oppressive practices as part and parcel of their cultural heritage has contributed largely to the violation of their basic rights as humans.

#### 4.5 EVIDENCE

The evidence required to prove defilement cases is difficult to obtain because the offence usually occurs in secrecy. Medical evidence is required which is sometimes unavailable. The Magistrates often require evidence of blood, semen or physical injury but this is usually not available. There is usually no forensic equipment for investigating and proving sexual offences including defilement and so even if the child is defiled, the case will not proceed.

In cases of defilement there is a general requirement that the victim must have a medical report done within 48 hours of the defilement otherwise the evidence is lost. In addition to this even after the medical examination is done, some doctors are unwilling to go to court to testify.<sup>54</sup> This puts the victim in a very awkward position because there is no one to corroborate her evidence. Another addition is that sometimes the children do not report the incidence immediately and so by the time they are reporting there is no evidence to support their claim. But this does not mean that the child was not defiled. On this part the law is too rigid to the extent that it pins

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<sup>54</sup> This was expressed in an interview with the Executive Director of YWCA Mrs Mary Mulenga.

down the victim instead of saving her. The strictness in the requirements of evidence usually comes to the aid of the perpetrator, even when in actual fact he did commit the offence.

This requirement for evidence contributes to the increase in defilement cases in that when a child is defiled and is unable to undergo a medical examination there will be no evidence to pin down the perpetrator apart from the child's story. What this entails is that the perpetrator will be aware of the fact that the victim is unable to have evidence to confirm his acts and he will go free. This in turn may stir an attitude amongst other would-be offenders that the lack of medical evidence will prevent their arrest and/ or conviction and so they will freely defile other children especially in areas where there is no forensic equipment to examine the victim and prove defilement.

Although the courts rely so much on the medical report, this report is too brief and may usually not be sufficient and conclusive evidence to determine defilement especially where the report states that the condition and appearance of the clothes is clean and that the inner garments such as the panties are clean. More detail must be added to the report otherwise a lot of injustice will be done to both the victim and the perpetrator. For the perpetrator, he may be convicted on evidence that the hymen was absent when in actual fact the child was born with no hymen while for the victim the mere absence of bruises and bites as well as the clean appearance of clothes and a normal vulva and vagina may make the perpetrator secure an acquittal.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusions

The fight for the protection of the girl child is a global one and countries all over the world have shown their commitment in making this noble cause a reality for their children by ratifying or acceding to the CRC AND CEDAW.

The rights of the child are considered in domestic legislation and regional conventions but the CRC is unique in that it is regarded as the most complete catalogue of children's rights ever made and the first to give such rights the force of international law. This makes the convention generally acceptable as paramount in establishing international standards on the protection of children's rights.

The focus of this paper has been to analyse defilement as a sexual offence in Zambia and why this crime is on the increase. An examination of the existing laws and their enforcement, the sentencing system, the role of the police, evidence required to prove defilement and cultural myths has been undertaken. In this regard the paper has sought to advocate for greater protection of the girl child's interests. It has brought out the weakness in law enforcement through minimal sentencing and the application of customary law as a defence to charges of defilement, where these defences are permitted to override the best interest of the child and to contradict justice and equity. It has also looked at the negative attitude of untrained personnel in the police force who deal with defilement cases.

The paper has sought to address questions such as: does the existing law adequately protect the girl child from defilement or does it excuse the perpetrator from

conviction? Do law enforcers properly enforce the law? What other legislation is, or other forms of protection are there to protect the girl child from defilement? How does the existing law on defilement contribute to the increase in defilement cases? How do the cultural myths contribute to the rise in defilement cases? To what extent does the law comply with the international conventions such as the CRC and CEDAW to which Zambia is a party?

In answering these questions, the essay examined the provisions of the Penal Code and the defence provided hereunder, and also examined the administration of customary law in English courts. In examining the administration of the law, consideration was had of early customary marriages and certain cultural myths that are in contradiction with Section 138(1) of the Penal Code but are still allowed to prevail in courts of law. The paper also considered issues such as the powers of sentencing given to magistrates and the attitude of the police towards the victim and their zeal to investigate the reported cases or apprehend the victims. Other issues looked into were the international conventions and domestic laws; and to what extent the domestic laws comply with international standards laid down in the CRC or CEDAW, as well as Non-Governmental Organisations such as YWCA and institutions like City of Hope Orphanage concerned with the welfare of the child. In addition to this the sex education syllabus in secondary schools was also considered as a way of protection against defilement.

It was observed that in Zambia the occurrence of this crime is alarming. Previous surveys conducted confirmed that most children are sexually abused by people they are close to, such as biological fathers, step fathers, uncles, brothers, teachers,

clergymen and other family members. In rare circumstances strangers abuse them.

More often than not the abuse is preceded by threats, gifts, bribes, physical force and tricks so that the child can aid the sexual gratification of the perpetrator.

An examination of the law on defilement and other law on the protection of the rights of the child revealed that the rights of the child are of great importance but these laws are enforced weakly. Zambia has no less than 24 pieces of legislation that promote in one-way or another, the interests of children. It was observed that these are mostly archaic pieces of legislation that do not adequately reflect contemporary attitudes on children's rights. Nonetheless the best interests of the child are entrenched in these laws. The law is adequate but the problem lies in the enforcement. The challenge lies in enacting new laws in line with the CRC for the best interests of the child to be more meaningful to the child.

The Penal Code in Section 138(2) provides for a defence to defilement cases. This defence is aimed at excusing the perpetrator from being convicted. This proviso is contrary to justice in that girls who look older than their age and are defiled are indirectly blamed for bringing defilement upon themselves because they look older than their age. The intention of Section 138 is contradictory in itself because it provides an offence and a defence to that offence and also rebuts its definition of defilement by providing for those who reasonably believe the child was older than 16 years to be excused for their deeds despite the fact that the child was in actual fact younger than 16 years.

In addition to this it was also observed that early child customary law marriages are used as a defence to charges of defilement and these marriages are permitted to

perpetrators family to settle the matter outside court. These police officers are also usually reluctant to investigate the cases or to arrest the offenders because they are insensitive to the interests of the child due to lack of training on how to handle sexual abuse cases. Sometimes they even blame the victim for being dressed in a short skirt or being out late at night. This is not the right attitude because it means the girl is being blamed for exercising her freedom of movement, which is her fundamental freedom. Combating sexual exploitation as envisaged under the CRC entails not only the existence of laws but also creation of child friendly police offices.

The paper also found that the cultural myths such as sexual cleansing and having sexual intercourse with girls who are virgins to cleanse a man with the HIV/AIDS virus has put the girls at an even greater risk of being defiled. The girls are used to get rid of the deceased's spirit and the HIV/AIDS virus respectively. Usually the traditional healers prescribe sexual intercourse with minors as the best cure for those infected with the virus.

Finally it was established that the evidence required in the court of law to prove defilement is sometimes an obstacle to justice and evades the perpetrators responsibility over the crime committed by him when it is present. The absence of medical evidence, it was noted, obstructs justice because the perpetrator goes away unpunished simply because there is no medical evidence to pin him down as the perpetrator. This demoralises the victim and contributes to the culture of silence because the victim feels that without the evidence from the hospital her claim will not be believed to be true. In certain places there are no facilities to aid a medical examination like in rural areas. There is no forensic equipment to carry out the

examination and at other times the doctor who conducted the examination is not willing to testify in court. Lack of evidence means the perpetrator is innocent, since this offence occurs in secrecy and medical evidence is the only "witness" the child has to support her claim. The medical report is supposed to be submitted within 48 hours of the defilement but sometimes the children report two or three days after it happened. This implies that all evidence is lost and so the perpetrator is a free man. If the child still has bruises or bloodstains on her private parts and panties respectively that are discovered days after the defilement, or the child complains after 48 hours, it will give rise to a claim that there is no guarantee that the suspect caused them even if he really did.

## **5.2 Recommendations**

### **1) Defences**

Having in mind the best interests of the child, it is recommended that the proviso to Section 138(2) should be removed from the Penal Code as a defence to defilement charges because it reflects injustice on the part of the victim. This defence should not be relied upon because it enhances human rights abuse. This defence is oppressive and unfair because young girls have no control over their hormones and cannot therefore control the size of their bodies. Therefore the size of the body or the physical features should not disadvantage girls.

The other defence raising great concern is that of early customary law marriages. On this particular aspect there should be a law enacted that will be in line with the CRC to determine the marriage age under customary law as not less than 16 years instead of puberty as the determinant of capacity. Consequently marriages should be

dissolved especially where they involve very young girls aged between 9 and 16 years and criminal proceedings instituted against perpetrators.

## 2) The Police

It is recommended that the Ministry of Home Affairs ensures that police officers are trained to handle cases of defilement. The police should also be trained to understand the language of the child. In addition to this the police should also be trained on sensitivity to the interests of the child. Child friendly police offices should also be created.

## 3) Consolidation of laws pertaining to the child

It is recommended that there should be a law enacted that will be in line with the CRC. The constitution should make it mandatory for laws on the protection of the girl child to be interpreted in line with the CRC and any law in contravention should be declared void. The duality in administration of law in Zambian courts of law has a significant role to play in defilement cases that occur in traditional settings. Therefore there should be a statute enacted, which will have the best interest of the child as its core principle and which will consolidate other laws protecting the girl child from defilement. It should be in line with the CRC because as it is in Zambia today the multiplicity of legal regimes makes it difficult to implement and enforce the rights of the girl child especially in a traditional setting.

The Affiliation and Maintenance of Children's Act has the best interests of the child as its core principle but it has no specific mention and provision for protection of the girl child from defilement.

#### 4) Sentencing

It is recommended that for the law not to be weakly enforced, the sentencing powers of the magistrates should increase. The seriousness of defilement is reflected by the maximum sentence available but the sentencing is a mockery to this penalty because more often than not it is very minimal. All classes of Magistrates handle defilement cases and some are given the authority to impose very minimal sentences such as Class Three Magistrates who can only impose a maximum of three years. Therefore if this person has a defilement case before him or her, a sentence of less than three years will be imposed.

The magistrates should be given a minimum sentence of perhaps 10 to 25 years imprisonment. This will perhaps make the punishment deterrent on the perpetrator. If the sentencing powers can not be increased, it is recommended that all defilement cases should be handled by the High Court judges who have the authority to impose long sentences to deter potential defilers.

It is also recommended that the sentencing should vary depending on the age of the girl. If the girl is below 10 years old the sentence should be life imprisonment, if she is above 10 years but below 16 years the sentence should be slightly less than life imprisonment but enough to be deterrent on would be offenders like 25 years and above.

#### 5) Evidence

The requirement of what evidence is to be brought before the court to prove defilement should be revised. A claim should not be rejected merely because of the absence of medical evidence. The magistrates require evidence of bloodstains or damage to the hymen but as a matter of fact these may not be present because the

hymen is not always damaged after defilement and this should not be a basis for setting a perpetrator free. Sometimes certain victims cannot even afford to undergo medical examinations but this entails that they cannot even take the matter to court because they have no evidence. A new system needs to be introduced whereby a medical report will not be the only conclusive evidence of defilement.

The medical report should also be revised so as to include a lot of detail that will enable it to be sufficient and conclusive evidence in establishing whether the child was defiled or not.

#### 6) Court System

The courts should have the one-way mirror system that will make the victim not see the perpetrator face to face in court because this may be very tormenting and it may affect the victim's ability to give evidence. With this system the court sees the victim but she can't see anyone and this makes her more comfortable to give evidence.

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