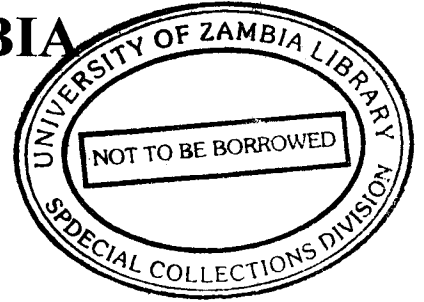


UNIVERSITY OF ZAMBIA



SCHOOL OF LAW

I recommend that the directed research prepared under my supervision

By

ZAIN HAMIR

Entitled

THE RIGHTS OF A CHILD: DEFILEMENT IN ZAMBIA

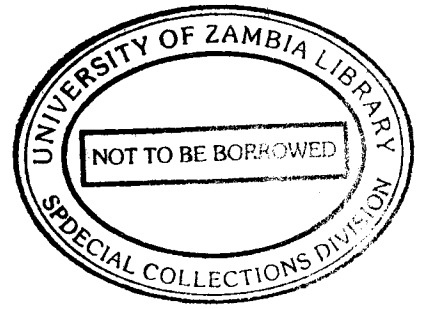
Be accepted for examination. I have checked it carefully and am satisfied that it fulfils the requirement relating to format as laid down in the regulations governing directed researches.

Date 07 December 2005

Supervisor
Mr. Kulusika

A handwritten signature in black ink, appearing to be 'SK', written over a horizontal line. A vertical line extends downwards from the center of the horizontal line.

OBLIGATORY ESSAY



On

THE RIGHTS OF A CHILD: DEFILEMENT IN ZAMBIA.

By

ZAIN HAMIR

(Computer number 99543010)

**Submitted to the University of Zambia in partial fulfillment of the requirements of
the Bachelor of Laws (LLB) Degree program**

School of Law
University Of Zambia
(UNZA)
Lusaka

November 2005

DEDICATION

To my parents who have given me their constant support and prayers throughout my life and for making me who I am today. Thank you, for inspiring me to achieve my goals. Your supervision and guidance will help me face numerous challenges in life. I will forever cherish the kindness and love you have given me.

To my beautiful wife, thank you for being so understanding, patient and loving. Thank you for standing by my side through thick and thin. Today I can acknowledge through experience that behind every successful man is a woman... I will always love you.

ACKNOWLEDGEMENTS

Praise be to Allah, the cherisher and sustainer of the worlds. Most Gracious, Most Merciful, Master of the day of judgement. Oh Allah, thank you for easing my task for me. Thank you for giving me the strength to come this far through many difficulties and for helping me achieve the very best in life. O Allah, thank you for supporting me with your help, you alone are sufficient for me. You are the almighty, the all-wise.

To my supervisor Mr. Kulusika, words cannot express my gratitude to you for not only being an inspiration but for just being present in my years at the University of Zambia. You are truly a man worthy of praising and deserve great respect. Thank you for dedicating your time to me, for your help, for your kindness and advising me throughout my years at law school. Your door has always been open to me; you are in all honesty a great man and a brilliant, exceptional, gifted, talented and cultured lecturer. I cannot thank you enough.

DECLARATION

I, Zain Hamir, do hereby declare that this dissertation is my authentic work and that to the best of my knowledge information and belief, no similar piece of work has previously been produced of the University of Zambia or any other institution for the award of a Bachelor of Laws degree. All other works referred to in this dissertation have been duly acknowledged.

Made this 07th day of December 2005 by the said Zain Hamir at Lusaka

A handwritten signature in black ink, appearing to be 'Zain Hamir', written in a cursive style with a large, sweeping flourish at the end.

TABLE OF CONTENTS

CONTENTS

	PAGE
Submission	i
Title	ii
Dedication	iii
Acknowledgements	iv

<u>PREFACE</u>	1
-----------------------------	---

<u>INTRODUCTION</u>	3
----------------------------------	---

CHAPTER ONE

Child Protection in Zambia

The Convention on the Rights of the Child	8
The Optional Protocols	12
The Involvement of Children in Armed Conflict	13
The sale of Children, Child Prostitution and Child Pornography	14

Relevant Provisions on the Rights of a Child in Zambia

The Constitution	16
Legislation Protecting Children in Zambian Law	16
Law Currently In the Making	20

CHAPTER TWO

Defilement In Zambia	21
News reports in Zambia	21

CHAPTER THREE

The Courts and Defilement in Zambia	28
Table of cases of Child-Defilement from the Subordinate Court of Lusaka, Zambia	38

CHAPTER FOUR

Child Protection

Families and Children's Rights	45
Putting Principles into Practice	47
The Role of Local authorities	49
United Nations Children's Fund (UNICEF)	49
A rights-based approach to programming	50

<u>CONCLUSION</u>	52
--------------------------------	----

<u>RECOMMENDATIONS</u>	54
-------------------------------------	----

<u>BIBLIOGRAPHY</u>	58
----------------------------------	----

PREFACE

It is a wonder that in the year 2004 alone child defilement cases were rocking Zambian daily newspapers. It's sad to say that the "so called" male parents or possibly brother, cousin or relative who should be there to protect the child has hit the public eye and is indeed a threat to the child.

Zambians are now waking up to one of the worst forms of human torture and the seriousness of the brutal crime of child defilement. Child defilement has been going on for years of late and an increase in child defilement cases are being reported.

According to the World Health Organization, statistics for the year 2004 indicate that the catastrophe of HIV/AIDS (human immune deficiency virus/acquired immune deficiency syndrome) in Africa has already claimed over 18 million lives on the continent and has hit girls and women harder than boys and men. In many countries of eastern and southern Africa, HIV prevalence among girls under the age of eighteen is four to seven times higher than among boys of the same age, an unusual disparity that means more deaths occur among women than men. Abuses of the human rights of girls, especially sexual violence and other sexual abuse, contribute directly to this disparity in infection and mortality. In Zambia, as in other countries in the region, tens of thousands of girls, many orphaned by AIDS or otherwise without parental care, suffer in silence as the government fails to provide basic protections from sexual assault that would lessen their vulnerability to HIV/AIDS or other Sexually Transmitted Diseases (STD's) as well as serious psychological distress.

In the view of this scenario, this research is dedicated at understanding the concept of

child defilement and the various implications it has on the victim. This research sets out to introduce the felony of child defilement.

The research creates an understanding of what rights a child has in general. It will explain how the Convention on the Rights of the Child and the protocols that followed it were created and why. It further demonstrates the legislation with regard to children, which has been enacted in Zambia, under the Zambian Law.

After achieving this, focus shall be set on the crime of defilement, looking at the practicalities and realities tied to application of the law discussed. The various bodies that play an active role in helping both the children and the awareness of this offence shall be identified. This research shall come to an end with a conclusion and set of recommendations on how to dissuade possible offenders.

INTRODUCTION

Definition of Child Defilement in Zambia

Any male commits an offence if he has sexual intercourse with a girl under the age of sixteen. The offence is confined to carnal knowledge. Even if the girl consents, this will have no effect in law and the offence is still committed¹. According to the section 138 of the Penal code act (chapter 87 of The Laws of Zambia), this section shall be discussed in detail in the proceeding chapters.

Laws in various countries differ in the penalty that is sentenced to defilers, however according to the Laws of Zambia, a person who unlawfully and carnally knows any girl under the age of sixteen is guilty of a felony and is liable to imprisonment for life.

Psychological Disorders affecting some defilers

It is important to note that some of the people who commit the crime of defilement are victims of mental dysfunction and thus have various sexual disorders or faulty early learning, i.e.; learning false theories about sex in their childhood.

¹ **The People V Jacob Mwele**, In the subordinate court of Zambia, cause number **SSP2-13-2003** the accused pleaded guilty of having carnal knowledge of one Mendy Nyirongo but he believed her to be older than 16, Ms M. Chanda sentenced the accused to 5 years in hard labor.

Lusaka-based consultant psychiatrist Alan Haworth² cites watching pornographic movies and explicit films as a major motivation behind the spate of defilement cases. Other factors, he says, may include the use of mind-altering drugs like alcohol and failure to settle disputes amicably, say between an employer and a domestic worker which may motivate the worker to inflict pain on the employer by defiling their child.

While others resort to the practice due to the absence of an appropriate partner, there are also people that are just born with a natural interest in having sex with children –this is a variant sexual behavior, psychologically referred to as pedophilia.

The New Oxford Textbook of Psychiatry (Volume one)³ defines pedophiles as people who prefer having sex with young children than older women for reasons they may not even comprehend. According to the Psycho-analytic perspective, these people are known to have a sexual psychopathology usually because of early childhood conflicts.

"Pedophiles usually lead children into doing something they (children) do not fully understand such as fondling their private parts before having sex with them," reads the book⁴.

Other pedophiles may even have steady relationships with older women or even be married but would still hold exclusive interest in children.

Professor Harworth in the same article says the existence of pedophiles in the country cannot be ruled out. They cut across all nations, religions and races. The church and other religious sectors on the other hand feel that the problem has further been compounded by the extreme lack of fear for God on the face of the earth today. They say this has given

² Lusaka-based consultant psychiatrist Alan Haworth The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society, by Nebert Mulenga And Potipher Tembo

³The New Oxford Textbook of Psychiatry (Volume one) 1998, Stewart Wall

⁴ P193

rise to a number of sorcerers and witchdoctors who are deceiving people into believing they would be cleansed of their sins and incurable diseases like HIV/AIDS upon having sex with minors.

Physical and Psychological implications on children who are defiled

There are reported physical and psychological implications on children who have been defiled. A medical superintendent for sub-division four under the Lusaka District Health Management Team, Dr Mwaba Kasese has undertaken a number of studies on the various aspects of child defilement since 1999.

According to Dr. Kasese, defilement is not restricted to an actual sexual act with a minor. It includes the involvement of dependent, developmentally immature children and adolescents in any sexual activity which they (children) do not fully comprehend and are thus unable to give informed consent⁵.

“Defilement does not exist in isolation but is usually accompanied by force which leaves painful lacerations on the child's private parts. If not checked on time, these may lead to long-term psycho-somatic problems like extreme fear and anxiety, nightmares and bed-wetting since a child would be too scared to get up at night, even when fully awake.

For those going to school, the immediate symptom would be a sudden attention deficit disorder while the majority just take to the streets for prostitution or resort to drugs and substance abuse.”⁶ Dr. Kasese.

⁵ The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

⁶ The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

A recent global study undertaken by the Women's World Summit Foundation, in 2003 indicates that 95 per cent of the total number of defiled children stand high chances of becoming abusers in the future.

*"Ninety-five per cent of prostitutes and 80 per cent of substance abusers were abused as children, 80 per cent of the children who run away from homes cite abuse-related reasons and 78 per cent of the total prison population in the world were abused as little children,"*⁷.

*"Defilement cuts across the tripartite being of a person. It is a problem of the malfunctioning of the soul, spirit and body. There is no inhibition process in the people who defile young girls and boys as they relate to themselves as dynamic beings"*⁸.
brochure released by the global civic organization, 2004.

For such people, their inhibition (self control) is struck as a balance between the logical part of the brain and the emotional part which only desires self-fulfillment. This would call for self-examination of one's feelings against logic if one was to become rational.

"Sex-drive can be as pressurizing as hunger depending on how a person lives, the priorities one sets in life and the decisions made. People who defile children fail to cross-examine themselves against their own integrity, that of other persons, the socio-environment and consequences outlined by moral philosophy", says Ms Chongo⁹. This is a view highly esteemed among the psychologists on the probable causes of child defilement.

⁷ Brochure released by the global civic organization, 2004. The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

⁸ Brochure released by the global civic organization, 2004. The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

⁹ Ndola Central Hospital psychologist Ethel Chongo -The Times of Zambia (Ndola) September 25, 2003, Article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

Unfortunate circumstances may also lead the child into contracting sexually transmitted diseases, painful cervix, vaginal infections as well as urinary- tract infections.

"Some children have contracted STDs and tested HIV positive after being defiled which is tantamount to murder since there is no known cure for the virus at the moment." Dr.

Mwaba Kasese

From the above it can be seen that children are delicate as they are in the process of development, they are fast learners in this ever changing world. Influences in the environment will have effects on their mental, physical and psychological well-being in the future. With unfortunate experiences such as being sexually molested in their infancy/ childhood will leave damaging scars in their lives as well as physical, emotional and mental disturbances in their adult lives.

It is important to understand the history of human rights to understand how children's rights came into being. It is also essential to study the Zambian situation and perspective on defilement so as to give recommendations on what action is to be taken by the law to deter possible offenders from committing such a crime.

CHAPTER ONE

Child Protection in Zambia

“The investment in children and mothers today will be the guarantor of the well-being and productivity of future generations. Indeed, children are our most accurate measure of development.” – Carol Bellamy¹⁰

“A century that began with children having virtually no rights is ending with children having the most powerful legal instrument that not only recognizes but protects their human rights.” – Carol Bellamy¹¹

The Convention on the Rights of the Child.

The human rights of children and the standards to which all governments must aspire in realizing these rights for all children, are most concisely and fully articulated in one international human rights treaty: the Convention on the Rights of the Child. The Convention is the most universally accepted human rights instrument in history, it has been ratified by every country in the world except two.

¹⁰ UNICEF Executive Director, Dublin, October 1997

¹¹ UNICEF Executive Director, Dublin, October 1997

Somalia and the United States have not ratified this celebrated agreement. Somalia is currently unable to proceed to ratification as it has no recognized government. By signing the Convention, the United States has signaled its intention to ratify – but has yet to do so. As in many other nations, the United States undertakes an extensive examination and scrutiny of treaties before proceeding to ratify. This examination, which includes an evaluation of the degree of compliance with existing law and practice in the country at state and federal levels, can take several years – or even longer if the treaty is portrayed as being controversial or if the process is politicized. For example, the Convention on the Prevention and Punishment of the Crime of Genocide took more than 30 years to be ratified in the United States and the Convention on the Elimination of All Forms of Discrimination against Women, which was signed by the United States 17 years ago, still has not been ratified¹². Moreover, the US Government typically will consider only one human rights treaty at a time. Currently, the Convention on the Elimination of All Forms of Discrimination against Women is cited as the nation's top priority among human rights treaties.

The fact that more countries have ratified the Convention than any other human rights treaty in history, 192 countries had become State Parties to the Convention as of November 2003, therefore uniquely places children centre-stage in the quest for the universal application of human rights. By ratifying this instrument, national governments have committed themselves to protecting and ensuring children's rights and they have agreed to hold themselves accountable for this commitment before the international community.

¹² www.unicef.org/crc/faq.htm#009

Built on varied legal systems and cultural traditions, the Convention on the Rights of the Child is a universally agreed set of non-negotiable standards and obligations. It spells out the basic human rights that children everywhere – without discrimination – have: the right to survival¹³; to develop to the fullest¹⁴; to protection from harmful influences¹⁵, abuse and exploitation¹⁶, etc. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child. The Convention protects children's rights by setting standards in health care, education and legal, civil and social services. These standards are benchmarks against which progress can be assessed. States that are party to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child.

¹³Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept.2 1990. *Article 6* 1. States Parties recognize that every child has the inherent right to life.

¹⁴Article 6 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

¹⁵ *Article 33* States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

¹⁶ *Article 34* States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States 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.

The Convention on the Rights of the Child (CRC) defines a child as a person under the age of 18 years. The Convention on the rights of a child provides for the right of the child against sexual exploitation. Article 34 states:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States 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 also provides that the child shall be protected against all kinds of physical or mental violence, including sexual abuse. Other relevant articles include Article 35, which says that children shall be protected from being abducted, sold, or in other ways treated as merchandise. Also Article 39 observes that children, who are exploited, exposed to abuse or cruel or degrading treatment should be helped with rehabilitation.

The Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights for children, civil and political rights as well as economic, social and cultural rights. Two Optional Protocols were adopted to strengthen the provisions of the Convention in these areas. They entered into force, respectively on 12 February and 18 January 2002.

The Optional Protocols

The Optional Protocols to the Convention on the rights of a child has been introduced for the sole purpose of protecting children from being victims of being subject to intolerable conditions which are not specifically mentioned in the convention. The Optional Protocol on the sale of children, child prostitution and child pornography was applied on 18 January 2002, and of the Optional Protocol on the involvement of children in armed conflict on 12 February. The two Optional Protocols were adopted by the United Nations General Assembly on 25th May 2000¹⁷. The introduction of these Protocols creates a large umbrella of protection for children universally.

Worldwide, an estimated 300,000 children are engaged in armed conflict in their countries, with tragic consequences. Often recruited or abducted to join armies, many of these children -- some younger than 10 years old -- have witnessed or taken part in acts of unbelievable violence, often against their own families or communities. Many children that had been immunized educated or otherwise helped by programmes later systematically brutalized when armed conflicts took place in their countries.

It is important to note that in order for the Optional Protocols to enter into force, States must ratify each of the Protocols following the same procedure required when ratifying the Convention. In the case of the Optional Protocol on the involvement of children in armed conflict, upon ratification States are also required to make a declaration regarding the age at which they will permit voluntary recruitment into national forces.

¹⁷ (General Assembly Resolution A/Res/54/263) .

(A) The Involvement of Children in Armed Conflict

"Every day that we delay, the toll of death and suffering among children in armed conflict will continue to grow - and that is simply unconscionable."¹⁸ Carol Bellamy

In article 38, the Convention on the Rights of the Child urges governments to take all feasible measures to ensure that children have no direct part in hostilities. On 25 May 2000, the United Nations General Assembly adopted by consensus an Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict which raises from 15 to 18 years the age at which direct participation in armed conflict will be permitted and establishes a ban on compulsory recruitment below 18 years.

In addition, the Protocol requires States to make a declaration, upon ratification, regarding the age at which national forces will permit voluntary recruitment, as well as the steps that States will take to ensure that such recruitment is never forced or coerced. This clause is particularly important because, although the Optional Protocol sets 18 years as the minimum age for compulsory recruitment, it does not establish age 18 years as a minimum for voluntary recruitment. However, this has had little impact on countries that have been engaged in armed conflict over a period of time. To date, 117 countries have signed and 88 have ratified this Protocol. By its ratification statistics, it can be seen that many countries have not placed emphasis on this Protocol. The Convention has been

¹⁸ UNICEF Executive Director, Dublin, October 1997

ratified by 192 countries save for two, explained above, therefore, the figure of 88 countries is disappointing.

In establishing 18 years as a minimum age for participation in peacekeeping operations, the United Nations set an important precedent and bolstered the efforts of all those supporting the Optional Protocol to the Convention. The United Nations further recommended that this policy serves as an example for police and military forces worldwide.

(B) The sale of Children, Child Prostitution and Child Pornography

An estimated one million children (mainly girls but also a significant number of boys) enter the multi-billion dollar commercial sex trade every year¹⁹. The 2nd World Congress Against Commercial Sexual Exploitation of Children, held in December 2001 in Yokohama and co-organized by the Government of Japan and UNICEF, showed the commitment of the international community - States, international organizations, NGOs - to tackle this global issue urgently. During the negotiations for adoption of this protocol, UNICEF had promoted the consideration of several issues aiming at the highest level of protection for children. The Optional Protocol gives special emphasis to the criminalization of serious violations of children's rights - namely sale of children, illegal adoption, child prostitution and pornography. Similarly, the text stresses the value of international cooperation as a means of combating these transnational activities, and of

¹⁹ see speech by UNICEF Executive Director Carol Bellamy *Dublin, October 1997*

public awareness, information and education campaigns to enhance the protection of children from these serious violations of their rights.

As an Optional Protocol to the CRC, this text must always be interpreted in light of the Convention as a whole and be guided always by the principles of non-discrimination, best interests and child participation.

To date, 110 have signed and 87 have ratified this Protocol.

The World Conference on Human Rights, held in June 1993 in Vienna, recognized that the human rights of children constitute a priority for action within the United Nations system. The Conference also recommended that UN agencies, such as UNICEF, periodically assess the impact of their strategies and policies on children's enjoyment of human rights.

UNICEF's work in the area of child rights is informed by the World Summit for Children (1990), as well as by the World Conference on Education for All (1990), the World Conference on Human Rights (1993), the World Summit for Social Development (1995) and the Fourth World Conference on Women (1995).

Relevant Provisions on the Rights of a Child in Zambia

The Constitution

The Constitution is the supreme law in Zambia. Part III of the Constitution provides a Bill of Rights, which is justifiable, i.e. liable to trial in a court of justice.^{i[3]} The rights of children are protected in the following ways:

- (a) Article 11 provides for the protection of the fundamental rights and freedoms of an individual;
- (b) Article 12 provides for the protection of the right to life. Article 12 (1) expressly prohibits a person from depriving an unborn child of life by termination of pregnancy except in accordance with the conditions explicitly stated in an Act of Parliament;
- (c) Article 6 (1) upholds the need to preserve a child's nationality and identity;
- (d) Article 125 establishes the Human Rights Commission, whose functions include investigation of human rights abuses against children.

Legislation Protecting Children in Zambian Law

In addition to protections contained in the Constitution, a number of statutes contain provisions specifically directed at protecting the rights of children.

The Adoption Act²⁰, provides for:

- (a) The creation and registration of adoption orders;
- (b) The registration and control of adoption societies;
- (c) The regulation of arrangements made by adoption societies and other persons to adopt children;
- (d) The supervision of adopted children by the Commissioner for Juvenile Welfare;
- (e) The protection of the rights of children by the court by ensuring that any adoption order made is in favor of the child.

The Juveniles Act²¹, provides for care and protection of children and juveniles; custody and protection of juveniles in need of care; a system of adjudication for juveniles who are in conflict with the law; correction and rehabilitation of juveniles who are in trouble or in conflict with the law; and the establishment of children's institutions such as orphanages and foster care homes.

The Affiliation and Maintenance of Children Act²², provides for court orders where paternity is contested, and consolidates the law relating to maintenance of children. The Act brings Zambian law into conformity with CRC in terms of affiliation and maintenance of children.

²⁰ Chapter 54, The Laws of the Republic of Zambia

²¹ Chapter 53, The Laws of the Republic of Zambia

²² Chapter 64, The Laws of the Republic of Zambia

The Employment of Young Persons and Children Act²³, regulates employment of young persons and children.

The Wills and Administration of Testate Estate Act, ²⁴provides for the administration of estates of persons, who made a valid will before dying. The Act also provides for adequate financial and other provisions to be made to dependants in a will. The Act permits the Court to vary provisions of a will if it determines that the estate is unreasonably distributed and would result in detriment to the children of the deceased.

The Intestate Succession Act²⁵, provides a uniform intestate succession law that is applicable throughout the country to cover a situation where a person dies without having made a will. It makes adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate. The essence of this Act is to protect children against property grabbing and, therefore, preserve sufficient resources for their survival. Children born out of wedlock are recognized for purposes of succession.

The Zambia Police Act²⁶ - to establish the Police Complaints Authority. The Authority is responsible for disciplinary aspects of the Police Services so as to ensure transparency and accountability to the public. The Act also establishes the Victim Support Unit, which handles all types of abuse, including child abuse, violence against women, property grabbing and victimization of the elderly.

²³ Chapter 274, The Laws of the Republic of Zambia

²⁴ Chapter 60, The Laws of the Republic of Zambia

²⁵ Chapter 59, The Laws of the Republic of Zambia

²⁶ (Amendment) Act No. 14 of 1999 amended the Zambia Police Act, chapter 107, The Laws of the Republic of Zambia

The Defence Act²⁷, provides guidelines on the age at which a person can be recruited into the defence forces.

The Births and Deaths Registration Act²⁸, provides a uniform law for the registration of all births and deaths in Zambia, without distinction of origin or descent.

The Day Nurseries Act²⁹, provides for registration and regulation of day nurseries.

The Probation of Offenders Act³⁰, provides for the correction and rehabilitation of juveniles in conflict with the law, and probation of offenders. The Act is also responsible for the establishment of probation hostels and prescribes the activities of these hostels.

These are all the laws relating to children under the Zambian Constitution and Zambian legislation. However the law that relates to defilement is considered below:

The Penal Code³¹, establishes the code of criminal law and has provisions for the protection of children's rights. The law that relates to Defilement is covered by section 138 of the Penal Code Act in the Laws of the Republic of Zambia Chapter 87. This section reads as follows:-

138. (1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life. Defilement of girls under sixteen

²⁷ Chapter 106, section 14 (2), The Laws of the Republic of Zambia

²⁸ Chapter 51, The Laws of the Republic of Zambia

²⁹ Chapter 313, The Laws of the Republic of Zambia

³⁰ Chapter 93, The Laws of the Republic of Zambia

³¹ Chapter 87, The Laws of the Republic of Zambia

(2) Any person who attempts to have unlawful carnal knowledge of any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for fourteen years:

Attempt

Provided that it shall be a sufficient defense to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of sixteen years³².

Law Currently In the Making

Currently there is a bill that has made its way through the legislature specifically aimed at defilement making the crime punishable by castration, the bill is awaiting presidential assent. The circumstances leading to this bill shall be discussed in the next chapter.

³² As amended by No. 26 of 1933 and No. 25 of 1941

CHAPTER TWO

DEFILEMENT IN ZAMBIA

Just about every day police in Zambia country record one incident of child rape. An estimated one in five people here test positive for HIV, the virus which causes AIDS. Defilement in children is an unfortunate experience that not only causes HIV/AIDS but also disturbs a Childs emotional, physical as well as mental frame of mind.

News reports in Zambia

Various news reports indicate the rising prevalence of defilement cases in Zambia. A few examples are as follows:

According to Brenda Muntemba, a police spokeswoman³³, "Police have handled more than 200 cases of child rape in the second quarter of 2003." The situation is so critical that for every case published, there are (probably) 10 other unheard ones. Child rape has become a burning issue in Zambia following the death of 11-year-old Nyarai Seke³⁴. She died from multiple sexually-transmitted diseases contracted after she was raped by her

³³ Times of Zambia 20th October 2004 article on Let's strengthen partnerships -- counselling council

³⁴ Brochure released by the global civic organization, 2004. The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

step-brother. Seke has become a symbol of the plight of many young girls in Zambia. Touched by her story, former Zambian president Kenneth Kaunda has vowed to take up the fight against the abuse of young girls³⁵.

"Defilers need to be punished. We can't tolerate this kind of behavior," Kaunda³⁶. He paid Seke a visit in hospital a day before she died and openly wept at her condition.

"Raping young girls will not heal the HIV virus. I will have to take up this campaign now," Kaunda.

Seke's step-brother has since been arrested and charged with murder and child defilement. This is the first time in Zambia that a person has been charged with murder for having infected somebody with a killer disease. Others are following Kaunda's lead. Leading opposition lawmaker Edith Nawakwi recently promised to move a motion in parliament to enact a stiff law against men found guilty of child rape. *"We need to protect our children and I will come up with a bill in parliament when we resume in November, 2000."* Nawakwi³⁷.

Members of civil society are calling for tough penalties, including castration, for convicted child rapists. Joyce Nonde, the president of the Federation of Free Trade Unions of Zambia, organized a march during which a petition calling for stiffer penalties

³⁵ Brochure released by the global civic organization, 2004. The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society Nebert Mulenga And Potipher Tembo

³⁶ Agence France-Presse Scott Goes to Africa- September 29, 2003 A:\- The Canadian Harm Reduction Network.htm

³⁷ Agence France-Presse Scott Goes to Africa- September 29, 2003 A:\- The Canadian Harm Reduction Network.htm

for rapists will be delivered to the government. *"We want to petition government to take this matter very seriously. We can't sit and watch girls being infected with various sexual diseases and nothing is being done."* Nonde.

The number of street children in Lusaka increased from approximately 35,000 in 1991 to approximately 95,000 in 2001, partly because of the growing number of orphans whose parents have died from HIV/AIDS. Approximately 75 percent of all households were caring for at least one orphan; these children faced greater risks of child abuse, sexual abuse, and child labor. Approximately 7 percent of households were headed by children due to the death of both parents. The Government instituted programs to increase public awareness of HIV/AIDS.

Child abuse was believed to be fairly common, but few statistics were available. On July 30 2003, the Deputy Minister of Home Affairs told Parliament that 925 child defilement cases were recorded over the last 2 years, of which 753 had been prosecuted. Of those numbers, 260 cases involved allegations of incest by parents. In August the National Initiative for Citizen's Awareness called on the Government to institute more severe penalties and step up prosecution of such offenses.

There have been few reported cases on defilement in Zambia however it is slowly becoming a heated topic among Zambians and action seems to be targeting defilers, for example, on October 5, 2004, a Lusaka-based police inspector by the name of James Phiri sexually assaulted his 12-year-old stepdaughter and infected her with HIV. The

police officer was arrested by officials from Chilanga Police Station after his stepdaughter's aunt reported the case to Kabwata police. Phiri, a paramilitary police inspector based at Lamya House, is said to have repeatedly defiled the young girl whenever his wife was away from their house. According to the eyewitness, there was some suggestion that he slept with the girl thinking it would rid him of HIV. (Times of Zambia)

From this case it can be deduced that many Zambians have misconceptions about sexually transmitted diseases and so end up destroying the lives of innocent children and in many cases their own offspring.

Police Spokesperson, Brenda Muntemba, has since stated that the former inspector would face charges of threatening violence in addition to defilement, after attempting to shoot his assistant superintendent during the arrest. Following the incident, the victim was taken to University Teaching Hospital for medical treatment, where she tested positive for HIV. *"We are trying to make sure the victim is in a safe place now."* Muntemba.

"We have had many instances where relatives interfere with a case wanting to solve it with the perpetrator. However, it is now our policy not to withdraw defilement cases". Muntemba

A Choma-based police officer was arrested for abducting a 12-year-old grade six pupil, forcing her into 'marriage' and infecting her with syphilis and HIV. According to the

Victim Support Unit's National Coordinator, Mr. Peter Kanunka, there are still several obstacles to overcome in raising awareness of gender and sexual abuse in Zambia. *"The VSU carry out comprehensive awareness campaigns but it is still the case that 75% of these take place along the line of rail"*, lamented Mr. Kanaunka. *"We really need to go into the rural areas and use a holistic approach to tackle issues of sexual and gender-based violence."*

Defilement cases in Zambia are now dealt with through the VSU, but as Mr. Kanunka admits, the groups are facing an uphill battle when it comes to convicting offenders. "One of the biggest problems faced is the length of time it takes for the wheels of justice to turn, some victims are not willing to go down that long road and because of our dual legal system they may just go to a local court instead. It is sad but many families opt for compensation at the expense of the victim." Kanunka

The High Court of Kitwe has sentenced a 26-year -old man to 12 years imprisonment with hard labour for defiling a 12- year-old girl and infecting her with HIV/AIDS³⁸.

If the rate at which defilement cases are soaring in Zambia continues unabated, very little, if anything, positive would be said of the moral fiber of this Christian nation. Or else, who would like to exalt a nation where in every given week, not less than five children are reportedly defiled by close relatives or some other known people within the community?

³⁸ The Times of Zambia Reports LUSAKA, Sept. 16

And the perpetrators mostly get away with mocking jail sentences as short as three months of simple imprisonment. Such is the prevailing situation that has continued laughing loudly in the face of every concerned Zambian parent and civic organisation fighting for the welfare of children. Even so, the amount of trauma and pain inflicted on the innocent children has not sneaked out unnoticed.

A 12-year-old girl in Kitwe was diagnosed with severe syphilis after she was defiled by her 30-year-old uncle.³⁹ In a few weeks that followed, some two sisters in Lusaka's George Township aged eight and nine were lying in agony at the local clinic, nursing serious wounds on their private parts after being sexually abused by their own 36-year-old father. "Lusaka residents and civic organisations are still mourning the death of an 11-year-old girl who was defiled by her 32-year-old step-brother for a period of over three years until she died of medical complications recently"⁴⁰.

Between January and June this year, a total of 470 cases of child defilement were reported to the police through the Victim Support Unit (VSU). VSU national co-ordinator Peter Kanunka says the record represents a rapid increase in the number of cases handled by the Unit since its inception in 1996. In the year 2000, only 366 cases were recorded while in 2001 the number doubled to 715. Whether the increase is due to improved awareness is a question of debate but the general impression being created is that defilement cases have become more rampant and complicated today, leading to many deaths and permanent deformity of victims.

[\allAfrica_com Zambia The Impact of Child Defilement On Society.htm](#)
[\allAfrica_com Zambia The Impact of Child Defilement On Society.htm](#)

After 39 years without a child defilement policy and weak legislation, Zambians are now waking up to the worst form of human torture and the seriousness of the brutal crime of child defilement⁴¹.

Even with the celebration of the 16 Days of Activism Against Gender-based Violence (November 25 December 10, 2003), Zambians have been groaning at the unprecedented cases of defilement in the past months, with the latest being the defilement of a 14 year-old girl, by a Paramount Chief. The child was later discovered to be infected with a sexually transmitted disease.

From the above news reports and articles the seriousness of the problem facing children in our nation can be grasped, however this is just the tip of the iceberg, there is, as stated above, believed to be hundreds if not thousands of cases(perhaps 1/10thsof the cases) that have been reported to the relevant authorities. Possibly because people feel that if they report the matter shame will be brought to the family, perhaps because they have been threatened by the defilers not to tell anyone. Whatever the reason is reports should be encouraged in order to rectify the problems facing children.

⁴¹ Child Defilers to face castration(Singy Hanyona)

CHAPTER THREE

THE COURTS AND DEFILEMENT IN ZAMBIA

NSOFU v THE PEOPLE (1973)⁴²

The appellant in this case was convicted on three counts of defilement. The provision to section 138 of the Penal Code was not explained to him. There was certain evidence which it was argued was corroborative of the evidence of the three girls but which was not conclusive in itself.

The appellant appealed on the grounds (1) that the failure to explain the provision to section 138 resulted in the appellant being denied the opportunity to make out the defence which that proviso creates, and (2) that the evidence put forward as corroborative was not conclusive and therefore could not be corroboration.

The court held that:

(i) In the case of a plea of not guilty the failure to explain to an accused the proviso to section 138 of the Penal Code is at best from his point of view an irregularity which may be cured if there has been no prejudice.

⁴² Z.R. 287 (S.C.) SUPREME COURT BARON, D.C.J., GARDNER AND HUGHES, J.J.S.19TH SEPTEMBER AND 18TH OCTOBER, 1973.(APPEAL NO. 121 OF 1973)

(ii) It is a rule of practice that where it appears that an unrepresented accused may be intending to plead guilty to a charge of defilement the proviso to section 138 of the Penal Code should be explained to him.

(iii) Even where an accused pleads not guilty it is desirable that the proviso be explained before plea, but certainly at some early stage in the proceedings, so that he may have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girls' age.

(iv) For a defence under the proviso to succeed an accused must satisfy the court (a) that he had reasonable cause to believe that the girl was of or above the age of sixteen years and also (b) that he did in fact believe this. The magistrate having found as a fact from his observation of the girls that no one could think that any one of them could be over the age of sixteen years the defence under the proviso could not have succeeded and the appellant had not been prejudiced by the failure to explain it to him.

(v) Corroboration must not be equated with independent proof; it is not evidence which needs to be conclusive in itself.

(vi) 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.

(vii) 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.

MWABA v. THE PEOPLE (1974)⁴³

The appellant was convicted after trial of defilement 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 s. 138 of the Penal Code.

It was held that.

- (i) 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 of the Penal Code should be explained to him.⁴⁴
- (ii) Even where an accused person pleads not guilty it is desirable that the proviso be explained before plea, but certainly at 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.
- (iii) In a borderline case in terms of age the failure to explain the statutory defence to an accused person is an irregularity which may be cured if there has been no prejudice.

⁴³ Z.R. 264 (S.C.) Supreme Court, Doyle C.J., Gardner and Hughes, JJ.S. 7th November, 1974 S.C.Z. JUDGMENT NO. 43 OF 1974

⁴⁴ Nsofu v The People (1973) Z.R. 287

(iv) Having regarded the circumstances under which this offence was committed and the sexual antecedents of the complainant, a sentence of three years' imprisonment with hard labour is excessive.

SICHIMBA v THE PEOPLE (1975) ⁴⁵

The facts of the case are that the appellant was convicted of attempted defilement by a subordinate court. The prosecutrix, an eleven-year-old girl, had gone to fish at the canal in the company of a friend. Apparently they were near a cane field when the accused had allegedly put down his bicycle and chased the girls who ran into the field. The accused had caught the complainant and challenged her with having stolen sugar cane and threatened to take her to the police if she did not have intercourse with him. She declined to have intercourse and said she preferred to go to the police. According to her, the accused then took off her knickers.

Had the appellant been charged with indecent assault on these facts he might perhaps have been convicted, but the court found it unnecessary to pursue this. The facts fall squarely within the provisions of section 141 (a) of the Penal Code which reads:

"Any person who by threats or intimidation procures or attempts to procure any woman or girl for any unlawful carnal connection either in Zambia or elsewhere is guilty of a misdemeanour."

⁴⁵Z.R. 104 (H.C.) SUPREME COURT, BARON, AC.J., GARDNER, AD.C.J., AND HUGHES, J.S., 6TH MAY, 1975 (S.C.Z. JUDGMENT NO 16 OF 1975)

The court held that:

(i) The word "procure" in s. 141 (a) of the Penal Code (Cap. 146) is not confined to acting as a pimp or pander to induce a woman or girl to have connection with another but includes an attempt to obtain, cause or bring about a connection with the offender himself.

(ii) It is a serious matter to harass and insult young girls in the way in which the accused did in this case, and although it is misbehaviour and the accused is a first offender it is too serious to be dealt with by a fine.

This appeal was allowed and the conviction for attempted defilement was set aside and in its place a conviction under section 141 (a) of the Penal Code substituted. This was a misdemeanour and therefore a less serious offence than attempted defilement. However it is nonetheless a serious matter to harass and insult young girls in the way in which the appellant in this case did

And although it was a misdemeanour and the court considered the fact that appellant was a first offender they were of the opinion that it the case was too serious to be dealt with by a fine. The sentence was set aside and the appellant was sentenced to serve one year's imprisonment with hard labour.

ZULU v THE PEOPLE (1973) ⁴⁶

The appellant was convicted of the defilement of a twelve-year-old girl. Counsel for the State conceded that the *voire dire* was defective and that the prosecutrix's evidence must be ignored; without that evidence there was no evidence of penetration and the conviction could not stand. The State asked for a re-trial. The Director of Legal Aid submitted that where owing to the absence or inadequacy of a *voire dire* there was insufficient evidence to support a conviction it was not competent to order a re-trial.

The court held

- (i) The correct procedure under section 122 of the Juveniles Act Cap. 217, was as follows –
 - (a) The court must first decide that the proposing witness is a child of tender years; if he is not, the section does not apply and the only manner in which the witness's evidence can be received is on oath.
 - (b) If the court decides that the witness is a child of tender years, it must then inquire whether the child understands the nature of an oath; if he does, he is sworn in the ordinary way and his evidence is received on the same basis as that of an adult witness.
 - (c) If, having decided that the proposing witness is a child of tender years, the court is not satisfied that the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence and that he understands the duty of speaking the truth; if the court is satisfied on both these matters then the child's evidence may be received although not on oath, and in that event,

⁴⁶ Z.R. 326 (S.C.) SUPREME COURT BARON, D.C.J., GARDNER, AND HUGHES, JJ.S. 21ST AUGUST, AND 23RD OCTOBER, 1973.(APPEAL NO. 83 OF 1973)

in addition to any other cautionary rules relating to corroboration (for instance because the offence charged is a sexual one) there arises the statutory requirement of corroboration contained in the proviso to section 122 (1). But if the court is not satisfied on either of the foregoing matters the child's evidence may not be received at all.

(ii) Section 15 (2) of the Supreme Court of Zambia Act, 1973, gives the court power in a proper case to order a re-trial where the appeal has been allowed only because of a defective *voire dire*.

(iii) Although section 15 (2) is mandatory in form the qualification "if the interests of justice so require" renders the power discretionary.

(iv) It is neither necessary nor desirable to attempt to classify the types of cases in which the court will exercise this discretion but it should not be exercised where the result would be to give the prosecution a "second bite at the cherry" on the merits.

(v) Where a *voire dire* has been inadequate the fault lies with the court; there is no question of the prosecution being given the opportunity to look for further evidence to strengthen its case.

This was a serious offence. The appellant has been in custody since 9th March, 1973. The court was satisfied that this was a proper case in which to order a new trial. The appeal was allowed and the conviction and sentence was set aside, the appellant was retried before a Subordinate Court of competent jurisdiction.

The facts of the case were that the appellant was convicted of the defilement of a girl said to be eleven years of age. The only evidence as to age was given by the girl herself who said that her mother had told her that she was born in 1961.

The court held that:

- (i) Where the age of a person is an essential ingredient of a charge, that age must be strictly proved.
- (ii) it is not acceptable simply for a prosecutrix to state her age; this call be no more than a statement as to her belief as to her age. Age should be proved by one of the parents or by whatever other best evidence is available.

Judgment delivered:

The appellant was convicted of defilement, contrary to section 138 of the Penal Code, the particulars of the offence being that he had carnal knowledge of a girl under sixteen years of age. The girl in question was said to be eleven years old. She gave this as her age when the *voire dire* was conducted by the magistrate, who decided that she could be sworn. In evidence the only reference she made to her age was in answer to a question by the court when she said that she was born in 1961, and she added that her mother had told her so. This is not satisfactory proof of age. There is abundant authority for the proposition that where the age of a person is an essential ingredient of a charge, that age must be strictly

⁴⁷ Z.R. 145 (C.A.) COURT OF APPEAL BARON, A.C.J., GARDNER, A.J.P., AND HUGHES, J.A. 9TH MAY, 1973. (APPEAL NO. 46 OF 1973)

proved. We need only refer to the case of *Diamond Kapwepwe v R.* [1]. In that case the girl in question was fifteen years of age, but this in no way affects the principle. As the learned judge observed in that case, there is no difficulty in proving the age of a prosecutrix, and it is not acceptable simply for a prosecutrix to come to court and state her age. This can be no more than a statement as to her belief as to her age. The prosecution should have called one of her parents or whatever other best evidence was available for the purposes of such proof.

In the result this conviction cannot stand and must be set aside. The appellant was arrested on the 9th December, 1972, and appears to have been in custody since that time. This, however, is a very serious offence and in our view it is a proper case in which to order a retrial. The appellant will be retried before a court of competent jurisdiction presided over by a different magistrate.

From the above cases it can be seen that cases regarding defilement that reach the supreme court are only appealed to by the appellant if there are technicalities to do with the law, or if they have been tried under the wrong section of the penal code, or to do with evidence e.g. *voir dire* as in the above case.

It should be noted that the bulk of the defilement cases is dealt with in the subordinate court where the accused either admits the case or the police do not bother to appeal to a higher court once a sentence has been given, regardless of the sentence.

In the subordinate it is important to note that magistrates have certain limitations in their power covered by section 7 of Chapter 88 of the laws of Zambia Criminal Procedure Code Act

7. Subject to the other provisions of this Code, a subordinate court of the first, second or third class may try any offence under the Penal Code or any other written law, and may pass any sentence or make any other order authorized by the Penal Code or any other written law: Powers of subordinate courts Provided that-

- (i) A subordinate court presided over by a senior resident magistrate shall not impose any sentence of imprisonment exceeding a term of nine years;
- (ii) A subordinate court presided over by a resident magistrate shall not impose any sentence of imprisonment exceeding a term of seven years;
- (iii) A subordinate court presided over by a magistrate of the first class shall not impose any sentence of imprisonment exceeding a term of five years;
- (iv) A subordinate court other than a court presided over by a senior resident magistrate, a resident magistrate or a magistrate of the first class, shall not impose any sentence of imprisonment exceeding a term of three years⁴⁸

With the powers stated above how is it possible for anyone to be sentenced to life imprisonment by a magistrate?

Below is a table of cases tried in the subordinate court stating the name of the accused, the cause number, the crime, where possible the magistrate and the sentence. After which some cases shall be discussed in more detail.

⁴⁸ (As amended by No. 23 of 1939, No. 26 of 1956, No. 28 of 1965 and No. 6 of 1972)

Table of cases of Child-Defilement from the Subordinate Court of Lusaka, Zambia.

Name of Accused	Cause Number	Crime	Magistrate	Sentence
Victor Mugabe	SSP2-120-2001	Defilement		12 Months probation
Mathew Musonda	SSP4-26-2001	Defilement		Discharged
Steven Tembo	SSP1-80-2001	Defilement		Discharged under section 88(a) of the CPC ⁴⁹
Mathews Siyame	SP1-105-2000	Defilement		Withdrawn under section 88(a) of the CPC
Julias Simwelu	SSP1-105-2000	Defilement		Probation
Bruno Chiamba	SSP1-143-2001	Defilement		Discharged under section 88(a) of the CPC
Inocent	SSP1-15-2001	Defilement		Withdrawn

⁴⁹ CPC, Criminal Procedure Code Cap of the Laws of the Republic of Zambia

Hamakulu				
Wilson Chizya Malaya	SSP1-61-2001	Defilement		6 years I.H.L. ⁵⁰
Kaweka	SP1-100-2001	Defilement		24 Months I.H.L.
Harry Mweemba	SP4-72-2000	Defilement		Discharged under section 88(a) of the CPC
Doubt Chipasha	SSP2-210-2001	Defilement	Ms Chanda	6 years I.H.L.
Jeff Kasonde	SPB-144-2001	Defilement	Ms Chanda	Diversion Programes of 8 weeks at Red Cross
Tauri Basa	SSP-91-2001	Defilement		7 years I.H.L.
John Smith	SSP-207-2001	Defilement		1 month I.H.L.
Marshal Mwape	SP1-34-2001	Defilement		Withdrawn under section 201 of the CPC
Lewis Chisenza	SSP1-14-2002	Defilement	Bwalya	7 years I.H.L.
Martin Mwiya Sikomba	SP5-78-2001	Defilement	Choonga	Discharged
Mujangana D. Sinongwe	SP2-78-2001	Defilement	Choonga	Discharged

⁵⁰ I.H.L., In Hard Labour

Jeff Kasonde	SPB2-144-2001	Defilement	Chanda	8 weeks Program
Gelson Kaole	SP2-08-2002	Defilement		60 months I.H.L.
Sangu Sakala	SSP1-114-2002	Defilement		Withdrawn under section 201 of the CPC
Goodfrey Kasoka	SP4-06-2002	Defilement	P. Masosa	Discharged under section 88(a) of the CPC
Sole Phiri	SP4-67-01	Defilement	Hangandu	48 months I.H.L.
Chibwe Mwansa	SP4-67-2001	Defilement	Hangandu	7 years I.H.L.
Benaïd Mwampikita	Sp2-51-2002	Defilement	Hangandu	Discharged under section 88(a) of the CPC
Isaac Kapongo	SSP1-80-2002	Defilement	Bwalya	Acquitted
Mala Matulula	SSP1-232-2002	Defilement	Bwalya	Acquitted under section 201 of the CPC
Mulenga	SSP2-09-2002	Defilement	Chanda	4 years I.H.L
Derrick Munsaka	SPS-69-2001	Defilement	Chaoonga	5 years
John Mwape	SP4-85-2001	Defilement	Chanda	Acquitted under section 201 of the CPC
Sign J. Kasolwa	SP4-85-2001	Defilement	Hamaundu	12 months

				sentence to run concurrently
Collins Kaujengu	SPS-205-2002	Defilement		Discharged
Christopher Sikazwe	SPS-56-2002	Defilement	Kasamu	5 years
Webby Simukoko	SSP-56-2001	Defilement	Mwanabo	Set at liberty
Jacob Mwawela	SSP2-13-2003	Defilement	Chanda	9 years I.H.L
Joseph Daka	SP2-156-2001	Defilement		60 months I.H.L

As can be seen from the above tabular representation of defilement cases in the subordinate court, random cases over the past four years, it can be seen that there are cases that were either withdrawn or had served little prison sentence, e.g. John Smith cause number SSP-207-2001 served a sentence of one month in hard labor.

The case of *The People v. Alfred Musonda*, Cause number SP2-241-2003, in this case a man repeatedly had unlawful carnal knowledge of his niece for over a year, she was 13 at the time, and he threatened her not to tell anyone, the only way it was discovered was when the girl became pregnant. He was sentenced to five years imprisonment.

In the case *The People v. Raymond Tembo* cause number SP2-03-2004, Hon B. Mbao accepted to have the case withdrawn under section 88(a) of the Criminal Procedure code⁵¹ because the arresting officer could not locate witnesses. Thus the accused was discharged.

Section 88 of the CPC states as follows:

In any trial before a subordinate court, any public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal-

(a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) If it is made after the accused person is called upon to make his defence, he shall be acquitted. (As amended by S.I. No. 63 of 1964) Withdrawal from prosecution in trials before subordinate courts.

Thus, it can be seen that most of the cases are withdrawn because of this section where situations where witnesses cannot be located.

⁵¹ Chapter 88 Laws Of Zambia

In the case of *The People v. Steven Zulu*, cause number SSP-84-2001, the ruling was after considering the evidence of the prosecutor, there was no evidence of identification for the two main prosecution witnesses. Therefore, the accused was found with no case to answer and was acquitted under Section 206 of the CPC.

Section 206 states the following; if, at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defense, the court shall dismiss the case, and shall forthwith acquit him. (As amended by No. 2 of 1960)Acquittal.

The People v. Jamu Chenguluka cause number SSP2-209-2001, the accused was a juvenile offender well as a first offender and therefore entitled to leniency, the court sentenced him to 2 years where he will be rehabilitated at Nakambala approved School where he will be able to acquire some life skills.

In a similar case of *The People v. JM Masosa*, cause number SP4-72-2001, the accused juvenile offender was sentenced to eight weeks of counseling.

In the case of *The People v. Robson Meemba*, cause number SP4-72-2001, the accused defiled two girls on separate occasions and received the sentence of two years for each count to run consecutively.

From the above situation it can be seen that a man who defiled two children was given four years sentence for his actions. This is an offence to which a maximum of life sentence is attached, and it was committed twice in the above situation. Taking the few examples above it can be gathered that the judgments are extremely irregular.

The reason for the low sentencing could be that the Magistrates of Subordinate Court have limited sentences which they can pass, and for a principle Resident Magistrate the maximum sentence is nine years. However if a magistrate feels that the crime is severe and the sentence that he/she is allowed to give does not fit the crime they can refer the case to the high court. The high court on the other hand is not limited in the term that it can sentence a criminal.

All the cases above were commenced by an indictment, evidence that may be needed for the police in terms may be in form of medical examinations.

CHAPTER FOUR

CHILD PROTECTION

Families and Children's Rights

The Convention on the Rights of the Child highlights and upholds the primary importance of families – and parents in particular – in protecting children's rights. There is a misperception that the Convention takes responsibility for children away from their parents and other legal guardians and gives more authority in this area to governments. But that is not the case. In several articles, the Convention refers to the role of parents and families directly and charges governments with protecting and assisting families in fulfilling their essential role as nurturers of their children Article 18 states as follows:

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

The Convention calls on governments to respect the responsibility of parents, legal guardians and other caregivers for providing appropriate guidance to children about the exercise of children's rights as stated above.

In the context of the Convention on the Rights of the Child, outdated notions that parents 'own' their children and have absolute rights over them are replaced by the concept that parents are responsible for protecting their children's rights. While article 5 makes clear that parents do have rights with respect to their children, these rights are linked directly to the need for parents to promote and protect their children's rights. Parents' responsibilities with respect to their children's rights diminish as children mature – as children begin to understand their society's values, culture and norms and as they begin to interact on the basis of tolerance, mutual respect and solidarity in their families and communities⁵². The Convention on the Rights of the Child acknowledges the balance between the rights and

⁵² Article 12 and 13 of the Convention on the Rights of the Child

responsibilities of families, on the one hand and the increasing capacity of children to become the main actors in the exercise of their rights and responsibilities, on the other⁵³.

Putting Principles into Practice

Above all, translating child rights principles into practice requires action and leadership by governments. By ratifying the Convention, States commit to undertaking "all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention"⁵⁴ and to reporting on such measures to the Committee on the Rights of the Child, the internationally-elected body of experts charged with monitoring States' implementation of the Convention.

There is no specific right or wrong measures of implementation. What is key is that the Convention should be the main benchmark and inspiration for action at all levels of government. And because the protection of human rights is by nature a permanent and endless process, there is always room for improvement.

In its reviews, the Committee urges all levels of government to use the Convention as a guide in policy-making and implementation, to:

- Develop a comprehensive national agenda.
- Develop permanent bodies or mechanisms to promote coordination, monitoring and evaluation of activities throughout all sectors of government.

⁵³ Article 13 of the Convention on the Rights of the Child

⁵⁴ Article 4 of the Convention on the Rights of the Child

- Ensure that all legislation is fully compatible with the Convention by incorporating it into domestic law or ensuring that its principles take precedence in cases of conflict with national legislation.
- Make children visible in policy development processes throughout government by introducing child impact assessments.
- Analyse government spending to determine the portion of public funds spent on children and to ensure that these resources are being used effectively.
- Ensure that sufficient data are collected and used to improve the situation of all children in each jurisdiction.
- Raise awareness and disseminate information on the Convention by providing training to all those involved in government policy-making and working with or for children.
- Involve civil society – including children themselves – in the process of implementing and raising awareness of child rights.
- Set up independent statutory offices – ombudspersons, commissions or other institutions – to promote and protect children's rights.

The Committee on the Rights of the Child consistently urges governments to take special measures and develop special policies and programmes for children. In this way, it has contributed to the creation of a higher political priority for children and has promoted a growing awareness of how the actions and inaction of government affect children.

The Role of Local authorities

In many countries, local governments are increasingly assuming responsibility for protecting child rights. Indeed, local authorities have a pivotal role to play in giving support to other service providers and also in the areas of regulation, enforcement and monitoring of child rights. This role is increasing where decentralization and reduction of safety nets have created vacuums in social provision, adding to the burden at the local level. In many such cases, city and municipal authorities and local branches of national agencies become the primary actors in providing basic services for children. Even where assistance from higher levels of government is lacking, local authorities maintain the legal responsibility to respond as best they can to the situation of children under their jurisdiction.

United Nations Children's Fund (UNICEF)

The new, worldwide recognition accorded to children's rights and the widespread acceptance of the Convention on the Rights of the Child have presented great opportunities for the United Nations Children's Fund (UNICEF) and have revitalized its work. The UNICEF Mission Statement⁵⁵ formally acknowledges that the pursuit of the rights of children and women is a fundamental purpose of UNICEF. The Mission Statement also makes clear that UNICEF's work for the overall protection of childhood is guided by the principles and standards established by the Convention on the Rights of the Child as well as by the Convention on the Elimination of All Forms of Discrimination

⁵⁵ agreed on by the Executive Board in 1996

against Women. When women's rights are respected in a society, then it follows that children's rights will also be better protected.

A rights-based approach to programming

Since its foundation in the aftermath of World War II as the United Nations International Children's Emergency Fund, UNICEF has been strongly committed to protecting the rights of children in times of peace and war, by encouraging action and advocating in favour of the most disadvantaged and forgotten. In the 1990s, following adoption of the Convention on the Rights of the Child, UNICEF has become an essential actor in the field of human rights, incorporating the principles of the Convention on the Rights of the Child and of other human rights treaties into its programmes. The Convention's guiding principles – non-discrimination, the best interests of the child, child survival and development and the participation of children – frame UNICEF's human rights approach to development. UNICEF country programming is based on and tested against, its fulfillment of the promise of these principles.

UNICEF offices throughout the developing world are working with national partners and other UN agencies in an increasingly systematic way to identify rights-based approaches to such complex problems affecting the realization of children's rights as HIV/AIDS, child labour, malnutrition, lack of access to basic education and armed conflict. In all regions, this human rights perspective has led to new opportunities for collaboration that go beyond well-established partnerships at the national level. UNICEF has forged many new alliances – with development banks, specialized agencies, professional and media

groups and community and civil society organizations – to better reach the most marginalized and exploited children, whose rights are often least respected.

CONCLUSION

A caring society will give freedom and dignity to young people, creating conditions in which they can develop their full potential and so look forward to a full and satisfying adult life. Having examined the salient features of the existing legal framework, it is evident that there is a lot of ground to be covered in relation to the protection afforded to children from all types of harm, and the punishment for offender who commit vile acts against helpless children, without distinction.

There is mounting evidence of hardships and abuse suffered by children. Is their lot in life to be born to us, only to be abused by us? Zambia Law Development Commission's response to the crisis is a call to legal reform in the areas that provide the vanguard to greater and effective protection, be they social, economic or cultural. It is not enough to procrastinate while countless numbers of children live in constant fear and dread in the very environs that are meant to protect and nurture.

It has been realized that the law as it stands has not been a beacon of hope for the nation's children who have had to bear the trauma of attacks and it is apparent that the law in its current form is deficient in the protection it offers to children.

It is evitable that Zambia lags behind many countries in terms of legislation against child abuse. For example, South Africa, Mozambique and Seychelles have enacted laws that specifically deal with gender-based violence as a response to the rising number of cases

of sexual abuse of women and children. The Seychelles has even gone to the extent of introducing a family court, to deal with the domestic violence Act.

Child abuse is one of the leading problems affecting an individual's psychological, emotional and physical well-being in the world today, thus leading to disastrous effects in later life. It is important to take this problem seriously by implementing policies that are in the best interests of the people of Zambia. It is to try and eliminate this pathology as it is affecting millions today especially since it eliminates the norms of cultural barriers in Zambian society.

RECOMMENDATIONS

Children are our Nation's most valuable asset. They represent the bright future of the country and hold hope for a better Nation. Children are also the most vulnerable members of society. Protecting them against the fear of crime and from becoming victims of crime must be a national priority.

Having examined the issue of defilement and the full magnitude of this problem in Zambia there is need to hinder efforts to establish a nation free of crimes against children.

This report recommends that urgent measures be taken in the following ways:

- Measures should be taken in the field of law enforcement, education and recovery, rehabilitation and integration of victims. Proper legislation needs to be established and enforced.
- Law enforcement officials also require education on how to clamp down on the culture of impunity surrounding Sexual Exploitation of Children.
- The convention and its protocols should be referred to, as it provides broad rules on the rights that children have. The near-universal ratification of the Convention on the Rights of the Child reflects a global commitment to the principles of children's rights and by ratifying the Convention, governments state their intention to put this commitment into practice. The task, however, must engage not just governments but all members of society. The standards and principles articulated in the Convention can only become a reality when they are respected

by everyone – within the family, in schools and other institutions that provide services for children, in communities and at all levels of administration.

- It is well established that an offense against the person is an offense against the State. It follows that the State should be seen to mete out fitting punishment to perpetrators of sexual offenses against children. This will require adequate provisions in the law, which, while not able to restore a child's physical and mental well being, will ensure justice by imposing maximum custodial sentences which will remove the threat of a repeat of the offense. It must be borne in mind that the criminal law seeks to punish and deter and so it must be seen to do so.
- The Penal Code was notably the most obvious piece of legislation earmarked for review because it is central to the criminal justice delivery system and because of the fundamental deficiencies in the provisions. The Penal Code expressly provides for minimum sentences of 15 years imprisonment for the sexual offenses of rape and defilement, among others. These have not been invoked by the courts, leading society to decry the lenience of the judicial system and its seeming sympathetic stand on the offender. The deterrent effect has thus not been felt. In response, therefore, sentences should be mandatory and the jurisdiction of child-related offenses be transferred to the High Court as a court of first instance. In addition, the withdrawal of complaints of sexual abuse should not be tolerated by the police and such power be transferred to the office of the Director of Public Prosecution.
- Traditional practices that offend against children and statute should be discouraged and criminalized. In the cultural context they may be acceptable, but

abuse is abuse, a child is a child, in whatever context society wishes to imply. The practices of early marriages and abduction can also come to mind as repugnant. In an age when disease is rife, technology and information easily accessible and so, we cannot be seen to be holding onto archaic practices that do more harm than good. Society should also wish to see that an offense be created for compromising the health and morals of children. This will apply to those in whose care children are when abused and those who choose to remain silent about such occurrences. This has to be carefully formulated so as not to over-victimize children, particularly where such person is a parent. The Courts should take action against Traditional healers and any other individual who encourage the misconception that having sex with a child will cure the HIV/AIDS virus.

- There is need for more HIV/AIDS health awareness programmes to educate the people of Zambia on sexually transmitted diseases, prevention techniques and most importantly whether there is a cure or not.
- The criminal liability of such parent will need to be examined against the best interests of the child. Particularly thorny and emotive has been the requirement for bail of sexual offenders. Currently, the Penal Code provides for bail in defilement cases. There have been calls for revocation of this statutory right. This is yet to be determined, because of the many implications such a move would have and the ever-present possibility of abuse. It is widely known that our Penal System has a tendency to mistreat victims of sexual crimes by subjecting them to court room trauma. A child's psychological well being needs to be a paramount

concern throughout proceedings and so child-friendly procedures have been recommended.

- Zambia's penal system needs to embrace instruments such as the Convention on the Rights of the Child (CRC), which charts new territory for children. It establishes the right of a child to be an actor in his or her own development, to express opinions and to have them taken into account in the making of decisions relating to his or her life. It acknowledges the primary role of the family and parents in the care and protection of children, and the obligation of the State to help them in carrying out these duties. This is a powerful statement for children, which is a reflection of the stand we must take as a nation.
- Research and information gathering must be improved.
- People should be encouraged to report cases of defilement to the police or relevant authorities. So far in Zambia, the Central Board of Statistics has been unable to obtain information on Defilement.
- There is need to prevent corruption especially in the court room, a place where justice should prevail.

The crisis requires every Zambians Participation for it to be rectified.

BIBLIOGRAPHY

BOOKS

The New Oxford Textbook of Psychiatry (Volume one) 1998, Stewart Wall

The Evolution of International Human Rights. Philadelphia: University of Pennsylvania Press, Lauren, P. 1998

Universal Declaration of Human Rights: Origins, Drafting, and Intent. Philadelphia: University of Pennsylvania Press Morsink, J. 1999.

Principles of Criminal Law Second Edition, Oxford, Ashworth, 1995

Criminal Law Third Edition, Sweet and Maxwell, Marianne Giles, 1993

DECLARATIONS, CONVENTIONS AND CONSTITUTIONS

Universal Declaration of Human Rights 1948

Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept.2 1990

The constitution of the Republic of Zambia 1996

United Nations General Assembly Resolution A/Res/54/263

LAWS OF ZAMBIA

Chapter 54, The Laws of Zambia

Chapter 53, The Laws of Zambia

Chapter 64, The Laws of Zambia

Chapter 274, The Laws of Zambia

Chapter 60, The Laws of Zambia

Chapter 59, The Laws of Zambia

(Amendment) Act No. 14 of 1999 amended the Zambia Police Act, chapter 107, The Chapter 106, section 14 (2), The Laws of Zambia

Chapter 51, The Laws of Zambia
Chapter 313, The Laws of Zambia
Chapter 93, The Laws of Zambia
Chapter 87, The Laws of Zambia
Chapter 88 Laws of Zambia

ARTICLES

The Times of Zambia (Ndola) September 25, 2003, article name- The Impact of Child Defilement On Society, by Nebert Mulenga And Potipher Tembo

UNICEF Executive Director, Dublin, October 1997

Times of Zambia 20th October 2004 article on Let's strengthen partnerships counseling Brochure released by the global civic organization, 2004. The Times of Zambia (Ndola) 2003, article name- The Impact of Child Defilement on Society - Nebert Mulenga and Potipher Tembo.

The Times of Zambia Reports LUSAKA, Sept. 16 2004 Child Defilers to face castration (Siny Hanyona)

INTERNET

UNICEF WEBSITE speech by UNICEF Executive Director Carol Bellamy Dublin, October 1997 ON CHILDRENS RIGHTS

www.unicef.org/crc/faq.htm#009

Agence France-Presse, Scott Goes to Africa- September 29, 2003 A:\- The Canadian Harm Reduction Network.htm

[www.allAfrica_com Zambia The Impact of Child Defilement On Society.htm](http://www.allAfrica_com/Zambia/The_Impact_of_Child_Defilement_On_Society.htm)
