

The Lacuna in the Zimbabwean Law on Child Sexual Abuse and the Implications

JOSEPHINE SHAMBARE
PROFESSOR JAMESON KURASHA

Abstract: This study sought to review Zimbabwean law on Child Sexual Abuse (CSA) with a view to expose shortcomings that impeded efforts in the fight against the scourge among the various key stakeholders in the justice delivery system. The study employed a qualitative research design and engaged the key stakeholders in a Focus Group Discussion (FGD). The study population comprised all the stakeholders in the justice delivery system, which dealt with CSA cases in Zimbabwe. The nine (9) participants were purposively sampled and comprised one (1) regional magistrate, two (2) police officers; i.e. one from the Victim Friendly Unit (VFU) and the other from the Investigations Section, two (2) public prosecutors, one (1) probation officer, one (1) traditional leader and one (1) official from a civic society organisation. These stakeholders were much experienced in their respective fields and played different roles before and after the commission of cases of CSA, hence they had in-depth knowledge about the subject matter. An FGD guide was used as the major instruments to elicit the data in addition to electronic recording apparatus. Consistent with qualitative enquiries, the researcher and her assistant were the primary research tools, hence the moderation of the FGD was done by them. The major findings were that the current laws on CSA in Zimbabwe were Eurocentric and were not compatible with the traditional norms and values regarding sexuality, marriage and the concept of a child. Resultantly, the lack of harmony between the unwritten customary laws, cultural practices, norms and values; and the modern Eurocentric laws resulted in the conviction and incarceration of ‘innocent’ people in prisons, since they did not have the necessary guilty minds, nonetheless they were incarcerated in prisons. While the Eurocentric laws do not empower traditional leaders to handle CSA cases, the traditional or customary laws, norms and values on their own, have mechanisms that can effectively deter CSA, through powers vested in the chiefs and headmen. The Customary Law and Local Courts Act (Act No. 2 of 1990 as amended through Act No. 9 of 1997) (Chapter 7:05) leaves yawning gaps on the roles of traditional leaders, that is, chiefs and headmen insofar as addressing CSA is concerned since the laws do not mention any roles for the traditional leaders in the event of a case being reported to them. Subsequently the study recommends that a thorough research be conducted by the legislative arm of government to find ways of infusing traditional or customary laws, norms and values in the modern Eurocentric laws that seem to be completely divorced from them.

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I. BACKGROUND TO THE STUDY

In the traditional Zimbabwean context, a child is not clearly defined like in the modern laws, which are premised on foreign cultures. According to Mawema (2006), Zimbabwean tradition defines a child through both his/her biological development and marital status, particularly considering the stages of physical development. For instance *mwana-komana* (*boy child*) refers to a male person who is not yet mature for sexual intercourse or marriage. The term *jaya* in Shona or *ijaha* in Ndebele refers to a young male person who has now matured enough to get married or to impregnate a woman, but who has not yet had any sexual intercourse with a female person. What defines a *jaya* or *ijaha*, according to Mawema (2006) is his ability to impregnate a girl or woman but he abstains from sexual intercourse throughout his boyhood. Therefore, in the Shona and Ndebele cultures, a boy who has not yet become a *jaya* or *ijaha*, is regarded as a child, that is, *mwana* in Shona or *umtwana* in Ndebele, and is not expected to have indulged in sexual intercourse yet. Traditionally, in Zimbabwe, the socially acceptable transition from boyhood to *jaya* or *ijaha* (manhood), would usually be marked by certain ceremonies involving tests for the ability to impregnate a woman, lessons on how to head a family, circumcision, *et cetera*. Once a boy has passed through this stage, he would no longer be regarded as a child as he is now capable of having sexual relations with a girl or woman.

Similarly, *mwana-sikana* (*girl child*) refers to a female person who is not yet married and/or is not yet mature for sexual intercourse or marriage. The term *mhandara* in Shona or *intombi* in Ndebele refers to a young female person, who has matured enough to get married, but has not yet had any sexual intercourse with a male person, that is, she should still be a virgin. According to Mawema (2006), “*mhandara munhukadzi anenge ava*

pakati pehwana neukuru, asati aroorwa kana kuita bonde nemurume”, meaning “*mhandara* is a female person between childhood and adulthood, who is not yet married and who has not yet had sexual intercourse with a male person”.

From the perspectives of Mawema (2006) and Chihuri (2015), CSA has not been explicitly defined in the traditional Zimbabwean context. Its definition can be implied from the various local languages; folktales, proverbs, idioms and traditional songs. For instance; *Regai dzive shiri, mazai haana muto*, meaning; *Let them grow into birds first, for eggs can't produce soup* appears to have been aimed at deterring older people from having sexual relations with young children. In this case, young children are likened to eggs (*mazai*) for two very apparent reasons. The first one is that eggs cannot produce soup (*muto*), which in the traditional Zimbabwean context, means not yet fully formed to become edible or to make up a meaningful meal that can be enjoyed. Thus, in essence, there is nothing to enjoy in a meal, which has no meat but prematurely eaten as an egg. Secondly, eggs (*mazai*) in this idiom, portray that element of fragility and sexual immaturity in the child, implying that the traditional Zimbabwean culture views the child as a very delicate human being who is very unripe for sexual activities. Thus, from the traditional Zimbabwean context, having any inappropriate sexual contact with a child was implicitly deemed a form of sexual abuse because of the physical and mental immaturity of the child.

In modern law, a number of conflicting definitions are used to define the concept of a child. For instance, Section 81 (1) of the Constitution of Zimbabwe (Amendment Number 20) Act 2013 defines a child as every boy or girl under the age of eighteen (18) years. This definition is consistent with the one provided by the United Nations Children's Fund (2006) in its Convention on the rights of the child, which asserts that “a child is a person below the age of eighteen (18) years unless the laws of a particular country set the legal age for adulthood younger.” Section 61 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 defines a young person as a boy or girl under sixteen (16) years. This is in agreement with Section 2 of the Children's Act Chapter 5:06, which also defines a child as a person under the age of sixteen (16) years and includes an infant. Section 351 of the Criminal Procedure and Evidence Act Chapter 9:07 also talks about giving a lighter sentence to an offender under the age of twenty-one (21) years. Effectively, these are also children at law.

Section 70 of the Criminal Law (Codification and Reform) Act, Chapter 9:23, prohibits sexual relations with a ‘young person’. What this implies is that once a girl or boy attains sixteen (16) years, then they can have sexual relations. Surprisingly, section 78 (1) of the Constitution effectively prohibits children, that is, any boy or girl under the age of eighteen (18) years) from getting married. Impliedly, such children can legally have sexual intercourse but they cannot legally get married. Thus, the law appears to be leaving a yawning gap in that one can have sexual intercourse with a girl under eighteen (18) years, get her pregnant but cannot legally marry her.

Although in the traditional Zimbabwean context, a child is not clearly defined like in the modern laws, traditional Zimbabwean culture places high value on the child. Several local language idioms, folktales, proverbs and songs such as; *mwana ndishe (a child is the king)*, *chirere, mangwana chigokurerawo (look after the child, for tomorrow he/she will in turn look after you)*, among others, bear testimony on how traditional Zimbabwean culture values the child in the society. In this view, Zimbabweans, in the traditional context, view a child as their posterior guardian, when they would no longer be able to look after themselves financially, chiefly due to old age.

Chihuri (2015) asserts that prior to colonisation, the notion ‘*your kid is yours and totally your responsibility*’ never existed in the Zimbabwean society. He further points out that the notion that children belong to their parents’ orchids is foreign to the notion of African and Zimbabwean relationships. Rather, the Zimbabwean traditional view of a child is that he/she belongs to the society. As outlined by Chihuri, old local adages such as ‘*umuntu kasizaleli umtwana. (one does not bear a child for him/herself alone)*. *Umtwana ngowesizwe*’ in Ndebele and ‘*mwana ndewe munhu wese*’ in Shona, literally meaning ‘a child belongs to everybody’, are testimony to this notion.

According to Mawema (2006), Zimbabwean tradition defines a child through both his/her biological development and marital status, particularly considering the stages of physical development. For instance *mwana-komana (boy child)* refers to a male person who is not yet mature for sexual intercourse or marriage. The term *jaya* in Shona or *ijaha* in Ndebele refers to a young male person who has now matured enough to get married or to impregnate a woman, but who has not yet had any sexual intercourse with a female person. What defines *jaya* or *ijaha*, according to Mawema (2006) is his ability to impregnate a girl or woman but he abstains from sexual intercourse throughout his boyhood. Therefore, in the Shona and Ndebele cultures, a boy who has not yet become a *jaya* or *ijaha*, is regarded as a child, that is, *mwana* in Shona or *umtwana* in Ndebele, and is not expected to have indulged in sexual intercourse yet. Traditionally, in Zimbabwe, the socially acceptable transition from boyhood to *jaya* or *ijaha* (manhood), would usually be marked by certain ceremonies involving tests for the ability to impregnate a woman, lessons on how to head a family, circumcision, *et cetera*. Once a boy has passed through this stage, he would no longer be regarded as a child as he is now capable of having sexual relations with a girl or woman.

Similarly, *mwana-sikana* (*girl child*) refers to a female person who is not yet married and/or is not yet mature for sexual intercourse or marriage. The term *mhandara* in Shona or *intombi* in Ndebele refers to a young female person, who has matured enough to get married, but has not yet had any sexual intercourse with a male person, that is, she should still be a virgin. According to Mawema (2006), “*mhandara munhukadzi anenge ava pakati pehwana neukuru, asati aroorwa kana kuita bonde nemurume*”, meaning “*mhandara* is a female person between childhood and adulthood, who is not yet married and who has not yet had sexual intercourse with a male person”.

The concept of child in modern law that is in force in Zimbabwe today completely ignores the traditional concepts of *mwana/umtwana* (*child*), *jaya/ijaha* (*young man*) and *mhandara/intombi* (*young woman*). Common law, which was later enacted into the Criminal Law (Codification and Reform) Act; Chapter 9:23, for example, has its origins in foreign customs, especially the Romans and the Dutch, culminating the Roman-Dutch Law.

In modern law, a number of definitions are used to define the concept of a child. For instance, Section 81 (1) of the Constitution of Zimbabwe (Amendment Number 20) Act 2013 defines a child as every boy or girl under the age of eighteen (18) years. This definition is consistent with the one provided by the United Nations Children’s Fund (2006) in its Convention on the rights of the child, which asserts that “a child is a person below the age of eighteen (18) years unless the laws of a particular country set the legal age for adulthood younger.”

In summary, there is stark contrast in the definition of the key concept of child between the traditional Zimbabwean context and the modern laws that are in force. Traditionally, Africans in Zimbabwe define a child by considering an array of qualitative dimensions such as **ability to economically sustain a family, physical, mental and social maturity**, *inter alia*, as opposed to the modern, Eurocentric definition that only considers a single quantitative factor, namely **age**. To this end, the argument between the two views presents a serious dilemma in the policing of CSA, since the traditional family setup and social hierarchy is still intact in Zimbabwe, especially in the rural areas.

This study, has so far interrogated the constitutional definition of a child, which regards a child as any person below the age of eighteen (18) years. This definition does not consider the customary law definition, which regards a child as one who is not yet a *jaya/ijaha* or *mhandara/intombi*. The study therefore, has exposed gaps in the conceptual framework of a child in two ways. Firstly, taking into account the diverse and conflicting views between Zimbabwean customary law and modern laws that are in force in the country and secondly, the conflicting and inconsistent concepts of child within the Eurocentric laws themselves.

The Zimbabwean modern law gives an age limit for a child whereas the unwritten Zimbabwean customary law defines a child according to his/her biological/physical development, which can vary from child to child.

According to Section 11 of the Customary Law and Local Courts Act (Act No. 2 of 1990 as amended through Act No. 9 of 1997) (Chapter 7:05), traditional leaders, that is, chiefs and headmen are the community and primary courts respectively. However, this Eurocentric law does not give these important stakeholders any role in the fight against CSA, as it confines them to minor civil cases through Sections 15 and 16 of the same Act. This is another lacuna in the law on CSA that stifles the traditional structures’ efforts in the fight against CSA, by undermining the deterrent powers of traditional leaders to would-be-offenders within the rural communities in particular. It should be understood here that in the traditional structures, which are still intact in rural Zimbabwe, any social deviance, including criminal activities that occur in households, must always be reported to the traditional leaders. Therefore, it is clear that before CSA cases are reported in the formal justice system, the traditional leaders would have already ‘dealt’ with them in a way, yet they are not empowered by the Eurocentric law to play any role in such cases.

II. STATEMENT OF THE PROBLEM

Despite Zimbabwe’s much developed legal system, yawning gaps are evident in the laws aimed at protecting children from sexual abuse. Firstly, there are conflicts between the traditional Zimbabwean laws and the Eurocentric modern laws that are in force, regarding the concept of a child in Zimbabwe. While the Zimbabwean traditional laws dwell much on the qualitative definition of child, entailing the *jaya/ijaha*, *mhandara/intombi* concepts that demarcate childhood and adulthood, the Eurocentric laws strictly focus on the quantitative definitions. Secondly, the quantitative definitions in the Eurocentric laws are also in conflict with one another, from one piece of legislation to another. In some pieces of legislation, eighteen (18) years has been the cap for childhood, while in others sixteen (16), and twenty-one (21) have been promulgated as the caps for childhood. Thus, while there is no harmony between the traditional Zimbabwean laws, to which the majority of the native Zimbabweans still abide by, and the Eurocentric laws, which were derived from foreign cultures (Roman-Dutch cultures), there is also some discord within the Eurocentric laws themselves, regarding the concept of ‘child’. This then leads to insurmountable obstacles in the fight against CSA. The obstacles include

non-reporting of cases, parallel justice systems, and general discord among the stakeholders dealing with the scourge.

PURPOSE OF THE STUDY

The purpose of this study was to explore ways of harmonizing laws that seek to protect children from sexual abuse, through engaging stakeholders that deal with child sexual abuse (CSA), from pre-occurrence to post-occurrence of cases.

RESEARCH QUESTIONS

This study was guided by the following questions:

- Are the laws that seek to protect children from sexual abuse adequate for their intended purpose?
- Could CSA be addressed by a fusion of Zimbabwean traditional policing methods and contemporary methods?
- Which areas in the current methods of policing CSA need improvement?

III. METHODS AND PROCEDURES

The study employed a Focus Group Discussion (FGD) design, under the qualitative research methodology. It also utilized documentary analysis of existing laws on CSA, particularly the following pieces of legislation:

- i. Constitution of Zimbabwe (Amendment Number 20) Act 2013,
- ii. The Criminal Law (Codification and Reform) Act, Chapter 9:23,
- iii. The Criminal Procedure and Evidence Act, Chapter 9:07,
- iv. The Customary Law and Local Courts Act (Act No. 2 of 1990 as amended through Act No. 9 of 1997) (Chapter 7:05).
- v. The Children's Act, Chapter 5:06

Participants of the FGD were selected from all the stakeholders in the justice delivery system who handle CSA cases, from commission of a case up to its finality. These included traditional leaders, the police, National Prosecution Authority (NPA), Ministry of Health and Child Care, the judiciary, the Department of Social Welfare and civil society organisations (CSOs). An interview guide was used to elicit the research data.

IV. FINDINGS AND DISCUSSION

The study revealed the following findings:

- a) Incompatibility of the current Eurocentric laws that are in force in Zimbabwe, with African traditional norms and values that literally allow the qualitatively mature *jaya/ijaha* or *mhandara/intombi* to enter into marriage or sexual relations, despite being under the quantitative maturity of attaining the age of eighteen (18) years.
- b) The lack of harmony between the unwritten customary laws, cultural practices, norms and values; and the modern Eurocentric laws is resulting in the conviction and incarceration of 'innocent' people in prisons, that is, according to their own traditional laws the 'offenders' did not have the necessary guilty minds, nonetheless they were incarcerated in prisons.
- c) While the Eurocentric laws that are in force in Zimbabwe do not empower traditional leaders, that is, chiefs and headmen to handle CSA cases, the traditional or customary laws, norms and values on their own, have mechanisms that can effectively deter CSA, through powers vested in chiefs and headmen such as banishment from the respective chiefdoms, restitution and other forms of punishment including looking for very rare livestock such as a completely white cow to appease the victims' ancestral spirits.
- d) The Customary Law and Local Courts Act (Act No. 2 of 1990 as amended through Act No. 9 of 1997) (Chapter 7:05) leaves yawning gaps on the roles of traditional leaders, that is, chiefs and headmen insofar as addressing CSA is concerned. In fact, there is not even mention of any role of these important custodians of local norms and values in the event of a CSA case despite recognizing them as community and primary courts respectively.

V. CONCLUSIONS AND RECOMMENDATIONS

The study concluded that the lack of harmony between the traditional or customary laws, norms and values, and the modern Eurocentric laws on one hand, and the conflict between the Eurocentric laws on their own, are major impediments in the stakeholders' efforts to fight CSA in Zimbabwe. Lack of one piece of legislation that holistically defines all concepts relating to CSA is another major setback in the fight against the

scourge.

Based on the conclusions and findings of this study, the researcher recommended the following:

- A thorough research be conducted by the legislative arm of government to find ways of infusing traditional or customary laws, norms and values in the modern Eurocentric laws, that seem to be completely divorced from them.
- Traditional leaders, that is, chiefs and headmen be empowered by the law to play their traditional roles in deterring would be offenders of CSA.
- The various pieces of legislation from which the concept of CSA are drawn, be reviewed and a single piece of legislation holistically and exclusively dealing with CSA, be enacted in order to, not only redefine the roles of all key stakeholders in the fight against CSA, but also, to remove inconsistencies in the important concepts such as child and roping in the qualitative concepts of child from the traditional standpoint.

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