



The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

2016

The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us for possible publication other articles.

A Reflection on the Domestic Violence Act [Chapter 5:16] and Harmful Cultural Practices in Zimbabwe

By Sylvia Chirawu-Mugomba¹

Part 1

Introduction

Thoughts or discussions on African culture conjure up horror stories – female genital mutilation, (FGM), wife inheritance, homicide brides and early marriages. African culture is often viewed as homogeneous. This is not the case. Cultural practices and beliefs differ from place to place. Without falling into the trap of the emissary position², not all cultures or cultural practices are negative. For instance, in Zimbabwe, there is the *Zunde Ramambo* concept. This entails, especially in the context of HIV and AIDS and climate change which brings with it drought or poor harvests, the growing of food crops that are stored in a granary overseen by a traditional leader. The food so stored is used to feed the vulnerable to mitigate the effects of poverty or drought. Under the traditional Shona culture, when a child (regardless of age) loses a parent, a replacement parent *sara pavana* (literal translation remain with the children), is chosen. The role of this replacement parent is to step into the shoes of the deceased and perform functions that the deceased would have played in relation to their children. This cultural norm is meant to ensure that a child does not feel the gap left by the death of a parent. However, certain cultural and customary practices have been recognized as being harmful to women and children.

Although harmful cultural practices has been viewed as a violation of women’s rights for a long time, it was only with the Beijing Conference of 1995 that the issue gathered momentum when it stated in its mission statement in relation to the girl child that,

“They are often subjected to various forms of sexual and economic exploitation, pedophilia, forced prostitution and possibly the sale of their organs and tissues, violence and harmful cultural practices such as female infanticide and prenatal sex selection, incest, female genital mutilation and early marriage, including child marriage.”³

The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa calls on state parties to condemn all forms of harmful practices that negatively affect the human rights of women and which are contrary to recognized international standards.⁴ Harmful practices are defined in the Protocol as “all behavior, attitudes, and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health,

¹ LLB(S)(UZ); MScIR(UZ); LLM(AUWCL), Deputy Dean, Faculty of Law; lecturer and chairperson, Department of Private Law, University of Zimbabwe

² See Sujata Warrior: *Culture: What it is, who owns it, Claims It, Changes It* available on www.apiahf.org/apidvinstitute/criticalissue/culture.htm(last accessed 16 January 2017). She describes the emissary position as proclamation of how wonderful each of our cultures and its traditions are.

³ See Fourth World Conference on women, Beijing 1995 Mission statement Clause 40 available on www.un.org/womenwatch/daw/beijing/platform/plat 1.htm (last accessed on 17 January 2017)

⁴ Article 5

dignity, education and physical integrity.”⁵ The only harmful cultural practice specifically mentioned in the protocol is FGM.⁶

CEDAW,⁷ to which Zimbabwe is a signatory, calls on State parties to:

“Take all appropriate measures to: (a) modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotypes roles for men and women.”⁸

CEDAW also calls on State parties to eliminate discrimination in matters related to marriage and to ensure that women and men have the same rights freely to choose a spouse and to enter into marriage only with their free and full consent;⁹ that the betrothal and marriage of a child shall have no legal effect and further that there should be a minimum specified age for marriage.¹⁰ In Zimbabwe, the first attempt to deal with cultural practices was through the Customary Marriages Act [*Chapter 5:07*]. The act prohibits pledging of girls and women in marriage and makes this practice a criminal offence.¹¹ Compelling an African woman to marry against her consent is also prohibited.¹² Section 11 and 15 of the Customary Marriages Act were re-enacted in Section 94 of the Criminal Law (Codification and Reform) Act.¹³ The Code went on further to prohibit the customary law practice of noxal surrender of a female person to settle a debt or delict.

However, it was only with the promulgation of the Domestic Violence Act¹⁴ (hereinafter called the Act) that the law made specific reference to cultural or customary rites or practices as being discriminatory or degrading to women. In other words, the practices so identified are harmful to women. The Act was signed into law on 26 February 2007 and became operational on 25 October 2007. The Act thus went a step further than the Code or the Customary Marriages Act. The practices specified are; forced virginity testing, female genital mutilation, pledging of women or girls for the purposes of appeasing spirits, forced marriage, child marriage, forced wife inheritance or sexual intercourse between father-in-law and newly married daughter-in-law. These constitute acts of domestic violence.

In passing specific legislation on harmful cultural practices, Zimbabwe complied with the CEDAW Committee recommendation number 157.¹⁵ The outlawing of harmful cultural practices finds resonance in the Constitution which states that, “all laws, customs, traditions

⁵ Article 1 definition section

⁶ Article 5(b)

⁷ The Convention on the Elimination of all Forms of Discrimination Against Women

⁸ Article 5 (a)

⁹ Article 16 (b)

¹⁰ *Ibid* 16 (2)

¹¹ Section 11

¹² Section 15

¹³ [*Chapter 9:23*]: The Criminal Code came into operation on 1 July 2006.

¹⁴ [*Chapter 5:16*]. The Act was promulgated on 26 February 2007 and came into operation on 25 October 2007.

¹⁵ Zimbabwe ratified CEDAW in 1991 and filed its first report in 1996. This report was considered by the CEDAW Committee in May 1998. In its concluding observations, the committee expressed its concern that discriminatory traditional practices are still accepted and it called on Zimbabwe to codify only those customary practices that promote gender equality.

and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement".¹⁶

As momentum was raised by the Beijing Conference of 1995 and the twelve critical areas of action identified, women in Zimbabwe began advocating for a law that could protect them from violence. In 2003 a draft bill titled, 'Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act', was produced. Significantly that Bill also recognized harmful cultural practices as acts of domestic violence.

Although that Act is not the best piece of legislation, it is a significant step towards eradicating domestic violence and moving the issue from the private to the public arena. However, the issue of harmful cultural practices potentially presents the greatest challenge to the implementation and acceptance by society of the Act. As postulated by Anika Rahman and Nahid Toubia;

"One of the highly debated issues is the role – if any – of legislative action against a pervasive social practice (referring to female genital mutilation) that is strongly linked to cultural norms and beliefs."¹⁷

Cultural practices, whether harmful or not, have existed in Zimbabwe since time immemorial. History has revealed that "legislation alone cannot change social behavior"¹⁸ but the fact of passing legislation to deal with cultural issues "creates a *de facto* role for legislation."¹⁹ To enable Zimbabwean society to fully embrace the specification of harmful cultural practices as acts of domestic violence, the debate has to shift from the purely legal, that is criminalization and other legal sanctions, to the broader context of human rights. Whilst the law is a good starting point it is not "by law alone" that harmful cultural practices will be eradicated from Zimbabwean society.

This introduction will be followed by part two of this article that will put the Domestic Violence Act and cultural relativism into context. Part three will discuss harmful cultural practices specified in the act. This chapter will conclude by suggesting that an opportunity for more engagement on harmful cultural practices has been created.

Part Two

Putting the Domestic Violence Act into Perspective

Cultural relativism

In the context of human rights and violence against women, UN Women has recognised the tensions between universality of human rights and proponents of cultural relativism;

"Cultural relativists have questioned the overall relevance of the human rights framework for addressing the subordination of women, claiming that some traditions are central to people's cultural history and must be respected"²⁰

¹⁶ Section 80(2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013

¹⁷ In female genital mutilation. A guide to laws and policies worldwide at page xiii

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ UNIFEM; Not a minute more; Ending violence against women page 76

UN Women further states that this is not a new argument and that cultural arguments are often used to justify practices that are detrimental to women.²¹

The then Special Rapporteur on Violence stated that “it is only with regard to women’s rights, those rights that affect the practices in the family and the community, that the argument of cultural relativism is used.”²²

Perhaps more significant, however, is the bold assertion that,

“...although traditional practices such as virginity tests, ‘crimes of honor’ and widowhood rites are specific to certain cultures and undermine women’s human rights, in all cultures violence persists because it is culturally acceptable. Around the world, most perpetrators of violence against women count on the fact that their community will not censure them for their behavior. Challenging this impunity and the almost universal acceptance of a culture of violence against women is central to diminishing the problem.”²³

Cultural relativism views all beliefs as equally valid and that truth itself is relative depending on the situation, environment and individual.²⁴ In Zimbabwe, nowhere did cultural relativism play out more than in debates and opinions expressed during the Bill stage. These issues, despite promulgation of the law, continue playing out in Zimbabwean society.

Debates on the Domestic Violence Bill

In Zimbabwe, the face of cultural relativism on domestic violence is a former Member of the House of Assembly who boldly stated in Parliament that,

“I stand here representing God, the Almighty. Women are not equal to men. ...It is a dangerous Bill and let it be known in Zimbabwe that the rights, privilege and status of men are gone. I stand here alone and say this Bill should not be passed in this House. It is diabolic.”²⁵

It became apparent that he was not alone in his views. The prospect of making the private public was one that frightened patriarchy and forced it to hide behind culture and tradition. Another former Member of the House of Assembly stated that “There are certain cultural values that shape every family which are likely to be at stake with this legislation and many families are going to break up.”²⁶

In defense of virginity testing, one traditional leader argued that “Virginity testing is not conducted by just anyone. There are selected elderly women in the villages that are responsible for that.”²⁷ Therefore the issue to him was not the harmfulness of the practice but in who conducted it.

²¹ *Ibid* at note 20

²² *Ibid* at note 20.

²³ *Ibid*, note 20 at page 77

²⁴ See www.cultural-relativism.com (last accessed on the 16 January 2017)

²⁵ See: *The Independent* of 20 October 2006 article by Ray Matikinye: *Domestic violence Bill stirs fiery debate* available on www.kubatana.net/html/archive/legisl/061020zimind.asp.sector

²⁶ *Ibid* note 25

²⁷ *Ibid* note 25

Two clauses in the draft bill were the subject of much controversy. Obsessive jealousy and unreasonable denial of conjugal rights were listed under emotional, verbal and psychological abuse as acts of domestic violence. A commentator surmised as follows,

“The Bill on domestic violence seeks to make jealousy and possessiveness about your wife or husband an offence. It is difficult to fathom what lay in the mind of the person contemplating such a piece of law. Are we not stretching civilization too far? While you commit an offence of being ‘too possessive’ of your spouse, you are still expected to fulfill his or her ‘conjugal rights.’ How does one reconcile the two? Isn’t the law seeking to be intrusive on issues that ordinarily should be resolved by two consenting adults or in the family setting with friends and relatives?”²⁸

Even some males who supported promulgation of the Bill into law were against the issue of unreasonable denial of conjugal rights. One prominent male journalist stated as follows;

“However, while by and large there is very little that is offensive about the bill, the point should be made that the State has no right to go into bedrooms of this nation. We all abhor domestic violence. But it does seem that the institution of marriage is at risk from the legal consequences from the issue of the denial of conjugal rights.”²⁹

Not surprisingly, the two issues were removed from the Bill and the only reference to possessiveness is found in the definition section of domestic violence under emotional, verbal and psychological abuse which is defined as a

“pattern of degrading or humiliating conduct towards a complainant, including but not limited to among other indicators, the repeated exhibition of obsessive possessiveness which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security.”³⁰

At stake, however, were essentially two bigger issues that were not given credence. The act of jealousy is viewed as a sign of love and culturally acceptable. Alice Armstrong postulates that;

“Although jealousy, as an emotion, is universal, there is another factor presentthat suggests that ‘culture’ and ‘tradition’ are used as arguments to excuse behavior which produces jealousy and violent reactions to jealousy. First, jealousy in women is not culturally condoned.Secondly, jealousy in men is culturally condoned because men - particularly husbands - are expected to have exclusive rights over women’s sexuality”³¹

That it can lead to disastrous consequences such as murder, infliction of harm or mental anguish is ignored. The unreasonable denial of conjugal rights proved to be a double edged

²⁸ *Jealousy and possessiveness in the Domestic Violence Bill*. Comment in The Zimbabwean Independent dated 20 October, 2006 available on www.kubatana.net/html/archive/legisl/061020zimind_1/asp/sector

²⁹ *Domestic Violence; A very good law*. Article by Bornwell Chakaodza in the *Financial Gazette* dated the 19th of October 2006 available from www.kubatana.net.html/archive/opn/061019bc.asp?sector

³⁰ Section 3 (2) (C) (iii)

³¹ Culture and choice: Lessons from survivors of gender violence in Zimbabwe at page 16

sword. While marriage imposes duties of *consortium onmis vitae*,³² this clause flies in the face of marital rape which in Zimbabwe is a criminal offence.

Of concern to many activists was the fact that the bill seemed to be taking a dangerous dimension as a law meant to protect women only. This could not have been further from the truth as the definition of complainant is neutral. However, perhaps the emphasis on women was the realization that women are more affected by domestic violence than men.

It is easy to paint all men as being against the Bill. However, there are men who realize the real benefits of laws that enhance the rights of citizens especially women. PADARE- Men's Forum³³ is one such organization that supported the passage of the Bill into law. PADARE acknowledged that gender based violence was an existing problem based on patriarchal beliefs. Some men expressed negative sentiments against the Bill because they were afraid that their sphere was being taken over by women. This conception, according to PADARE, was based on ignorance since there is no excuse for violence. The use of culture and religion to perpetrate violence was therefore misguided.³⁴

The Bill also generated unprecedented coverage not only in the media but was the subject of debate by Zimbabweans from all walks of life. By the time the Bill was signed into law, there were strong views for and against it.

Implications of the domestic violence law on women in Zimbabwe

The greatest strength of the Act lies in its comprehensive definition of domestic violence to include any unlawful act, omission or behavior which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes : physical, sexual, emotional, verbal, psychological and economic abuse, intimidation, harassment, stalking, malicious damage to property, forcible entry into complainant's residence where the parties do not share the same residence, depriving the complainant of or hindering the complainant from access to or a reasonable share of the use of the facilities associated with the complainant's place of residence, the unreasonable disposal of household effects or other property in which the complainant has an interest, abuse derived from the cultural or customary practices that discriminate against or degrade women, abuse done because of complainant's physical or mental incapacity, abuse done because of complainant's physical, mental, sensory, visual, hearing or speech disability and abuse done because of complainant's mental illness, arrested or incomplete development of the mind, psychotic disorder or any other disorder or disability of the mind.³⁵

The wide definition of domestic violence takes a cue from international instruments such as the UN 1993 Declaration of Violence against Women which defines gender based violence as;

“Any act of gender based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life. Violence

³² Essentially companionship, love, affection, comfort, mutual services and exclusive sexual intercourse

³³ PADARE is a men's organization advocating a social movement towards a gender-just society.

³⁴ *Domestic violence bill: 2007 and beyond*. Article by Fungai Machirori dated January 18 2007 available on www.kubatana.net/html/archive/gen

³⁵ Section 3 of the Act.

against women shall be understood to encompass but not limited to: Physical, sexual and psychological violence occurring in the family and in the community, including battering, sexual abuse of female children, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women...”

The effect of the wide definition of domestic violence is that no longer is it seen as just the visible act of physical violence but it covers all other aspects. The Act gives powers to a complainants’ representative defined as a police officer, a social welfare officer, an employer of complainant, a person acting on behalf of a church or other religious organization, a private voluntary organization concerned with the welfare of victims of domestic violence, a relative, neighbour or fellow employee, a counselor and any other person so appointed to apply for a protection order on behalf of the complainant.³⁶ This provision was put in the law after the realization that many victims of domestic violence, especially women, were afraid to file cases due to socio-cultural, economic and other factors. However the complainants’ representative in the absence of consent by the complainant must seek leave of the court to apply for a protection order. This provision will result in domestic violence becoming everyone’s responsibility. No longer can any person afford to take a hands off approach domestic violence.

One of the major reasons for not reporting cases is also the real fear by women that they will be left destitute if they file for a protection order. The Act took this into account by providing for a wide ranging protection order that *inter alia* makes provision for payment of emergency monetary relief in respect of the complainant’s needs and those of any child or dependant, including household necessities, medical expenses, school fees and mortgage bond or rent repayments.³⁷ The act also makes provision for temporary custody and regulation of access to a child or dependant.³⁸ Custody has always been a thorny issue but the provisions of the Act will entail that a complainant who is awarded temporary custody can also get temporary maintenance. This means that the designated courts for domestic violence will act as ‘one stop’ courts³⁹ in the sense that a complainant who applies for relief does not have to go to the Maintenance court, civil cases and Children’s Court for relief but will have to file one all-encompassing application.

The Act puts in place an anti-Domestic Violence Council that will keep under constant review the problem of domestic violence and will monitor the implementation of the Act among other terms of reference. On paper therefore, the act provides a good starting point for the elimination of violence against women.

Part Three

Harmful cultural practices and domestic violence

While the specific singling out of certain harmful practices including acts of domestic violence should be celebrated, this aspect poses the greatest challenge in implementation. The following cultural practices were specified as acts of domestic violence:

³⁶ See Section 2 of the Act.

³⁷ Section 11 (d)

³⁸ Section 11 (e)

³⁹ The Act defines court as meaning a magistrates court, the High Court or local court. The latter, essentially Chiefs and Headman’s courts, can only hear cases of emotional, verbal, psychological and economic abuse.

(a) Forced virginity testing

It is apparent that the act of virginity testing itself is not an act of domestic violence unless it is a forced act. However, there is a fine line between force and consent. This is a result of compromise between those who out rightly believed that it is an integral part of Zimbabwean culture and those who are against the practice.

(b) Female genital mutilation

While the practice of FGM has attracted a lot of attention over the years, in Zimbabwe it is relatively unknown. Nonetheless the law makers thought it prudent to include it in the act lest it becomes an issue.

(c) Pledging of young women or girls for the purposes of appeasing spirits

This act involves the surrender of a woman or girl to appease an avenging spirit.

(d) Forced marriage

This act involves the marriage of persons who may be above the age of marriage which is 18 years but is as a result of force.

(e) Child marriage

Child marriage is defined as a situation where one or both parties to a marriage, whether under customary or general law, is below the age of 18 at the time of the marriage. The Constitution defines a child as any person below the age of 18 years. In *Mudzuru and Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors*,⁴⁰ the Constitutional Court outlawed child marriages and struck down section 22(1) of the Marriage Act [Chapter 5:11] and any law, practice or custom authorizing a person under the age of 18 years to marry or be married and that with effect from 20 January 2016, no person male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of 18 years.

(f) Forced wife inheritance

Women and Law in Southern Africa (WLSA) states that the referring of remarriage within a deceased man's family as widow inheritance may be misleading as "a widow is not inherited as a mere object without any say or control. She has the choice whether to accept the union or not."⁴¹ However:

"In some situations, the notion of consent may be misleading as the widow may be technically able to refuse but if she wants to retain her relationship with her children, have access to her husband's land allocation and to continue to live among his people, she may have little option but to accept the new husband."⁴²

Realizing that this issue would derail progress, a compromise was reached on the word "forced". The act of wife inheritance in itself is not an act of domestic violence unless it is accompanied by force. There are no indicators to denote what forms of force will suffice.

⁴⁰ CCZ-12-15

⁴¹ In *Widowhood, inheritance laws, customs and practices in Southern Africa* page 42

⁴² *Ibid* at note 41.

(g) Sexual intercourse between fathers-in-law and newly married daughters-in-law

This practice entails a newly married daughter-in-law having sexual intercourse with her father-in-law before she does so with her husband.

Part 4

Conclusion

Whilst cases of domestic violence, mostly physical abuse, have been heard in the courts, so far the author is not aware of any cases of domestic violence related to harmful cultural practices that have come before the courts. Perhaps this is because such cases are hard to bring before the courts as they touch on customary law and cultural practices. What the Act has done, however, is to open dialogue on such issues and has created an opportunity for introspection. The law is certainly important but, for some issues, the presence of a legal framework will not result in immediate change.