

Simba Utano Campaign on Date Rape:

A policy framework on the management of date rape in Zimbabwe

EXECUTIVE SUMMARY

This paper is directed to the Parliament of Zimbabwe and calls on the institution to incorporate provisions for date rape in the law. The paper defines date rape and explores the current legal system governing sexual offenses and related matters and points a special analytical lens on the legal framework governing the management of rape and related matters. The issue of informed consent is central to this paper in so far as the appreciation of date rape is concerned. By highlighting how the date rape escapes the legal radar, the paper shows unintended negative consequences that befall girls and young women when they innocently accept to go on a date. The paper argues that the failure to separate and identify date rape as a specific crime as is the case with marital rape reduces the chances of conviction of the perpetrator and results in the girl child being pushed into a forced marriage by parents or guardians. The paper concludes that by failing to recognize date rape as a specific crime, the state is inadvertently perpetuating and promoting sexual abuse of the girls and young women. The paper further makes recommendations to the legislature to align all laws with the Constitution in order to close the gaps between the various laws and strengthen coordination of the efforts of the service providers in the management of sexual offenses. The paper presents several policy options that Parliament should adopt in the fight to end sexual gender-based violence. In the end the paper makes recommendations on the possible solutions to the identified shortcomings.

Defining Date Rape

Date rape is a concept that seeks to give distinction to 'sexual experiences that many survivors believed had been non-consensual but which were not criminal in nature because they occurred in the context of a romantic relationship.'¹

Date rape is 'non-aggravated, non-consensual sex that rarely involves physical injury or the explicit threat of physical injury...'² Because physical injury is usually the sole criterion that the sexual encounter was non-consensual, date rape has largely been difficult to prove.

Background and Scope of the Problem

Research has shown that most rape cases are perpetrated by people who are known to the survivor and most of these are in the dating age group - that is plus 12 years and early 20s. According to Deborah England, 80% of all women who are raped, are raped by people they know³. Deborah further points out that because of the underlining relationship between the assailant and the victim, the legal issue that arises is that of consent- where the consent started and ended and how the lack of consent was communicated?

In the United States, the issue of date rape has been an issue that has been under consideration since 1980s⁴. The term 'date rape' was introduced then to demystify the fact that not all rapes are by strangers. This was because at that time there was no legal provisions to sanction cases of rape that occur within a romantic relationship hence then no offence could be committed. This form of rape was also referred to

¹ Encyclopedia Britannica.com

² Science direct.com

³ What is Date rape? criminaldefenselawyer.com/resources/date-rape.htm. visited on 29 July 2021

⁴ Annie Dude www.britannica.com

as acquaintance rape. The use of acquaintance served to show that there necessarily need not be a romantic relationship but the fact that the victim knows the attacker. The state of California defines Date rape as non-consensual sexual intercourse, between two people who are or were dating and are voluntarily spending time together.⁵ Thus in the United States, Date rape is viewed as a phenomenon where a woman is forced by an acquaintance during a voluntary social involvement and the perpetrators include but are not limited to male relatives, current or former husbands, boyfriends or lovers.⁶ One of the legislation used to prosecute these date rape cases is Drug-induced Rape prevention Act of 1996 which among other provisions provides that a 20 year sentence should be imposed for people who are found distributing illicit drugs that are used in DR⁷. According to Annie Dude, DR is used to describe the forcing, coercing of a victim to have unwanted sexual intercourse by a friend, romantic suitor or through violence, verbal pressure, misuse of authority and use of incapacitating substances.⁸

The above cited awareness of the existence of date rape resulted in law reforms aimed at the prosecutions of the attackers. The laws that were enacted in the United States of America, which provides for date rape are the Penal code 261PC, of California's Rape Law and The Drug – induced Rape Prevention and Punishment Act of 1996.

The South African legal system presents a good model of legislation to curb the menace of date rape. Section 56 of the Sexual Offenses act defines consent as an agreement between two persons to engage in a sexual encounter, and specifies that marriage, friendship, or any other type of relationship do not count as consent. The South African definition of rape is also broad in that it criminalizes any unlawful and intentional sexual penetration of another without their consent. An interpretation of these provisions indicates that the South African Law is broad enough to include date rape. It further criminalizes the act of Steal-thing, which is an act of condom removal. This arises where a party consents to having sexual intercourse with a condom, but the partner deceives them and removes the condom. Thus, the combination of the South African definition of consent and rape are highly commended for they are broad and clarify that previous sexual or other relationships between the parties do not imply consent. These provisions mean that date rape and steal-thing are offenses in South Africa.

In the Zimbabwean legal system, the Criminal Codification and Reform Act (chapter 9: 23), (herein after the CODE) codifies criminal offenses, and outlines the possible penalties for their commission. The offenses that are related to sexual and gender based violence include rape, aggravated indecent assault, indecent assault, deliberately infecting another with a sexually transmitted disease, soliciting, procuring, sexual crimes against a young person or mentally incompetent person, sexual intercourse within a prohibited degree of relationship, kidnapping or unlawful detention, pledging of female persons, deliberately infecting another with HIV and or sexual transmitted diseases⁹, soliciting for purposes of prostitution¹⁰, having sexual intercourse with a young person¹¹, having sexual intercourse within a prohibited degree of relationship¹², coercing or inducing persons for purposes of engaging in sexual

⁵ Penal Code 261PC, California's rape law

⁶ Legal information institute LII WEX Date rape

⁷ NCJA Justice Bulletin Volume 16 Issue 12 dated (December 1996) Pages 1,3-5

⁸ www.britannica.com

⁹ Section 79 of the code

¹⁰ Section 81 of the code

¹¹ Section 70 of the Code

¹² Section 75 of the Code

conduct¹³, detaining a person for purpose of engaging in unlawful sexual conduct¹⁴, permitting the living off or facilitating prostitution¹⁵, and allowing a child to become a prostitute¹⁶.

The Criminal Procedure and Evidence Act (herein after CPEA) provides for protection of the witness during the trial when they are giving evidence (section 319B). It also provides for procedural law that ensures that there is a fair trial. Section 319 as amended provides for the needs of all witnesses deemed as vulnerable witnesses during criminal proceedings in the Victim Friendly Courts, use of support persons, use of closed-circuit television, use of an intermediary (a specialist interpreter) to work with vulnerable witnesses and the establishment of the Multi-Sectorial Victim Friendly System. Thus, the CPEA provides for the protection of witnesses during trial.

This indicates an awareness by the legislature that the offenses of a sexual nature make the witnesses and survivors vulnerable and that they would not be free to discuss what happened to them in an open court. This same lens should be worn when an issue of date rape is raised as the relationships and the manner in which the offenses occur make the survivors more vulnerable as they might blame themselves for being date raped. From the face of it, Zimbabwe has very good and comprehensive laws as far as curbing the menace of rape and any unbecoming behaviors of a sexual nature.

In practice most of the cases that are heard in our courts are those of date rape. Some are prosecuted as cases of having sexual intercourse with a young person whilst some are prosecuted as rape if they involve those above the age of 16.

However, due to some cultural and societal norms some cases go unreported as the criminality thereof is not appreciated. There is also a worrying trend as to how these cases are being handled by the courts. Most of the few cases that are reported are acquitted by the courts on prosecution. The major reasons why these cases are acquitted are that the courts are clouded by the fact that the parties would have been in a relationship, and in most cases the complainant consent is implied by what she does prior to the act. For example, if the girl willingly goes to the accused's house or consents to kissing, she is deemed to have accepted the sexual encounter that ensues. The rape statistics below clearly show how the date rape cases are being handled by the courts at Harare Magistrate Courts.

Harare Magistrate Court is the largest regional court in the country and the findings at these courts represent about 40% of what happens nationally. The cases of date rape are mostly found in the plus 12 age group up to the early 20s. As illustrated below these cases have a more than 70% likelihood of being acquitted or being withdrawn as demonstrated by the table below.

¹³ Section 84 of the Code

¹⁴ Section 85 of the Code

¹⁵Section 82 of the Code²

¹⁶ Section 87 of the Code

Table of Statistics on rape cases at Harare Regional Courts for 2019.

Victim Ages	Acquittals	Convictions	Withdrawals / Futher remand Refused
0 -12	34%	57 %	9 %
13 - 16	69%	36%	10%
17 - 20	63%	17%	20%
21 - 30	77%	10%	13%
30+	58%	1%	41%

An analysis of the table shows that the cases of rape within the dating range are mostly acquitted. It is also interesting to note that cases in the dating category are mostly withdrawn before plea or the accused is removed from remand after the complainant for some reasons fails to come to court. In most of the cases the complainant could have married the accused and accused will come to court well knowing that the complainant will never come to court. As demonstrated above 79% of all cases involving 13-16 aged complainants who came to the Harare Regional court in 2019 were either acquitted or withdrawn from the system, 83 % of the cases for cases for the 17-20 age group were also either acquitted or withdrawn and 90% of the cases for 21-30 age group were also either acquitted or withdrawn from the system. Most of these cases are possible date rapes because of the ages involved, and this justifies the need to revisit the law that govern date rape within these age groups.

The statistics above show that despite the seemingly watertight legal system, there are some legal and procedural gaps that have been noted in practice and this paper shall explore the law, its applicability to real life situations and the effect it has on service providers and community at large.

How Date Rape escapes the legal radar

1) Legal gaps

i) Absence of the definition of consent

The issue of consent is another conflict area. Consent despite being a key element of all forms of rape, is not defined in section 61 of the Zimbabwean CODE as one would expect yet it is the issue that is interrogated to determine whether or not an offence of rape has been committed. This omission to define

consent creates a major legal gap as it leaves the service providers with a lot of room to individually define and conclude what would constitute consent. This gives room for individual, cultural, religious and socialization to be of great influence on the conclusion on issues of rape, particularly date rape. In the process date rape is trivialized as a cultural issue and not a criminal issue hence the legal radar does not pick it.

The degree of force used in most date rapes is usually minimal because of the underlying relationship between the parties. The girl might even allow the man to kiss her or hug her but once that limited consent is given the man will go all the way and have sexual intercourse with the girl basing on the assumption that since the girl has consented to kissing the implication is that she has consented to the sexual act. That some girls are raped basing on implied consent. On trial most of these perpetrators get away with it because the Zimbabwean law is silent as to what exactly is meant by consent, yet these date rapes have a great psychological injury since a loved person would have breached the trust the survivor had and the person committing the rape is related to the survivor romantically, emotionally and or otherwise.

ii) Age of consent

The age of consent that is pegged at 12 is also a cause for concern. Age has a direct bearing on the decision made by the younger women during a date that promote the commission of a date rape. Most girls, because of immaturity are lured to go to the older boyfriend house to get, for example a memory card, phone or satchel and when the girl, arrives at the boy's residence, the boy pounces on the unsuspecting immature girl and rapes her. When the young woman tries to explain her ordeal at the hands of the older boyfriend, society and the law again overburdens the young mind by asking her why in the first place she had gone to the accused's residence, forgetting that she is just but a child.

The legal discourse is complicated by the confusion resulting from the absence of the definition of consent. When the law provides that a 13-year-old minor can consent to sexual intercourse, the legal issue that arise is what kind of consent is in issue here? Can a minor provide informed consent about a sexual activity? In what circumstances is this consent to be given? The law creates a legal lacuna that clearly exposes the minors to the mercy of the adults to satisfy their sexual desires hiding behind the so called consent? Are the young ones not being raped within these "relationships", sadly, after being bribed with a packet of snacks or piece of chicken and chips? Is not this scenario a direct contradiction of the earlier highlighted, watertight intention of the legislator to protect these minors? Is the legislator saying the minors can go around consenting to sexual intercourse, which can be viewed as promoting them to be promiscuous in contravention of Section 87 of the CODE? Is it the legislators' intention that the minors can be legally sexually active before marriage? Are these legal provisions in the best interest of the child¹⁷?

¹⁷ Constitution Section

iii) Conflict of the laws- the marriage laws, the criminal law and the Constitutional law.

The diagram below illustrates the conflict of laws as provided by the Zimbabwean legal system.

Age Group	Classification of laws that govern the age group
18+	<p>Can marry (Constitutional court)</p> <p>Can be raped by their spouses regardless of their marriage(s 68 of the Code)</p>
16-18	<p>These and all the others below are children (Constitution)</p> <p>Need approval from both parents and the minister to get married(Marriages Act)</p> <p>Are too young to marry(Constitutional court)</p> <p>If they consent sexual intercourse no offence is committed(Code)</p>
14 -16	<p>Can consent to sexual intercourse, if they do accused to be charged with having sexual intercourse with a young person(code)</p> <p>Can consent to sexual intercourse within marriage,and if they do no offense is committed(section 61 of the Code)</p> <p>Can be married (section 61 of the Code)</p>
13-14	<p>Can consent to sexual intercourse</p> <p>but even if they consent the accused must be charged with rape</p> <p>Subject to the assessment whether or not the complainant appreciated what she was consenting to</p>
0-12	Can not consent to sexual intercourse(Code)

Key

	Good laws that protect the age group
	Laws that offer partial protection to the age group
	Bad laws that do not protect the age group

As demonstrated above, the Zimbabwean legal system protects some age groups, and exposes some by the nature of the laws available. The Marriages Act provides that a 16-year-old can only be married with the consent of both parents and or guardian and approval of the Minister. This has been outlawed by the Constitutional landmark Judgment that pegs marriage at 18. Contrary to this in terms of section 61 as read with section 70 of the Code a child above 14 but below 16 can get married, and if they have sexual intercourse with their spouses within that marriage, no offense is committed. Further the Code provides that if one has sexual intercourse with a young person who is 16 years old, there is no offense. As demonstrated by the red zone in the table, the laws do not protect the 13 -16 and partially protects those above 16 but below 18 in as far as marriage is concerned. What boggles the legal mind is what exactly the legislator is saying. Is it saying a child below 16 can be married, considering that C/S70 provides for those below 16, (below the marriage age). The Customary Marriages Act does not provide for the marriage age. In sharp contrast to the lack of protection of the younger women and girls, the legislation provides for marital rape. Thus, the law provides for the minors below 12 and the married adult women, yet it creates confusion as regards those above 12 but below 16 as well as the unmarried young women who have to endure the rigorous procedures of having their consent tested with a very high scale for being known to the perpetrators. One can conclude that this gap in the law is promoting the date rape of minors and letting the accused get away with it in the guise that it is having sexual intercourse with a young person and or no offense because ‘we were in a relationship’.

iv) Non-Legal sanction of Date Rape

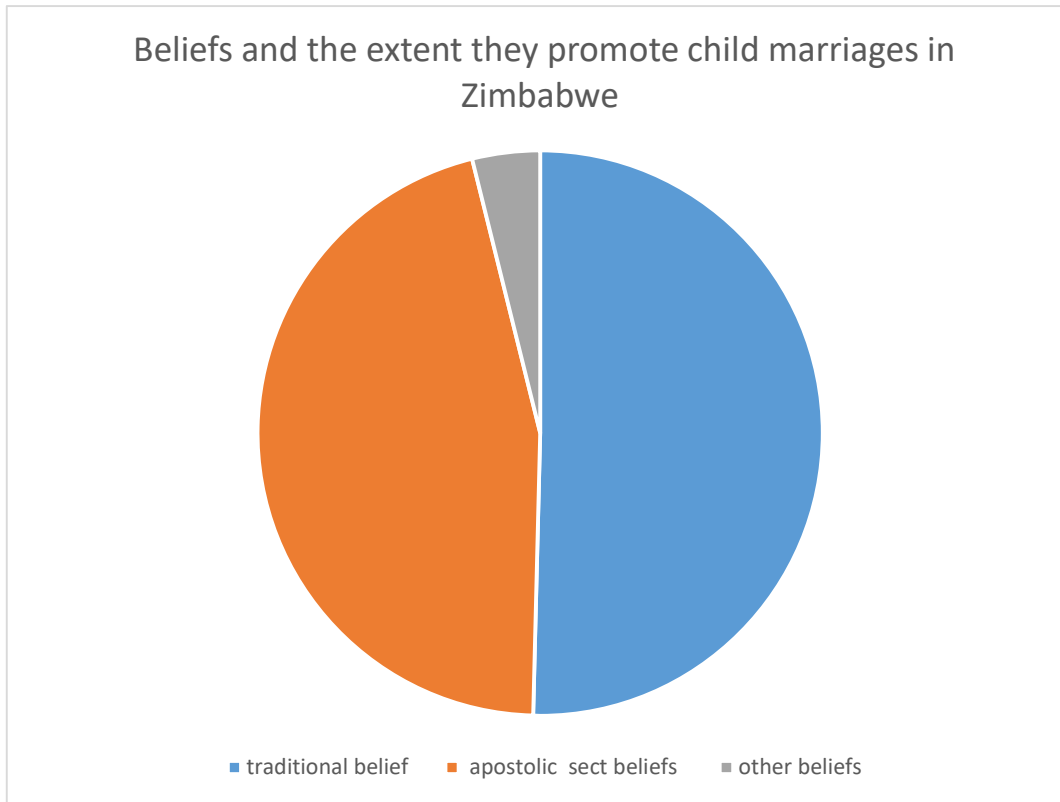
Date rape also escapes the legal radar because no section specifically sanction it. This form of rape is committed by a person who is in a relationship with the survivor. At times it occurs where their relationship has not officially developed. Sometimes it occurs on the first date when the people meet and the male forces himself on the girl or makes her drunk resulting in them having unplanned sexual intercourse. This type of rape, despite not being defined in Zimbabwean law, is a very common form of under the radar sexual violation within our jurisdiction. Parliament is the only institution that can redress this sad scenario by introducing a clause in the law that leaves no doubt in the minds of the citizenry and service providers that it is not a defense that parties were in a relationship or known to each other.

2. Culture and Religion

Date rape escapes the legal radar under the guise of culture. Most of the rapes involving survivors above 12 but below 16 are perpetrated by their boyfriends or aspiring boyfriends. If the survivor discloses to the guardian/parent, that a rape has taken place and the rapist is her boyfriend, arrangements are automatically made to take her to the boy’s residence as culture dictates that whoever deflowers a girl should marry her. Culturally, parents value virginity and once a girl is intimate with a man (including where she is raped) she has compromised family honor and the only way to redeem herself and the family is to marry the man responsible. Statistics by Zimstat shows that 33.7% of girls in Zimbabwe are married before they are 18. 5% of these are married before they are 15. (Zimstat February 2021)

The above statistics show that culture and religion are major drivers of child marriages. If it were to be put in the context of this paper, one can deduce that most of these child marriages could be a result of date rapes that are dismissed in the name of culture and or religion. According to the Women’s Access to Justice in the Context of Covid-19 Troicare May 2021 Report, rape cases are being reported to community leaders both traditional, religious and relatives. This scenario shows that the likelihood of cases of date rape being reported to the formal justice system in the Covid-19 era are slim. If reported to the community leaders, chances are that they will be handled and finalized at community level with perpetrators getting

away by merely paying a fine to the traditional leader in addition to being forced to marry the young woman.



Source: Unicef data updated February 2021

Thus when a date rape occurs, the woman decision is marred by self-blame, confusion and the conflicting legal and societal norms. The responsibility to report therefore falls away in the conflict between culture, religion and the law. This results in further abuse of the survivor. Thus, date rapes are swept under the carpet in the guise of a marriage and dismissed in the name of culture and religion.

ii) Gender stereotypes

Date rape is also fueled by gender stereotypes and negative cultural notions that expect women to resist sexual advances (regardless of their level of interest in pursuing them). One such gender stereotyping is a basic assumption that when a woman says 'NO' she means 'maybe' or 'yes' if you persist. Due to this assumption, men get credit for being sexually "aggressive," especially on a date. Further, when a man is proposing love to a woman, he doesn't expect her to say 'yes' the first time and does not take her 'No' as a 'Never'. Women who say 'yes', are viewed as lacking in morals or as loose women. Gender stereotyping therefore creates excuses for date rape among other violations.

Legal definition of rape

Rape is committed when a male person has vaginal or anal sexual intercourse with a female without her consent or knowingly or realizing the possibility that she has not consented¹⁸.

What is legal Consent?

¹⁸ Section 65 of the Code

The central element of various sexual offenses is consent. According to the schools' dictionary, consent is the act of agreeing to what someone wishes. It involves saying that one is willing and involves the giving of the permission for one to do something. A further interrogation of the word consent shows that there is more than one type of consent: informed consent, implied consent and vitiated consent.

In Zimbabwean legislation, the term consent is used and is also a key element to the charge of rape and unfortunately, the Zimbabwean legislator did not expand on what exactly they meant by consent. In South Africa consent is defined as agreement by choice with the freedom and capacity to make the choice¹⁹, meaning voluntary or uncoerced agreement to be sexually intimate with another²⁰. According to the research by the University of Pretoria, the South African Criminal Law (sexual offenses and related matters) Amendment Act 6 of 2012, consent refers to voluntary and unforced agreement. Thus it is an agreement between two parties to engage in a sexual activity, and that that consent does not need to be verbal.²¹

The research further revealed that the consent must be effectively communicated and obtained. According to the research by the University of Pretoria, consent should be explicitly communicated, meaning that Silence is not consent, previous consent is not consent, code of dress does not define consent, accepting social invite is not consent and the consent has no effect if it is given by a person who has no capacity to consent. This South African version of defining consent and interpreting consent is very broad and includes the legal issues involved in date rape like the fact that consent can be withdrawn at any stage during the act of intimacy.

The broad perspective taken by the South African Law sanctions the perpetrators of date rape who do so on the mistaken belief that because the girl has accepted a social invite, therefore she is willing to engage in a sexual activity.

In Zimbabwe the story is, unfortunately, different. Culture blames the girl for allowing herself to be lured into the boy's house or some private space. Knowing this, the girl knows she has no sympathizers and forgoes any responsibility to report. The legal issue of what form of consent is being referred in the Zimbabwean law makes the issue more complicated.

The Concept of Consent Explained

Vitiated consent

While the South African Law is broad, the Zimbabwean law in Section 69 of the CODE, only defines vitiated consent. Consent is vitiated where one uses violence or threats of violence, intimidation or unlawful pressure to induce the other person to submit²². It also involves fraudulent misrepresentation that makes one believe that something other than sex is about to happen²³, involves impersonating one's husband or lover²⁴, having sexual intercourse with someone who is asleep knowing that prior consent had not been given before going to sleep²⁵ and having sexual intercourse with someone who is hypnotized or

¹⁹ Section 74 of the Sexual offences Act 2003

²⁰ Sexual Offences in South Africa <https://hsf-briefs/sexual-offences-south-africa>

²¹ www.up.ac.za accessed 23/07/21

²² 69(1)(a)

²³ 69(1)(b)

²⁴ 69(1)(c)

²⁵ 69(1)(d)

intoxicated by drugs or alcohol to the extent that they are not able to consent to sexual intercourse, knowing the other person had not consented prior to being intoxicated or hypnotized²⁶.

These, according to the CODE, are the only scenarios that vitiate consent, and the question that arises is, do these scenarios actually cover all the situations that vitiate consent in real life? Does youthfulness and cultural beliefs, among other scenarios, not affect whether or not X actually consented to the act? However, according to Section 69 of the CODE vitiated consent is excluded from the acceptable forms of consent in cases of rape.

Implied consent

This is another form of consent that is not expressly given but is deduced. This form of consent greatly affects how court officials and the public view the issue of date rape. In Canada, implied consent is not a defense to rape. In a decided Canadian court, **R v Ewanchuk**, the court ruled that consent must be explicitly given.

In the United States, the courts must determine the woman's state of mind, such as her behavior during the rape and her character in general. This allows the defense to argue that implied consent was given taking into consideration the following, befriending, dating, cohabiting, or marrying the rapist. These are not provided for by the law but can influence the court to rule that there was implied consent.

In Zimbabwe, this form of consent is greatly considered, creating a conflict between the law and culture. It is generally accepted that women and girls are shy to expressly communicate what they want in a relationship, resulting in most date rapes because the males think that once they are in a relationship with a woman, they are by default entitled to do whatever they want with the girl because, 'she is my girlfriend'. This mistaken belief also affects the decision the elders or guardian of the survivor take upon being told that, 'my boyfriend raped me'. Instead of addressing the rape issue they address the cultural issue of the boyfriend marrying the girlfriend on the basis that the girl must have been a willing participant. This demonstrates that implied consent is affecting how cases of date rape are being decided in Zimbabwe.

Informed consent

According to the Nolo's Plain English law dictionary, informed consent refers to an agreement to do something or allow something to happen, made with complete knowledge of all relevant factual consequences such as the risks involved and other alternatives²⁷. This means consenting to something well knowing the consequences thereof. This could be an ideal form of consent in sexual offenses and there is need for the Zimbabwean law to expressly define consent. The law also provides that it shall not be a defense that the accused and the survivor are married.²⁸

This justifies a need for the Zimbabwean legislators to revisit the legal provision and be more specific about consent to decide the acceptable form of consent in issue in a case of rape and consequentially protect the girl child who is likely to fall into trap of implied consent.

The marital rape precedence

It provides for marital rape, which is closely related to date rape. Culturally, marriage is viewed as giving one spouse rights over the other, it brings in the issue of implied conjugal rights. Parliament in their

²⁶ 69(1)(e)

²⁷ www.nolo.com accessed 23 JULY 2021

²⁸ S68

wisdom saw it fit to clearly state that these conjugal rights are, like any other rights, limited in that consent for every individual engagement in sexual intercourse must be obtained. Despite the various cultural, religious, and societal views against this view that a husband can rape his wife, cases of marital rape are being prosecuted in our courts because of the legal sanction provided by section 68 of the Code.

Thus, the law correctly acknowledges that even in an official romantic, relationship rape can occur. If one must consider that the legal marital age is 18, and the law provides that an adult married woman can be raped by her husband, why then does the same law not provide for the young unmarried women who, though in a relationship, are also being raped by their boyfriends or intimate partners?

The legal issue to be considered in a marital rape is whether the survivor would have consented to a particular encounter of sexual intercourse notwithstanding the fact that the couple could have enjoyed consensual encounters before. With such a legal stance and view-point, it shall be argued that the legislator is putting a lot of pressure on the immature young women who are being penalized for being in a relationship and or for going to the accused's residence. In considering the cases of date rape, the courts, clouded by the fact that the survivor was in a relationship with the accused and the fact that she would have gone on a date with the accused willingly makes the law overlook the fact that what really matters is whether or not the survivor consented to the act.

If marriage does not give one a right to have sexual intercourse without the spouse's consent, it therefore follows that a boyfriend equally has no entitlement what so ever of having sexual intercourse without the woman's consent, and the law should clearly sanction such behavior by clearly stating that it shall not be a defense that the two were about to date, dating or in any other relationship that might appear to the parties as being romantically involved. If the law accepts the existence of marital rape, it should necessarily acknowledge the existence of Date Rape.

Cases of c/s 70 also raise a red flag in as far as the issue of consent is concerned, and are a major scapegoat for cases of DR. The law is clear that a child below 12 is incapable of consenting to sexual intercourse. It further provides that even if a child above 12 but is below 14 consents to the sexual intercourse, the appropriate charge is that of rape.²⁹ On the other hand, the marriage law provides that a girl above 16 but below 18 needs both the consent of the mother and father to be married³⁰. The Constitutional Court through precedent has created a law that no one below the age of 18 can enter into any marriage in Zimbabwe. The law thus acknowledges that all minds below 16 are youthful minds, that cannot be married and or make informed decisions in sexual intercourse related matters.

In contrast to this Constitutional view, the CODE provides that a girl above 14 but below 16, can consent to sexual intercourse. In the event that that happens, the charge of rape falls away and the law stipulates that a charge of having sexual intercourse with a minor should be preferred. The question that arises is that of consent. What form of consent is being considered here? Does that mind really appreciate the act and the consequences thereof? Is the consent given informed consent?

Given the above scenario, is the state not indirectly promoting date rape and other forms of rape because by pegging the age limit at that tender age it makes the young children be involved in some sexual relationships before they are mature enough to appreciate the implications of the sexual act. These young women are being raped by their dates and these DR cases are being trivialized as mere C/s 70 cases. This demonstrates a disturbing legal gap that exists in our law.

²⁹ Section 64 of the code.

³⁰ Marriage Act chapter 5;11

The law, on one hand (through case law), provides that the legal age of marriage is 18, yet the same law provides that when a young person has sexual intercourse with their spouse, no offence is committed. It can be argued that this provision is promoting child marriages through date rape.

The case for distinguishing of Date rape in Zimbabwe

In Zimbabwe a person who is raped on a date, is usually forced to marry the abuser. This marriage which can also be defined as forced marriage usually happens against the girls wish. Because the girl feels guilty that she has dishonored her family she accepts the punishment and quietly elopes. The girl enters marriage before she is physically, mentally, socially and economically ready for it. Her mental and physical health is undeniably compromised through this forced marriage. The girl's other rights, such as right to education and right to protection from abuse consequentially but inadvertently fall away. To rescue this girl, the law needs to clearly distinguish date rape from other forms of abuse just as it clearly identifies marital rape.

Even if the sexual encounter is not discovered by the parents, and the girl is not forced to marry the abuser, the girl remains scarred mentally and physically but is unable to seek legal recourse because she is not sure of the legal interpretation of this sexual encounter.

Research by Katswe Sistahood also reveals the social implications of date rape and these show that the majority of the child marriages were a result of date rape. The young women narrate that when the men they were in relationships with had raped them and after their parents found out what had happened, they were married off to the man. Once it is discovered that a girl is pregnant most parents send her to the man who is responsible for the pregnancy even in cases where the pregnancy resulted from date rape. Out of fear of their parent's reaction to the fact that they had been intimate with man, some young women had chosen to remain at the man's house as his wife. Thus, these cases of date rape were not reported and the few that were reported were ignored because of culture resulting in one of the major consequences of date rape, which is child marriages, or forced marriages and or unwanted pregnancies because the girls would not have been prepared for surprise unlawful sexual intercourse, and they would not have taken any contraceptives. The child marriages forced marriages and unwanted pregnancies undermine the rights of the girl child and the young women.

Katswe also found out that there are serious health implications of date rape. The girls below 18 years find it difficult to access contraceptives and, in many cases, they lack comprehensive sexuality education. As noted, before, in the NBSLEA only 2.7% of rape victims reported that they received medical or legal assistance. This means that 93% of women who experienced sexual violence including date rapes did not report the matter to the police and did not receive any Post Exposure Prophylaxis (PEP) or emergency contraception. Failure to access health services becomes a human and woman's rights issue which Parliament should be seized with.

Conclusion

It is submitted that the Constitution of Zimbabwe is the supreme law of the country and provides for the rights of the citizens, the functions and responsibilities of key justice actors and independent commissions as well as remedies for violation of rights enshrined in the Constitution. Parliament is one such institution. Section 81 provides that every child has a right to be protected against sexual exploitation. Section 19 places an obligation on the state to adopt reasonable measures to ensure that children are protected from all forms of abuse. The constitution also provides that anything that is done within Zimbabwe, that involves children, should be in the best interest of the child. Section 52 of the Constitution provides all

citizens with a right to personal security which include protection from all forms of violence from public and private sources. Young women and girls are failing to fully enjoy this right because of the legal gaps cited above. All laws, customs, traditional and cultural practices that infringe the rights of women are void to the extent of the infringement.³¹

Zimbabwean women and children are being negatively affected by the uncoordinated legal system which leaves out key issues like date rape. To remedy the above noted legal gaps in the management of cases of sexual nature and date rape, Parliament is called upon to ensure the laws are aligned to the Constitution.

RECOMMENDATIONS

As shown above, “Date” rape is a term colloquially used to refer to sexual assault by a person involved in a romantic or potentially romantic relationship with the victim or known to the victim. This form of rape is not legally provided for as is, yet the law provides against incidents that are closely related to it. The same law, unfortunately, also fuels the commission of date rape and abuse of the women and girls as demonstrated above. Faced with such a complicated legal tangle with procedural inefficiency, this paper makes the following recommendations:

Legal reforms

- **Definition of consent:** The Zimbabwean Law should clearly define what consent is, taking into consideration the ages of the people giving the consent and the effect thereto. The legal and procedural gaps that arise in cases of consent in cases involving persons in the plus 12 age group, which consent is not clearly defined and is in conflict with the basic legal principles of the best interest of the child need to be further explored. A broader definition like the South African one will go a long way in including cases of date rape.
- **Age of consent:** The legislators should consider making amendments that provide that having sexual intercourse with anyone below 16 is rape. Such a provision will protect the minors until they reach the age of 16. Such a provision will be in the best interests of the child.
- **Definition of a young person:** The legislators should further extend the definition of a young person as provided for by section 61 of the CODE to include anyone below 18. This will further protect the minors from sexual exploitation and forced marriages as a result of date rape.
- **Having sexual intercourse with a young person:** It is also recommended that the C/S 70 be revisited with the view of increasing the age to the effect that having sexual intercourse with a young person includes having sexual intercourse with someone above 16 but below 18.
- **Date rape:** The marital rape clause could be broadened and avoid being only specific to marriage. It shall not be a defense in any sexual offense that the parties were in a previous, present sexual or other relationship. Such a clause will provide for all kinds of rape that occur in both relationships, marital and dating. The high court in its wisdom in the case of High Court judgment of the **S v Musumhiri HH-404-14** where the learned Judge observed that on appeal against conviction, the court had to;
“ look at the case not only from the perspective of the convicted but also that of the complainant who experienced the rape especially in cases where the parties are known to each other as in such cases precisely justice is usually hampered when the convicted takes advantage of the fact that the two, were known to each other, the conduct of their victims fall short of the standard

³¹ Section 80(3) of the Constitution of Zimbabwe.

which society has relentlessly crafted in terms of the expected behavior of its ideal rape victim. She must scream very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim. If she knows the assailant, she instantly loses credibility, and the understanding is that she was not raped. It is the duty of the court to assess an application unfettered by such dangerous myths which can clearly threaten the quest for substantive justice”

Thus, the Judge exposed the procedural challenges that are likely to be caused in interpreting the law and assessing the evidence in rape cases involving persons who are known to each other. Hence a legal provision as suggested will go a long way in ensuring the intention of the legislature of protecting potential victims from rape by persons known to them thereby curbing the menace of date rape.

- **Alignment of all Laws.** There is a need for the alignment of all laws in as far as management of cases of a sexual nature is concerned .The constitution, the Criminal Codification and Reform Act, the Criminal Procedure and Evidence Act, Termination of Pregnancy Act, Children Act should all speak consistently with regard who a child is and the need to protect the children all being guided by the rule that the best interests of the child are of paramount importance. All laws and or procedures that are not in the best interest of the child should be reviewed.
- **Termination of pregnancy and related issues:**
 - 1)*Broadening of the unlawful intercourse in terms of Termination of Pregnancy Act*
will go a long way to protect the young girls who fall pregnant as a result of date rape which are disguised as having sexual intercourse with a young person. In terms of the Termination of Pregnancy Act, such pregnancies cannot be terminated, a convict of having sexual intercourse with a young person can be incarcerated for 10 years imprisonment. Thus, the minors despite being date raped, are being forced to keep these unwanted, unplanned pregnancies, and one wonders if such a legal stance is in the best interest of the children as envisioned by the Constitution.³²
 - 2)*Availability of Post Exposure Prophylaxis (PEP) on demand*
The minors are disadvantaged not only due to these gaps in the legal system but also because they have limited access to comprehensive sexual and reproductive health information and services. The policy environment in Zimbabwe in terms of sexual and reproductive health rights has been mainly dominated by discourse on the prevention and management of HIV while Adolescent Sexual and Reproductive Health Rights (ASHR) ranks low on the priority list. Although there is a strategy on adolescent sexual health, there are several cultural, economic, and social barriers that prevent girls from accessing contraception and sexuality education. Teenage sexual activity is highly stigmatized, and many health providers are reluctant to give contraception to minors.
- **Marriage laws:** Harmonization of marriage laws and adoption of the SADC Model Law on Child Marriage could go a long way in curbing child marriages. Firstly, a new marriage law could broaden the meaning of marriage to include even cohabitation arrangements. Many of the girls who experience date rape cohabit with the men involved without going through the formal customary or civil marriage processes. This effectively means under the current law that they are not legally married hence the issue of child marriage would not suffice. The situation is worse if the girl is

³² Section

above 16 years, then even a charge of having sexual intercourse with a young person would not suffice. The issues about child marriage, left unclear in the Domestic Violence Act, could be elaborated further in a new marriage law and through the adoption of the SADC Model Law. These include persons to be charged in the case of child marriage. Section 17 of the SADC Model Law creates an offence of contracting, solemnizing, aiding, abetting, promoting, permitting, coercing, or forcing the betrothal or marriage of a child. Where a parent is involved in any of these this it is treated as an aggravating factor before a court of law. Finally, these would ensure that a wider definition of child marriage that includes betrothal is adopted.

Mindset and Behavioral change advocacy

- **Societal mindset change:** There is need for the change of the society mindset about date rape. This can be achieved by including age-appropriate data in the school curriculum to ensure that we catch them young in as far as respecting one another is concerned.
 1. **Empowerment of the young women:** There is need for empowerment of the young women on when it is best to enter romantic relationships and that they should be free to express themselves and clearly articulate what they want and what they do not want. The young women should also be empowered to safeguard themselves and avoid trusting the men 100%. Some positive cultural practices like group dating, avoiding being alone with a male and talking about relationships with responsible minors or church elders could go a long way in producing young women who are respectful and informed about sexual reproduction activities.
 2. **Empowerment of the young men:** The boys and men should be taught to respect and protect women and their desires and not be aggressive towards them. Research has revealed that different individuals and groups experience sexual violence in different ways and legal prosecution at a regional, international, and national level will serve as a deterrent to some, but fear of criminal reprisals is insufficient to address the problem if people do not understand what is wrong with their behavior. Thus, there is need for community awareness programs taking into consideration key community leaders like the chiefs, headmen, members of parliament and church leaders just to mention a few. Clear warnings that sexual and gender-based violence will not be tolerated. In a survey done by ICJ on 27 victims and or perpetrators of sexual offenses, and or persons who may be involved in different forms of formal or informal interaction with them, the participants were of the view that, potential perpetrators need to have an understanding of the full extent of their crimes and of the impact these crimes have on their victims. "I have met many young men who have been convicted and sentenced for many years for sexual offenses, but they told me they actually did not understand why they were there; they do not know what they did." Another participant said working with and developing strong societal role models who can encourage men and boys to live up to the minimum values of gender equality that we aspire to be an effective means of changing attitudes too. There is a need to redefine masculinity in the current era.
 3. **Empowerment of service providers:** Professional training of Police officers, Prosecutors and Magistrates will go a long way in ensuring that the cases of date rape are accordingly investigated, prosecuted and judgments passed taking into consideration the various legal and societal variables raised above. When assessing whether there was consent, a victim's background, and her behavior at time of commission of offence, should not influence the perceptions of the police or the court. In cases of date rape, it should not

be difficult to claim that consent was absent despite the fact that there might have been consent to some sexual contact but not sexual intercourse. A person who accompanies his or her date home (or invites him or her in), must not be misinterpreted as to having consented to the act of sexual intercourse. Dress code, behavior, consent to some sexual contact—all may be raised in a date rape trial but should not be misconstrued as affecting the credibility of an alleged rape victim. The withdrawal of cases involving children below 18 years where the charge is rape or having sexual intercourse with a young person should be outlawed.

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