# TOWARDS CURBING DOMESTIC VIOLENCE IN ZIMBABWE: A CRITICAL ANALYSIS OF THE SENTENCING PATTERNS OF DOMESTIC VIOLENCE OFFENDERS IN HARARE, MBARE AND CHITUNGWIZA MAGISTRATES' COURTS

**BY**

**Fourie REVAI**

**Supervisor: Ms Rosalie Katsande**
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## ABSTRACT

This research seeks to reduce the incidence of the serious gender-based crime of domestic violence (DV), perpetrated most commonly by men against women, by proposing various recommendations in order to effect improvements to the current unsatisfactory sentencing trends of judicial officers (particularly magistrates, the majority of whom are male) under the Domestic Violence Act which, despite its passing 2007, has failed to reduce the scourge. Choosing as her research site the Magistrates' Courts of Harare, Mbare and Chitungwiza, the researcher (a women's rights activist working for the Zimbabwe Women Lawyers Association who has legally represented women complainants in DV cases) critically analyses this problem using the grounded women's law approach. This is a unique methodology which harnesses other complementary approaches as it directs the research uncovering, as it progresses, how the various worlds of the protagonists involved in the sentencing process intersect and influence the lived realities of women complainants of DV, a unique and often recurring crime of escalating proportions which takes place within the intimacy of the home between parties who share a fragile relationship of power, trust and responsibility. Research evidence gathered includes that of complainants and assailants, judges, magistrates, clerks of court and prosecutors (the majority of whom are also men), observations of proceedings and the perusal of court records, various other legal resources and literature. The research finds that, left to their own seemingly unfettered discretion, most magistrates are often blindly motivated by their deep-rooted patriarchal social and cultural beliefs when they hand down the majority of their extremely lenient sentences (in the form of fines and community service) against perpetrators of DV. One of the key indicators of their discriminatory attitude against women victims is that in the sentencing process they often treat the crime of DV itself as a mitigating (rather than an aggravating) factor in favour of (as opposed to against) its perpetrators. Their trivialisation of this serious crime undermines and, sadly, even sometimes subverts the very local and international legal safeguards (contained, e.g., in the DV Act, the Constitution and CEDAW) which they, as judicial officers, are duty bound to enforce. As a direct result, court sentences tend to incite rather than deter male perpetrators of DV. So, women victims find themselves disillusioned and further victimised by a judicial system to which they only reluctantly turn having exhausted all domestic social and cultural remedies in a desperate and final attempt to protect themselves against repeated serious abuse. The research concludes with its recommendations that the courts are only likely to pass more deterrent sentences which will help to reduce the incidence of DV if dedicated DV courts are established staffed by specialised officers effectively trained in the treatment of DV cases and if clear sentencing guidelines are established and minimum mandatory sentences imposed

## Declaration

I, Fourie Revai, certify that this dissertation is my original work; it is an honest and true effort of my personal research. I certify that the work has not been presented elsewhere before for any other thesis.

Signed……

Date……

This dissertation was submitted for examination with my approval as the University Supervisor

Signed…….

Date…….

## *Dedication*

*This work is dedicated to my husband Peter and my son Charles Tanatswa.*

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## Acronyms

| | |
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| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| DEVAW | Declaration on the Elimination of Violence against Women |
| ZWLA | Zimbabwe Women Lawyers Association |
| DVA | Domestic Violence Act |

## List of human rights instruments

Beijing Platform and Programme for Action

Convention on the Elimination of all forms of Discrimination against Women

Declaration on the Elimination of Violence against Women

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

The African Charter on Human and People's Rights

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

SADC Protocol on Gender and Development

UN Declaration on the Elimination of Violence against Women

## List of statutes

*Zimbabwe*

Constitution of Zimbabwe Amendment (No. 20) Act 2013

Criminal Law (Codification and Reform) Act (Chapter 9.23)

Criminal Procedure and Evidence Act (Chapter 9:07)

Domestic Violence Act (Chapter 5:16)

*South Africa*

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Republic of South Africa)

Domestic Violence (Republic of South Africa) Act 116 of 1998

## List of cases

*Carmichele v Minister of Safety and Security & Anor* 2001 (4) SA 938 (CC)

*Ntlele* 1993 (2) SACR 610 W

*Opuz v Turkey* (33401/02)

*R v Sergeant* (1974) 60 Cr App R 74

*S v Baloyi* 2000 1 SACR 81 (CC)

*S v Chinzenze* 1998 (1) ZLR 470 (H)

*S v Ncube* HH-335-13

*S v Madembe and Anor* HH-17-03

*S v Malgas* 2001 (2) SA 1222 (A) at 1234-25 (S. Aft.)

*S v Mpofu (2)* 1985 (1) ZLR 285 (H)

*S v Munyakwe and Others* HH-92-93

*S v Shariwa* HB-37-2003

*S v Mushuku* HB-95-2004

*S v Zinn* 1969 (2) SA 537 (A)

*Veen v The Queen (No 2)* (1988) 164 CLR 465

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## Executive summary

The topic of domestic violence has received ubiquitous attention and concern around the globe. Each and every country has responded to the plague of violence in the home in different ways. Laws have been enacted to try and curb domestic violence. Closer to home, the legal framework concerning violence against women was enacted following the ratification of international instruments such as the Convention on Elimination of All Forms of Violence against Women (CEDAW) and regional human rights instruments such as the Southern African Development Community Protocol on Gender and Development (SADC Protocol). The new Constitution of Zimbabwe has also brought a significant and most welcome dimension to the problem in that it clearly and explicitly recognizes the rights of women in both the private and public sphere with specific provisions on domestic violence. The old Constitution employed the proverbial carrot and stick approach. While it provided for non-discrimination on the basis of gender, the old Constitution of Zimbabwe still retained and permitted, under section 23(2), discrimination on the basis of personal law and customary law. One is then compelled to ponder why domestic violence remains on the increase despite the existence of institutions and legal provisions attempting to eradicate it. Further, one may be forgiven for thinking that there is something in the legal provisions and the judicial process that needs interrogation and possible review. This is what informed the present research: Could there be error in the way offenders are sentenced? This main question, together with related considerations, seeks to be answered in this piece of work.

The basic functions of penal provisions are retribution, reparation and deterrence. Having penal provisions in an enactment is not enough without the necessary guidelines to ensure that the mischief which the enactment is targeting is properly tackled. The sentencing patterns in domestic violence cases need to be reflective of the seriousness of such cases. Otherwise all efforts will amount to nought and cases of domestic violence will continue to increase. The sentencing process in judicial proceedings is very significant for it provides the benchmark against which the effectiveness or otherwise of any law will be measured. Further, the obligations placed on national authorities consequent upon the government's acts of ratification of international instruments ought to be respected in a meaningful manner so that the crime of domestic violence is not trivialised by the courts. This research is based on the sentencing patterns in domestic violence cases in order to establish whether or not the

courts are treating the crime of domestic violence with the seriousness it deserves and what effects such sentencing patterns have on the incidence of domestic violence. Since the ultimate purpose of the law on domestic violence is to assist in curbing violence in the private sphere, this will only be possible if sentences imposed on offenders are of a sufficiently deterrent nature.

Traditional methodological approaches were employed in gathering information for this study. While some of the research established that magistrates are generally lenient in sentencing convicted domestic violence offenders or accused persons, some offenders felt that this was not the case. The truth, however, is that it was rare to find a case in which the maximum prison sentence had been imposed on a perpetrator who had been found guilty of committing serious acts of assault.

Furthermore, it was confirmed that domestic violence is recurring in nature. Most of the complainants interviewed indicated that while the assault about which they were complaining was not the first incident of violence they had suffered, it might be the first one that had been reported. I also noted that some of the offenders had previous convictions. The study found that inherent social attitudes and beliefs also influence the type of sentences that are passed in domestic violence cases as some magistrates clearly indicated that it is very difficult to separate themselves from such deep-rooted beliefs from their day to day work. Some complainants who are also socialized to use other methods of dispute resolution had difficulties in following the matters to their logical conclusion resulting in a withdrawal of cases based on a consideration of a number of other factors. These factors include dependency on the perpetrator for financial support and lack of agency. Based on the statistics of the cases, the outcome of the research determined that men commit most crimes of domestic violence.

The principle of recidivism also came out clearly in the process of information gathering. Most offenders keep repeating their undesirable behaviour despite experiencing negative consequences as a result of such action. Therefore, unsurprisingly, some of them had previous convictions for domestic violence. While the Domestic Violence Act contains provisions which are to a large extent deterrent in nature, the prevailing sentencing patterns have tended to show a generalized and trivialistic tendency by judicial officers towards domestic violence crimes, especially when their victims are women. Although it is important

to remember that the spirit behind the Domestic Violence Act is to encourage families to live together in harmony, the Act's effectiveness lies in judicial officers' properly using the sanction of the law to hold accountable those within the family who seek to break up the family by breaking the law.

A recurring idea throughout this research was the need to address domestic violence in a more aggressive and effective way as cases of such nature continue to escalate and sometimes even result in the extremely serious crimes of rape and murder. Deficiencies were found not only in the law itself but within the structures and their administrators which have been set up to curb the violence. The remnants of deeply seated harmful cultural practices still haunt our society and these have been a breeding ground for acts of violence within families. Therefore, there is a need for the implementation of interventions other than law reform which require transformative strategies.

As a way forward the research recommends amendments to the sentencing provisions of the Domestic Violence Act so that they have mandatory minimum sentences. Deviations should only be permitted where special circumstances exist. Due to the intimate nature of domestic violence cases there is also a need for special guidelines to help judicial officers through the process of how to determine an appropriate sentence and what sorts of factors should be taken into account in such a process. Making generalisations should be avoided at all costs. Improvements in the technological front are also long overdue with the provision of click-on centralized conviction data bases being chief. For the transformative recommendations, it is suggested that judicial officers need to be trained to be gender sensitive as this will go a long way to changing attitudes and perceptions that affect their general outlook of domestic violence as a societal evil.

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# CHAPTER 1

# 1.0 INTRODUCTION

## 1.1 The research in perspective

The year 2007 represents a fundamental milestone in the Zimbabwean legislative framework. In October 2007, the Legislature enacted the Domestic Violence Act (Chapter 5:16) after almost ten years of lobbying by various human rights groups, with Musasa Project at the fore. The Act could not have come at a better time given the incessant increase in domestic violence cases.[1] General criminal law had failed to combat this societal scourge and targeted specialised legislation had been designed to reduce and eradicate the crime. It is now almost seven years since the enactment and implementation of the Act. It should be pointed out at the outset that research has been conducted elsewhere on the causes and effects of domestic violence and the provisions of the Domestic Violence Act itself. However, while this area of the law has thus become a fertile ground for academic research, the scourge of domestic violence still continues to erode the moral fabric of our society. We must then ask ourselves how and where are we going wrong? Therefore, further intrinsic interrogation of the subject matter of domestic violence is called for.

Another great breakthrough was realized once more on 22 May 2013 when the country enacted a new Constitution, the Constitution of Zimbabwe Amendment (No. 20) Act 2013. The Constitution explicitly places a duty on the state to protect and foster the institution of the family and must endeavour within the limits of the resources available to it to adopt measures for the prevention of domestic violence.[2] Further, section 52 provides that every person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from both public and private sources.

As a women's rights activist, I have observed and noted as a cause for concern the way in which domestic violence cases are treated by the courts of law. This surely needs interrogation. Working as a Programmes Officer with the Zimbabwe Women Lawyers

[1] In 1998, a survey by Musasa Project revealed that one in every four women has been a victim of domestic violence of a physical nature in their lifetime.

[2] Section 25 of the New Constitution of Zimbabwe.

Association (ZWLA)[3] and judging by the reports emanating from various media releases, it has become apparent that domestic violence cases of a criminal nature continue to be on the increase. However, this is not to suggest that women are always victims. Some are also caught on the wrong side of the law. I have thus set out to investigate and research into the sentencing patterns in domestic violence cases. They tend to show that perpetrators of domestic violence in Zimbabwe are given different sentences with regard to crimes of domestic violence and they are more often than not trivial and of an insufficiently deterrent nature. At Zimbabwe Women Lawyers Association, I observed through court monitoring sessions, that these sentences are not systematic and usually depend on the philosophical world outlook of the presiding magistrate of the day. The research will thus investigate the impact of criminal law in domestic violence cases, in particular the sentencing patterns, as measured against the spirit which motivated the enactment of the Domestic Violence Act in order to examine and establish what benefits are actually being derived from its implementation.

Of late domestic violence has gained international recognition in the realm of human rights protection. It is perceived as a violation against women's rights mostly because women are recorded as its most common victims (while its most common perpetrators are men) and because women bear the brunt of violence in the domestic sphere. Such gender based violence is an act of discrimination against women. Zimbabwe, being a party to a number of international instruments, including CEDAW, has an obligation under international law to adopt appropriate legislative and other measures, including sanctions, where appropriate, prohibiting all discrimination against women.[4] The law fails to achieve its own goal of equal treatment through its failure to recognize and respond to domestic violence as a violation of a women's right to be free from violence (Mauliajhrd, 2004). Reports have shown that violence in the family setting usually occur more against women than men, and many studies on domestic violence have thus focused on violence against women. This research is biased towards this supposition in that it tackles violence against women by scrutinising how the courts sentences offenders who are mostly men.

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3 Zimbabwe Women Lawyers Association is an organisation of female lawyers offering free legal services to indigent women and children and the organisation is based in Harare and Bulawayo but also carries out its activities in a number of districts in Zimbabwe.

4 Article 2(b) of the Convention on the Elimination of All Forms of Discrimination Against Women.

Sentencing justices often fail to tailor an appropriate sentencing response that takes into account the particular background of the offence and the relationship between the perpetrator and the victim. In fact, I observed from the reports by women who visit ZWLA that the relationship between the parties to domestic violence cases is often relied upon as a factor in the mitigation of sentence, a practice which tends to trivialise the crime. Feminist scholars and activists have argued that the application of criminal law to cases of domestic violence has encouraged both public condemnation of violence in the intimate sphere and police accountability for the protection of women (Schneider, 2000). In short, the approach to sentencing reflects a trivializing tendency by judicial officers.

Research has shown that the imposition of fines for offenders of domestic violence cases is not deterrent enough and in most cases the tendency is for the perpetrator to want to repeat the offences (Makahamadze, 2011). As a result, some victims are discouraged from reporting the crime due to a lack of confidence and satisfaction in the justice delivery system. Domestic violence is recurring in nature; it is not an isolated event, but rather a pattern of repeated behaviour against the same victim by the same perpetrator. Longer sentences may serve the purpose of giving victims time to move on by finding safety and deterring would-be offenders from repeating the crime. Improved sentencing helps the victim to break the circle of violence by moving on with their life. Without more enlightened longer sentences, the abuser and victim are, post-release, at a high risk of falling back into the cycle of violence. Because domestic violence relationships are complicated (marked by domination, control and submission) where victims have often been isolated from friends and family, it can be difficult for victims to safely break the cycle of violence on their own (Mahoney, 1991).

The study also seeks to investigate and interrogate the attitude of judicial officers towards offenders and victims in domestic violence cases. Regard will also be paid to the attitudes of judicial officers and examine whether such have an impact on sentencing patterns. The study thus attempts to understand the rationale of judicial officers when they preside over domestic violence cases. Hence, it is important to for the purposes of a deeper understanding of the above to interview officers of the law and evaluate their court judgments and the statements they make.

## 1.2 Identifying the problem

According to the Zimbabwe Demographic Health Survey statistics of 2010 to 2011, 42% of women in Zimbabwe have either experienced physical, emotional or sexual abuse at some point in their lives. One may be inclined to wonder why we have such alarming figures in the face of a legislative framework which is supposed to curb violence. The answer, however, is not a straight forward one which explains the reason why there are so many studies on domestic violence. One thing is certain: Since the scourge of domestic violence continues to wreak havoc within our society, the need remains to have effective interventions to reduce it. In her study of domestic violence in Zimbabwe, Armstrong (2000:135) noted that the country is characterized by changing norms, values, changing attitudes towards women, gender roles, sexuality and marriage and changing socio-economic conditions. All these factors, she argues, consistently lead to stresses and confusion in marriages, in families and in sexual relations and these stresses and confusion may lead to violence as men attempt to reassert their dominance.

In Zimbabwe, as already mentioned, there is a dedicated statute to deal with domestic violence. When its Domestic Violence Act was passed it complied with the human rights standards enshrined in various human rights instruments to which Zimbabwe is a party. It is now almost seven years since the inception of the law but domestic violence cases continue to rise even if one judges by press reports alone. Is it the case, then, that the law has failed us? This surely cannot be true. There is a need for introspection into the law and the justice delivery system to see where the problem or hindrance lies. The very fact that a dedicated Act was promulgated reflects the seriousness with which the country's policy makers consider the scourge of domestic violence. The reality in the courts, however, has been the converse. Cases of domestic violence have not been treated with the seriousness that one would have expected particularly if regard is had to the sentencing patterns. And this problem has motivated the present study. It would seem that the particularization of domestic violence as a form of violence has not achieved much.

Under the common law there are guidelines to govern the sentencing of offenders who commit violent crimes. The Domestic Violence Act, however, does not provide any similar sentencing guidelines and this has also been a major contributing factor to the problem of

erratic sentencing patterns by judicial officers who are given a wide discretion to decide an appropriate sentence/remedy in any particular case.

This study, therefore, seeks to explore the possibilities of curbing domestic violence through regularising the sentencing regime. The sentencing of offenders serves many purposes in the criminal justice system. One fundamental aim is to seek to pass a sentence which will prevent the further commissioning of the same offence without forgetting the need for at least some element of retribution against the offender. It is important to caution that sentences must not always be long for them to be effective. Stiff penalties that meet the exigencies of a particular case suffice and are of a sufficiently deterrent quality. Given the uniquely intimate nature of domestic violence cases, one would expect them to attract the most comprehensive sentencing guidelines in the law. Alas, this is not the case in our jurisdiction and so little, if any, deterrence has been achieved. The thrust of this research is, thus, to analyze how magistrates reach decisions in domestic violence criminal matters. This will also require an investigation into the attitudes of the judicial officers and how these affect the outcome of matters over which they preside. Ultimately, the research intends to show whether there is a problem in the law or whether the attitudes of judicial officers need to be re-focused. In the sentencing of most domestic violence cases it is often not clear whether the nature of the relationship between the offender and the victim actually played a role in determining the leniency of a sentence (Easteal and Gani, 2005). From the cases presented by some female complainants at ZWLA, it emerged that there is no uniformity in sentencing and it only depends on the presiding officer and the factors he considers pertinent in arriving at a decision. Some are lenient while others are not. The type of sentences reflects a trivialising of the crime despite the fact that there is in place a dedicated piece of legislation that provides for a higher threshold in sentencing.

## 1.3 Delineation of the study

Extensive research was conducted in Harare and Chitungwiza. Specific focus and direction was on the offenders in domestic violence crimes and the judicial officers who presided over their cases, the premise being that sentencing can be best examined from the angle of those who are sentenced and those who are sentencing. In Harare, the target was Harare and Mbare Magistrates' Courts, Musasa Project, Attorney General's Office, High Court of Zimbabwe

and the Zimbabwe Women Lawyers Association.[5] In Chitungwiza, the research zeroed in on the Chitungwiza Magistrates' Courts Criminal and Civil Divisions.[6]

The research locations were chosen based on various factors which include proximity for ease of access to the different areas. It was also important to have three courts to allow for a comparison of the sentencing patterns. In addition, most of the complainants also visit ZWLA for assistance and I obtained information there as well. Harare and Chitungwiza represent the most populated cities in Zimbabwe, hence, the statistics of cases are also high.

## 1.4 Objectives

The research is aimed at the following:

1. To assess the sentencing patterns in domestic violence cases in selected courts in Harare and Chitungwiza.
2. To examine the factors that judicial officers take into account in passing sentences in domestic violence cases.
3. To assess whether men commit most of the domestic violence cases.
4. To assess if there are any emerging patterns in the sentencing of domestic violence cases, e.g., reluctance to incarcerate, imposing fines, community service, etc.
5. To assess the impact of sentencing on offenders in selected domestic violence cases.

## 1.5 Research assumptions

The underpinning suppositions to the present study are based mainly on my personal experience in interacting with the women at ZWLA and representing women in court in domestic violence cases.

1. The sentencing in domestic violence cases is too lenient as compared to the provisions of the Act.

[5] Mbare Magistrates Court is a few kilometres from town and Musasa Project, the new government complex and the High Court are all in town. ZWLA is in Fife Avenue, in Harare, about 2 km from the CBD.

[6] Chitungwiza is about 50 km from Harare.

2. The sentencing patterns in domestic violence cases are influenced by the attitudes and expectations of the complainants as well as the inherent social attitudes and beliefs of judicial officers themselves.
3. Men commit most of the domestic violence cases.
4. The criminal remedies are of an insufficiently deterrent nature to curb domestic violence.
5. There are no standard sentencing guidelines in domestic violence cases.

## 1.6 Research questions

Corollary to the assumptions, the following questions informed the interviews undertaken:

1. Is the sentencing in domestic violence cases too lenient as compared to the provisions of the Act?
2. Are the sentencing patterns in domestic violence cases influenced by the attitudes and expectations of the complaints as well as the inherent social attitudes and beliefs of judicial officers?
3. Do men commit most of the domestic violence cases?
4. Are the criminal remedies sufficiently deterrent in nature to curb domestic violence?
5. Are there standard sentencing guidelines in domestic violence cases?

## 1.7 Validation of the study

In my work as a legal officer at ZWLA I have come across a plethora of cases affecting women in the home sphere. In many family law cases that I have handled, I have realized with great concern that be it divorce, deceased estate cases or custody matters women face some degree of violence in one form or another. Women are strongly advised to report such cases to the police. More often than not client experience has shown that most women are not satisfied with the outcome of the court cases. As a result, most will suddenly return to the familiar shell of dependency upon the abuser and so find themselves trapped in the vicious cycle of abuse. I have thus always had questions regarding the sentencing in such cases. As adverted to earlier the fundamental query being whether or not the sentencing is of any assistance both on the deterrent as well the societal confidence front. As mentioned earlier, my fundamental question has been whether or not current sentencing patterns are fulfilling

their intended purpose of deterring abusers as well as instilling the confidence of victims and the public at large in the ability of the justice delivery system to protect them.

There is no doubt that extensive research has been done on the subject matter of domestic violence. The subject has been tackled from purely legalistic, psychological and cultural standpoints. The international community has weighed in heavily with a number of very illustrious treaties and recommendations on the prevention of domestic violence and the protection of its victims. Locally, the enactment of the Domestic Violence Act has been Zimbabwe's major milestone in the detection, treatment and prevention of domestic violence.

Admittedly, the Act has to date not been fully implemented due mainly to economic challenges. Some essential resources, such as safe houses, are yet to be provided and the government has, to a large extent, effectively abdicated its duty to non-governmental organisations. Thus, the country has had to grapple with the situation as it is. One thus would have hoped that the scourge of domestic violence in the present circumstances would be addressed by sentencing. Without being necessarily scientific, studies have shown that the greatest weapon in dealing with humans is fear. Sentences for domestic violence cases ought to instil that fear in would-be offenders if something is to be achieved in the fight against domestic violence. The writer has thus sought to contribute to the discourse of domestic violence by examining the sentencing patterns in the selected Magistrates' Courts in order to establish factors influencing the same. It is fervently hoped that this study will present a need to revisit the sentencing provisions of the Act as well as to re-focus the rather warped view of sentencing of domestic violence cases by most judicial officers.

## 1.8 Defining domestic violence

Simply stated, domestic violence is violence that happens within a domestic sphere or in the home. This means that it is violence between people who are somehow related. The definition also includes a former spouse or boyfriend or girlfriend not necessarily living under the same roof. The Domestic Violence Act (Chapter 5.16) defines domestic violence as an unlawful act, omission or behaviour which results in the death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent.[7] However, section 4 of the Act

[7] Section 3 of the Domestic Violence Act (Chapter 5:16). According to the Act, the acts include physical abuse, sexual abuse, emotional verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, malicious damage to property, forcible entry into the complainant's residence

states that emotional, verbal, psychological and economic abuse does not constitute an offence. This, therefore, means that any other abuse defined in section 3 falls under general criminal law. The above definition of domestic violence shall, thus, serve as a working definition. Special attention shall be given to cases that are criminalized under the Act, not forgetting, however, other codified cases such as assault, attempted murder, murder and sexual abuse as these might also be committed within the confines of the home and by people who are related to one another.

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 and abuse that is derived from cultural or customary rites or practices that discriminate against or degrade women.

# CHAPTER 2

# 2.0 THEORETICAL AND CONCEPTIONAL FRAMEWORK

## 2.1 Introduction

This chapter provides the conceptual framework of the subject matter of domestic violence in general as it is addressed within various human rights instruments, national laws and policies. The section will explore the different concepts applicable to this research and they are the principles of sentencing and the issue of mandatory minimum sentences. Further, it will also touch on previous research in the area, thereby providing a background to the present research. An explanation of sentencing of offenders in general will be given with a particular emphasis on sentencing patterns in domestic violence cases. Inspiration will also be drawn from other institutions and jurisdictions. The chapter will also establish a theoretical basis for the research and help determine its nature. The process involves analysing a selection of a limited number of works that are central to the area. The basic purpose is to provide a context for the research, to justify it, show where it fits into the existing body of knowledge and how it enhances its value.

## 2.2 Domestic violence from a general perspective

Domestic violence is a form of gender based violence. In recent years domestic violence, as one form of violence against women, has been examined using a human rights framework with much of the additional discussion centring on the applicability of international law to domestic violence. Debate has also centred on the purported private nature of domestic violence and how such violence can be addressed through international law (Amnesty International, 2005). Domestic violence itself violates the inherent dignity, the indisputable right to freedom from fear and the equal rights of men and women. Despite the existence of the rich international base on domestic violence, Zimbabwe took almost ten years of expansive and intense lobbying for the current Domestic Violence Act to be put in place let alone to be fully operationalised. The police had become notorious for sending away victims of domestic violence in the misplaced belief that such matters were best solved at the family level. Women were the most affected and suffered the most. This shows a resistance and reluctance to regulate ‘what happens in the home’. It has also been difficult to recognize such violence as a violation of women’s human rights internationally. Hence, conceptualization of

the subject has been problematic. Thus the link drawn between violence against women to human rights is rooted in the movement to recognize 'women's rights as human rights' (Bunch, 1990) and this is well articulated in the different human rights instruments.

In conducting the research insights were drawn from human rights instruments that Zimbabwe has signed. The international community has developed frameworks such as declarations, conventions, treaties and other instruments to address domestic violence (Oguli-Oumo, 2002). Though these are not automatically binding, they provide a framework within which countries can operate. It is important to note, however, that some of the prescriptions of the human rights instruments are part of international customary law. In terms of section 326 of the Constitution of Zimbabwe Amendment No. 20, Act 2013, customary international law is part of Zimbabwean law. In this regard, states are under a positive duty to prevent and punish crimes related to violence in the home. In light of the above, state parties must ensure that the sentencing in domestic violence is aimed at making the sentences deterrent in order to curb domestic violence cases of a criminal nature. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) created an international definition of discrimination.[8] In 1992 the CEDAW Committee adopted General Recommendation 19 in which it confirmed that violence against women constitutes a violation of their human rights. The CEDAW Committee stipulated measures that states parties should take to ensure that women are protected from violence. In terms of article 4(1) of the Recommendation, states parties are expected to take effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including violence and abuses in the family.

The SADC Protocol on Gender and Development states that legislation should eliminate practices which are detrimental to the achievements of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto and eliminate gender based violence.[9] Having deterrent sentences is no doubt one of the most fundamental and effective ways to eliminate violence against women. South Africa has a Domestic Violence Act which is similar to that of Zimbabwe. The Zimbabwean Act borrows a lot from the South African piece of legislation. In the case of *Carmichele v Minister of Safety and Security & Anor Centre for Applied Studies Intervening,* 2001 (4) SA 938 (CC), the court pointed to South

[8] See Article 1 of CEDAW.

[9] Article 6(2) of the SADC Protocol on Gender and Development.

Africa's duty under international law to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of their fundamental rights and freedoms and to take reasonable and appropriate measures to prevent violation of those rights.

The African Women's Protocol,[10] specifically defines violence against women as an act perpetrated against women which causes or could cause them physical, sexual, psychological and economic harm, including the threat to take such acts or to undertake the imposition of arbitrary restrictions, on or during situations of armed conflicts or war. The Women's Protocol encompasses other important human rights such as the right to dignity,[11] right to life, integrity and security of a person[12] and the elimination of harmful practices.[13]

Zimbabwe has a new Constitution which provides for the protection of the family. Section 25(b) of this new Constitution provides that:

> 'The state and all institutions and agencies of government at every level must protect and foster the institution of the family and in particular must endeavour, within the limits of the resources available to them, to adopt measures for the prevention of domestic violence.'

There is also a non-discrimination clause and a provision that the state is to take reasonable legislative and other measures to promote the achievement of equality.[14] In this regard, the Zimbabwean Constitution is thus in line with the first state obligation that obliges state parties to personify the principle of non-discrimination. Since the goal of preventing domestic violence is to be achieved 'within the limits of the resources available', the state, however, may be tempted to use the country's poor prevailing economic conditions as an excuse not to attempt to do so.

Before the enactment of the Domestic Violence Act, the Criminal Law (Codification and Reform) Act governed criminal conduct arising from violence, including violence in the home. Of interest is the fact that the Code did not specifically address criminal behaviour

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10 The Women's Protocol was adopted in Maputo on 11 July 2003.
11 See Article 3.
12 See Article 4.
13 See Article 5.
14 Section 56(6) of the Constitution.

within the family or home set-up. As a result, the general criminal procedure system would apply to cases of violence within the family setting. In most cases, victims of domestic violence would find no protection with the police who regarded the matters as 'domestic' and not criminal and would, therefore, encourage parties to settle the matter between each other. However, in cases of assault there are clear guidelines in the Penal Code[15] as far as the sentencing of the perpetrator is concerned but this is clearly missing from the Domestic Violence Act.

Section 4(1) of the Domestic Violence Act provides that any person who commits an act of violence shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding ten years or both such fine and imprisonment. Unlike the Criminal Code, the Domestic Violence Act does not provide guidelines on sentencing. It is assumed, for purposes of this study, that such lack of clarity and guidelines may also make a significant contribution to the passing of non-deterrent sentences against those who commit violent crimes in the home.

## 2.3 The general approach to sentencing and sentencing principles

In general, sentences serve three broad functions, namely, retribution, reparation and deterrence. The focus is to try and punish the offender, to pacify the victim as well as to prevent the further commission of crimes of a similar nature or generally. It is trite law that before passing a sentence, a presiding officer must obtain sufficient information in any particular case to enable him/her to assess a sentence humanely and meaningfully and to reach a decision based on fairness and proportionality (Feltoe, 2009). It must also be stated that sentences are not rigid but must meet the exigencies of each and every particular case. Factors that are considered before a convicted person is sentenced include age, marital status and dependents, employment, the likelihood of facing a civil action, the crime itself and the possibility of restoration or compensation (Feltoe, 2009).

Section 89(3)(a)-(f) of the Criminal Law (Codification and Reform) Act sets out the guidelines in determining an appropriate sentence to be imposed upon a person convicted of assault. The Domestic Violence Act, however, only provides maximum sentences that can be meted out to offenders. As a consequence, magistrates are permitted to enjoy a very wide

[15] Section 89 of the Criminal (Codification and Reform) Act Chapter 9:23.

discretion when sentencing domestic violence offenders. This scenario forms the bedrock of the present research which is to try and establish how these offenders are sentenced and to measure their deterrent effect (if any) against the continued occurrence of such cases.

As indicated earlier, the idea behind enacting a specific piece of legislation is to enable the total arrest of a particular situation as far as is possible. Having identified the weaknesses in the old criminal law, Zimbabwe felt compelled to enact the Domestic Violence Act as a way, among other things, to minimize the recurrence of cases of this nature. The most inhibiting factor about domestic violence cases in our jurisdiction is that there are handled by Magistrates Courts. In our law, Magistrates Court decisions are not reported and thus do not become part of legal jurisprudence. This has made it a sufficiently compelling reason to examine such cases in order to establish the efficacy of sentences emanating from these lower courts.

While deterrence is not the only purpose of sentencing, it is worthwhile to note that it is one of the fundamental objectives of sentencing an offender. A deterrent sentence has the double effect of reforming the offender as well as instilling societal discipline. The principle behind passing a deterrent sentence on a person guilty of a crime is to ensure that the punishment is sufficient to deter the guilty person, and others, from committing the same crime. Despite the lack of guidelines for the sentencing of offenders in the Domestic Violence Act, I still believe appropriate deterrent sentences can be passed. The mere fact that the Act prescribes a long maximum sentence means that the Legislature did not intend to trivialize the offences of domestic violence. Generally in Zimbabwe, first offenders are usually spared a prison term as far as is possible. There are a variety of cases that support this proposition or principle.[16] The courts will try hard to avoid imposing a prison term for such offenders simply because they are usually amenable to reform and the belief is that sending them to prison will only set them on a criminal path by exposing them to the corrupting influence of hardened criminals in prison. It has been observed that such traditional sentencing patterns have the effect of almost routinely condoning the gravity of offences resulting in very lenient sentences being passed.

[16] *S v Shariwa* HB-37-2003.

The issue of looking at a particular case as it is regarding its surrounding circumstances and that of considering the consistency in sentencing is very challenging because there are various factors that come into play. Sentencing an offender is not as easy as it looks, hence, there is a need to have proper guidelines and not to leave the matter solely in the hands of presiding officers. There must always be an element of balance in the exercise of sentencing. In domestic violence cases, in particular, the research has shown that other external factors, such as the manner in which the case is reported by victims, the way different police officers investigate the crimes, how the different prosecutors pursue and resolve charges and whether the offender is represented or not, all impact on the sentencing process. It is important to note that domestic violence offenders are not a homogeneous group and each case should be looked at from its own surrounding circumstances. The dilemma is work out how the sentences can achieve these intended goals at the same time. This is where the role of the discretion of the magistrates becomes of paramount importance in sentencing. Thus, sentencing structures and rules should focus on making the exercise of discretion reasoned, transparent, and subject to review (Berman and Bibas, 2006-2007).

Generally, Zimbabwean magistrates rely on 'The Magistrates Handbook' which is the main text that guides them through the performance of their judicial duties, including sentencing. This text was produced many years before the enactment of the Domestic Violence Act. The book outlines factors that a magistrate ought to consider before meting out a sentence on an offender which factors include previous convictions, evidence in the matter, issues raised in mitigation and aggravation and the offender's personal circumstances. Before passing sentence, the magistrate must give careful thought and consideration to what is the appropriate sentence in the circumstances and he/she should give full reasons for imposing the sentence which has been decided upon. Thus, sentencing involves a rational thought process in which the court weighs all the relevant factors and decides what sentence is fair and appropriate (Feltoe, 2009). Our courts have always emphasized the importance of following the rational approach to sentencing.[17]

The accused's personal circumstances are also taken into consideration during the mitigation stage. Mitigation factors are those factors that a convicted person presents with a view to

[17] S v Shariwa HB 37/2003.

persuading the court to pass a lenient sentence. Age often plays a very pivotal role and very old or very young people are normally treated more leniently than other people. The gender of the offender also constitutes a factor in mitigation. Female first offenders are treated more leniently than males for three reasons which are that males commit more offences, recidivism is more common among males than females and women often have young children to care for. The marital status of the accused and dependency are factors that are also considered. This usually applies to cases of breadwinners where the argument is often put forward that imprisoning him/her would mean that their dependents would suffer with no one to provide for them. Employment or unemployment and the likelihood of a civil action are also considered in passing sentence.

There are also factors in aggravation that are considered. Practically, such factors are brought to the court's attention by the prosecutor. Aggravating circumstances include the prevalence of the crime. This should not, however, dominate the judicial officer's judgment and she or he must not punish using imprisonment where a fine would have sufficed. It is important to note that the prevalence of the crime of domestic violence is an important factor to consider in making attempts to reduce violence against women.

In other jurisdictions, particularly in South Africa, the decisive factor for the quantum of punishment has previously been to look at the aims of punishment, namely retribution, deterrence, incapacitation and rehabilitation. This has also been the norm in other countries. According to the British decision of *R v Sergeant* (1974) 60 Cr App R 74, retribution, deterrence, prevention and rehabilitation are the four main aims of sentencing. In the South African case of *S v Zinn* 1969 (2) SA 537 (A), the court, in determining the correct quantum, considered the offender, the offence and the interests of the community (Bradley, 2003). It suffices now to look at the general principles behind punishment.

### *2.3.1 Restorative justice*

The aim of restorative justice is to try as much as is possible to restore the state of affairs prior to the commission of the crime. Restoration also aims at the offender and his/her relationship with the community, victim and their loved ones (Sherman, 2000). Thus, the focus is the creation of good for the victim rather than pain for the offender. In other words, it is based primarily on the premise that something positive should be done for the victim. During the research I came across respondents who advocated strongly for the incorporation

of a restorative system of justice in our criminal justice system and they argued that this is likely to yield more desired results than the current system. However, we must take a closer look at the scenario in which a man hits a woman who loves him. Will there ever be the same level of trust and security as there was prior to the assault? Considering the patriarchal nature of our society, will this not result in more cases of violence being swept under the carpet where the traditional ways of dispute resolution which disadvantage women will be resorted to, leaving the dominant male to continue enjoying patriarchal dominance? No matter how much positive value might be offered in compensation for physical pain, the experience of fear can never be erased and where a victim has tragically lost a limb, it can never be replaced. Where one has lost virginity, it is gone for good. The recuperative approach, however, assumes that the greatest good to the public would result from a wrong-doer's full rehabilitation to that of a law-abiding citizen. However, an offender's conduct cannot be placed on a scale or his behavioural change measured with any convincing accuracy. In Zimbabwe, we do not have this kind of system in our criminal justice system.

### *2.3.2 Retribution*

This principle of retribution is based upon the premise that the punishment should not exceed the blameworthiness of the offender. The blameworthiness may be subjective or objective. Subjective blameworthiness is predicated on the state of mind of the offender. This focuses more on the mental state of mind shown in the commission of the offence, thereby increasing the blameworthiness of the offender. On the other hand, objective blameworthiness is predicated either on the tangible harm done or on the threat posed to the community. In sentencing, the presiding officer will consider the impact of the offence upon the victim as well as the community at large. An example of such a sentence is imprisonment. In the case of *S v Mushuku* HB-95-2004, Justice Cheda held that while there is a need for reformation, such reformation should not be applied as a rule of thumb. There is a need to weigh the accused's personal circumstances against the expectations of society at large. There is no doubt that, while the personal circumstances of the appellant are indeed important, so are the expectations of members of the public and society at large. Sentences which are less severe in the circumstances will no doubt shake the confidence of those they seek to protect and, hence, the courts will not be respected.

### *2.3.3 Deterrent sentencing*

Deterrent sentencing refers to a standard or principle of sentencing which ensures that the punishment is sufficient to deter the guilty person and others from committing the same crime. I firmly believe that such sentencing can go a long way in deterring would-be offenders. It is important to emphasise the fact that deterrence should not only come from the sentence itself but from the fear of receiving a particular sentence, hence, the need for mandatory sentences. One advantage of mandatory sentence is the fact that it serves as a deterrent by letting criminal offenders know what is in store for them if they continue with their criminal activities. This is an effective method of ensuring that at least some criminals do not repeat their offence. The fear of a mandatory life sentence might deter a convicted drug pusher from returning to their criminal activities. Mandatory sentencing also removes the ultimate decision about the sentencing of a criminal from the presiding officer, magistrate or judge. This guarantees a more uniform or smooth dispensation of justice for certain categories of offences instead of the disparity evident in the use of judicial discretion as has been seen in domestic violence cases.

## 2.4 Types of sentences

As stated earlier, the objective of sentencing includes punishing the offender, deterring the offender and would-be offenders, compensating the victim, rehabilitating the offender and protecting the public. In domestic violence cases there are different sentences that can be passed by a magistrate and these are discussed below.

### *2.4.1 Imprisonment*

Imprisonment can confirm offenders as criminals rather than reform them (Feltoe, 2009). Hence, in passing such a sentence the magistrate must be satisfied that it is the only appropriate sentence in the circumstances. Thus, factors to be considered include the likelihood of realistic reform while in prison, the deterrent value of the sentence, whether the sentence can only be justified in terms of retribution or whether the sentence can be justified in terms of protecting society by keeping a hardened offender off the streets. In the case of *S v Mpofu (2)* 1985 (1) ZLR 285 (H) it was stated that imprisonment is a severe punishment which must only be imposed as a last resort. In this regard, the court tries to keep first offenders out of prison but at times the gravity of the offence makes it impossible for such a provision. In certain instances, imprisonment can be imposed as a secondary or alternative

punishment, especially in cases where a fine has been an appropriate sentence but an additional sanction is intended to operate only if the offender fails to honour the first one. This does not, however, mean that the court is precluded from giving the offender time to pay and taking other steps to recover the fine imposed.

### *2.4.2 Community service*

This is where an offender is serving a sentence through working for the community. Loosely, it is referred to as 'unpaid work'. Such sentences are normally considered for first and youthful offenders. The offender is, thus, given an opportunity to reflect on his/her wrong doing and also paying reparation for his wrong deeds to society. Community service can be considered where the magistrate would have imposed an effective imprisonment of 12 months or less. According to the law, the court can impose community service as an alternative to the payment of a fine or as a direct sentence.[18] Factors, such as employment, are also taken into consideration when deciding on the hours in which the community service will be conducted. The trend nowadays has been to impose community service as much as possible, hence, there are now more community service officers stationed at Magistrates' Courts than there were in the past. A magistrate is enjoined to conduct a proper enquiry as to whether community service is an appropriate sentence for the convicted person.[19] In conducting the inquiry, the magistrate also relies on the report of the community service officer on the suitability of the punishment for the concerned offender. However, it is important to state that community service cannot be imposed on crimes such as rape, armed robbery, car theft and stock (cattle) theft as these are considered serious crimes (Feltoe, 2012).

### *2.4.3 Suspended sentence*

Suspending a sentence means that a sentence is passed but suspended for other reasons or conditions. The main objective of a suspended sentence is t bring about rehabilitation. The court should also be shown the special circumstances justifying a wholly suspended sentence if the sentence is imprisonment. The court should only attach no more than one condition of suspension to any sentence. Similarly, it would be improper to impose a single suspended sentence for two unrelated offences. This is largely left to the discretion of the magistrate.

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[18] Criminal Procedure and Evidence (Chapter 9.07) Act Section 348 and 350A.

[19] *S v Chinzenze* 1998 (1) ZLR 470 (H).

### *2.4.4 Fines*

A fine is another alternative to imprisonment which does not have the highly destructive consequences that imprisonment has. The fine should be tailored according to the means of the offender, as a failure to assess the fine according to the means can result in grave injustice for poorer culprits.[20] Remarks made in the case of *Ntlele* 1993 (2) SACR 610 W brought to the fore the meaning of equality before the law. In this case the judge stated that the personal circumstances of the offender are of paramount importance in considering payment of a fine. It was noted that a sentence which does not take account of a poor man's inability to pay in the circumstances where a fine is appropriate disregards one of the elementary criteria for punishment which is the offender's personal circumstances and such an omission would entitle a court on review or appeal to conclude that the lower court's discretion was not properly exercised. A sentencing court can also impose a prison term as an alternative punishment to the failure to pay.

## 2.5 Consistency in sentencing

The sentence in each particular case is determined based on its own surrounding circumstances on an individual basis of judicial discretion. As a result, the issue of consistency between sentences and the issue of disparity inevitably arise (Zdenkowski, 2000). In my opinion, attention should be focused more on how magistrates, using their discretion, determine sentences rather than the disparity between the sentences of different cases. Disparity can be justified especially on the basis of the offender's personal circumstances and criminal history. Such disparities might cause the public to lose confidence in the criminal justice system.

## 2.6 Mandatory minimum sentencing

Mandatory minimum sentencing laws require binding prison terms of a particular length for people convicted of certain crimes. There are sentences that can be imposed on serious crimes which are prevalent and cause economic and social harm (Feltoe, 2012). In Zimbabwe such sentences are provided for certain crimes. For instance, where a person infected with HIV/AIDS commits a sexual crime with full knowledge of her/her status,[21] in stock theft cases[22] and in relation to a crime of unlawful dealing with dangerous drugs.[23] A judicial

[20] *S v Munyakwe and Others* HH-92-93.
[21] Section 80 of the Criminal Law (Codification and Reform) Act (Chapter 9:23).
[22] Section 114(2)(e) of the Criminal Law (Codification and Reform) Act (Chapter 9:23).

officer can deviate from such a mandatory sentence only in circumstances where there are special or extenuating circumstances in the case. Sections 51 to 53 of the Criminal Law Amendment Act of South Africa set out mandatory minimum sentences for drug offences, firearm offences, corruption and fraud, murder, terrorism, robbery in aggravating circumstances, and rape, unless 'substantial and compelling circumstances' justify a deviation. Though 'substantial and compelling' is not defined in the Act, the South African Constitutional Court held in *S v Malgas* 2001 (2) SA 1222 (A) at 1234-25 that 'substantial and compelling circumstances' may arise from a number of factors considered together; taken one by one, these factors need not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be 'disproportionate to the crime, the criminal and the needs of society', the court may impose a lesser sentence. In another case,[24] the South African Constitutional Court expressed its concern about the proportionality of punishment:

> 'To attempt to justify any period of penal incarceration, let alone imprisonment for life.., without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached...they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ...the offender is being used essentially as a means to another end and the offender's dignity assailed.'

According to international studies, however, there is little evidence that suggests that harsher sentences do, in fact, deter crime. Even deterrence advocates acknowledge that effective deterrence requires swift and certain punishment. Some argue that deterrence is based on three factors, namely, capability, credibility and communication. The state must have the resources and capacity to identify, arrest, prosecute, convict, and punish the majority of serious offenders, and the government's threat of doing so must be credible. Furthermore, the state must effectively communicate that credible threat to the general public (Baehr, 2008-2009). This means, therefore, that violence against women is a social evil that can only be addressed through a holistic effort by government.

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[23] Section 156(1)(e)(i) of the Criminal Law (Codification and Reform) Act (Chapter 9:23).

[24] S v Dodo (CCT 1/01[2001] ZACC 16;2001 (3) SA 382 (CC).

Mandatory minimum sentences are statutory provisions which require the presiding officer to impose a specified minimum sentence when criteria specified in the relevant statute have been met (Brinkley, 2003). What it means, therefore, is that the sentence takes away judicial discretion in sentencing perpetrators. Because mandatory sentences seem to take away the discretion in sentencing and only leave magistrates with the option to decide on special circumstances, most magistrates interviewed were against the idea. Other opponents argue that mandatory minimum sentences undermine the intended purposes, such as deterrence, reduced disparity, and just punishment (Killian, 2001). As these arguments unfold, one notices that in relation to domestic violence they do not hold water because they are made primarily on other cases and eliminating judicial discretion in violence case may be beneficial to the women's rights discourse. According to Killian, mandatory minimum sentences serve three important purposes with respect to domestic violence cases: mandatory minimum sentences will deter domestic violence because they eliminate options once available to abusers, namely in our context, suspended sentences, community service and the option of a fine and the perpetrator is only left with only one option, that is, prison. With only one option available, abusers will think twice about abusing others. Cases of stock theft are not as prevalent as domestic violence cases because the law specifically provides for a mandatory sentence for those committing such a crime for a minimum of nine years.[25]

It can also be argued that mandatory minimum sentences will encourage victims to report incidents of domestic violence instead of discouraging them. If there is an assurance that the law will provide recourse then victims are encouraged to report. This is to be compared with the current situation in which cases are on the increase and reporting is meaningless as the cases seem to be trivialized. In addition, mandatory minimum sentences can save lives. A brief conversation with one female judge revealed that the High Court is dealing with a considerable number of murder cases emanating from domestic violence where women are being killed over petty issues such as *sadza* and goat meat. Certainly, one will learn and be obliged to control his/her anger if there is knowledge that a harsher sentence is inevitable.

## 2.7 Echoes of feminist perspectives

Feminists have problematized a number of issues surrounding the home and domestic violence. For example, radicals oppose motherhood, Marxists problematise domestic work

[25] Section 114 of the Criminal (Codification and Reform) Act Chapter 9.23.

and liberals focus on the equality in laws. Because of patriarchy, society's view of women is largely influenced by patriarchal norms and the idea that the law itself is traditionally a male construct (Barnett, 1998). As adverted to earlier, domestic violence is violence that occurs in the home and, hence, such violence cannot be separated from the context of the family in a given society. The connection is one of intimacy. The Domestic Violence Act expresses this proposition in the way it defines complainants or describes the type of people who are eligible to use and seek protection under the legislation; they all point to the family unit.[26] In Zimbabwe the concept of *unhu*/*ubuntu* is greatly valued (Barnett, 1998). *Unhu* is a social philosophy which embodies virtues that celebrate the mutual social responsibility, mutual assistance, trust, sharing, unselfishness, self-reliance, caring and respect for others, among other ethical values (Mandova and Chingombe, 2013). The overriding value in the African family is reflected in the non-individual nature of marriage, sometimes called the collective or communal aspect of the marriage relationship. This notion embodies the idea of marriage as an alliance between two kinship groups for the purposes of realizing goals beyond the immediate interests of the particular husband and wife (Nhlapo, 1991). Hence, in such a situation, what happens in the home is subject to scrutiny by all members of the extended family who then devise methods of dispute resolution within the family. Such a system reinforces the private/public dichotomy in patriarchal societies and group interests are prioritized at the expense of individual choices and more often than not group interests are synonymous with male interests. Such a society embraces practices which discriminate against women and impose nearly monastic rules of behaviour on women but not men. As a result, when violence takes place in the home it is not particularly easy for a woman to report it and it is even harder to get the perpetrator arrested who, in most cases, will be the male partner. This is more prevalent in the African setting.

It is clear from the above that African women are thus affected differently by domestic violence from Western women whose culture does not embrace the concept of *ubuntu*. Played

[26] Section 2(a)-(d) of the Domestic Violence Act (Chapter 5.16) states that 'complainant', in relation to a respondent, means –

(a) a current, former or estranged spouse of the respondent; or
(b) a child of the respondent, whether born in or out of wedlock, and includes an adopted child and a step-child; or
(c) any person who is or has been living with the respondent, whether related to the respondent or not; or
(d) any person who –
  (i) cohabits with the respondent; or
  (ii) is or has been in an intimate relationship with the respondent;

out in the wider context of poverty, race, class, culture, colonialism, religion, plurality of the legal systems, black women tend to fear being treated as an outcast as they place greater importance on their public rather than their private relationships. Their relationships with the outside world take precedence over everything else as articulated by advocates of relational feminism. For this reason, feminist legal theorists oppose the law's treating as strangers parties involved in domestic violence because they want the relationship between the abuser and his victim to be properly and fully considered by the courts (Tuerkheimer, 2004). At the present time the issue of the relationship between the parties is only taken into account by presiding officers after conviction and solely as a mitigating factor. A valid question posed in the case of *S v Ncube* HH-335-13 is whether such treatment of the relationship between the parties is leading to the judiciary's trivialisation of the crime. Is this the best way to tackle the problem, especially in a society in which patriarchal notions are so deeply entrenched? On the other hand, some argue that women and children will not be adequately protected if the public/private distinction is drawn in such a way that the relations between family members are not regulated by the state (Tuerkheimer, 2004). While some have seen the importance of focusing on providing resources to women and on creating programmes to address the social and economic realities that keep women in abusive relationships, it is also paramount to have an effective criminal justice sentencing system. It could also be argued that having mandatory minimum sentences would be meaningless, especially in the absence of access to social support systems. This seems to be more relevant in our African setting where women have historically been disadvantaged by cultural and religious practices and have no stable income. Such practices cause liberal feminists to argue that female subordination is rooted in a set of customary and legal constraints that block women from entering or enjoying success into the public world (Marie, 1994). This is why feminists value the mantra, 'the personal is political'. The two are interconnected and violence in the domestic sphere needs effective ways of curbing it. As Donna Coker states, the fact that women have less economic power than men in the public sphere necessarily correlates to their vulnerability to violence in their personal lives (Coker, 2003). It is against this background that there is a need for a careful and vigilant way of trying to curb violence in the family. I honestly believe that this can be achieved if sentences are effective, i.e., that they discipline the immediate offender and act as a deterrent to would-be offenders.

## 2.8 Conclusion

Based on the foregoing, one can say with almost complete certainty that domestic violence is an undesirable societal evil which is largely directed against women. The situation is aggravated by the fact that our society is entrenched in patriarchal norms and values that place women in a subordinate position thus making them vulnerable to abuse. The scourge of domestic violence has been part of our society for a very long time and there seems to be no indication that we are about to remove it any time soon. Although specific laws have been enacted to curb it we are still grappling with this social illness. Sentences handed down by our courts seem to fail to prevent abusers from re-offending. My research findings will also expose the debatable issues around sentencing and will explore more deeply the lived realities of black women; they will also reveal how a change in sentencing will assist the ordinary Zimbabwean woman and play a part in curbing violence against women if that change is needed. It now remains to put the research into perspective in terms of examining the process and premise from which the research, particularly the methodology and data collection methods, emanate.

# CHAPTER 3

# 3.0 RESEARCH METHODOLOGY AND METHODS OF DATA COLLECTION

## 3.1 Introduction

In gathering data different complementary methodologies were employed. In conducting the research I considered the relevant provisions of the law. These include the Domestic Violence Act, the Criminal Procedure and Evidence Act, the Criminal Law (Codification and Reform) Act, the Constitution as well as international and regional instruments. During the interviewing process of judicial officers and various complainants and offenders I constantly referred back to the provisions of the law which are central to this research. WLSA (2002:18) noted that law is a reflection of social and political imperatives and is shaped by a multitude of competing interests; analysing a law within its immediate context approach is a good starting point for a legal researcher.

The study specifically focused on domestic violence cases of a criminal nature and was greatly influenced by the legal centralist approach where the researcher remains within the limited range of legal source materials in order to research the application of the law. This greatly assisted in conducting the research with an open mind in that it allowed specific reference to be made to the relevant criminal laws and made a direct link between the law and the findings possible. It became apparent during this process why offenders were charged more often than not under the Criminal Code as opposed to under the domestic violence legislation.

## 3.2 Methodologies

### *3.2.1 The women's law approach*

The approach gave a description and understanding of the legal position of women in the society in which they live by unearthing their reality which is different from that of their male counterparts (Dahl, 1987: 17). During the research, I maintained a particular bias towards women as my starting point and it is for this reason that information emerged on how women are affected differently by the provisions of the same law. This also helped to reveal that although the Domestic Violence Act is meant for the betterment of society as a whole, it goes

without saying that women are the ones who bear the brunt of the scourge and this shows that the problem is a gendered one. Once during the research I sat in a court observing and listening to the submissions made, observed what took place before and after the proceedings, inside and outside court, and I realized that the problems faced by women in the domestic sphere are far more serious than I had ever imagined. I also sought to scrutinize how the judicial officers reach a particular sentence, what factors they take into account when sentencing and how these respond to the lived realities of women. I even noticed that it is very difficult to separate women from their children, especially minor children, who are caught in the cross fire and as a result subjected to violence by living in a violent home or environment.

My experience also assisted in crafting and moulding recommendations on the issue of sentencing. The methodology focuses on the biological, social and cultural differences between men and women with a view to establishing how the differences impact differently on both sexes. Taking into consideration the historical imbalances between the sexes and the dependency syndrome on the part of women, it was clear that men and women are affected differently by sentences and thus have different views regarding sentencing. The question that then occurred to me was, 'If the law does indeed trivialize domestic violence as a crime, who is most likely to suffer?' It was thus of paramount importance for me to interview both female and male offenders, victims and judicial officers.

### *3.2.2 Development of the grounded theory approach*

In coming up with the research assumptions, I relied a great deal on my experience at ZWLA where most women who come for assistance apply for protection orders which are dealt with by the civil courts. Most of them expressed their frustrations with the criminal justice system which, in their opinion, trivializes domestic violence cases as is reflected by the sentences passed by magistrates. This, they said, is mainly due to the fact that the offenders, who in most cases are their spouses, were sentenced to community service and the payment of fines which they as victims regarded as being very lenient and incapable of deterring the offender from re-offending.

According to their reports, domestic violence is not easy to reveal to the public because culturally victims are socialized not to divulge such information and it takes courage for them to approach the courts. Hence, cases are often reported not because it is the first time the

victim experiences abuse but because it is a well considered decision taken only after the victim has suffered several violence attacks. So they turn to the law for help in the expectation that they will receive a satisfying judgment that will make their reporting worthwhile. As I had conversations with the judicial officers, complainants and offenders, I endeavoured to find out the lived realities and experiences of the respondents in their interaction with the cases of violence in the domestic sphere. In order to unearth whether the social attitudes and patriarchal nature of our society has an influence on the handling of cases of violence I was required to delve deep into the social background of judicial officers and find out whether it has a negative or positive effect on the outcome of the cases and the attitude towards sentences. I also sought an understanding of the broad-based construction of the position of men and women in society and the dynamics of the power relations between them in order to ascertain how such relations influence the handling of domestic violence cases by judicial officers.

Using this methodology enabled the development of theory from the data collected. I used this methodology which is a process in which data, theory, lived realities of women and perceptions about norms are constantly engaged with each other to help in deciding what data to collect and how to interpret it (Bentzon et al., 1998:79).Triangulation of the data was made possible by this methodology as I was able to address the same research question using different sources such as the complainants, offenders, judicial officers and clerks of court. I was thus able to interrogate the experiences of women as they interacted with the criminal justice system as well as those of the judicial officers who presided over the matters. As I was interviewing the respondents, the methodology helped me to progress by mapping my next move based on the data collected.

### *3.2.3 Human rights approach*

Section 80(3) of the Constitution of Zimbabwe states that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement. Zimbabwe is a party to a number of international human rights instruments which are treaties that are relevant to international law and the protection of human rights in general. Zimbabwe has ratified instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and People's Rights and the Protocol to the African Charter on the Rights of Women. These documents have persuasive value in our law. Under these treaties, states assume obligations

and duties under international law to respect, to protect and fulfil human rights. Thus, having ratified these instruments, Zimbabwe, as a state party, is expected to condemn discrimination and modify cultural practices that discriminate against others as well as ensure that widows are not subjected to inhuman and degrading treatment.[27]

In perusing court records and listening to the victims' long testimonies, the study sought to establish the extent to which victims feel the state has provided them with a sufficient remedy through which to sentence offenders. Domestic violence is persistent in nature and the same victim can suffer at the hands of the same perpetrator if the sentence passed is not sufficiently deterrent or reformative. To examine whether the women's rights to protection from domestic violence had been realistically attained, I used a human rights based approach to assess if justice has been done through sentences that punish perpetrators and also produce a deterrent effect against would-be offenders.

My working experience at ZWLA contributed immensely to the realization that the organisation and other similar organisations use the rights based approach in programming in which they look at implementers and rights holders and the extent to which the implementers are upholding the rights of citizens. In this light, the research sought to unearth the patterns in sentencing domestic violence offenders and how they impact on the victims as rights holders. Questions were thus devised and worded in such a way as to try to establish the extent to which the law (enacted by duty bearers) has addressed the concerns of victims of domestic violence (i.e., rights holders).

### *3.2.4 Actors and structures perspective*

Since the focus of the study was to critically analyze the sentencing patterns for domestic violence offenders in the three selected courts, it was also necessary to look at the institutions which housed the key implementers of the law. The investigation also paid particular attention to the extent to which the implementers have complied with the provisions of the Act and its major aim which is to curb violence in the home. It is not possible to measure successfully the performance of an institution without measuring or assessing the individuals who work within it. Hence, the role of the judiciary and its personnel were key in the

[27] Articles 2 and 5 of the Convention of the Elimination of All Forms of Discrimination against Women, Article 18(3) of the African Charter on Human and People's Rights, Articles 20 and 21 of the Protocol to the African Charter on the Rights of Women.

investigation into sentencing patterns. I scrutinized the function played by the magistrates, prosecutors and clerks of court. The approach also helped in understanding the other factors (apart from the provisions of the law) that influence the sentencing process.

### *3.2.5 Sex/gender analysis*

Domestic violence is different from ordinary assaults on strangers because the victim perceives domestic violence as a pattern of harm in both a quantitative and qualitative sense. Quantitatively, domestic violence consists not just of a single incident, but of repeated acts by the same offender against the same victim. Qualitatively, the intention of the offender is not solely to engage in the violent conduct with which he is charged. Rather, his intention is to exercise power over and restrict the victim (Burke, 2007). Through this methodology I was able to get an explanation of why men are the majority of offenders. As already mentioned, the reason why victims of violence suffer at the hands of their loved ones has more to do with power than anything else. I was also able to analyze the sentences passed by female and male magistrates and the factors that they consider in passing sentence. Examples of factors include pregnancy, being the breadwinner and their attitude to gender roles. I also analysed why complainants were not satisfied with the sentences passed and the reasons why they considered they were not deterrent.

## 3.3 Data collection

A variety of both qualitative and quantitative methods of data collection were used in the research. They included focus group discussions, individual interviews, perusal of court records and observations. Given the background of this study, my main targeted respondents were the judicial officers themselves so that I could obtain an insight into their feelings and treatment of the cases of domestic violence when it comes to sentencing. It was a case of hearing directly from the horse's mouth. At the Harare Magistrates' Court Complex there are dedicated courts that deal with domestic violence cases and it was the magistrates presiding over these courts who were the focus of the research.

For the complainants or victims I targeted mainly non-governmental organisations that assist women, chief among them being ZWLA and Musasa Project. I also randomly selected complainants and offenders during my court observations and interviewed them after the court sessions. I also visited Chikurubi Maximum Prison to interview convicts. The

limitation, however, was that permission was granted for interviews with female prisoners only.

I also had opportunities to interview both male and female judges. Among them was also a former chief magistrate who had served as a magistrate for a long time and is now a judge of the High Court.

### *3.3.1 Focus group discussions*

Two focus group discussions were planned and conducted in Harare and were attended by 19 women from Mbare and Chitungwiza to cater for the other two areas of the research. Two further focus group discussions with judicial officers which were not initially planned were also conducted. Magistrates and prosecutors had a limited time for personal interviews due to pressure of work, hence, focus group discussions were conducted during their lunch or tea breaks. This came as a as a blessing in disguise since I managed to obtain more information because of their increased numbers. I also had an opportunity to observe and to talk to them in a more comfortable setting in the presence of their colleagues. As a result, I managed to extract their different opinions about sentencing and how their inherent social attitudes might cause the sentencing patterns of one magistrate to differ from that of another. Though most of the judicial officers were female, the group discussions were still fruitful as they yielded the intended results. One judicial officer's contribution would trigger a response from another officer in the group whose response would in turn trigger yet another officer's response and so on. As a result and within a short period of time, a great deal of information was gathered relating both directly and indirectly (in the form of emerging issues) to the research.

The female complainants with whom I had discussions had very long testimonies and some were clearly expecting assistance after they had given their accounts. The women needed to be assured that their information was safe and was to be used purely for academic purposes. They narrated their experiences at the hands of the courts and their expectations. This helped to shed light on their real situation. The common denominator was that they had all experienced violence and had all tried to resolve the matter using other methods, but in vain. The incident that resulted in their finally reporting the violent conduct to the police was their desire to have the matter treated by an authority in a serious as opposed to a trivial manner. The fact that they had all suffered the same painful experience encouraged the others in the group who were reluctant to open up. There was a spirit of togetherness.

### *3.3.2 Perusal of court records*

I randomly selected criminal court records from 2011 to 2013 in at the Mbare, Harare and Chitungwiza Magistrates' Courts. At the Harare Magistrates' Courts 20 records were perused, while at the Chitungwiza and Mbare Magistrates' Courts, 14 and 23 records, respectively, were randomly perused and analyzed. I also managed to obtain the statistics for all cases of domestic violence that were dealt with at the three courts from 2011 to 2013. The statistics helped to establish the nature and prevalence of violence and the sentences that were imposed on the different offenders. There was also a record of female and male offenders and male outnumbered female offenders.

### *3.3.3 Individual interviews*

I conducted individual interviews with the different key informants and this enabled me to gather information which then formed a new set of categories. For instance, I then realized the need to carry out further interviews with women who had been convicted of domestic violence at Chikurubi Prison which resulted in a wholesale collection of data and a creation of what was the common trend. This enabled me to answer the so what question and to follow the new leads. Below is a table showing the number of interviews carried out and with whom.

**Table 1: Showing respondents/interviewees**

| COURT | RESPONDENTS/INTERVIEWEES | | | | | | |
|---|---|---|---|---|---|---|---|
| | Judges | Magistrates | Prosecutors | Complainants | Offenders | Clerks | Other |
| HARARE | 2 | 7 | 10 | 13 | 11 | 3 | 3 |
| MBARE | | 4 | 4 | 3 | 1 | 1 | |
| CHITUN-GWIZA | | 1 | 3 | 6 | 3 | 2 | |
| TOTAL | 77 RESPONDENTS | | | | | | |

### *3.3.4 Observations*

I made observations before, during and after trial sessions in court. I regarded the information I gathered from my observations as being reliable as it accurately reflected what was on the ground and the most likely thoughts of the people present. I realized that sitting in the court of a magistrate who had full knowledge of my research was different from sitting in the court of a magistrate and/or prosecutor who did not and who believed that I was simply one of the relatives of the accused or complainant sitting in the gallery. It was quite interesting in the sense that the statements uttered or the general mood of the judicial officers and the procedures followed were different. I observed that when the judicial officers knew of my presence and intentions they tended to appear stricter than when they were unaware of the reason for my presence. Of particular interest was the reaction of judicial officers whom I did not forewarn. When they asked why I was sitting in their court without permission, I simply presented my authorisation letters from the offices of the Chief Magistrate and the Attorney General. As a result some of the assumptions were confirmed, while others were challenged. I observed the facial and body language of both the victim and offender after the passing of sentence. As the court adjourned you would hear their statements of satisfaction or disappointment as well as expectations.

### *3.3.5 Random sampling*

It was important in my data collection to hear the voices of the male defendants as well as the voices of the female complainants involved in the different cases of domestic violence. These voices would inevitably inform my research. Selecting my respondents randomly after court sessions enabled me to conduct interviews with men who ordinarily would not have agreed to grant interviews after court hearings. As a result I was able to interview the relevant respondents at the right time. There was also an additional advantage since there was no preparation on their part. I thus noticed that they did not give any planned answers and this helped to give a true insight into their lived realities. Interestingly, by interviewing the men straight after court hearings I heard not only their immediate reaction to the sentence which was usually in the form of murmurs but also their utterances about their cultural values. Because of the timing of the interviews which caught them unaware they tended to be more truthful in their answers. This was very useful.

## 3.4 Conclusion

It is important to state that all the above enumerated methodologies and the data collection methods were useful in the collection of data. All the issues that were not initially part of the research but which emerged from the discussions were addressed using the grounded approach woven together with other methodologies. The objective of the research which was to interrogate the sentencing patterns was met. The next chapter contains an analysis and discussion of the study's findings.

# CHAPTER 4

# 4.0 RESEARCH FINDINGS, DISCUSSIONS AND ANALYSIS

## 4.1 The myth of judicial leniency in sentencing offenders

It has become apparent from the research that the sentencing patterns of the magistrates under review tend more towards community service, fines and other non-custodial sentences rather than incarceration. There is also a disparity between the sentences passed down by different judicial officers who are influenced by their notions of domestic violence. The analysis shows that the most prevalent sentences in domestic violence cases are fines and community service (as shown in the diagram below). This is an appropriate moment to consider the words of a victim of domestic violence in order to highlight how horrific some of their injuries may be:

'Imagine being promised death by the person you love. Imagine him telling you that if you are to divorce he will leave you dead or with a disability so that you can remember him for the rest of your life. Within weeks of such threats he then runs over your leg by his car after an argument. The next two months that follows you are in hospital and the injuries sustained are permanent living you with a disability.'

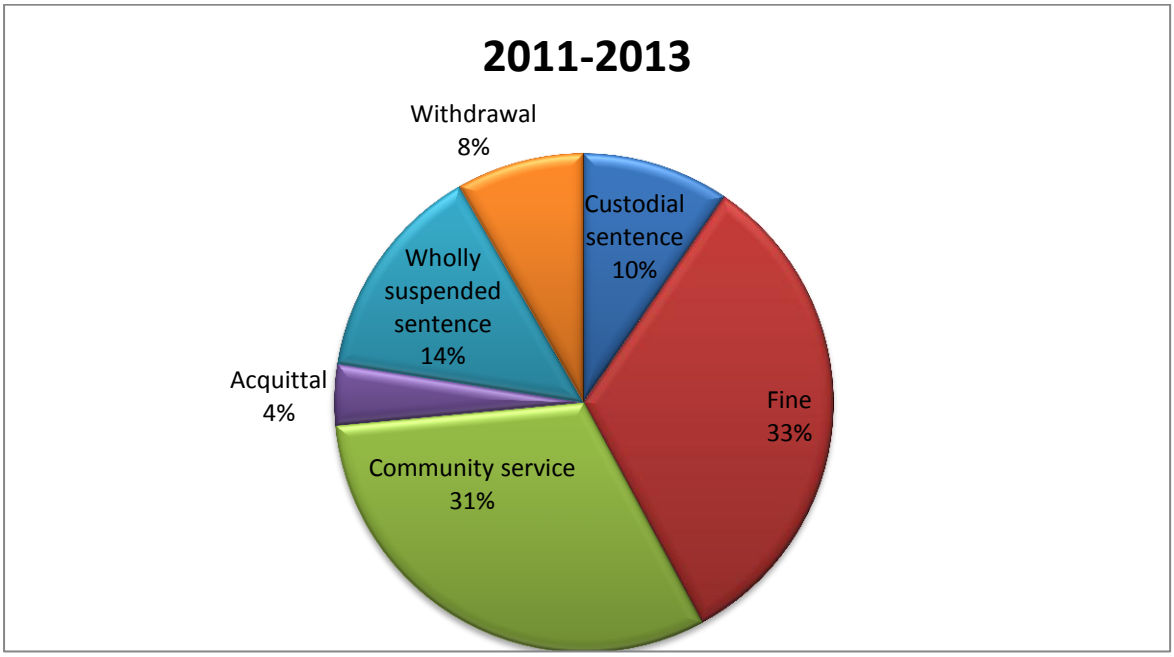
These were the words of one female respondent whose husband was charged with attempted murder after he had run her over with a vehicle. Her leg was severely injured and she spent two months in hospital in excruciating pain. There was no one except her assailant to take care of her one year old child. It emerged from the research that the majority of complainants believed that magistrates are lenient in the sentencing of domestic violence offenders. The above case is still pending, and one of the issues that the complainant was grappling with was her fear that all her efforts to attend the criminal case at court might be rendered fruitless by what she predicted would be the unsatisfactory attitude of magistrates towards sentencing.

The diagrams below illustrate the type of sentences handed down for a period of three years from 2011 to 2013 in the three courts where the interviews were carried out.

**Table 2: Showing a breakdown of the types of sentences passed against domestic violence offenders for 2011-2013**

| Year | Custodial sentence | Fine | Community service | Acquittals | Wholly suspended sentence | Withdrawal |
|---|---|---|---|---|---|---|
| 2011-2013 | 282 | 966 | 930 | 117 | 421 | 246 |

**Figure 1: A pie chart representing the types of sentences passed against domestic violence offenders for 2011-2013**




During the research one striking observation was that the victims consider that the sentences meted out to domestic violence offenders are not in any way assisting in curbing violence against women as the law seems to protect the 'sanctity of marriage' at the expense of the protection of women. One magistrate interviewed indicated that in all his years on the bench the highest sentence he had passed in a domestic violence case was a custodial sentence of two years. The facts of the case were that a man had used an iron bar to beat his sixteen year old daughter because she had come home late. She sustained serious injuries. The Domestic Violence Act however provides for a sentence of up to a maximum of ten years. The questions we must ask are as follows: 'Are there any crimes that warrant such a punishment?' Or, 'Is it the case that this particular magistrate had not come across such a serious case.' He further indicated that in the case of other 'serious' domestic violence cases, offenders are charged under the Criminal Code which then gives the impression that it is only really serious

crimes that are dealt with under the Code and not the Domestic Violence Act. Inherent in this type of reasoning is the danger of trivializing domestic violence cases which is reflected in the use of the words 'serious' domestic violence cases. What amounts to 'serious' domestic violence remains a mystery as the respondent would not answer that question. I followed up with another question, 'Is domestic violence not a serious crime?' His gave me an evasive response. He stated that he believed that magistrates are lenient with offenders because they perceive that complainants have the attitude that the court should not be too harsh on perpetrators but should rather warn, caution and discharge them. Upon further probing, he had this to say:

> 'Magistrates are not lenient but are forced due to the circumstances surrounding the case to give a lesser harsher sentence. Offenders are sentenced to reform and not to be trained to be hard core criminals and this is why sending them to prison is the last resort as compared to other sentences. I understand there are situations which can force us to opt for custodial sentence but it is not prudent to first consider it for first offenders.'

In simple terms, the above statement is an admission that magistrates are lenient in the sentencing of domestic violence offenders and I regarded this as a very interesting fact. In other words, no matter how well a case has been prosecuted, the fact that it is a domestic violence case will always militate against the seriousness with which a magistrate ought to treat the case. I also observed how mitigating factors, such as the fact that the offender is the only breadwinner, influences magistrates. I found that this fact pre-occupies them so much that they choose to preserve the liberty of offenders to enable them to continue fending for their families with the result that the retributive aspect of the sentence is completely lost.

Victims who opt to withdraw cases do so because of a myriad of familiar reasons which came out clearly in the research. Reasons include fears of retribution, distrust of criminal punishment, economic dependency, emotional attachments, and concerns for their children. Such reasons set victims of domestic violence apart from victims of ordinary crimes who might readily press charges and testify. My experience at ZWLA has revealed similar fears and concerns. In the divorce cases that I have handled, some women reveal that they would have tried to report the violence or tried to seek a protection order but were discouraged from doing so for fear of the probable backlash of their partners' suing them for divorce. In the case of women who had commenced divorce proceedings without the assistance of lawyers and as self-actors, they had usually cited such reasons as grounds for their divorce. Some

magistrates are so incensed by the withdrawal of domestic violence cases that, as an act of judicial activism, they have resolved to continue hearing these cases notwithstanding the fact of the withdrawal. Most sentences passed in such cases are suspended and appear, to some extent, to have a very deterrent effect.

Charging an act of domestic violence under the general provisions of the Criminal Code is, on its own, not proper because domestic violence is a unique kind of a crime that can never be compared to other criminal acts. The gap between the scope and purpose of general criminal legislation and the realities of domestic violence is such that it affects the kind of evidence that is used in court and the whole process of sentencing and treatment of domestic violence offenders in the criminal justice system. Hence, to consider one act of violence reported and prosecuted outside the broader pattern of abuse which had happened over a long period of time might not be in the interests of justice. Again, domestic violence is recurring in its nature, it is not an isolated event but rather a pattern of repeated behaviour against the same victim by the same perpetrator. Given the special nature of domestic violence and its potential for causing grievous harm or even death, it is very important to investigate the history of the offender even in a scenario where violence has never been reported.

The imposition of fines which is most preferred by magistrates (as indicated above) may give rise to unfortunate results. For instance, in one case I came across a perpetrator had used the money for his family's up-keep to pay the fine that had been imposed on him and then he continuously harassed the victim for having paid it; he also misused other funds and claimed that the money he had he was keeping to pay the next fine when they would return to court after he had again assaulted the victim. Thus, magistrates often fail to formulate appropriate sentences in such a way that they reflect and respond to the unique circumstances of the offence and the relationship between the offender and the victim. Instead, the uniqueness of the crime is used as a mitigating as opposed to an aggravating factor which magistrates tend to rely on in favour of rather than against the offender.

In this regard, the unreported case of *S v Ncube* HH-335-13 is apposite. This was a case presided over by a magistrate and was sent to the High Court for review. The facts of the matter were that the accused, an adult male aged 30 and married with 5 children, had unlawful intercourse with the complainant, his wife's sister, then aged 15, who had come to stay with them. On the night of the commission of the crime the perpetrator had attempted to

have intercourse with her but she refused. He persisted and the minor gave in. Sexual intercourse had taken place four times that night. She then missed her period and revealed this to her aunt naming the person responsible and the case was reported to the police. He was charged with contravening section 70(1)(a) of the Criminal Law (Codification and Reform) Act and pleaded guilty to the crime. In what I can only consider to be a shocking sentence, the magistrate stated the following:

> '24 months imprisonment of which 16 months are suspended for 5 years on condition that the accused does not, within that period, commit any offence involving contravention of section 3 of the Sexual Offences Act (Chapter 9: 21) and for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine. The remaining 8 months are further suspended on condition that the accused marries the complainant.'

During mitigation the accused had made a proposal that he be allowed to marry the complainant. There is no doubt that his proposal to marry was made in a bid to avoid a custodial sentence and it is sad to note that he was successful. The accused further stated in mitigation of sentence that he was offered the minor by the complainant's parents since his wife was asthmatic. On review, the High Court deleted the marital condition of the magistrate's suspended sentence and substituted it with one for community service whose terms and conditions were to be determined by the trial magistrate to whom the case was remitted for investigation. In her judgment Mrs Justice Amy Tsanga (one of the two review judges) said:

> '[I]n our cultural context where some married men believe the wife's unmarried sister is equally for the taking, ordering marriage gives a very unhealthy nod to predatory behaviour and does little to foster attitudes of respect and dignity towards females in what should be a safe family environment.'

She also noted that what was of paramount importance was the best interests of the minor child whose right to education was also trampled upon. Instead of the minor's pregnancy being regarded as an aggravating factor against the accused, the magistrate actually considered it mitigatory in favour of the accused that he had proposed that he marry the pregnant minor. In my view there is a need to send a strong message that such behaviour cannot be condoned in this day and age. Rubber stamping harmful cultural norms should not be encouraged.

Can we then talk of justice where a minor had stopped going to school and is expected to fill the shoes of a grown woman by going through the pains of giving birth at such a tender age? Some victims in similar situations will be discouraged by the outcome of the case and conclude that they enjoy little or no protection under criminal law. Hudson's concept of justice is important, especially in relation to domestic violence. She argues that there are three key principles that should underpin justice which are discursiveness, relationship and reflectiveness (Hudson, 2003). In her opinion, discursive justice is reactive to the conditions of a particular case and one cannot assume that one case is representative of another. When referring to the relational principle she means that justice must recognize individuals are part of a 'network of relationships' with the state and the community. In the same vein, Robin West notes that women live their lives more in the context of relationships with others rather than as individuals. This is particularly the case in our African societies where more importance is placed on *ubuthu* or peace between individuals rather than on the individuals themselves. To Hudson, justice should also be reflective, that is, each case should be understood in terms of all its unique circumstances. This approach can improve the way the criminal justice system responds to violence in the domestic sphere. Consequently, the long arm of the law should be able to address the central reality because failure to do so is tantamount to perpetuating the inequality.

One of the judicial officers brought to the fore the issue that first offenders are treated with leniency unless the crime committed is serious or unless it would amount to an injustice if a non-custodial sentence were imposed. It was also revealed by the research that not all magistrates are lenient as some do not adopt the leniency approach but they are in the minority. It should be noted that section 329 of the Criminal Procedure and Evidence Act provides that:

> 'Notwithstanding any provision of the law of evidence, any finger-print records, photographs or other documents purporting to be certified under the hand of any police officer, prison officer or immigration officer of Zimbabwe or elsewhere shall, at the trial of any person accused of any crime or offence, be admissible before any court as prima facie evidence against such accused person, either in proof of any previous conviction or of any other fact relative to the issue: Provided that the said finger-print records, photographs or documents shall be produced to such court by a police officer, prison officer or immigration officer of Zimbabwe having the custody for the time being of such finger-print records, photographs or documents.'

According to this provision, prosecutors should diligently for and produce evidence of an offender's previous convictions, if any, and failure to do produce such evidence is serious and is likely to lead to the court's treating a serial abuser as a first offender. I interviewed some complainants who indicated that they had reported previous incidents of violence against their abusers who had been convicted and sentenced. They said that they had no idea that such evidence could be used to affect the sentences against their abusers in future court cases. Most of the prosecutors I interviewed admitted that they considered domestic violence a light or trivial crime or offence that does not warrant their investing their time searching for an offender's previous convictions.

## 4.2 'We are now used to these women, they are a problem' - Exploring the inherent social attitudes of judicial officers

First and foremost it is important to note that the domestic violence legislation[28] sets out the duties of police officers in relation to the reporting of domestic violence cases. It was noted as an emerging issue that before the matter is even set down for trial, victims of violence suffer secondary victimization at the hands of the police officers and prosecutors who deal with their cases. Such experiences affect their perception of the criminal justice system and sometimes even result in the early withdrawal of their complaints because some women cannot bear the pressure. One complainant I came across was advised by a police officer that she was wasting her time reporting her complaint because, based on his experience, her case had no weight and would be dismissed by the court. Considering that victims of violence of a criminal nature do not only suffer physical but also economic, psychological and emotional harm, such discouragement and lack of trust in the system by a law enforcement agent is enough to scare any victim away. Some judicial officers even made it quite clear to complainants that violence in the home is 'natural' and is to be expected. Hence, to such a judicial officer the gravity of the offence is immaterial since he/she is already convinced that such conduct is 'natural and to be expected'. A philosophical world outlook such as this will definitely influence the mind of a judicial officer in a negative manner. Consciously or subconsciously, the decision of such a judicial officer will always favour the offender.

[28] Section 5 of the Act provides that there shall be a section at every police station which shall were practically possible be staffed by at least one police officer with relevant expertise in domestic violence, victim friendly or other family related matters and these are supposed to assist a victims of domestic violence.

What the law also fails to realise is the situation or the realities of women on the ground. The theory of interlocking oppressions or intersectionality can help to explain the predicament of many women who face violence in the domestic sphere. The theory refers to the interface between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in relation to power (Davis, 2008). It is sad to note that most of the complainants that I came across during the study period were encountering many difficulties in their lives and that the violence they were experiencing was aggravating an already bad situation. Some of them do not have the money to finance their court attendances meaning that the withdrawal of their cases is not so much a product of choice as design. Some suffer from ill heath because of HIV/AIDS, while others are victims of cultural norms that have deprived them of the rights to education, to secure steady employment and to earn a stable income. Putting all this into perspective, the problem becomes bigger than what is visible at first glance. Thus, the advocates of Africana Womanism[29] postulate that women are victimized first and foremost because of their colour (race) and they are further victimized because they are women living in a male dominated society.

I also realized that it is very difficult to change such deep-seated norms and beliefs of duty bearers within the justice delivery system without other strong and stringent interventions in place as they cannot be easily separated from the person who harbours them. Furthermore, duty bearers are part of the same society that we all live in and that society is patriarchal and responsible for creating a hierarchal and societal order which normalises certain evils. Some people still share the mentality that domestic violence is a private issue that should be left to the family to resolve as an internal affair through the exhaustion of other methods of dispute resolution.

In an interview with a male prosecutor and a female magistrate as to whether their personal attitudes and beliefs influenced their judgments in domestic violence cases, I realized that these factors play some part in the sentence that a judicial officer eventually hands down. One of the judicial officers openly stated that mostly women do not tell the truth in court because they just want to fix men for moral gain. A male prosecutor concurred and indicated that they

[29] These are feminists who problematise racism and who claim that it is one reason why black people are oppressed.

(i.e., prosecutors) find it difficult as representatives of the State to represent women to the best of their ability because, generally, they do not tell the truth.

While the allegations above may be true in some cases, this is not always the case and each particular case depends on its facts which must be properly, carefully and independently assessed in order to avoid the folly of generalizing. Simply because most victims of domestic violence are women does not always automatically mean that women fabricate stories for moral gain. If investigated with an open mind, there may be other reasons and motives for their conduct. Having a closed or prejudiced mind is likely to prevent judicial officers' from diligently prosecuting and handling such cases. In the case of domestic violence the issues are seldom simple and straight forward. The crime of domestic violence is really different from any other type of violent crime. Issues of intimacy, confidentiality, trust, reliance and external factors, such as culture and custom, often play a crucial role in crimes of domestic violence. Violence here happens in the home, behind closed doors. There is a general tendency to suppress the victim's ability and agility to seek or shout for help. There is thus a vital need for the prosecutor to be on the alert in evidence gathering and presentation in order to ensure sufficient evidence is placed before the court to secure a conviction. In most of the cases there are often no witnesses except the complainant.

One interesting issue emerged during the research which is the issue of medical examinations for purposes of sentencing. Three difficulties confront complainants. Firstly, when cases are reported to the police they do not assist the victims by ensuring that they are medically examined quickly, especially in cases in which the victim does not show signs of visible injury. This has a definite influence on the sentence passed if the case comes to court as the mentality subsists that the extent of injuries is not known. In this situation complainants definitely find themselves at a disadvantage or on the back foot in that they are forced to explain and convince the court of the injuries they suffered. This is an unpleasant ordeal which often makes them feel that they (and not their assailant) are the ones on trial and the enemy of justice. Secondly, I also observed that some prosecutors do not actively seek such medical reports from the police or, when they receive them, do not submit them as evidence into the court proceedings. To make matters worse, there are also like-minded magistrates who do not bother to ask for such evidence. Thirdly, it also emerged that cases are not dealt with timeously. This means that if a complainant's injuries have already healed by the time the trial starts and the complainant gives her evidence she might be accused of exaggerating

about the extent of those injuries. The fact is that some victims are actually locked up in their homes until their injuries have healed.

In certain instances the attitude of the judicial officers can force a complainant to withdraw her complaint or cause her to stop attending the trial. In one case a victim of domestic violence was asked by the prosecutor whether her allegation that she was hit on the head by her husband using an object she did not see was true. She said in all honesty that she did not recognize the object, but she was sure that he did not her with his bare hands. The prosecutor interrogated her further and openly accused her of persistently lying to the court. She subsequently and involuntarily withdrew her complainant giving as her reason one that was not related to the brow-beating tactics of the prosecutor.

A prosecutor also has the duty to notify the presiding magistrate of an accused's previous convictions, if any. One prosecutor indicated that domestic violence is not a serious crime and that he does not look for previous convictions in such matters unless he recognises that the accused person has already appeared in court before for the same crime. This means that there is a risk that habitual offenders of domestic violence may be treated as first offenders and, therefore, with leniency. Some complainants interviewed complained that their cases are not taken seriously by investigating officers who are known to advise the court on the date of the hearing of the case that the docket is not in order or that there is insufficient evidence for the case to be prosecuted or that the medical affidavit has been removed from the docket. This is very discouraging for a victim who suffers the secondary victimization of having to narrate her story before everyone in court and of being asked questions which she might fail to answer satisfactorily. The perpetrator might also hire a lawyer who represents his interests while the victim is reminded by the prosecutor that she has paid nothing for (usually) his services and, therefore, has no right to keep asking for help.

We need to recognise that magistrates are human and that despite the training they receive they still live and are part of society at large. During the research I noticed that some magistrates are more concerned with the idea of safeguarding the family and the patriarchal order than protecting the integrity and dignity of women. An example is the case of *S v Ncube* HH-335-13 (above) in which a magistrate imposed a wholly suspended sentence on an offender found guilty of contravening the Criminal Code for having sexual intercourse with a minor and making her pregnant. In this case the offender was the victim's sister in law. On

review, one of the two High Court judges, Mrs Justice Amy Tsanga, stated that the age discrepancy and its attendant power dynamics should have been central in interrogating the unlikelihood of a truly consensual relationship. She observed:

'In our cultural context where some married men believe the wife's unmarried sister is equally for the taking, ordering marriage gives a very unhealthy nod to predatory behaviour and does little to foster attitudes of respect and dignity towards females in what should be a safe family environment. Ordering marriage under such circumstances also does nothing towards sending a strong message of disapproval to such adult males who, behind a cloak of negative cultural practice, coerce a relative who is a minor into having sexual intercourse.'

Lack of knowledge of the power dynamics at play between the parties involved in a domestic violence case may result in magistrates honestly but mistakenly believing that the abused victim should simply leave her abuser. Such magistrates are blinded to their duty to take into account all the other factors that are relevant to the crime which make such a choice for victims extremely problematic and difficult. They fail to appreciate that their approach trivialises the crime, demeans its victims and sends a signal to society that the judiciary condones domestic violence. Such an attitude will only serve to incite perpetrators to further acts of domestic violence encouraging them to openly flaunt their crimes. Rather than express repentance for their crimes, perpetrators will simply exalt in their criminality and mock their victims with the insulting sentences handed down by the courts: one victim told of how her abuser waved a US$20 note in her facing showing her the price (or fine) he was prepared to pay for the privilege of beating her up the next time.

## 4.3 How is the scale tilting? Common trends

It is important to stress that the decisions of magistrates are not reported in Zimbabwe and without verification from statistics at the Magistrates' Courts it remains an assumption that it is men who commit most crimes of domestic violence. The studies and statistics I have managed to access in the country confirm my assumption that men commit most of such crimes. From the numbers of cases recorded at Chitungwiza, Mbare and Harare Magistrates' Courts, there is no doubt that men are usually the culprits. However, there are also female offenders. Women suffer more because of the patriarchal nature of our society and their relational nature. Patriarchy is grounded in the great lie that the answer to life needs is

disconnection, competition and control rather than connection, sharing and co-operation. This is why women value care giving because men have valued them according to it and their experience is defined in relation to men (Mackinnon, 1989).

Relational feminists, who celebrate the value of traditional feminine qualities and the importance of relationships, determine that women find themselves trapped between the criminal justice system and other methods of dispute resolution leaving them unsatisfied with the remedies. And this is why some officers admitted having a negative attitude towards them because a lot of factors come into play when it comes to making decisions about family matters.

What I have gathered during the research is that women who are offenders are usually responding to provocation over a long period of time. One case that I came across in the research was that of a woman who, having been subjected to violence by her husband throughout her marriage, had poured hot water over him after he had come home late and spent all the money. The woman pleaded guilty to the offence but narrated a sad story of all the emotional, physical, economical abuse that she had faced at the hands of her husband over ten years of her marriage to him. As she was narrating her story she made a point of emphasising that the pressure of such repeated violence increased over a long period of time and this is why she finally decided to inflict the same kind of pain on her husband as he had inflicted on her. However, she regretted what she had done and accepted the blame for everything. Both her husband's and her own relatives accused her of being a bad wife. This shows how women are brought up to believe that their worth is determined by the success of their relationships and that if such relationships fail the women are persuaded to think that it is entirely their fault. It seems that, in passing sentence, the magistrate failed to consider the degree of provocation suffered by the victim but did, in mitigation, consider that she had her four minor children and gave her community service.

In my analysis, the major reason why men are the most common perpetrators of domestic violence is the issue of power and control. Most of the violence men perpetrate is strategic as they seem to resort to violence when they perceive their control coming under threat (Mahoney, 1991). In one case a woman caused the arrest of her brother following a dispute with him over property that was left to them by their late parents. He had assaulted her physically with open fists and she reported the matter. Later she decided to withdraw her

complaint but the prosecutor refused and the case came before the court. On asking her why the prosecutor decided to continue with the matter, she said that the prosecutor told her that her brother was not a first offender and was appearing in court for the third time. What was of interest in this matter was the fact that her brother felt that since he was a man, he was superior to his female relatives and should be the only person to benefit from his late parent's estate. In fact, the law on inheritance makes it quite clear that all children and women are entitled to benefit from their parents' estate. The complainant's brother wanted to control his sister and threatened her with violence if she did not vacate their parents' home. Some researchers suggest that men batter women because they occupy positions of power over their relationships with women and they use that power to control those relationships; others suggest that men batter women because they feel powerless and are seeking to have more control over them (Babcock, 1993).

The research seeks to establish the emerging patterns in sentencing domestic violence cases by the three Magistrates' Courts selected for the study. It was clear from the research that the pattern established is that the many culprits who commit domestic violence are sentenced to community service and fines. Some of the complaints against them are withdrawn at the instance of the complainants and most of these complainants are women. I managed to have a conversation with one prosecutor who made the following contribution:

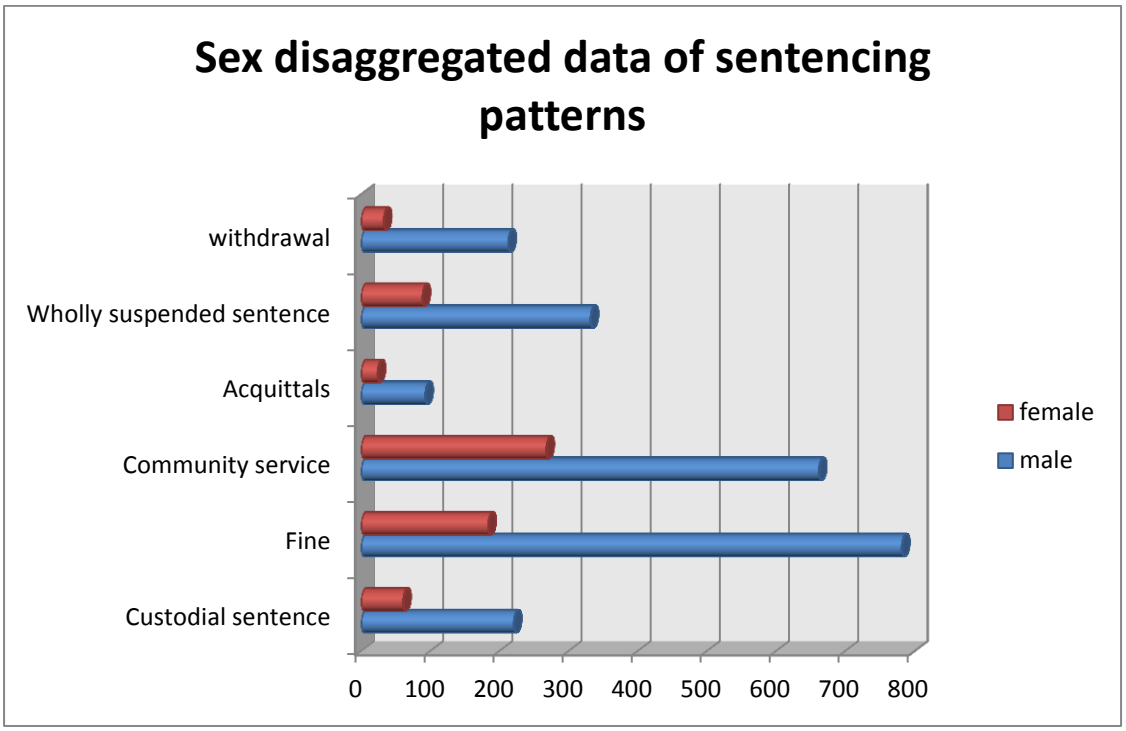
> 'Most women are the complainants and at times they leave us frustrated because they do withdraw the matters before trial even when the violence resulted in serious injuries that the seriousness is physically seen by naked eyes.'

The prosecutor indicated that they face challenges with some of the complainants when they decided to withdraw their complaints before trial. He indicated that one of the reasons that most complainants give include the fact that the accused is the breadwinner and they do not want him to be imprisoned. This is the common trend in most cases as key witnesses opt to withdraw their complaints. However the courts have devised ways of dealing with such obstacles and these devices vary from one court to another. For example, at Mbare Magistrates' Courts, they refuse to withdraw the matters but the problem with this is that in court it becomes difficult to force the complainant to proceed with the matter. Some of the judicial officers who were questioned about this indicated that they do not decide to proceed with a matter if the complainant does not want to do so, as she is the key witness in the

matter. They can only refuse to withdraw the matter if the complainant is bedridden or if it is a sexual offence or murder case.

Below is a graphical representation of the gender statistics relating to the domestic violence cases heard by the three courts that were the subject of the research. The statistics related to the period from January 2011 to December 2013 and show that it is mostly men who are the offenders and women the complainants.

**Figure 2: Histogram showing the statistics of the gender of the offender**



## 4.4 Stiffer penalties: A good direction to go/take?

**Figure 3: A headline of the Herald newspaper of 2 December 2103**

Stiffer penalties the way to go: Justice Mwayera

Chief Court Reporter

COURTS should complement the legislature to curb cases of domestic violence which are on the increase by imposing stiffer penalties to those who break the law, a High Court judge has said.

Justice Hlekani Mwayera said imposing deterrent sentences would send a

life she was carrying over a petty issue,"- said Justice Mwayera.

"Cases of domestic violence are on the increase and a deterrent sentence is called for to send a strong message to would be offenders."

Mr Innocent Chingarande of the Prosecutor General's Office had pressed for a stiffer penalty.

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The above figure shows an extract from a newspaper article taken from the Herald on 2 December 2013 in which it was reported that a High Court judge said, 'In passing sentence courts should complement the legislature to curb cases of domestic violence which are on the increase by imposing stiffer penalties to those who break the law.' The judge said imposing deterrent sentences would send a strong message to perpetrators of domestic violence. She made the remarks while imposing an 18-year jail term on a man who had killed his pregnant wife at the height of a domestic dispute in December 2012.

In another case, the accused was a soldier who was having problems with his wife and she decided to pack her belongings and go and stay with her mother at her rural home. Her husband followed and during the negotiations to bring his wife back home an argument started and he pulled out his okapi knife and stabbed his wife in the stomach resulting in serious injuries. He was then arrested and charged under the Domestic Violence Act and was sentenced to three years imprisonment plus 2 years which were suspended on condition of

good behaviour provided he did not commit a crime of a similar nature. One of the aggravating factors in this matter included the fact that he was a soldier who is expected to maintain peace between citizens, not violate their rights.

The other case I came across was of a man who was married to his wife according to customary law. They had two minor children and his wife was pregnant. He had an argument with her after she had cooked vegetables without using cooking oil. He then physically assaulted her with open fist and this resulted in her miscarrying. In the judgment, the magistrate pointed out that the harm the culprit caused was reasonably foreseeable since his wife was pregnant. He was not a responsible husband or father since it was perverse for him to beat her for failing to use cooking oil that he had failed to buy and he had failed to send their minor children to school. Although this was very cruel, he was only sentenced to community service. I was rather disappointed at the outcome of the case because I expected the presiding officer to sentence the man to a custodial sentence, considering the gravity of the offence and the pain inflicted on the woman. The woman said in court that this assault had not been the first of its kind, as she had been living in the abusive relationship for a long time. The miscarriage had, however, really traumatised her. Despite such evidence which had been supported by other witnesses, the court disregarded the history of the violence simply because this woman had not reported the previous assaults against her. Domestic violence cases are unique and should be treated in a unique manner in order for justice to be achieved. What was even more worrying was that the passing of such light sentences was sending the wrong message to potential offenders and victims. It said that the justice delivery system was trivializing serious domestic violence cases. A stiffer penalty would have met the justice of the case.

Domestic violence is a system and structural mechanism of patriarchal control of women that is built on male superiority and female inferiority, sex stereotypical roles and economic, social and political predominance of men and dependency of women (Cook, 1994). Hence, violence is encouraged by the perceptions of women's dependency and their subordinate position in society. Hence, it is more than just a case of a husband beating a wife. The law should not just give victims of violence paper writes but be visibly active in assisting them with the aim of reducing such incidents as opposed to simply being a means of processing cases as a matter of form. She likens violence to torture in the sense that methods of violence in the home resemble both methods of torture (that is biting, spitting, punching, beating with

objects) as well as its results (that is, causing mental pain, disfigurement, temporary and permanent disability, miscarriage and death). To aggravate the situation, domestic violence involves a breach of trust and, hence, it should not be underestimated.

Although the research focused mainly on the sentencing patterns at the Magistrates' Courts, an interview with a High Court judge was also revealing. There are a number of murder cases in which women were killed as a result of domestic disputes. It is therefore a valuable exercise to analyse the problem in order to identify and prevent acts that may be fatal.

## 4.5 Guidelines in sentencing or rather a wide discretion?

As indicated above, the Criminal law (Codification and Reform) Act sets out the guidelines for sentencing in assault cases.[30] This is not provided for in the Domestic Violence Act and it results in magistrates' using the same guidelines provided for in the Code. For domestic violence cases the Act ought to contain sentencing guidelines which specifically focus on the nature of the crime and the environment in which it is committed. The study was based on interviews with 11 magistrates and 17 prosecutors working in the three courts in the three study sites. I also realized during the research that sentencing is affected, in addition, by the administrative systems which operate at the different courts. In Mbare and Chitungwiza there are only a few judicial officers resulting in all the courts dealing with domestic violence cases as they are all allocated these cases. In Harare, there are 20 courts and there are specific courts dealing with domestic violence cases and they are served by 4 magistrates. The advantage of such a system is that there is less disparity in sentencing between these judicial officers as a result of the skill and experience they develop as a result of handling such cases than there is between other magistrates. The general opinion of these officers was that the guidelines would take from the magistrates the discretion they use in the process of sentencing. One officer had this to say:

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[30] Section 89(3)(a)-(f) of the Criminal law (Codification and Reform) Act Chapter 9.23 states that in determining an appropriate sentence to be imposed upon a person convicted of assault, and without derogating from the court's power to have regard to any other relevant considerations, a court shall have regard to the following:

(a) the age and physical condition of the person assaulted;
(b) the degree of force or violence used in the assault;
(c) whether or not any weapon was used to commit the assault;
(d) whether or not the person carrying out the assault intended to inflict serious bodily harm;
(e) whether or not the person carrying out the assault was in a position of authority over the person assaulted;
(f) in a case where the act constituting the assault was intended to cause any substance to be consumed by another person, the possibility that third persons might be harmed thereby, and whether such persons were so harmed.

> ‘We want magistrates to have discretion. There is no harm in creating literature of how others sentence but prescribing a sentence is wrong because each particular case is unique and should therefore be treated as such. Magistrates are officers of law who have been trained and are well able to exercise their discretion reasonably.’

It is true that magistrates are trained and able to exercise their discretion reasonably. The statement above should not be considered in isolation of other cases where the exercise of a discretion would result in an injustice. Having a set of guidelines for the sentencing of cases of this nature will go a long way in helping to curb violence in the home.

The case that follows illustrates some of the problems that are faced when a wide discretion is exercised. The danger is that the judicial officer may bring his/her social attitude and background to the front of their mind and make a decision guided more by them rather than the law. There is, however, a monitoring or controlling mechanism in place which most of the judicial officers interviewed considered effective. The only outstanding challenge they face is the heavy workload of judges and senior magistrates. In one particular case, a young woman poured cooking oil on her boyfriend after he had allegedly denied that he was the father of the child to whom she was to give birth. Her boyfriend suffered open wounds and had a medical affidavit supporting the nature and extent of his injuries. After the matter was stood down for judgment I had occasion to converse with the presiding magistrate and her colleague during their lunch break. During the discussions I was interested to know the likely sentence to be imposed considering the surrounding circumstances of the case. One of the magistrates reasoned that considering the sex, age and pregnancy of the offender, she was most likely going to consider imposing community service or the payment of a fine. The other magistrate, was not as inclined as her colleague, indicated that she was going to impose a custodial sentence bearing in mind the extent of the injuries sustained by the complainant and the fact that the assailant was not provoked on the day the assault took place. She reasoned that the girlfriend should have sought other methods of dispute resolution and not have been so quick to pour boiling hot cooking oil over her boyfriend. According to her, the measures taken were extreme.

The other magistrate (who expressed an intention to order community service or the payment of a fine) remained adamant and insisted that as long as she gave adequate reasons in her

judgment as to why she was relying on a particular factor in mitigation her sentence would do justice to the case. The principle was reiterated in the case of *S v Madembe and Anor* HH-17-03 in that where a judicial officer has accepted any factor in mitigation he/she must clearly specify the amount by which that factor has reduced the sentence. More often than not the sentencing officers frequently fail to formulate an appropriate sentence that reflects the specific background and circumstances of the case.

The common view shared by the magistrates was that the judicial discretion they exercise is important as each case depends on its own facts. In their view, the spirit of or the intention behind the Act was never to promote the separation of families. They indicated that they are quite lenient when passing sentence in domestic violence cases as compared with cases of assault charged under the Criminal Code. They have noticed that in domestic violence cases it is often the breadwinner who has committed the crime and if he is employed and looking after the family it is more appropriate to make him pay a fine for physical abuse rather than impose a custodial sentence that will prevent his going to work and further interfere with his responsibility as a father. Thus sentence in this regard should be aimed at repentance.

Some complainants were of the view that guidelines assist in sentencing to avoid the exercise of a wide discretion. They favoured a custodial sentence which in their opinion would send a clear message denouncing violence against women. One complainant suggested that there should be provisions for the mandatory arrest and sentencing of culprits of domestic violence.

A focus group discussion at Zimbabwe Women Lawyers Association which was attended by 15 women also revealed what victims think. They indicated that sentencing in domestic violence cases is too lenient as compared with the provisions of the Act. On asking their opinion on sentencing in violence cases the women had mixed views, as some were of the view that harsh sentences are a solution to curbing violence while others viewed harsh sentences as not being helpful because families would be destroyed. They indicated that it is for this reason that some cases are eventually withdrawn.

The criminal remedies do not curb domestic violence. The majority of the women who attended the focus group discussion indicated that violent acts are rampant and on the increase in our society because they are not being treated with the seriousness they deserve. They said an assailant just tells his victim that he is setting money aside in advance of the

assault he intends to inflict on the victim, then he assaults the victim saying that the court will simply order him to pay a fine which will not deter him or potential offenders. The other women were of the view that the sentences are of a sufficiently deterrent nature considering the nature of domestic violence cases and they attributed the statistics to an increase in knowledge that people now have through the media and other organisations and this is the reason why many people are reporting violence. Prosecutors insisted that sentences are sufficiently deterrent and one indicated that most of these crimes are committed by poor people who do not have money and ordering them to pay a US$100 fine is deterrent enough. Also, they said, community service will take away their time to work for their families and this will help to prevent the further commission of the crime. Sentences should be of such a sufficiently deterrent nature that the punishment of an offender acts as a threat to both the offender and to others, and so reduces the further commission of crime and this will send a clear message to the public that such criminal behaviour will not be tolerated. However, such a sentence may fail to sufficiently punish an offender or adequately denounce his or her offending behaviour. A custodial sentence is the most severe form of penalty that can be imposed by a court when sentencing an offender in domestic violence cases. The decision of the High Court of Australia in *Veen v The Queen (No 2)* (1988) 164 CLR 465 also affirmed the importance of deterrence as one of the purposes behind sentencing but drew attention to the fact that deterrence is just one of a number of purposes of sentencing and that sometimes those purposes can be conflict with each other. In that case, Chief Justice Mason and Judges of Appeal Brennan, Dawson and Toohey said:

> 'The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what an appropriate sentence is in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.'

One judge interviewed drew on examples from her experiences in that office. On the first assumption, she indicated that the sentencing is not generally lenient because there has to be a balance struck between the nature of the offence, societal interest, the offender and the principles of justice. It is not recommended to sentence someone to prison in a case where, after investigations, a judicial officer discovers that the justice of the case does not warrant a prison term. Imprisonment in such a case will create a situation where an individual who is supposed to reform is then allowed to mix with hard core criminals. She was thus proposing

that to reduce cases of domestic violence there is a need to impose mandatory minimum sentences to instil some fear as they do, for example, in stock theft cases where the nine years mandatory sentence has resulted in a reduction of stock theft cases in Zimbabwe.

Accordingly, even if an accused person is convicted of violating the general criminal law, that conviction may not reflect the severity of their crime which attaches to their violent pattern of conduct, thereby understating their true culpability. While that observation is true in the domestic violence context as well, limiting the criminal justice system's focus to isolated incidents ultimately hinders the efficacy of law enforcement by creating a disjoin between a domestic violence victim's perceptions and the criminal law's response, by preventing the jury from considering the broader picture of domestic violence, and by understating the extent of the accused's culpability.

## 4.6 Conclusion

The findings show that current sentencing patterns of the courts involved in the research reveal a rather lenient tendency in favour of culprits on the part of the judicial officers who are faced with the dilemma of striking a balance between preserving the sanctity of the family and punishing offenders. The sentences cannot be said to be sufficiently deterrent though it is rather farfetched to say that they have no impact. The inherent social attitudes and beliefs of officers also impair their judgment in sentencing as they are also part of society. Different factors which influence sentencing have been unearthed and sentencing is a critical part of the criminal justice system in so far as the curbing of domestic violence is concerned. Therefore, it has to be addressed.

# CHAPTER 5

# 5.0 CONCLUSION AND RECOMMENDATIONS

## 5.1 Conclusion

The main objective of the research was to interrogate the sentencing patterns in domestic violence cases determined in the Magistrates' Courts of Mbare, Harare and Chitungwiza with a view to assessing their impact on the incidence of the crime. The study further intended to examine the factors that judicial officers consider in passing sentence as well as interrogating whether sentencing is affected by their inherent attitudes and beliefs. All the assumptions of the study were duly confirmed and there were some emerging issues which were paramount to the research and which answered key questions.

Prior to its enactment there was the hope that the new domestic violence legislation would bring about a legal revolution which would see an end to the scourge of domestic violence as a result of the criminal and civil remedies that the legislation would offer. However, despite the passing of this legislation the study has revealed that the problem still persists. It also disclosed that the roots of this problem lie in the social as well as the legal realm. Having examined the sentencing patterns of magistrates, my findings suggested that domestic violence may be reduced by imposing stiffer penalties coupled with other interventions. It is also important to mention that the new Zimbabwe Constitution lays the foundation for an enabling legal environment towards women's rights by encouraging gender equality[31] which is one of its founding values and principles. Further, one of the national objectives in the Constitution is gender balance.[32]

The nature of violence in the home requires the law to work most efficiently with government and civil society organisations to embark on an integrated response to the problem. It is clear from the way violence manifests itself in the domestic sphere that it is not only about domestic disputes but about unequal power relationships. The law exists but its ability to reduce violence is compromised by deep-rooted cultural beliefs and economic situation.

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31 Section 3 of the Constitution of Zimbabwe.

32 Section 17 of the Constitution of Zimbabwe states that the state has a duty to promote gender balance in the Zimbabwean society through promoting participation of women, taking measures, including legislative ones, to rectify gender discrimination and imbalances resulting from past practices and policies.

Domestic violence does not stop in the home but penetrates into wider society manifesting itself through other forms of violence which corrupt successive generations causing other social problems. Effective interventions in this area are long overdue and the starting point is our enabling constitutional framework which facilitates the adoption of multi-faceted interventions consisting of numerous services and programmes for judicial officers, victims and abusers as well as enactments to amend the law.

## 5.2 Recommendations

### *5.2.1 Mandatory minimum sentences*

There is a need to impose mandatory minimum sentences against perpetrators of domestic violence. The cases can be streamlined in accordance with circumstances, such as whether or not a weapon was used in the commission of the offence. If the answer is in the affirmative then the mandatory sentence should apply. Mandatory sentences will provide an increased deterrent to criminal behaviour as observed by the Canadian Department of Justice Research and Statistics (2005). These will reduce sentence disparity and control the unfettered discretion of magistrates. These measures can potentially save lives by keeping abusers away from their victims, thereby preventing an escalation of violence to the point where it results in death (Killian, 2001). However this does not mean that every offender should be locked up but the main purpose is to deter would-be offenders through having a sentencing regime that does not condone violence in the home. Since the provision of mandatory minimum sentences will also carry a provision of substantial and compelling circumstances to justify a lesser sentence, magistrates will still have their discretion but it will be reduced and, at least, controlled. In the South African case of *S v Baloyi* 2000 1 SACR 81 (CC) it was held that whilst all crime has harsh effects on society, domestic violence, in particular, has a hidden, repetitive character whose ripple effects on society and family life are immeasurable.

The Zimbabwe National Gender Based Violence Strategy of 2012-2015 noted that gender based violence is seen as a development issue which has a severe consequential impact on social and economic development. Mandatory minimum sentences have a deterrent effect on domestic violence in that they eliminate options once available to abusers, namely, in our context, suspended sentences, community service and the option of a fine, leaving the perpetrator with only one option and that is prison. This is how a healthy fear of the law may be responsibly instilled in abusers.

### *5.2.2 Use of the domestic violence legislation*

The positive aspect to note for our jurisdiction is the existence of dedicated legislation on domestic violence. Zimbabwe's Domestic Violence Act is exclusive in its treatment of forms of domestic violence. Thus it is imperative that all cases of domestic violence are dealt with under the Act instead of under the provisions of the general criminal law. It should be understood that the murder of a spouse and the murder of unrelated person are two different scenarios with different circumstances in that those surrounding crimes of domestic violence are unique; hence, the heart and spirit of the statute should acknowledge and criminalise a culprit's attempt to gain control and power over their victim.

### *5.2.3 Dedicated Domestic Violence Courts*

The research revealed that where there is a specified domestic violence court and judicial officers who are specialized in dealing with such cases, service provision is improved. Therefore, the establishment of specific domestic violence courts at all Magistrates' Courts should be implemented. There is also a need to have specialised officers who are trained and are gender sensitive since domestic violence is a form of gender based violence. Power dynamics are at the core of such violence and one needs to be trained specifically in such areas in order to appreciate the type of sentence which is appropriate in any particular case. This will also reduce conflicts between or disparities within sentencing patterns. This is clearly the duty of the state. In the case of *Opuz v Turkey* (33401/02) the European Court on Human Rights noted that the state has a primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by appropriate law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

### *5.2.4 Enhancement of gathering evidence*

The police play a pivotal role in evidence gathering and should gather evidence efficiently and assist victims as directed by the Domestic Violence Act. This includes making available reports at police stations where an assault is reported but no docket opened. The police should also desist from encouraging victims to settle matters out of court as this will not deter abusers from further abusing their victims.

### *5.2.5 Sentencing guidelines*

The absence of sentencing guidelines in the Domestic Violence Act is worrisome. It is important to have a provision for sentencing guidelines due to the uniqueness of the crime of domestic violence. General sentencing guidelines may not be appropriate given the intimacy of the crime of domestic violence. Such guidelines may go a long way in creating a measure of consistency and effectiveness of sentences imposed on perpetrators of domestic violence.

### *5.2.6 Previous convictions*

The criminal history of an offender plays a very fundamental role in sentencing. As has been discussed in this research, the crime of domestic violence is recurring in nature which means that the history of a serial offender's violent conduct is very important. If an offender is of a criminal disposition with no sign of repentance then stiffer criminal sanctions must be visited upon them as a deterrent measure. There is no reason for mercy in these circumstances. I believe that it is more painful to be hurt by a person who is in a position of trust than by one who is not. Thus it is recommended that the State must put in place a centralized database to reduce the risk of treating habitual offenders as first offenders. During the research I observed that because of the lack of such database many offenders seem to benefit from the *status quo*.

### *5.2.7 Information dissemination*

If the total arrest of the scourge of domestic violence is to be realized, then there is a need for raising awareness about it within important institutions of society. For example, information about domestic violence must be included and taught in the schools curricula including in tertiary institutions.

The media should also assist in disseminating information that discourages rather than foments all kinds of violence, including domestic violence.

## Bibliography

Babcock, J. C et al. (1993) “Power and Violence: The Relation Between Communication Patterns, Power Discrepancies, and Domestic Violence”, 61 j. consulting & clinical psychol. 40

Bailey, K. D (2010) “Lost in translation: Domestic Violence, the Personal is Political, and the Criminal Justice System.” Journal of Criminal Law and Criminology Vol 100, Issue 4 p1255-1300.

Bentzon, A.W. et al. (1998) Pursuing Grounded Theory in law: North South Experiences in Developing Women`s Law. Harare: Mond Books, and Oslo: Tano-Aschehong.

Brinkley, L. V (2003) “Mandatory Minimum Sentencing: Overview and Background”, Nova Science Pub Inc. US

Bunch, C (1990) “Women's rights as human rights: Toward a re-vision of human rights.” Human Rights Quarterly, 12(4), 486-498.

Coker, D (2003). “Addressing Domestic Violence through a Strategy of Economic Rights”, Women's Rts. l. Rep. 187, 188

Cook, R ed (1994) Human Rights of women: National and International Perspective, Philadolphia, University of Pennsylvania Press

Dahl,T S (1987) Women’s law: An introduction to feminist jurisprudence. Oslo, Norwegian University Press

Davis, K (2008) “Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful.” In: Feminist Theory (2008) 9: 67.

Easteal, P and Gani, M (2005) “Sexual Assault by Male Partners: A Study of Sentencing Factors”: 9 S. Cross U. L. Rev. 39 2005 Content downloaded/printed from HeinOnline (http://heinonline.org) Fri Sep 20 03:29:32 2013

Feltoe, G. (2009) Magistrates' Handbook, Legal Resources Foundation, Harare

Feltoe, G. (2012) Judges' Handbook for criminal cases, Legal Resources Foundation, Harare

Hudson Barbara (2013), Justice in the Risk Society

Killian, A. M (2001) "Mandatory minimum sentences coupled with multi-facet interventions: an effective response to domestic violence." Accessed on 6 UDC L. Rev. 51 HeinOnline (http://heinonline.org) Tue Mar 18 07:56:54 2014

Mackenzie, G (2002) "Achieving Consistency in sentencing: Moving to best Practice," University of Queensland Law Journal, Vol 22, Issue 1 pp 74-90

Mahoney, M. R (1991) "Legal Images of Battered Women: Redefining the Issue of Separation," 90 MICH. L. REV. 1, 63

Makahamadze, T et al (2011) "Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act". Journal of Interpersonal Violence XX(X) 1 –22 Reprints and permission:sagepub.com/journalsPermissions.navDOI:10.1177/0886260511423239http://jiv.sagepub.com

Marie Tong, R (1994) Feminist Thought – A Comprehensive introduction, London, Routledge.

Muliajhrd, E (2004) "Rethinking Access to Justice: Enforcing Women's Rights in Cases of Domestic Violence in Kenya." Vol. 2 No.3 Sept pp 222-253 ISSN 1686-900X Copyright @ EAHRI, Printed in Kenya

Nhlapo, T. R (1991) "African family and women's rights: Friends or Foes." Acta Juridica, Vol 135 pp135-146

Oguli-Oumom , M et al (2002), Promoting an integrated Approach to combat Gender Based Violence: A Training Manual, Commonwealth Secretariat, London

Sherman, L.W (2000) “Domestic Violence and Restorative Justice: Answering questions.” Virginia Journal of Social Policy and the law, Vol 8, Issues 1 pp 263- 290.

Stewart, J (2002), Paving a way forward: A review and research primer of WLSA research methodologies, WLSA, Harare

Tsanga, A. S (2000) Laws affecting women in Zimbabwe: A critical assessment of strength, weaknesses and gaps. Paper presented to the women parliamentarians.

Tsanga, A.S (2003) Taking law to the people, Gender law reform and community education in Zimbabwe, Weaver Press, Harare

Tuerkheimer, D (2004) “Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence,” 94 J. CRIM. L. & CRIMINOLOGY 959, 971-72

WLSA: Lobola its implications for women’s reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe, Weaver Press, Harare.

Zdenkowski, G (2000) “Limiting Sentencing Discretion: Has There Been a Paradigm Shift?”12 Current Issues in Criminal Justice 58