

PART III. CASE STUDIES

THE 'PROPOSITION' MAINTENANCE IN THE TWILIGHT IN URBAN ZIMBABWE

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Introduction

The formal rules under customary and general law relating to marriage (and non-marital) relationships and the responsibilities of bringing up children under Zimbabwean law can be fairly simply stated (see Stewart and Armstrong 1990: 171, 189). But this paper argues that, whatever the formal position, a great many Zimbabweans, especially in urban areas, live in a 'twilight zone' between custom and general law. In an old and rather stereotyped refrain, casual or other sexual relationships are formed and then ended; left mostly on their own, women turn to the courts, without much success. The picture was summed up by a 1995 newspaper article:

While community courts were established to assure maintenance rights for women and children in unregistered customary unions as well as for single mothers and their children, disbursement of the money through the courts has been described as poor with the beneficiaries accusing court officials of causing the delays... As a result, many women had been left stranded and in some cases

¹ I am grateful for valuable insights and assistance from Professor Angela Cheater, formerly of the University of Zimbabwe and now of the Department of Social Anthropology, University of Waikato, Hamilton, New Zealand.

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gave up. Some went into vending while others were forced into prostitution... [S]ome officials had even called [the women litigants] prostitutes who were not entitled to get maintenance... (Zindi 1995)

This paper explores these issues, concentrating on the situation amongst the Shona peoples in Harare, the capital of Zimbabwe.² The image is of people caught between a lost customary law and an irrelevant general law in this crucial area of sexual relationships and children. I should make it clear that I am not romanticising 'tradition', accusing Zimbabwe's men of mass sexual harassment followed by neglect, or regarding its women as victims. These issues represent profound changes in the nature of the urban family in Zimbabwe - and possibly all over Africa. I argue that we need to understand the 'zone' particularly in terms of urbanisation - and all that accompanies that word. Shona custom was rooted in a rural village life and an agricultural economy, where face-to-face relations, kinship, tribal hierarchy and ancestral respect formed a coherent normative system. From the turn of the century, however, the urban experience was, for most Shona, dislocated from these roots. No doubt this was inevitable, given the inexorable changes in economy and technology over this century. But the issues need analysis and debate.

'Socialising' Sexual Relationships

Every culture has norms relating to basic life issues: reproduction, food, shelter, survival, death. In technologically simple societies, the norms linking such basics are often regarded as 'seamless'. Diana Jeater notes that all social groups need systems whereby children can be recognised as members of the group, and particularly as descendants of the partners (see Caplan 1987; Foucault 1979). In relation to the pre-colonial Shona, she analyses the cultural cornerstone of the bridewealth exchange by which sexuality was 'socialised'. It is clear that Shona bridewealth was based upon the rural economy, patriarchy, ancestral authority, clear views of gender and sexual relations, and the processes by which individuals and

² I speak broadly of the groups known as the Shona peoples of northern Zimbabwe. Of course, urban Harare is not all Shona and the issues here would not be identical in relation to every tribal grouping. But there is a remarkable similarity between different parts of the country (cf Werbner 1991). The bulk of the field research on which this paper was originally based was conducted amongst the Shona peoples in 1982, 1987 and 1990, although I observed broadly similar issues in other urban areas. See Ladley 1982, 1985 and 1990.

kinship groups changed their status: child to adult, girl to mother, for example (Jeater 1993: 8-16).

In the Harare of the 1990s, however, the close linkages between these basic life processes are hardly apparent. The ability to feed oneself with fast-food bought on the way back from factory work does not obviously require a normative linking between sex, work, food-production etc. At one level, therefore, the processes by which Shona men and women in urban Zimbabwe conduct their lives may be thought of as personal, isolated instances, removed from any coherent cultural base. Indeed: this is the zone that we explore.

Normative Complexity

There are obviously different categories and hierarchies of norms/rules in any society. We are well used to the notion that some things are *wrong* in one culture (drinking alcohol, say), but not *unlawful* in the state sense. In addition, and irrespective of the law, when different cultural or religious groups live together, there are often normative differences, from reasonably obvious issues like dress, to complex matters which relate to power, such as personal rights and freedoms. And there may well be disputes within a culture, for example over a custom which is thought by some to be outdated or unfair, but which is defended by 'traditionalists'.³ A number of factors can be used to distinguish between categories of rules, including their origins, economic derivatives, processes for enforcement, content and the nature of issues covered by the rules. Using these factors, some writers distinguish between such categories as 'law', 'custom' and 'social etiquette'.⁴ In urban African situations, these normative interactions can be especially complex. It seems that there has been little close study of this complexity in post-colonial Zimbabwe. Certainly, most of the legal anthropologists in the 1950s and 1960s thought that 'true' tribal customs were only to be found in the rural areas. They, and their chiefly informants, considered that something transformed African behaviour suddenly in urban areas. Despite rearguard actions, chiefs and headmen effectively abandoned jurisdiction over their peoples who were in towns. Jeater's significant

³ I cannot here solve the issue of the constant mutation of 'custom'. Suffice to say that the matter is well rehearsed in the literature, going back decades (cf Hobsbawm and Ranger 1983).

⁴ Writers in the field have mostly abandoned agonising over whether all can be given the rubric of 'law', a term which has accordingly stretched itself generously; cf Tamanaha 1993: 192-217.

recent work on the effects of urbanisation on Shona custom is focused on the period 1894-1930. Her telling introductory thoughts capture the issues precisely:

I imagined how a man would feel when he began to discover that he could raise his own bridewealth; that his right to stay in town was unconnected to considerations of kinship; that there were no established social rules about how to live in town, how to make love, how to raise children, how to have a sense of self. Moreover, it became clear to me that there were also women in the towns, similarly faced with an absence of social rules about ways to live, ways to be, in this new environment (Jeater 1993: 1).

From the first establishment of colonial authority, these issues bothered the tribal chiefs, and their new allies, the Native Commissioners.

Customary Marriage and Sexual Relations

One must be careful in attempting to define something as flexible as custom. Apart from local changes, official attempts were made to reshape 'customary' marriage from early in the administration of the British South Africa Company. It is therefore crucial to think carefully about the time one is describing, rather than assuming there has been some immutable 'custom'. Still, Jeater's reconstruction of pre-colonial Karanga (a sub-group of the Shona) customs around modern Gweru makes the central point that the "regulation of sexuality... was not distinct from the other obligations of the lineage" (1993: 29). As with other aspects of social existence, lineage, morality and the legal order were intertwined. The core obligation of men and women was to direct their sexual relations in terms of intended customary marriage. This would be publicly recognised in the negotiations between the husband (and his family) and the father (or other male guardians) of the wife, which would establish the various forms of bridewealth payment - and hence a system of perpetuation of the lineages which would be approved by the ancestors. Sexual transgressions of this normative framework were not punished in themselves, as sinful acts. They were recognised as departures from the lineage expectations, and compensation for this was accordingly sought. Jeater sums this up:

A girl who lost her virginity did not step over some absolute line, but put in place a procedure whereby the transgression could be absorbed through the negotiation of compensation or bridewealth payments from her lover's family (1993: 30).

This view was later generalised to cover all the Shona peoples, Bourdillon stating

that anything was permitted, as long as it was heading for a satisfactory marriage (1982: 48). This can be simplified to its essence, seen in innumerable court cases and in all the texts of the period (Goldin and Gelfand 1975: 79, 209).

Marriage, in the ideal, was thus a relationship between families, an exchange of the productive services of a daughter for a wife, the perpetuation of the lineages through a recognised ritual. The husband and his family must pay for this exchange, in terms of bridewealth. The general position of bridewealth is well discussed in the literature (Kuper 1982; Meillassoux 1981; Comaroff 1980; Aschwanden 1982a). Once the bridewealth had been agreed upon, and often token payments made, the marriage was regarded as being formed. A man might take additional wives, provided he could care for all - a factor which might lead to a third or fourth wife's parents objecting to the proposed marriage. But separation was rare, and often resisted by the wife's family who would pressure her to stay (not least because bridewealth might have to be returned).

Of course, even then practice did not always match the theory, and this gave vast scope for litigation in customary law courts. Partially-paid customary debts have also for much of the century constituted part of the fabric of ties and debts which made up rural life.

There might be a pregnancy resulting from the 'seduction'. Again, custom seemed clear. Children were part of the marriage exchange. If a man fathered a child outside of marriage, he had to compensate the new mother's father for the loss of her original child-rearing capacity and hence bridewealth from future marriages. This was not 'maintenance' in its western sense, of assisting with the expenses of bringing a child up to adulthood (Stewart *et al.* 1990: 190). It was, like seduction damages, a repair of the bridewealth process. Caring for a child was the responsibility of the unmarried mother's family. However, if the unmarried father paid an agreed sum of compensatory bridewealth requested by his former girlfriend's family, he could take the child himself, as of right, to his own family for upbringing - at any time in the child's youth. The child's interests, or the mother's, were not strictly relevant; it was a matter of negotiation between men in order to get as close to a completion of the full bridewealth exchange as negotiations allowed. In other words, if the theory of the marriage exchange broke down for any reasons, the customary court process could be used to approximate it. Above all, this was litigation by *men*. And although there were defendants who denied responsibility, a remarkable feature of all studies of litigation was the extremely high rate of compliance by defendants. In other words, men agreed to the basic rules, no doubt often breached them, but mostly paid by the rules in the event they were sued.

Town: when 'Custom' Stops Being Customary

Cities are social crucibles, somehow producing changes in the cultural ingredients which went into their making. For a century, African traditional leaders, men, publicly complained that their sons and daughters were being led astray, corrupted, seduced, etc, from *traditional* ways. Amongst the Shona at least, rural chiefs could feel their tribal blood and customs haemorrhaging, as they saw the effects of urbanisation on their peoples. They complained often to the Native Commissioners, foreseeing the demise of the cultural norms and their chiefly power. A key issue was, of course, the chiefs' loss of vital elements in their powers, for example when land and local dispute-resolution became subject to the control of Native Commissioners. Later new forms of mass political movements began to sweep the continent and these too left chiefs in rural backwaters. But apart from political authority and the land, the chiefs were also often lamenting the loss of something more personal in their views of customary behaviour: the relationships between men and women were 'not right', there was prostitution, men and women refused to recognise their responsibilities to each other, their children, their elders - and so on.

The key to this lament was urbanisation. Perhaps this too is universal. But when one considers the vast difference which must have struck migrating Africans all over the continent, of both genders, between their rural existence and the new towns, perhaps this is a peculiarly strong feature of the lament in Africa. Time and culture kaleidoscoped in the urban areas, with no extended-family villages, no chiefs, no animals, no agriculture - and, initially, almost no women. As Rudo Gaidzanwa argues, it was basic colonial policy for the first part of the century, that the rural tribal and family structure should be kept nominally intact by a policy of migrant labour. One benefit was that this provided some social security for unemployed workers, who would return to the rural areas.⁵ But it also meant there were disproportionate balances of women and children in rural villages, and currently-single men in urban areas (Gaidzwana 1993: 43). As the economic circumstances and political controls which had belonged to rural life were lost, so, apparently, were the norms. Writing of the early part of this century, Jeater sums this up (1993: 117):

In [the] cosmopolitan urban culture, the established systems for regulating sexual behaviour through networks of intimacy and

⁵ This was impossible, of course, for the vast numbers of Mozambicans, Malawians, etc, who were absorbed into the Rhodesian economy this century. Many of such formed the core labour forces of commercial farms and mines.

surveillance began to break down. [...] [I]t was easier to think of sexual contact as taking place between individuals, not lineages.

The colonial legal system responded in several stages. From the turn of the century, a number of Native Commissioners had noted that the system of bridewealth itself was changing in many areas, partly as a result of the destruction of cattle herds as a result of the rinderpest epidemics. They argued that bridewealth was the sole source of controlling African promiscuity and that stiff legislative measures should be put into place to ensure that it was a compulsory part of all African marriages, and that such marriages would be registered. Colonial officials thus became preoccupied with sexual regulation - and so attempted to shape moral beliefs (Jeater 1993: 64-67).⁶ In this regard, they formed something of an alliance with the chiefs, who certainly knew that the 'customs' were changing rapidly. The clear assumption was that if women and men could make decisions on their sexuality outside of the lineage system, the result would be promiscuity. Indeed, the historical record reflects a preoccupation with controlling prostitution. In addition to ordinary criminal law on prostitution, the Native Commissioners also recommended 'protecting' customary rules on sex, by criminalising African adultery in 1916. There were other steps taken too, such as limiting the allocation of land-rights to unmarried women in rural areas (to keep them part of male-absentee households), whilst also discouraging women's migration to the urban areas (Gaidzwana 1993: 43). These measures were aimed at strengthening 'customary' marriage and sexuality. But the Native Affairs Department was also extremely concerned at the practice of pledging young females to older men in marriage. The same legal techniques were thus also used to require that marriage be entered into voluntarily by women. This insistence contradicted the basic Shona view of marriage essentially concerning lineages, not the private wishes of individual women (Jeater 1993: 78). By the 1920s, it became clear that the attempt to keep women out of the urban areas was doomed, and policy changed (often against the wishes of the chiefs) towards the creation of stable single family homes in urban areas (Jeater 1993: 169).

It was small wonder that urban norms of family relationships changed. Apart from anything else, the climatic rhythms which shaped rural Africa were irrelevant in urban life. Rain or dry, urban life was concerned with commuting, labour, selling and buying - not with crops and cattle. For most Africans, residential life was based on densely-populated townships, where tribe and family proximity was mostly impossible. Houses were built to contain extremely small family units - and in some

⁶ This was first framed in the first Native Marriages Ordinance (1901), which, with amendments, still forms the basis of current law.

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cases, mass single-sex hostels.

The irony of the early attempts at the regulation of sexuality, especially in the urban areas, was that large numbers of illicit relationships were established, outside of the formal rules. From 1915, the courts were enjoined not to recognise the legal consequences of these unofficial concubinages, some of which became known as *mapoto* (of the pot) marriages (Chavanduka 1979; Jeater 1993: 85). Thus the 'twilight zone', which persists today:

[If] parties, African or non-Africans, cohabit without entering into some form of marriage, the law treats them as strangers and thus they acquire no rights or obligations against each other. (Stewart *et al.* 1990: 173)

Freed from lineage and customary constraints based on household agricultural production, urban women did indeed start making their own decisions. There was no simple way for chiefs to control such issues as seduction damages, or the customary equivalent of maintenance. In an anonymous urban world, men often refused to pay - as far back as the 1920s.

A gendered pattern of socialisation began early in the home. Jeater notes that the "child's entire relationship with the material world was structured by its gender" (1993: 23). In general, rural life was face-to-face: people knew each other. But although some peasant farmers produced surpluses and had reasonable incomes, the pattern was seldom economically self-sufficient. Over the century, virtually every rural village was sustained by money from relatives working in towns. Indeed, there were coercive Rhodesian taxation measures to compel part-time work in order to produce more labour. And at times when kinfolk were out of work, or fleeing from unwelcome pressures, the rural areas re-absorbed considerable numbers. But, over this century, the numerical balances shifted. Although only some 20% of the Zimbabwe population is currently urban, the proportion is apparently, in common with all the developing world, increasing steadily. But the communal lands were home, ultimately, for a very considerable proportion of Black Zimbabweans. Remarkably few urban Africans ever finally gave this up. But by the 1970s, it was apparently rare for urban Africans to ask for seasonal leave 'to plough' (the family acres in the communal lands). Like Japan, perhaps, much of Zimbabwean psyche was tied up in the ideal of small-scale rural farms. The urban realities might be where the future (and money) was being made, but they were slow to reshape the collective images of self and tribe.

The rural images of ancient tribal autonomy, ancestors and rain, were given a huge resuscitation by the liberation war of the 1970s. Fighting in the bush, the ZANLA

guerrillas at least formally adopted much of the conceptual representation of themselves as the new 'chiefs', blessed by the ancestors, come to reclaim the lost lands (and pure Shona culture) of the past (Lan 1985). Whatever the possible romanticism of this, or indeed its durability, the imagery was still dramatically evident when I did my fieldwork in northern Zimbabwe in 1982. And it represented, crucially, the basic climate in which the Primary Courts were established in 1981. 'Custom' was reborn in a flush of Zimbabwean pride. The ancestors (at least initially) approved, and, for the first two years, the rains fell abundantly on a new Shona Party-state.

The tides of litigation to which I refer in this paper, thus began in the new primary courts as part of this customary revival, based on old concepts of custom which were supposed to govern sexual relations. The irony was that these customs had been directly challenged by the guerrillas. Although the rural chiefs lamented the effects of urban life on the above idealised customary morality, they preserved, as best as possible, the framework of customary marriage in their rural courts over much of this century. Their jurisdiction was limited to their own areas, or to people who consented to come before them having received a summons in town. In the urban areas, District Commissioners presided formally over the same customs. Family matters, and increasingly maintenance cases, began to dominate all urban 'customary law' litigation. But their general case loads declined steadily over the 1960s and, in the teeth of the guerrilla war, collapsed in the 1970s for all but some maintenance matters. Some informal urban courts developed, attracting considerable popularity, applying rules one might call 'urban custom', but these appeared to have been rare (Chavanduka 1979). The liberation war changed all - temporarily, at least.

The Liberation War

I have elsewhere described the effects of the guerrilla war on chiefs and on customary law in the rural areas, especially in Guruwe (Ladley 1985). I argued that over some ten years there was a denunciation of the basic framework of chiefly authority, including, explicitly, the old strictures of custom on marriage and sexual relations. The ZANLA guerrillas (mostly Shona speaking), and later the party-state of Zimbabwe, claimed to have taken on the traditional role as the political representatives of the ancestors which the chiefs had filled. They denounced the chiefs as being captured by the Rhodesian state, especially by the District Commissioners. And they sought to replace the formal functions of the chiefs and DCs. After independence in 1980, the Mugabe government created a series of new structures, including village and community courts, to administer customary law. These were, for the first time, to be elected by the local populace at village court

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level. Partially-trained presiding officers were appointed to deal with appeals and more serious matters in the community courts. A nationally organised court structure, applying all aspects of customary law, was thus in place to confront the rural-urban ambiguities inherited from the past.

As I have shown elsewhere, initially this court structure was apparently massively successful. Some 1500 village courts, and 30 community courts, were operative by the end of 1982, dealing with thousands of cases weekly. But what law were they to apply? How would these courts deal with the dramatically changed urban customs, and indeed, the effects of the last decade on the rural situation? The answer appears to be that the new urban village courts provided, for the first time, a great many accessible fora in which the clashes between 'rural custom' and 'urban reality' could be played out. The vast bulk of the litigation in these courts became concentrated around the issues which form the focus of this paper: seduction and maintenance claims. In 1986, the seduction action was declared invalid by the Zimbabwe Supreme Court, in a test case which established that the Legal Age of Majority Act 1982 had removed the legal basis of the action (i.e. men's perpetual guardianship over women, whether under 18 or not).⁷ Earlier, the customary law courts had also been given formal jurisdiction to hear claims for 'maintenance', recognising that what was being claimed was something between the general and customary law. These developments set in train an industry of litigation, as Zimbabwe's women pursued men through the courts, seeking damages, and/or maintenance. Blood testing blossomed, as men denied paternity and sought to prove such. The courts were filled with detailed allegations of time and circumstance of sex, and countless stories of double-dealing (by men and women), as claims multiplied.

In 1990, under a tide of litigation, the court administration seems to have been swamped. There were many allegations of misappropriation of funds and lost files and an apparent general administrative breakdown. Faced with considerable popular (mostly male) clamour against the village courts and shortly before a general election, these courts were abolished by legislation. Chiefs' courts were to be re-established, but with severely reduced jurisdiction, and, specifically, excluding the key areas of seduction and maintenance. Community courts remained, with maintenance jurisdiction only over informal customary marriages. All other maintenance issues had to go to the Magistrate's Court. For the first time in African history, customary court litigation over seduction and childbirth, had essentially ended.

⁷ *Katekwe v Muchabaiwa* [1984] 2 Zim L R, 112; see Ncube 1987: 193.

Adapting 'Custom': The *Proposition*

Some evidence of how 'custom' was apparently adapted can be seen in an analysis of the arguments which came before the courts in the 1980s. What follows is a synthesis of what countless litigants argued in open court, often going into considerable detail. At one court I regularly observed, large crowds gathered every Sunday, as the court hearings became social events. In these hearings, it was apparent that theory and reality were constantly interacting. In customary theory, men offered women gifts as part of the exchange process in bridewealth; if the gifts were accepted, the road to possible marriage had begun. But in the reality of urban areas, men (and perhaps women) *proposed* - not marriage, but 'love' - by which they meant, sex. The English phrase *propose love* has been appropriated into everyday African urban parlance, to mean just this. As part of the *proposal*, men offer women gifts (e.g. a meal, clothes) and expect sex; if a gift is accepted, discussion revolves around time and opportunity. This does not mean that all women were passively waiting for offers and then misunderstanding them; or that men cynically manipulated a 'customary transaction' (gift giving). The issues are complicated and it seems clear that factual and normative claims are made by any party to a dispute, trying to bolster their case. But the expression of these views by litigants in thousands of court cases demands further research, and perhaps offers a clue to the changing norms. There are different claims involved between maintenance litigation and prostitution. In both, gift-giving is alleged to play a crucial role.

To the extent that litigants could rely on any semblance of 'custom' as being relevant to their lives, men (at least) appeared to have been willing to pay some compensation for seduction damages over some of the 1980s. But as the awards of damages increased, and as maintenance up to the age of 18 years old became associated with seduction actions, men increasingly refused to pay. They argued vociferously, in the streets, in court and in parliament, that the whole business had taken on the trappings of retrospective prostitution (payment after the fact) as pregnant women sought well-heeled men to sue... In the event, considerable maintenance litigation continues, mostly in Magistrates Courts, and although there have been administrative improvements the queues remain substantial as the opening newspaper quote suggests. Zimbabwe's urban women and men are clearly not mostly living according to the customary expectations. Writing in the context of Matabeleland, Werbner cites poignant oral statements by urban women who are making their own way:

In December we divorced, because he takes too many women.
He would find another woman, live with her and ignore me and

my children. A year later he would remember me and say 'Come back my wife, and live with me.' Is that right? No, it is not right. And if I would write to him, he would not answer. He just went about and ate up his money, without a thought for me or for his child. He has a child in Form 1 (secondary school) and doesn't care about her. I want her to study through to Form 6 and I am the only one who supports her. If I would ask him, he would say 'I'll do it, eventually'. And he would go off to another woman. He wouldn't curse, or fight. He would just keep quiet, go his own way... I am the one who supports the children by knitting and peddling. In a week I can knit a jersey. I suffer when I have no wool, but not when I have it... Here in the city, women help each other... (Werbner 1991: 184)

The results of this competition are everywhere on Zimbabwe's urban streets. Women travel and trade to survive (Schmidt 1992).

Conclusion

Litigation over maintenance stands amidst current concern over urban housing crises, high population growth, AIDS, the protection of children, the disintegration of the two-parent and extended family, and critical problems of unemployment. Clustered on street corners with food, handiwork and second-hand clothes for sale, travelling across the region to trade, Zimbabwe's urban women are clearly surviving. In the disillusionment with urban inflation and personal struggles, there is evidence of a significant revival of ancestral spirit possession affecting females, in both Shona and Ndebele cultures and this too is connected with petty trade to survive (Werbner 1991: 191). Urban women must trade: with children, without the framework of custom (such as it was), and mostly without effective protection from the courts for the burdens of maintenance until the child is an adult. These are not easy issues to solve, even in developed countries.⁸ In common with other developing

⁸ In New Zealand, for example, the state pays the custodial parent (almost always, mothers) in these circumstances a solid Domestic Purposes Benefit, and then pursues fathers through the tax system for a reimbursement to the state. Only a fraction of the funds are recouped, but the mothers, at least, are protected from the burdens of litigation, and especially the difficulties of survival when funds are not paid on time. But the system is hugely expensive, and its effects have been strongly criticised by some as encouraging childbirth and/or dependency on the state - an echo of the male lament in Zimbabwe.

countries where the state infrastructure appears to be getting weaker, it does not seem likely that the state can possibly create, by effective coercion in courts, a new 'customary behaviour' amongst urban adults. Relief may be piece-meal in the form of occasional improvements in law or process. Education will no doubt assist. This seems to be a classic example of Maine's shift from 'status' to 'contract' - and women are largely on their contracting own (Maine 1930). In terms of freedoms and personal autonomy, the legacy of the first fifteen years of independence in this respect, may be somewhat mixed (Staunton 1990). The twilight, where rural custom has gone and state law is irrelevant, may be particularly hostile for indigent urban women. I suspect that all over the continent, Africa's townsfolk will recognise the issues.

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