

Looking Back at an Aporia

The Effectiveness of the Legal System in Combating Violence Against Women in Burkina Faso

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Abstract

This article analyzes the impact of legal measures to combat violence against women (VAW) in Burkina Faso. Its aim is to assess the effectiveness of this system in the face of the persistence of VAW, fanned by the current security crisis. The results reveal a mixed picture. On the one hand, thanks to the adoption of legal texts and the establishment of some institutions, several actions have been sustained in the fight against VAW. On the other hand, the existence of pitfalls in the texts and institutional dysfunctions prevent the legal system in question from substantially reducing the practice of VAW. In order to achieve this goal, it is necessary to mobilize, in addition to the law, other agents of social change with an often underestimated incremental potential, such as customary and religious authorities.

Keywords

VEF, gender, inequalities, law, social change

Introduction

Violence against women (VAW) is a worrying phenomenon worldwide. According to the Afrobarometer 2021-2023, 24 % of women declare that VAW is a “fairly/very common” practice in Burkina Faso (M’Cormack-Hale et al., 2023, p. 3).

Violence against women is defined as:

acts of violence directed against persons of the female sex, and causing or likely to cause women and girls physical, sexual, psychological, moral, economic and cultural harm or suffering, including the threat of such acts, whether in public or private life. (Law n° 025-2018/AN, 2018, p. 190)

Conducting an analysis of VAW has a heuristic challenge, namely to contribute to a critical study of the legal arsenal put in place to combat VAW in Burkina Faso.

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Reflection on such a legal framework inevitably raises the question of its effectiveness. In other words, is Burkina Faso's current legal framework for combating VAW likely to lead to the eradication or substantial reduction of this practice?

Based on a positivist and empirical approach to the law, this could help to sketch out some answers to this central question. These elements could be articulated, in the first instance, around the contrasting results revealed by an evaluation of the aforementioned system. Secondly, given the limits of the law, it would seem necessary to suggest the idea of greater involvement of traditional and religious authorities in order to achieve the goal of substantially reducing VAWs.

A System with Contrasting Results

Two extremes must be avoided when analyzing Burkina Faso's current legal framework for combating VAW. The first is to maintain that the system is effective. The second is to describe it as completely ineffective. The empirically-backed observation is that Burkina Faso's legal framework for combating VAW has certainly enabled progress to be made, but it does have its pitfalls.

Sustained Actions

The legal framework for combating VAW in Burkina Faso has led to progress on both the normative and structural fronts. In terms of standards, the adoption or ratification of certain texts has provided a solid normative guarantee for the fight against VAW.

To put an end to VAWs, the Burkinabe authorities have adopted legislation condemning them, obliging them to take certain measures, specifying the sanctions available to any perpetrator of VAWs and the possibilities for any victim to obtain legal redress. These texts are of various kinds. Firstly, there are international texts such as the 1966¹ International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 1993 United Nations General Assembly Declaration 48/104 on the Elimination of Violence against Women. Article 4 of the latter states that:

States should condemn violence against women and not invoke considerations of custom, tradition or religion to avoid the obligation to eliminate it. States should implement without delay, by all appropriate means, a policy aimed at eliminating violence against women [...]. (United Nations, 1993)

Then there are regional texts, of which the 1981² African Charter on Human and Peoples' Rights (OAU, 1981) remains the most emblematic. Then there are national texts such as the 1991 Constitution, Law n° 061-2015/CNT on the prevention, repression and reparation of violence against women and girls and the care of victims, and Law n° 025-2018/AN on the Penal Code. For example, articles 513-2 to 514-3 of the Penal Code punish various forms of violence against women with prison sentences and fines. These legal texts are complemented by policies such as the National Gender Strategy 2020-2024, which makes the fight against VAW one of its priority areas. In addition, the creation of certain structures is an important step forward. In this respect, the establishment and deployment of certain bodies have often helped to ensure the application of the texts adopted.

Numerous structures have been created, and their various actions have helped to reduce the practice of VAW. First and foremost, the Ministry for the Promotion of Women, National Solidarity and the Family, set up in 1997, has implemented projects aimed specifically at combating VAW. For example, in March 2021, the Ministry, in collaboration with its partners, set up a toll-free number dedicated to VAW alerts and denunciations. The anonymity and free nature of the mechanism have enabled many cases to be handled and victims to be taken care of. In this respect, the Ministry's statistics show that in 2020, 5,224 people were victims of gender-based violence (GBV), including VAW, and received

1 "Article 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

2 "Article 4: The human person is inviolable. Every human being has the right to respect for his life and the physical and moral integrity of his person: no one may be arbitrarily deprived of this right."

care (Zongo, 2021). Secondly, the Permanent Secretariat of the National Council for the Promotion of Gender (SP/CONAP-Genre), attached to the Ministry for the Promotion of Women, has set up training and awareness-raising initiatives in both villages and towns (Zongo, 2022). In Ouagadougou and in provinces such as Kaya (UNFPA, 2022) and Tenkodogo (Dembélé, 2023), centers have been set up to provide medical and social services for victims of VAW.

Although statistics on VAW cases are not available online, it is known that the gendarmerie and police services work to uphold the rights of citizens, particularly women. In this respect, networks of researchers such as Afrobarometer have praised their dedication (AIB, 2024a). When perpetrators of VAW are identified by these services, they can be referred to the relevant state courts, where there are “special” chambers responsible for punishing VAW. If the offences are indeed proven, the judges do not hesitate to punish the perpetrators with prison sentences and fines.

This was the case, for example, in *Public Prosecutor v. Kinda Jean Noël* in 2017 (TGI Kongoussi, 2017). Accused by Marie, a minor under 18, of sexual assault and rape, Jean Noël, an adult, admitted all the charges against him. He was sentenced by the Kongoussi High Court to five years in prison. Similarly, in the case *Public Prosecutor v. O. S. M.* of 2021 (TGI Ouahigouya, 2021), Mohamed was charged with attempted murder and obscene insults. He confessed to the facts and the Ouahigouya TGI found him guilty and sentenced him to twelve years’ imprisonment. Thus, the legal framework for combating VAW in Burkina Faso has made it possible to perpetuate actions. However, the system has its limitations, which should be emphasized.

Persistent Shortcomings

The shortcomings of the legal framework for combating VAW in Burkina Faso can be identified at two levels: there are not only textual limitations, but also institutional ones that prevent the framework from fully achieving the aims for which it was created.

The texts adopted to combat VAW in Burkina Faso are imperfect. These are reflected in the omission of certain concepts from the texts. The first is “domestic violence”. According to article 3.b of the 2011 Istanbul Convention, it means:

All acts of physical, sexual, psychological or economic violence that occur within the family or household or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same home as the victim. (Council of Europe, 2011, p. 3)

The principle of the legality of penalties, which is one of the general principles of criminal law, means that no offence can be punished and no penalty can be pronounced by the judge if they are not provided for by law. However, the notion of “domestic violence” does not appear in Law n° 025-2018/AN on the Penal Code, nor in Law n° 061-2015/CNT on the prevention, repression and reparation of violence against women and girls and the care of victims. As a result, it would be difficult for judges to punish the perpetrators of domestic violence. Yet, according to the Afrobaromètre 2021-2023, Burkinabè acknowledge the existence of this type of violence. Furthermore, 26% of them consider domestic violence to be a criminal matter whose full resolution requires the involvement of law enforcement agencies (M’Cormack-Hale et al., 2023, p. 4).

The second concept is “honor-based violence” (HBV). These can be defined as acts of violence perpetrated against a woman by a group (tribe, clan, ethnic group) which considers that the words or actions compromising her chastity have harmed the group’s honor. This absence may be explained by the fact that such violence is rare in Burkinabe society. However, there is no guarantee that such violence will not take on worrying proportions in the future. For example, the legal vacuum relating to HBV did not worry Canadian legislators unduly until the day when tragedies shook Canadian society (Conseil du statut de la femme, 2013).

On the other hand, the shortcomings of the texts are reflected in the non-dissuasive nature of certain penalties. This is the case with penalties for moral and psychological violence. The legislator has not attached any prison sentences to this type of offence; thus, the recognized perpetrator of this type of violence will only be sentenced to pay fines of between 250,000 FCFA and 600,000 FCFA, according

to article 513-5 of law n° 025-2018/AN on the Penal Code. Is moral and psychological violence less harmful than other forms of violence that can result in custodial sentences? Can the payment of fines of 600,000 FCFA by a man convicted of “moral and material abandonment of the home” for years fairly compensate for the harm suffered by his wife and children? It is doubtful. In fact, psychologists have shown that moral and psychological violence has devastating effects not only on the victim within the couple, but also on the children.

There are also institutional pitfalls. The institutions responsible for combating VAW often do not function as they should. Firstly, victims of VAW do not always benefit from treatment, counseling and medico-social services due to the non-existence of care centers in certain localities of Burkina Faso. Indeed, the GBV Situation Analysis Report for Burkina Faso for the period January 1 to June 30, 2022 reveals that only five of the country’s thirteen regions have specialized GBV services (medical, psychosocial, security/safety, legal, socio-economic reintegration). It states that 85% of rape survivors have not received appropriate clinical care within seventy-two hours of the crime (AoR VBG Burkina Faso, 2022, p. 3).

Secondly, the amount of funding allocated to the various public bodies responsible for combating VAW remains inadequate. For example, according to the above-mentioned analysis report, out of a required budget of 25 million, 1.8 million has been disbursed for the activities of the Burkina Faso GBV sub-cluster (AoR). In the current context, where the fight against terrorism remains the priority, the increase in military expenditure (Somda, 2024) may have led to a reduction in funds allocated to the fight against VAW. Yet, according to the GBV sub-cluster’s semi-annual report 2022, 91% of cases reported during this period concerned people displaced within the country due to terrorism (Cluster Protection Burkina Faso, 2022, p. 1).

In addition, victims of VAW often face financial difficulties in accessing justice. To remedy this, a legal aid fund for victims of violence has been set up. However, this fund has not yet been put into operation, and its beneficiaries remain largely unaware of its existence (AIB, 2024b). Furthermore, when victims of VAW finally manage to overcome these difficulties, they do not always obtain fair compensation for the harm they have suffered.

This is the case, for example, in the 2019 case *Public Prosecutor v. G. S. alias Kakaga* (TGI Ouahigouya, 2019). G. S. alias Kakaga, aged over 18, was accused of attempting to rape a minor girl. After dragging her into the bush and undressing her, he was interrupted by the girl’s mother, who confronted the accused with a stick. G. S. admitted the facts and stated that he had had an uncontrollable urge to have sex with the victim when she delivered the meal he had ordered from her mother’s restaurant to his store. After examining all the arguments, the Ouahigouya High Court found him guilty of attempted rape and sentenced him to a twelve-month suspended prison sentence, plus a fine of 100,000 FCFA. As for the victim, the court awarded her compensation worth 10,000 FCFA. With such a sentence, it is legitimate to question the fairness of justice towards VAW’s victims.

Moreover, because VAW can be linked to customs and religious beliefs, it seems appropriate to find ways and means of involving customary and religious authorities more closely in this fight.

Greater Inclusion of Customary and Religious Authorities

In Africa in general, and in Burkina Faso in particular, customary and religious authorities play an important role in society. Through the exercise of their religious and customary powers, they contribute to the dynamics of society. In the fight against VAW, there are many arguments in favor of greater inclusion of customary and religious authorities. This process of inclusion could be improved in a number of ways.

Reasons for Inclusion

There are three main reasons why customary and religious authorities need to be more involved in the fight against VAW.

The first is that the persistence of VAW seems to be partly linked to social and cultural patterns of behavior commonly conveyed by customs and religions. Indeed, the latter often disseminate stereotypes, ideas and values that have helped to establish unequal power relations between men and women, thus encouraging the domination of the former over the latter and, in turn, the exercise of VAW. The UN implicitly recognizes the role of certain customs and religions in perpetuating VAW when it urges States parties to condemn violence against women and not to invoke considerations of custom, tradition or religion to avoid the obligation to eliminate it³. Moreover, customary and religious authorities – and this is the second reason – have real incremental power (Perrot & Fauvelle-Aymar, 2003; Bayart, 2018). This power takes various forms. On the one hand, it is a normative and hermeneutic power, through which these authorities can participate in the making and interpretation of customary and religious norms. On the other hand, they have the legitimacy and political power to continue to play a crucial progressive role in the social, political and cultural spheres. For example, they play an essential role in preventing and resolving family, community and political conflicts. The mediation of customary and religious authorities in the 2022 conflict between Captain Ibrahim Traoré and Lieutenant-Colonel Henri Damiba is a case in point. The involvement of these authorities undeniably had a transformational effect: the situation, which could have ended in chaos and bloodshed, came to a “peaceful” conclusion with the resignation of lieutenant-Colonel Henri Damiba (Le faso.net, 2022). The third reason, which justifies the idea of greater inclusion of customary and religious authorities in the fight against VAWs, is inherent in the pre-eminence of the local authorities in the fight against VAWs. The third reason, which justifies the idea of better inclusion of customary and religious authorities in the fight against VAW, is inherent in the de facto pre-eminence of customary and religious rights over state law (Sow Sidibé, 1991). For example, Burkina Faso’s Personal and Family Code (PFC) prohibits dowries⁴. However, most future brides and grooms observe customary norms that prescribe dowry. Similarly, customary and religious marriages are not explicitly recognized in the PFC. Despite this non-recognition, some citizens still celebrate their marriages in a religious or customary way, to the detriment of civil marriage before the civil registrar. This preeminent reference to customary and religious marriages is one of the reasons why, on July 10, 2024, the government adopted a draft bill on the PFC, in which it recognized customary and religious marriages through their transcriptions in the civil register under certain conditions (Queen Mafa, 2024).

Inclusion Procedures

One avenue that could be explored is the institutionalization of a tripartite forum for dialogue, bringing together representatives of state authorities (members of government and parliament), women’s rights organizations and customary and religious authorities. However, the inclusion of the latter is a delicate exercise that could end in failure if a psychological bias is not taken into account: for the various players, the aim is to avoid any attitude or behavior that is contemptuous of customary and religious authorities and tends to equate them with retrograde forces. Once this bias has been overcome, this dialogue space could serve as an advocacy forum where representatives of state authorities and women’s rights organizations could direct their nudge-based strategies to achieve two objectives.

The first objective would be to encourage customary and religious authorities to change certain customary norms and interpret religious texts in a way that helps reduce VAW. Indeed, if the normative and hermeneutic power of these authorities is used to protect women, it could contribute to a considerable reduction in VAW. Take, for example, the hypothesis that all customary authorities

³ Article 4 of UNGA Declaration 48/104 on the elimination of violence against women, 1993.

⁴ Article 244 of Zatu an VII 13 of November 16, 1989 establishing and implementing a personal and family code in Burkina Faso.

were to adopt customary “decrees” explicitly prohibiting excision or physical violence against women within their jurisdictions. Would not this normative power have beneficial effects on the fight against VAW? The answer is yes.

The second objective would be to encourage customary and religious authorities to use their legitimacy as opinion leaders to speak out in the various media and raise awareness of the need to abandon acts of VAW. Their legitimacy gives them the advantage of seeing their messages listened to and put into practice by the population. This approach deserves to be explored, especially as it seems to have proved its effectiveness in relation to other phenomena, such as hate speech by preachers. Faced with their spread in the media, religious authorities have taken the phenomenon head-on through media interventions (commercials, interviews, press releases, etc.). It may seem premature to assess the results of such an initiative, but tangible results are already visible, with fewer and fewer hate speeches by preachers in the media.

Conclusion

Analysis of the legal framework for combating VAW in Burkina Faso presents the image of an iceberg. On the tip of the iceberg, we can see that a great deal of progress has been made. However, there is a large submerged part, made up of various pitfalls that reduce the performance of this system. Moreover, this reflection has served to remind us that the law is only a vector for social change. It is illusory to make law a panacea, because:

it remains for law and jurists to recognize, rather than engaging in a chase with facts that is doomed to failure, that they are coming up against limits, that not everything can be settled in the pure logic of law and on its terrain alone, and that there are episodes, often the most dramatic, of political [and social] life that escape them. (Du Bois de Gaudusson, 2003, p. 149)

Alongside the law, there are other agents for social change, such as customary and religious authorities. Because of their incremental potential, they can be mobilized to substantially reduce violence against women in Burkina Faso, which is currently in the throes of a multidimensional crisis.

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