‘Freedom from all forms of violence’

Using Zimbabwe’s new Constitution to encourage rape law reform

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The right to ‘freedom from all forms of violence from public or private sources’, enshrined in Zimbabwe’s new Constitution, could have a significant impact on efforts to end violence against women (VAW) in the country. The right is particularly relevant in the Zimbabwean context where VAW occurs in a range of settings, from the most intimate of relationships in the home to the state’s use of rape as a political weapon. One way in which the state can fulfil its duty to address VAW is through the reform of the country’s rape law. With comparative reference to the impact of the right to freedom from violence in South African law, this article discusses three areas of Zimbabwean law that present potential obstacles to achieving justice for rape survivors: the definition of the crime of rape, the abolished but tenacious cautionary rule, and the sentencing of sexual offenders.[1]

The new Constitution of Zimbabwe[2] was drafted in the wake of what was arguably the country’s most violent election.[3] Much of the violence had been perpetrated against women.[4] When President Robert Mugabe signed the new Constitution into law on 22 May 2013, for the first time in the nation’s history the supreme law of the land enshrined a right to ‘freedom from all forms of violence from public or private sources’.[5] Although Zimbabwe’s previous Constitution did have a Declaration of Rights, it did not include the right to freedom from violence and generally was less extensive than the new Declaration of Rights. The criminal law was, therefore, the primary legal means of protecting women from violence. In all likelihood this will continue to be the case following the adoption of the new Constitution. However, the inclusion of the right to freedom from all forms of violence in the supreme law of Zimbabwe, to which the criminal law is subject, means that the criminal law may need to be amended, moulded and shaped in order to better give effect to this right.[6]

The right, therefore, has huge potential for advancing women’s rights and addressing violence against women in Zimbabwe.[7] However, as observed by a key civil society leader, Netsai Mushonga, ‘[w]hile we applaud the successful end to the constitution-making, this ushers in the more difficult exercise of constitution-building, ensuring that rights become reality for women’.[8] This article seeks to make a contribution to that difficult task by considering how the right to freedom from all forms of violence can be used to encourage the reform of Zimbabwe’s rape law.

First, the nature and prevalence of rape in Zimbabwe will be considered. Next, I will discuss the importance of the right to freedom from violence for the law reform agenda. Lastly, I explore how the right can be

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brought to bear on three aspects of the criminal law that present potential obstacles to justice for rape survivors, namely the definition of rape, the cautionary rule and sentencing of offenders.

Rape perpetration in Zimbabwe

The Zimbabwe National Statistics Agency provides statistics for reported cases of rape. According to figures released for the fourth quarter of 2013, reported rapes from the previous four years were as follows: 3 481 in 2009, 4 450 in 2010, 5 446 in 2011, 5 412 in 2012 and 4 735 in 2013 (excluding November and December).[9] These statistics are based on police records and therefore must be regarded with extreme caution. It is widely recognised that rape is underreported globally.[10] Police statistics are sometimes rendered even more unreliable in developing countries, where there is limited infrastructure for crime reporting.[11] Research in Zimbabwe further shows that reporting is negatively affected by societal perceptions of rape, especially marital rape.[12] Politically motivated rape is also less likely to be reported, especially if the crime was committed by the police themselves.[13] Nevertheless, these figures provide some basis for assessing the prevalence of rape in Zimbabwe. The Research and Advocacy Unit has estimated, based on these statistics, that '[f]ifteen (15) women are raped in Zimbabwe every day – one in every 90 minutes'.[14] Given the reality of low reporting levels, the situation is probably much worse.

In Zimbabwe rape has been perpetrated both by private persons, often including those close to the rape survivor, as well as by the state and the state's agencies, such as the police and the army. Studies show that politically motivated violence in Zimbabwe has been perpetrated by the state, and, when perpetrated by private parties, has sometimes been state sanctioned.[15] According to a number of civil society sources, rape has been used as a political weapon in Zimbabwe.[16] There are reports of politically motivated rapes occurring during the liberation war of the 1970s,[17] and being perpetrated by the army (especially the Fifth Brigade) during the 'disturbances' of the 1980s known as *Gukurahundi*.[18] Since 2000, according to the Research and Advocacy Unit, politically motivated violence, including rape, has primarily occurred during elections.[19]

A survey conducted between 2005 and 2006 among 8 907 women between the ages 15 and 49 indicated that a significant portion of Zimbabwean women had experienced domestic violence of a sexual nature. In the survey, '25 percent of women reported that they have experienced sexual violence at some point in their lives'.[20] Furthermore, the 'majority (65%) of women reported that their current or former husband, partner, or boyfriend committed the [first] act of sexual violence [against them]'.[21]

The relevance of the right to 'freedom from violence' to rape law reform

Obligations under the due diligence standard

The concept of 'due diligence' has been imported into human rights law – particularly with regard to VAW – to assess whether the state has taken adequate measures to fulfil its duties to protect women.[22] These duties have been acknowledged in Zimbabwe's Constitution, which states that the state has a duty to respect, protect, promote and fulfil the rights in the Declaration of Rights – including, of course, the right to freedom from all forms of violence.[23] The former United Nations Special Rapporteur for Violence against Women, its Causes and Consequences, Yakin Ertürk, outlined numerous steps that states should take in order to fulfil these obligations. This article will focus on just two of these, namely the reform of the criminal law[24] and the administration of punishment for perpetrators of rape as a form of VAW.[25] The legislature has an important role to play in fulfilling these duties, as the primary arm of government tasked with law reform by passing new legislation and making amendments to existing laws.[26] The judiciary also has a role in the law reform process by developing the common law in line with the Constitution[27] and striking down any unconstitutional legislation.[28] The judiciary is also the arm of government that administers punishment to those who violate the right to freedom from violence, by sentencing those convicted of violent crimes, such as rape, under the criminal law.

The influence of the right in South African law

Section 52(a) of the Constitution of Zimbabwe states that 'every person has the right to bodily and psychological integrity, which includes the right … to freedom from all forms of violence from public or private sources'. An almost identical right is found in section 12(1)(c) of the South African Constitution, which states that 'everyone has the right to freedom and security of the person, which includes the right … to be free from all forms of violence from either public or private source'.[29] For this reason, the South African experience will be valuable in informing how the right can be used in Zimbabwe. The South African experience is also relevant for at least two other reasons: firstly, as a neighbouring country to Zimbabwe, South Africa has a similar history and context as well as similar cultures; secondly, both countries' legal systems have their roots in Roman-Dutch law and English common law and refer to each other's case law.

In 1998, Helene Combrinck wrote an influential paper on how the inclusion of this right in South Africa's new Constitution could be used in the fight to end VAW in South Africa.[30] According to Combrinck, what is of particular importance for addressing VAW is that the right is framed to include violence from both public and private sources.[31] This is because human rights have traditionally been regarded as only protecting the individual from the abuses of the state, or 'public sources'.[32] This legal tradition has long undermined the protection of women from violence, since the source of VAW is very often a private one.[33]

The right to freedom from violence has been instrumental in the reform of rape law, both through legislative reforms and through the development of the common law by the courts. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007,[34] which introduced a number of key reforms to South African rape law, was founded on the right to be free from all forms of violence, and other key constitutional rights such as the right to equality.[35] The right has also influenced how the South African courts understand the purpose of the crime of rape. This is seen clearly in a judgement penned by Justice AJ Patel of the Venda High Court, which states:

> The modern function of the crime of rape … is the protection of women from sexualised violence. It is not so much as it involves unlawful sexual intercourse as the fact that it involves an invasion and infringement of a woman's fundamental rights as a person ... [such as] her right to be free from all forms of violence …[36]

In light of the above, the South African experience will be relevant to understanding the potential impact of the right to freedom from violence on each of the three areas of Zimbabwe's criminal law as discussed below, namely the definition of the crime of rape, the cautionary rule and the sentencing of sexual offenders.

The definition of rape

Much of the debate around the reform of South Africa's rape law has centred on the definition of rape.[37] This is an area of the law that also needs reform in Zimbabwe. The definition of rape in Zimbabwean law is found in section 65(1) of the Criminal Law (Codification and Reform) Act 2004 and is framed as follows:

> If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse … the female person has not consented to it … and … he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it … he shall be guilty of rape and liable to imprisonment for life or any shorter period.[38]

The definition is fairly comprehensive, but it is not without its problems. Firstly, the definition of rape, read with the definitions of sexual intercourse and anal sexual intercourse,[39] restricts the types of penetration to vaginal or anal penetration of a woman by a man's penis. Therefore, other types of coerced penetration, such as oral penetration, or vaginal and anal penetration by objects other than a penis, are excluded from the definition. These types of coerced penetration fall under a different crime – aggravated indecent assault.[40] Although aggravated

indecent assault carries the same penalty as rape, it has been argued that the exclusion of these types of penetration from the definition of rape fails to recognise that 'the trauma of the victim is equally severe in all instances of penetration' and implicitly labels such acts of penetration a lesser crime.[41]

Secondly, the definition of rape is gendered: only men can be perpetrators of rape and only women can be victims of rape. Not only does this raise serious constitutional concerns relating to discrimination against men and boys who are raped, but who are not *legally* considered to have been raped, but additionally the gendered definition of rape has its roots in patriarchal considerations. The common law crime of rape was originally conceived as a property crime against men.[42] Furthermore, it has been argued that the idea that only women can be raped perpetuates the patriarchal conception of rape as a 'metonym of feminised victimhood'.[43]

Should the courts declare the definition unconstitutional?

While it is clearly arguable that the definition of rape in Zimbabwean law could be improved, the question remains whether it is unconstitutional. A similar question came before the South African Constitutional Court in *Masiya v Director of Public Prosecutions*[44] where the court was asked to decide whether the common law definition of rape, which excluded anal penetration of women and similarly discriminated on the grounds of sex, was unconstitutional. The Constitutional Court found that notwithstanding its deficiencies, the definition of rape 'ensure[d] that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality [were] protected'.[45] The court held that the definition should be developed to include 'acts of non-consensual penetration of a penis into the anus of a female' in order to give effect to the spirit, objects and purport of the Bill of Rights but declined to extend the definition of rape in a gender-neutral way.

If the Zimbabwean courts decide to follow *Masiya* then it may be that Zimbabwean law's definition of rape may be found not to fall foul of the Constitution of Zimbabwe, which is similar in many respects to the South African Constitution. However, it should be noted that the *Masiya* judgement was widely criticised,[46] and South African law's definition of rape was amended through legislative intervention soon after the judgement was handed down in order to make the changes the court had failed to make.

Therefore, Zimbabwean courts should not be overly influenced by the restrictive approach adopted in *Masiya*. Rather it is submitted that the courts should follow the approach to the interpretation of fundamental rights laid down by Zimbabwe's Supreme Court in *Smyth v Ushewokunze,*[47] where the Court stated that '[t]he endeavour of the Court should always be to expand the reach of a fundamental right than to attenuate its meaning or content'. This approach has been given added weight in light of section 46(1)(a) of the new Constitution of Zimbabwe, which binds the courts to give '*full* effect to the rights and freedoms enshrined in [the Declaration of Rights].'[48]

Furthermore, in *Zimbabwe Township Developers v Lou's Shoes*,[49] the Supreme Court stressed that when considering whether a statute is unconstitutional '[o]ne doesn't interpret the Constitution in a restricted manner in order to accommodate the challenged legislation'. Rather, stated the Court, '[t]he Constitution must be properly interpreted, after which the challenged legislation must be examined to discover whether it be interpreted to fit into the framework of the Constitution'. In light of the above, and in relation to the right to freedom from all forms of violence, it is suggested that Zimbabwean courts now have the opportunity to declare the criminal law's distinction between different forms of coerced sexual penetration unconstitutional, given the appropriate case.

Legislative intervention needed?

Alternatively, the legislature could amend the definition of rape to make it gender-neutral and to extend it to all types of coerced sexual penetration.[50] Given that the definition of rape is contained in statute rather than in the common law, this is preferable. This could be done through amending the definition in Criminal Law (Codification and Reform) Act 2004 or by creating a separate Sexual Offences Act. Zimbabwe did previously have separate sexual

offences legislation, which included a definition of rape that was gender-neutral and applied to a broad range of types of sexual penetration. This Act was repealed by the Criminal Law (Codification and Reform) Act 2004, which codified the majority of Zimbabwe's criminal offences in a single Act. Although there is some merit in having a single codified Act for criminal offences, it may be prudent for Zimbabwe to return to a system of dealing with sexual offences separately, given the unique challenges that sexual offences present and in light of the other legislative changes suggested below. In the next section I address the cautionary rule in sexual offences cases.

The cautionary rule

The *Mupfudza* rule

The cautionary rule in relation to sexual offences is a rule of evidence that requires judicial officers to treat the evidence given by a complainant in a sexual offence case as inherently suspect, and therefore in need of corroboration.[51] The rule seriously prejudices the success of the prosecutorial process in rape trials and is humiliating for sexual assault survivors.[52] In Zimbabwe, the courts used to apply the cautionary rule using a two-stage test laid down in *S v Mupfudza*[53] that has been summarised as follows:

> The first question to be asked by the court is: 'Is the complainant credible?' If the answer is in the affirmative, the next question is: 'Is there corroboration of or support for the evidence of the complainant?' In other words, the court must not only believe the complainant, it must in addition be satisfied, by an application of the cautionary rule, whether it might still not have been deceived by a plausible witness.[54]

Has the rule been abolished?

Heléne Combrinck's 1998 article argued that the right to be free from all forms of violence would be key to ensuring the abolition of the cautionary rule in South African law.[55] That very same year the rule was, arguably, abolished in South Africa by the Supreme Court in the case of *S v Jackson.*[56] Two years after that, in the case of *S v Banana,*[57] the Supreme Court of Zimbabwe expressly overruled *S v Mupfudza* and applied *S v Jackson*, abolishing the cautionary rule from Zimbabwean law. Nevertheless, the cautionary rule continues to threaten to unduly influence cases involving sexual offences. In South Africa, some judges, such as Justice Thring in *S v Van der Ross*,[58] have interpreted *S v Jackson* as merely abolishing the mandatory application of the cautionary rule to complainants in sexual cases, and continued to apply it on a discretionary basis.[59] In Zimbabwe, although the higher courts have generally avoided applying the cautionary rule, there remains a concern that the courts may adopt the approach of *S v Van der Ross* (and thus resurrect the cautionary rule), since *S v Banana* stated that Zimbabwean courts should 'proceed in conformity with the approach advocated in South Africa'.[60]

Ensuring the rule is no longer applied

South Africa's legislature has now expressly abolished the cautionary rule through section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[61] It may be advisable for Zimbabwe's legislature to do the same in order to ensure clarity, especially in light of evidence that there is still confusion in Zimbabwe around the application of the cautionary rule. For example, Justice Musakwa's judgement in *S v Makomeke*[62] reports that '*[b]oth* counsels submitted in their heads of argument that the trial court ought to have adopted the approach in *S v Mupfudza* supra in its assessment of the complainant's evidence'.[63] If, over a decade after *S v Banana* was handed down, there is still such confusion among Zimbabwean legal practitioners, it raises concern about what is being applied in the magistrates' courts – usually the courts of first instance in rape cases – whose judgements are not reported.

However, it must be acknowledged that legislative interventions are no guarantee to ensuring that courts do not apply the rule. A recent study has indicated that South African judges are *still* applying the cautionary rule, despite its having been expressly abolished by the legislature.[64] Therefore, there may have to be judicial training on this matter, in addition to legislative clarity, in order to finally do away with this tenacious and patriarchal rule.

The third and final issue, discussed in the next section, is the sentencing of offenders.

Sentencing of sexual offenders

Rape sentencing in Zimbabwe

Sentencing of sexual offenders recently came under the spotlight in Zimbabwe when a motion was introduced in Parliament in February 2014, calling for mandatory minimum sentences of no less than 30 years' imprisonment for those convicted of rape.[65] At present, Zimbabwean law does not impose mandatory minimum sentences for the crime of rape. The courts are entitled to impose a life sentence for rape,[66] but generally far more lenient sentences than that are administered, even in very serious cases of rape. For example, in *S v Dhliwayo*,[67] the High Court reduced the sentence imposed by a magistrate to an effective sentence of four and a half years' imprisonment for the rape of a girl estimated to be between 10 and 11 years of age.[68] In reaching its decision the Court relied on a series of cases in which similarly lenient sentences had been administered for rape.

One of the seminal Zimbabwean cases on sentencing in rape trials is *Nemukuyu v S.*[69] The judgement sets out what the courts must take into account when sentencing persons convicted of rape. While the judgement is generally quite balanced, it nevertheless illustrates one of the problems in Zimbabwe's rape sentencing legislation that perpetuates misconceptions about the nature of rape and encourages lenient sentencing. Section 65(2) of the Criminal Law (Codification and Reform) Act requires judges to take 'the degree of force or violence used in the rape' and 'the extent of physical and psychological injury inflicted upon the person raped' when sentencing. Therefore, in reaching its decision to reduce the magistrate's sentence to an effective sentence of eight years' imprisonment,[70] the Court relied on mitigating evidence that the convicted man 'did not use a lot of force … [h]e simply over powered the complainant, causing no further physical harm beside that he inflicted on her private parts'.[71] Such remarks exhibit a gross misunderstanding about the inherently forceful and violent nature of rape, especially in light of the fact that the rape survivor was only 12 years old when she was raped, and the convicted person, who was her grandfather, was meant to be looking after her (in *loco parentis*) at the time and thus was in a position of authority and protection over her.

South Africa's mandatory minimum sentence legislation

South Africa has passed minimum sentence legislation to try to ensure that judges administer more severe and consistent sentences for a number of serious crimes, including rape. When rape is perpetrated under certain aggravating circumstances, a life sentence must be administered. One such aggravating circumstance is when the victim is under the age of 16 years. This lies in stark contrast to the sentences administered in *S v Dhliwayo* and *Nemukuyu v S* – where in both cases the victims were younger than 16 years. When there are no such aggravating circumstances, the minimum sentences for rape under South African legislation range from 10 to 15 to 20 years' imprisonment for first, second and third offences, respectively. This more nuanced approach presents a potential alternative to the blanket minimum sentence of 30 years' imprisonment for all instances of rape proposed by the motion submitted to the Zimbabwean Parliament.

Judges in South Africa may not derogate from the mandatory minimum sentences unless there are 'substantial and compelling reasons' to do so.[72] The legislation also outlines certain circumstances that may not constitute substantial or compelling reasons, one of which is 'an apparent lack of physical injury to the complainant'.[73] Although the 'substantial and compelling reasons' proviso has been inappropriately used by some South African judges to reduce sentences on spurious grounds – sometimes even directly contradicting the list of grounds that may not constitute substantial and compelling reasons – the legislation has led to an increase in the severity of sentences for rape in South Africa.[74]

Does the right support the adoption of minimum sentences?

Two primary justifications for legislating mandatory minimum sentences for rape in Zimbabwe were put forward during the parliamentary debate. These

were, firstly, the need to send a strong message to the public that rape is a serious crime and, secondly, the argument that more severe sentences will act as a deterrent to potential perpetrators of rape. These sentiments are similar to the reasons put forward for the introduction and continuation of mandatory minimum sentences in South Africa.[75]

In societies like Zimbabwe and South Africa, where sexual violence against women has been normalised, it is important to send a strong message to society that rape is a heinous crime, and that those who perpetrate rape will be punished harshly.[76] The right to freedom from violence adds weight to this argument, as rape can no longer be viewed as just a crime – it is also a violation of a fundamental human right. Additionally, the disproportionate impact that rape has on women means that the crime engages the constitutional dimensions of equality and dignity. Testimonials from rape survivors in South Africa indicate that 'lenient sentences make survivors feel like their lives are "cheap," that they have been exposed to tremendous injustice, and that they are left exposed to intimidation and threats'.[77] Therefore, increasing the severity of punishments administered to perpetrators of rape through minimum sentence legislation may serve as a much needed acknowledgement of the seriousness of the crime and the severity of its impact on rape survivors.

An evaluation of the efficacy of minimum sentence legislation as a deterrent is very important for the purposes of this article – if the right to freedom from violence is to be used as a justification for introducing such legislation then it is important that the legislation should be aimed at reducing the perpetration of rape in Zimbabwe, and thus protecting women from violence. In light of this, it is important to acknowledge that research suggests that increasing the severity of sentences does not seem to have a significant deterrent effect on the rate of commission of crimes targeted by the increased sentences.[78] Sloth-Nielsen and Ehlers' 2005 paper assessing the impact of South Africa's minimum sentence legislation concludes that 'at present, there is little reliable evidence that the new sentencing law has reduced crime in general, or that specific offences targeted by this law have been curbed'.[79] A number of studies have suggested that the severity of a punishment may have less influence on its efficacy as a deterrent than the certainty that a punishment will be administered and the celerity of its administration.[80] Therefore, if deterrence is the goal, it may be more effective to focus on streamlining the criminal justice system to ensure the swift and certain administration of justice in rape trials, rather than to increase sentences.

Therefore, in reaching its decision on whether to introduce mandatory minimum sentences, Zimbabwe's legislature will need to balance the importance of sending a strong message to society about the seriousness of the crime of rape, with the lack of conclusive evidence on the deterrent effect of such legislation.[81]

Addressing misconceptions about rape

Whether or not the legislature decides to adopt mandatory minimum sentencing, Zimbabwe's sentencing guidelines must be amended to avoid the perpetuation of misconceptions about rape. It is submitted that either section 65(2) be amended such that 'the degree of force or violence used in the rape' and 'the extent of physical and psychological injury inflicted upon the person raped' are removed from the list of factors that judges must take into account when sentencing. Alternatively, it should be specified that these factors may only be used as aggravating circumstances, because the way in which these factors have been applied by judges – as mitigating circumstances when they are not present – undermines the inherently violent and forceful nature of rape. It may be necessary for the legislature to go as far as the South African legislation and explicitly state that the lack of apparent injury to the complainant may not be used as grounds for reducing a sentence. Judicial training and education, as required by the due diligence standard,[82] may also be necessary to address judges' misconceptions about rape.

Conclusion

It is clear that the new Constitution could have a significant impact on the fight to end violence against women in Zimbabwe, through the reform of the country's criminal law relating to rape. The right to

freedom from all forms of violence demands that the criminal law properly acknowledges women's lived experiences of sexual violence, ensures a smooth and non-discriminatory prosecutorial process, and administers appropriate punishments to those who have perpetrated rape. The state's obligations ushered in by the new Constitution to respect, protect, promote and fulfil women's right to freedom from violence gives added weight to the urgency of the law reform process. While comparative examples from the South African context provide useful guidance for that process, it remains to be seen what will be done in the Zimbabwean context, where the courts and the legislature face the challenges of operating in a highly politically contested environment with a severely depressed economy and a history scarred with violence.

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Notes

1 The author would like to thank Dee Smythe, Kelley Moult and Chloë McGrath for helpful comments on earlier drafts of this article.

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3 Research and Advocacy Unit, Politically motivated rape in Zimbabwe: report produced by the Women's Programme of the Research & Advocacy Unit RAU, 2011, 9. The RAU is an independent non-governmental organisation based in Zimbabwe.

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48 Constitution of Zimbabwe, section 46(1)(a) (emphasis added).

49 *Zimbabwe Township Developers v Lou's Shoes* 1984 (2) SA 778 (ZS).

50 Shortly after the *Masiya* judgement was handed down, the South African legislature did exactly that. See section 3, read with the definition of 'sexual penetration' in Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, section 1.

51 *S v Banana* 2000 (3) SA 885 (ZS), 892H-I.

52 PJ Schwikkard, Getting somewhere slowly – the revision of a few evidence rules, in Lillian Artz and Dee Smythe (eds), *Should we consent?: Rape law reform in South Africa*, Cape Town: Juta & Company, 2008, 74.

53 *S v Mupfudza* 1982 (1) ZLR 271 (SC).

54 *S v Banana*, 892I-893B.

55 Combrinck, Positive state duties to protect women from violence, 682.

56 *S v Jackson* 1998 (1) SACR 470 (SCA).

57 *S v Banana* 2000 (3) SA 885 (ZS).

58 *S v Van Der Ross* 2002 SACR 362 (C).

59 Schwikkard, Getting somewhere slowly, 77.

60 *S v Banana*, 614E.

61 Criminal Law (Sexual Offences and Related Matters) Amendment Act.

62 Unreported case, Harare High Court case number 118-11.

63 Ibid., 4 (emphasis added).

64 Stacey Moreland, Talking about rape – and why it matters: adjudicating rape in the Western Cape High Court, *South African Crime Quarterly* 47 (2014), 11.

65 Full text of debate on motion on mandatory sentence for rape, including statutory rape, of not less than thirty years and appropriate sentences for other forms of gender based violence in Parliament 5 February 2014 – 22 July 2014, compiled by Fungayi Jessie Majome MP.

66 Criminal Law (Codification and Reform) Act, section 65, chapter 9:23.

67 *S v Dhliwayo* [1999] JOL 4922 (ZH).

68 Seven years' imprisonment, of which two and a half years were suspended for five years.

69 *Nemukuyu v S* [2010] JOL 26232 (ZH).

70 Twelve years' imprisonment, four of which were suspended for five years.

71 *Nemukuyu v S*, 10.

72 Criminal Law Amendment Act 1997 (Act 105 of 1997), schedule 2.

73 Ibid., section 51(3)(aA)(ii).

74 Yonina Hoffman-Wanderer, Sentencing and management of sexual offenders, in Artz and Smyth (eds), *Should we consent?,* 231.

75 Submission to the Minister of Justice and Constitutional Development in response to the evaluation of the Criminal Law Amendment Act 105 of 1997, prepared by the Western Cape consortium on violence against women, 4 March 2005, 6.

76 Ibid.

77 Ibid., 8.

78 Andrew von Hirsch, Anthony E Bottoms, Elizabeth Burney et al, *Criminal deterrence and sentence severity: an analysis of recent research,* Oxford: Hart Publishing, 1999; Anthony N Doob and Cheryl Marie Webster, Sentence severity and crime: accepting the null hypothesis, *Crime and Justice,* 30 (2003), 143–195.

79 Julia Sloth-Nielsen and Louise Ehlers, Assessing the impact: mandatory and minimum sentences in South Africa, *South African Crime Quarterly* 14 (2005), 17.

80 John M Darley and Adam L Alter, Behavioural Issues of punishment, retribution, and deterrence, in Eldar Sharfir (ed), *The behavioural foundations of public policy,* Princeton: Princeton University Press, 2013, 188; P Robinson and J Darley, Does criminal law deter? A behavioural science investigation, *Oxford Journal of Legal Studies* 24 (2004), 173–205.

81 There are, of course, other justifications for and objections to the adoption of mandatory minimum sentences, not discussed here, which the legislature will need to take into account.

82 Ertürk, *Report of the Special Rapporteur on Violence Against Women, Its Cause and Consequences,* 21.