

SHOULD A MINIMUM SENTENCE FOR RAPE BE IMPOSED IN NAMIBIA?

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I INTRODUCTION

Much concern has been expressed in Namibia about the sentences for rape, as there is a widespread public sentiment that these sentences tend to be too light. However, the idea of imposing a statutory minimum sentence for the offence of rape potentially raises constitutional questions regarding due process, cruel and unusual punishment and the separation of powers between the legislative and judicial branches.

This paper examines constitutional rulings on minimum sentences in jurisdictions with constitutional provisions similar to those in Namibia, and attempts to address some of the policy issues which are implicated in light of the experience of other countries.

II THE CURRENT SITUATION

(1) The incidence of rape

The number of reported rapes has been steadily increasing over the last few years -- which could be an indication that more rapes are being committed, or that a higher percentage of rapes are being reported to the police. There were 352 reported rapes in Namibia in 1988, 384 in 1989, 419 in 1990 and 445 in 1991. _ Reports of rape and attempted rape together totaled 564 in 1991, 583 in 1992 and 606 in 1993. _

It is widely believed that only about one out of every 20 rapes which is committed is reported to the police. _ Women's Solidarity -- a small non-governmental organization which is active in education, counselling and research around the issue of violence against women -- has pointed out that if this estimate holds true for Namibia, the number of rape victims is equivalent to the rape of approximately one woman each hour of the day, each day of the year. _

(2) Average sentences for rape

Since the Namibian Constitution outlawed the death penalty, the maximum sentence for rape is life imprisonment. Although no comprehensive statistics are available on the average sentences being imposed for rape in Namibia at present, information has been gathered on the sentences imposed in rape cases heard by the High Court during the period January 1988 to November 1990. According to information collected with the assistance of Women's Solidarity, the average sentence imposed during this period was approximately six years, while the average effective sentence (taking into account suspended sentences) was four to five years.

It must be kept in mind that the High Court hears only the most serious rape cases. The study conducted by Women's Solidarity did not examine the files of rape cases heard in the regional magistrate's court. However, information gathered from the 1988 court register for the regional magistrate's court (which did not record the disposition of every case) indicated that the average sentence was just over four years, while the average effective sentence was just over three years.

The conviction rate in the High Court cases studied ranged from 60% to 80%. Of the rape cases for which dispositions were recorded in the 1988 register of the regional magistrate's court, 71% of the charges resulted in convictions. (If this limited data can be taken as indicative, Namibia's conviction rate compares favourably with that of other countries.)

In 1988, there were convictions on 78 counts of rape in what was then the Supreme Court. Sentences of more than ten years were imposed on six counts of rape (four 15-year sentences and two 11-year sentences), while 11 convicted rapists spent no time in gaol, having been given warnings, cuts or suspended sentences.

In 1989, the Supreme Court handed down convictions on 50 counts of rape. Sentences of more than ten years were imposed in three instances, while three convicted rapists received only fines, cuts or suspended sentences.

In 1990 (up to 15 November), the Supreme Court (which became the High Court at independence) handed down convictions on 18 counts of rape. There were no sentences greater than ten years, while two convicted rapists had their sentences postponed on condition of good behaviour. _

(3) Rape under customary law

It must be kept in mind that traditional tribunals sometimes deal with rape cases in Namibia, even though they have no official authority to do so. _

Parties found guilty of rape may either be punished or ordered to pay compensation to the woman or her family.

Women in some areas have complained that these cases are not taken seriously enough by traditional leaders, noting that sometimes nothing happens to a man who ignores an order to pay compensation. There have also been complaints that women do not have the right to speak in traditional courts and that all headmen are males. _

(4) Public perceptions

There seems to be a widespread public perception in Namibia that rapists are not adequately punished. Violence against women in general has been the topic of a substantial number of grassroots demonstrations since independence, and it was emphasised as a priority for law reform in a petition presented to the Minister of Justice by ten non-governmental organisations on International Women's Day in 1993. _

Public frustrations on the issue of sentencing in rape cases have led to some demands for unconstitutional options, such as the reintroduction of the death penalty or even castration. _

In 1993 Women's Solidarity was invited by the Prosecutor-General's Office to send a representative to testify as an expert witness on the topic of sentencing and public perceptions regarding sentencing in a rape case heard by the High Court, but the presiding judge stated that this information could not be allowed to influence his decision on the question of sentencing in the particular case before him. _

The present research on this topic was prompted by a petition from the Namibia Women's Agricultural Association to the government's Law Reform and Development Commission, requesting the imposition of a statutory minimum penalty for convicted rapists. _

(5) International responsibility

Action to combat violence against women is part of Namibia's responsibility as a signatory to the Convention on the Elimination of all forms of Violence Against Women (CEDAW). Although CEDAW does not mention violence against women explicitly, it is recognised at an international level that violence against

women is a human rights violation as well as a form of discrimination against women. Furthermore, the UN committee which oversees the implementation of CEDAW has adopted a recommendation requesting all countries which have signed the Convention to include in their reports information on measures they have adopted to protect women against violence.

Of course, nothing in CEDAW implies that the sentencing of convicted rapists must be addressed, but its provisions would seem to indicate that Namibia has a duty to take some sort of action to combat the high incidence of rape. At the same time, it must also be acknowledged that, while stiff sentences are a signal of a society's strong disapproval of rape, research conducted overseas has not consistently shown that heavier sentences have a significant deterrent effect. _

(6) Minimum sentences in Namibian and South African law

In the South African legal system which is the predecessor to Namibia's legal system, there has been a historical resistance to the idea of minimum sentences as an unjustified interference with the independence of the judiciary.

In the 1970's, a compulsory minimum sentence was prescribed for possession of marijuana. The result was that magistrates and judges resorted to legal contortions to avoid this compulsory sentence in cases where the circumstances did not seem to warrant it. _

In the past, there was also a compulsory minimum sentence for various criminal offences associated with 'terrorism', which progressive lawyers attacked repeatedly in the context of the liberation struggle. _

The most notable form of minimum sentence was the death penalty, which was previously obligatory where an accused had been convicted of murder and the court found no extenuating circumstances. _ (This provision fell away with respect to Namibia at independence when the Constitution outlawed the death penalty, and was amended in South Africa in 1990 to restore judges' discretion to impose death or a lesser penalty on the basis of the circumstances of each case. _)

The 1976 Viljoen Commission of Inquiry into the Penal System of South Africa took the stance that 'the creation of minimum sentences is an unwarranted and futile interference with the discretion of judicial officers', and 'a practice which is inconsistent with the penal policy' followed by the South African courts. _

There are minimum sentences in force at present in both South Africa and Namibia. In Namibia, the Stock Theft Act 12 of 1990 provides for a minimum sentence of three years for a second or subsequent conviction of any one of a range of statutory offences relating to stock theft. _ In South Africa, where a offender is convicted of illegal possession of a firearm and that firearm was used in the commission of another offence, the penalty for the firearm offence is set by statute at five to 25 years. _ The Explosives Act 26 of 1956, which is in force in both Namibia and South Africa, provides penalties of three to 15 years for various offences relating to possession and use of explosives, and for offences relating to bomb threats. _

Furthermore, sections 283 and 297 of the Criminal Procedure Act 51 of 1977 (as in force in both Namibian and South Africa) contemplate the possibility that the legislature may prescribe compulsory minimum penalties for other crimes. _

III MINIMUM SENTENCES IN THE UNITED STATES

Minimum sentences and sentencing guidelines which allow for varying degrees of judicial discretion have become common in the United States in recent years, both in federal law and in roughly one-third of the 50 state jurisdictions. _ The recent move towards determinate sentencing in the United States has been a product of several factors. Firstly, empirical studies discredited the idea that individually tailored sentencing combined with the possibility of parole were advancing the goal of rehabilitation on which they were based, while at the

same time evidencing unwarranted disparities in sentencing which encompassed discrimination on the basis of race, sex and social class. Secondly, it was argued that the indeterminate approach was dishonest, since the sentence imposed by the court often bore little relation to the amount of time actually served before the offender was released on parole. Thirdly, public opinion polls consistently indicated that the sentences being served for various crimes were perceived as being far too lenient. _

(1) The Constitutionality of minimum sentences

The US Supreme Court has stated that it is 'beyond question that the legislature has the power to define criminal punishments without giving the courts any sentencing discretion'. _ However, mandatory sentences have been called into question on the grounds of their proportionality to the crime committed. For many years, the leading case on proportionality was *Weems v US*. _ In this case, statute law applicable to the Philippine Islands (which were at that time under US jurisdiction) provided a minimum penalty of imprisonment for 12 years and a day, with hard labour and in chains, for the offence of falsifying official documents. It was argued that this penalty contravened the provision of the Philippines Bill of Rights which forbade the infliction of cruel and unusual punishment -- a provision copied verbatim from the Eighth Amendment of the US Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

After comparing the range of penalties available for comparable offences under other statutes in the US, the Court (McKenna J writing for the majority) concluded that the sentence in question was impermissibly cruel and unusual. The Court indicated that the Eighth Amendment of the US Constitution was directed, not only against punishments which inflict torture, but 'against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged'. _

In subsequent US cases and in other jurisdictions, the *Weems* case has been understood as standing for the principle of proportionality as a constitutional requirement. For example, in *Coker v Georgia* the Supreme Court held that the death penalty was a grossly disproportionate and excessive punishment for the crime of rape. _

More recently, the 1983 case of *Solem v Helm* _ set aside the imposition of a maximum sentence of life imprisonment for recidivists, without the possibility of parole, on the grounds that this punishment was unconstitutionally disproportionate. The Court set forth three factors relevant to the determination of proportionality: (1) the inherent gravity of the offence; (2) the sentences imposed for similarly grave offences in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. A majority of the Court applied these tests and reached the conclusion that the penalty was disproportionate to the commission of seven nonviolent felonies by the offender in question.

However, in the most recent Supreme Court case on this issue, *Harmelin v Michigan* _ , a split Court disagreed on whether the Eighth Amendment does in fact encompass a principle of proportionality. This case involved a mandatory sentence of life imprisonment without the possibility of parole for the offence of possession of cocaine. A majority of the Court agreed that mandatory sentences are not cruel and unusual simply by virtue of their mandatory character and upheld the sentence in question. _

Two justices (Scalia J and Rehnquist CJ) were of the opinion that the Eighth Amendment encompasses no principle of proportionality, but addresses only permissible kinds of punishment. Three justices (Kennedy J, O'Connor J and Souter J) believed that the Eighth Amendment includes 'a narrow proportionality principle' which is properly applied to invalidate only extreme sentences which

are 'grossly disproportionate' to the crime. However, they asserted that substantial deference must be given to legislative power to set the types and limits of punishment, and to assign different weight to the varying penological principles of retribution, deterrence, incapacitation and rehabilitation. Four dissenting justices (White J, Blackmun J, Stevens J and Marshall J) were prepared to apply a more assertive test of constitutional proportionality. They argued, *inter alia*, that a mandatory penalty is appropriate only when the offence is one which will always warrant the prescribed punishment. Additionally, they asserted that in order to be constitutionally proportionate, a punishment must be tailored to a defendant's personal responsibility and moral guilt, by being based on the direct effects of the offence and not on any 'collateral consequences'. _

(2) Federal sentencing guidelines

Federal sentencing policy has been drastically reformed in recent years in the United States by the establishment of guidelines which set relatively narrow sentencing ranges for different federal offences and different categories of defendants. These guidelines are set forth in a Guidelines Manual prepared by the United States Sentencing Commission, a body which is established by statute.

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The sentencing guidelines provide direction regarding the type of punishment which should be imposed (probation, fine or term of imprisonment), as well as specific guidelines on the appropriate extent of punishment. Amendments to the guidelines must be submitted to the legislature for a six-month period of review, and the legislature has the power to modify or disapprove them. According to the legislature, the purpose of the guidelines was to eliminate unwarranted disparities in sentencing and the uncertainty associated with indeterminate sentences.

The sentencing reform statute mandates that a court 'shall impose a sentence of the kind, and within the range, established by the applicable guidelines' unless it finds an aggravating or mitigating factor of a kind, or to a degree, not given adequate consideration by the Commission in setting the guidelines. _

(3) *Mistretta v US*

The federal sentencing guidelines were challenged in 1988 on the grounds that they were an unconstitutional violation of the principle of separation of powers _ -- not on the basis that the legislature was interfering with judicial discretion, but on the basis that it had delegated its legislative power to set sentences to a commission which is composed in part of judicial officers. Most of the Court's reasoning in the case of *Mistretta v US* is not relevant here because of the peculiar nature of the separation-of-powers challenge. However in the course of rejecting this constitutional challenge, the Court pointed out that the United States system which pre-dated the federal sentencing guidelines was a 'three-way sharing' of sentencing responsibility in which the legislature defined the maximum sentence, the judge imposed a sentence within the statutory range, and parole officers in the executive branch had the discretionary power to release a prisoner before the expiration of the sentence imposed by the judge. Furthermore, the Court noted that, in general, the three independent branches of government have a degree of overlapping responsibility, and that such interdependence is necessary for effective government. _
Since *Mistretta*, the federal sentencing guidelines have been upheld by federal courts in every circuit against constitutional challenges that they offend the due process of law by failing to 'individualize' sentences. _

(4) State approaches to sentencing

Different states in the United States take different approaches to providing guidance to the courts on the issue of sentencing. One approach is the establishment of sentencing guidelines similar to the federal ones discussed above. For example, the state of Minnesota has established a two-dimensional sentencing grid which correlates the gravity of the offence and the previous convictions of the accused. The grid establishes a fairly narrow sentencing range, with an extended range to be applied if there are aggravating or mitigating circumstances. However, the courts retain substantial discretion in that they are free to depart from the guidelines if 'substantial and compelling reasons' for the departure are provided in writing.

It has been pointed out that one advantage of such a comprehensive sentencing grid in a state such as Minnesota, where parole discretion has been removed, is that it enables the government to make accurate predictions of future prison populations. However, one criticism of such a grid is that previous criminal history is not the only personal factor which should influence the quantum of punishment; other considerations such as the temperament of the offender are equally relevant.

Another American approach is the use of presumptive sentences, where the legislature establishes three possibilities: a presumptive (or default) sentence, a higher penalty to be substituted where there are aggravating factors (such as the use of a firearm or serious injury to the victim), and a lower penalty to be substituted where there are mitigating factors (such as victim provocation). This approach has been adopted in the state of Arizona, for example.

A third approach is the legislative establishment of a specific range of sentences for particular classes of offences, whereby the legislature simply prescribes a minimum and a maximum sentence. This approach is used in the state of Colorado, to cite one example -- and is also the technique embodied in Namibia's Stock Theft Act. _

(5) Criticism of determinate sentences

It should be noted in general that determinate sentences in the United States exist in the context of a criminal justice system where plea-bargaining is commonplace. In fact, the certainty of determinate sentences is one factor which encourages plea bargaining, as an accused who knows exactly what penalty he or she would face upon conviction is in a better position to calculate the advisability of pleading guilty to a lesser charge. Similarly, prosecutors who feel that the recommended penalties for a certain offence would be inappropriate have an additional motivation to enter into a plea bargain.

It has been argued that determinate sentences in the United States have, by increasing time served, resulted in overcrowding in prisons -- to the point of turning prisons into human warehouses. It has also been asserted that determinate sentences, rather than eliminating discretion and the accompanying danger of discrimination, have merely moved the locus of this problem from judges to prosecutors. _ However, while these criticisms may be appropriate in the United States context, they are unlikely to apply to the imposition of a minimum sentences for a few carefully-targeted offences within the framework of a system which preserves a significant degree of judicial discretion. _

IV CONSTITUTIONALITY OF MINIMUM SENTENCES

Minimum sentences have been upheld against a variety of constitutional challenges in jurisdictions other than the US. In general, minimum sentences have consistently been found to be a legitimate exercise of legislative power consistent with the principle of the separation of powers. They have also withstood challenges that they constitute cruel and unusual punishment by virtue of their mandatory nature, provided that they do not violate the principle of proportionality to the offence.

(1) England

Minimum sentences are accepted in principle in England. For example, the sentence of life imprisonment is currently mandatory for the crime of murder. _ The relationship between mandatory sentences and the concept of separation of powers was summed up by the Privy Council in the case of *Hinds v The Queen* (Lord Diplock for the Council) with reference to Jamaica:

In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power.

The power conferred on Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law. The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which punishment is carried out.

In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence, as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it up to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

Thus parliament, in the exercise of its legislative power, may make a law imposing limits on the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. _

Thus, it appears that in countries with constitutions constructed on the Westminster model, the imposition of minimum sentences is consistent with the principle of three separate and independent branches of government. There is no statutory minimum sentence for rape in England, but, as will be discussed below, the courts have issued guidelines on appropriate punishment for this offence.

(2) Canada

In Canada, minimum sentences must adhere to the principle of proportionality in order to survive constitutional challenge. The 1985 case of *Smith v R* _ held that a minimum sentence of seven years imprisonment for any person convicted of importing or exporting any narcotic was contrary to section 12 of the Canadian Charter, which provides as follows:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The main objection cited in the three different opinions which constituted the majority holding was that the statute in question applied equally to a range of different offenders, from serious dealers in hard drugs to tourists convicted of

bringing a single 'joint' of marijuana into the country for personal consumption.

The Court emphasised that it was not making any decision on the validity of all minimum sentences (many of which are found in the provincial laws of Canada), but only on the specific minimum sentence in the case before it. This compulsory minimum cast its net too wide by covering offences of widely varying degrees of gravity, meaning that it would inevitably produce in some cases a punishment which is 'cruel and unusual' by virtue of being grossly disproportionate to the offence. The Court furthermore found that prosecutorial discretion to circumvent this disproportionate effect by charging 'small offenders' with lesser offences was not sufficient to overcome the constitutional objection.

The Court suggested that the minimum sentence in question might be acceptable if it were limited to more serious cases by applying only to the importation of large quantities of drugs, the importation of specific narcotics, repeat offenders, or some combination of such factors. However, the leading opinion also took note of the 1987 recommendation of the Canadian Sentencing Commission that mandatory minimum penalties be abolished for all offences except murder and high treason on the grounds that they 'serve no purpose that can compensate for the disadvantages resulting from their continued existence'. _

The sole dissenting opinion of McIntyre J would have upheld the minimum sentence in question on the grounds that it passed a three-prong test of constitutionality: (1) The seven-year minimum was not of such character or duration as to outrage the public conscience or to be degrading to human dignity, given the possibility of early parole and the fact that sentences in excess of seven years are regularly imposed in Canada for a variety of offences. (2) The minimum does not go beyond what is necessary for the achievement of a valid social aim (detering drug trafficking) -- particularly in light of the fact that the Court was not presented with any evidence suggesting effective alternatives which could meet the same goal. (3) The punishment is not arbitrarily imposed, because it is applied on a rational basis in accordance with ascertained or ascertainable standards. It is not impermissibly arbitrary for Parliament to determine that the gravity of the offence, the need to protect the public and the desirability of suppressing the drug trade are of such importance that the individual circumstances of a particular accused should be given relatively less weight. Moreover, the trial judge retains the discretion to consider the particular circumstances of the accused in determining whether to impose a sentence which is less than the maximum sentence of life imprisonment authorised for the offence in question.

The reasoning of this Canadian decision has been cited on the question of minimum sentencing in a number of other jurisdictions.

It should be noted that as of 1992 the offence of sexual assault which has replaced rape in Canada carried no minimum sentence. _

(3) Papua New Guinea

In the 1984 case Constitutional Reference by the Morobe Provincial Government _ , the Supreme Court of Papua New Guinea was asked to decide whether statutes prescribing minimum custodial sentences for certain offences violated section 36(1) of the Papua New Guinea Constitution, which reads as follows:

No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.

The minimum sentences in question included a mandatory sentence of ten years' imprisonment for the offence of rape. Where such a minimum penalty is prescribed by law, the Criminal Code provides that the courts have no power to suspend the sentence or any part of it, to discharge the convicted offender or to substitute any other penalty.

The Supreme Court held, in four separate opinions, that legislation prescribing minimum penalties is not unconstitutional. One justice (Kidu CJ) found that Parliament's constitutional power to define offences and prescribe penalties for these offences subsumes the power to prescribe minimums or maximums. One justice (Kapi DCJ) held that the constitutional provision referred to was properly applied only to kinds of punishment, not to degrees of punishment, concluding that Parliament therefore has an absolute power to prescribe penalties for criminal acts so long as those penalties are not of a type which interfere with inherent human dignity.

Two justices (Bredmeyer J and Kaputin J, writing separately) upheld the minimum sentences in question after finding them consistent with the principle of proportionality. (Both of these justices analysed the issue in terms of Parliament's power to enact punishments which would meet the goal of deterrence.)

One dissenting justice (McDermott J) traced the US line of cases on proportionality and concluded that the minimum sentences in question were unconstitutional because in each case situations could be readily imagined where the mandatory penalty would be disproportionate to the circumstances of the case and would prevent the courts from considering any of the factors which are usually relevant to sentencing. _

(4) Bermuda

The Court of Appeal in Bermuda has also upheld the Constitutionality of minimum sentences. In the 1988 case of Shorter and Others v R _ , the Court considered a statute which set forth a mandatory sentence for the offence of using a firearm while committing an indictable offence (at least ten years for a first offence and 20 years for subsequent offences) and required that any sentence imposed for this offence be served consecutively to any other punishment imposed for an offence arising out of the same set of events. _ The case questioned only the constitutionality of the consecutive sentencing requirement, but the Court's reasoning would appear to apply equally to the constitutionality of the obligatory minimum sentence.

Section 3(1) of the Bermuda Constitution states:

No person shall be subjected to torture or to inhuman or degrading punishment.

This provision is subject to the proviso that it will not be interpreted to outlaw 'the infliction of any description of punishment that was lawful in Bermuda immediately before the coming into operation of this constitution' (Section 3(2)). It is also subject to any limitations 'designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest' (Section 1). It was also alleged in the Shorter case that the mandatory consecutive sentencing requirement violated the constitutional guarantee of 'life, liberty, security of the person and the protection of the law' (Section 1(a)). After reviewing the Canadian case of Smith v R and the Papua New Guinea case, Constitutional Reference by the Morobe Provincial Government, the Court distinguished the Canadian case on the grounds that the Bermuda law did not violate the principle of proportionality because it applied only to the use of firearms in indictable offences (which excluded, for example, common assault) and because guns were most frequently used in serious offences against the person such as robbery and rape. Against this background, the Court felt that it was appropriate to defer to the legislature on sentencing as a question of public policy.

The unanimous opinion observed that the power of the courts to order that sentences be served consecutively was in place before the enactment of the Constitution, and that acceptable penalties prior to the Constitution included the death penalty. Therefore, while there might be 'hard cases', it was difficult to imagine a factual situation where mandatory consecutive sentences

of the type imposed by the statute would be unconstitutionally inhuman or in violation of the constitutional protection of life, liberty or security of the person.

(5) Zimbabwe

The Supreme Court of Zimbabwe has also approved minimum sentences in principle, so long as they satisfy the principle of proportionality. The statute which was at issue in the 1989 case of *Arab v The State* _ prescribed a sentence of a minimum of three to five years' imprisonment plus a fine of up to \$10,000 for a conviction of the offence of illegal possession of precious stones, 'unless the convicted person satisfies the court that there are special reasons in the particular case, which reasons shall be recorded by the court, why such a sentence should not be imposed'. If such reasons exist, the competent sentence is a fine of up to \$5000, or imprisonment for a period not exceeding 3 years, or both.

It was argued that this statutory provision was in conflict with section 15(1) of the Constitution, which reads:

No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

The principle of proportionality of punishment had already been accepted by the Zimbabwean Supreme Court in a previous case as being a necessary component of constitutionality under section 15(1). _ However, the Court (Dumbutshena CJ writing for the majority, with McNally JA concurring on all major points) distinguished the Zimbabwean statute from the Canadian statute which was held unconstitutional on the basis of proportionality in *Smith v R*, on the grounds that it provided the court with the mechanism of a finding of special reasons to use in unusual cases where the statutory minimum might not be appropriate. _ As a general matter, a sentence of three years for the offence in question was not, in the Court's opinion, impermissibly excessive or disproportionate. Furthermore, the Court held that the legislature had not acted impermissibly by removing some elements of the courts' discretion:

It must be accepted that Parliament has power to fetter in some cases the discretion of the sentencing court. For instance it fixes the maximum sentence beyond which a sentencing court cannot exceed. The presiding magistrate or judge may wish to impose a lengthier term of imprisonment than that prescribed by the legislature but cannot do so because his sentencing jurisdiction is limited. _

After finding that the obligatory minimum sentence in question was not unconstitutional, the Court canvassed the numbers of people prosecuted and convicted of illegal possession of emeralds from 1981 to 1989. (The mandatory penalty was imposed in 1982.) Noting a progressive decline in the incidence of the offence, the Court suggested that the legislature might now find it appropriate to remove the minimum sentence.

(6) Solomon Islands

The Solomon Islands Court of Appeal upheld a minimum sentence against a different sort of constitutional challenge; here, the accused argued that the statute violated his constitutional right to a fair hearing by interfering with the independence of the court.

The statute which was challenged in the 1984 case of *Gerea and Others v Director of Public Prosecutions* _ provided a mandatory sentence of life imprisonment for murder with malice aforethought. It was argued that the mandatory penalty violated Section 10(1) of the Constitution, which states:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Specifically, it was argued that the statute violated this constitutional provision by depriving the courts of the discretion to impose sentences in accordance with the circumstances of each case, thereby depriving the appellants to a fair hearing by an independent and impartial court.

In its majority opinion (Connelly JA with White P concurring), the Court first ruled that the term 'hearing' includes the entire judicial process and therefore includes the sentencing process. It then turned to the more difficult question of 'whether a court can be said to be other than independent because a provision of the law imposes a mandatory sentence'.

Relying heavily on the 1976 English case of *Hinds v the Queen*, the Court held that a mandatory sentence was not an impermissible limitation on the independence of the judiciary:

Obviously the provision of a mandatory sentence excludes all discretion in the court. This, it may be noted, was the position for hundreds of years under the law of England in the days of capital punishment, when for murder the only sentence which might be pronounced was a sentence of death. For our part we find it difficult to believe that the courts were any the less independent on this account. Statutes in many countries make provision not only for mandatory sentences but for maximum and for minimum sentences. It may be said that the latter two categories leave the court some discretion but it cannot be denied that they restrict it. The fact, however, is that it is of the nature of the legislative process constantly to vary the content of the law to be applied by the courts. This means that with every exercise of the legislative power there comes into existence a new legal framework to which the court must give effect. Thus a court which is free to act on the principles of common law and equity may find that a new defence or a new cause of action is introduced by a statute. It cannot, in our judgment, seriously be described as trenching upon the independence of the court to say that it is required to give effect to the alteration in the law. The courts exist to enforce the law in the form which it takes from time to time. They are, in our judgment, independent within the meaning of section 10(1) if in the exercise of that function they are subject neither to control nor pressure by any outside body. The requirement of section 10(1) is, in our opinion, fully met if, as is the case in Solomon Islands, they are subject to no direction by the legislature or the executive government as to the disposition of a particular case and to no form of pressure from outside bodies in the performance of their judicial functions. They are, however, like the courts in all civilized countries subject to the same body of law as is every other citizen. The courts are not intended by section 10(1) to be independent of the law but independent within it. _

The concurring opinion of Pratt JA reached the same conclusion, after focussing on Irish and English cases which emphasize the distinction between the permissible establishment of a general rule of punishment by a legislature, as opposed to an impermissible legislative selection of punishment in an individual case. _

V RAPE SENTENCING IN OTHER JURISDICTIONS

(1) England

The need for stiffer sentences for rape has been stressed by the English courts in recent years. In the 1982 case of *R v Roberts* _ , the Court of Appeal emphasised that rape is always a serious crime which calls for an immediate custodial sentence except in extremely exceptional circumstances.

However, in 1984, only 18% of convicted rapists in England were gaoled for four to five years, and only 8% for more than five years. The average sentence was five and one-half years, meaning that the average amount of time actually served before parole was much less. _

In 1986, in response to this situation, the Lord Chief Justice (Lord Lane CJ) issued new guidelines on sentencing in the case of R v Billam and other appeals and applications. _ These guidelines suggest at least five years' imprisonment as an appropriate sentence for rape committed by an adult where there are no aggravating or mitigating circumstances, and at least eight years' imprisonment as an appropriate sentence for rapes which are viewed as being more serious -- where two or more rapists acted together, where the rape occurred in the victim's own home, where the rapist abused a position of responsibility over his victim, or where the rape involved the abduction of the victim.

At the other end of the scale, where the rapist has raped more than once, 15 years' imprisonment was recommended as the minimum sentence. Where the rapist's behaviour exhibited perverted or psychopathic tendencies, or a personality disorder, such that the rapist would be likely to pose an ongoing danger to women, the Court felt that a sentence of life imprisonment would not be inappropriate.

The Court identified the following as aggravating factors which would warrant a sentence substantially higher than those suggested as starting points:

- (1) use of violence over and above the force necessary to commit the rape
- (2) use of a weapon to frighten or wound the victim
- (3) repetition of the rape
- (4) careful planning of the rape
- (5) previous convictions for rape or other offences of a violent or sexual nature
- (6) subjection of the victim to further sexual indignities or perversions
- (7) advanced age or extreme youth of the victim
- (8) special seriousness of the effects of the rape on the victim, whether physical or mental.

The Court suggested that a plea of guilty might be grounds for a reduction in the appropriate sentence, since this would spare the victim the added distress of giving evidence. The youth of the offender would be another mitigating factor, although custody would still be justifiable in most cases because of the gravity of the offence of rape.

The Court took care to specify what kind of behaviour on the part of the victim would qualify as a mitigating factor:

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance. _

(2) Papua New Guinea

In the case discussed above, Constitutional Reference by the Morobe Provincial Government, one of the justices (Bredmeyer J) considered the ten-year mandatory penalty for rape in some detail.

Examining the question of the excessiveness of this minimum, Bredmeyer J noted that with remissions for good behaviour, a rapist given a ten-year sentence would be likely to serve about seven years and five months. As a point of comparison, in New South Wales where there is no minimum sentence for rape, the average sentence for rape in 1976 was lower than ten years; however, the crime

rate is higher in Papua New Guinea than in New South Wales, and the effectiveness of law enforcement is lower. Therefore, Bredmeyer J concluded that the ten-year minimum for rape is not excessive in the social context of Papua New Guinea.

He went on, however, to question at length the wisdom of minimum sentences, particularly for the offence of rape. As many of these points are relevant to the Namibian context, the passage is quoted here in full:

In Papua New Guinea the offenders subject to minimum penalties can so easily evade them. Detection of crime is low. If caught, they can ask for bail, readily get it and abscond. If tried they can pit an experienced defence lawyer against an inexperienced prosecutor and so get acquitted. If convicted and sentenced, they may be released on licence, be given the prerogative of mercy, or simply, escape from our minimum security goals. Experience in other countries shows that the majority of rapes are not reported. The victim is unwilling to undergo the ordeal of a trial where she will be subjected to a merciless cross-examination, and perhaps be disbelieved, whilst the rapist is entitled to, and often does, remain silent in court. Moreover in this country many rapes are 'settled' out of court by the payment of compensation, especially in the Highlands. Often it is only when the offender refuses to pay compensation that the offence is reported to the police. The introduction of a minimum penalty will further reduce the number of rapes reported to the police and prosecuted. The prospect of a 10-year penalty for the rapist, with no reduction for a plea of guilty, will reduce the number of guilty pleas, and will prompt defence counsel to subject the victim to even harsher cross-examination. The prospect of a 10-year sentence for the rapist will prompt his family to pressurize the victim and her family to accept compensation and drop the charges. The introduction of the 10-year penalty for rape, paradoxically, will mean that fewer rapists will receive gaol terms, but that those who do, will receive longer terms. The best solution to our soaring crime rate is to improve the certainty of law enforcement rather than to increase the severity of the punishment. As Jeremy Bentham said: 'the more certain punishment is, the less severe it need be' (cited in G. Williams, *The Proof of Guilt*, (1963, London), p.51).

(3) New Zealand

The issue of appropriate sentences for rape was addressed in the 1984 New Zealand Court of Appeal case *R v Puru*. _ The Solicitor-General asked the Court to find that there should be a broad-based and significant increase in rape sentences. Statistical evidence indicated that during the ten years ending in 1983, one third of all sentences imposed for rape were for terms of five years and above.

The Court (Woodhouse P, writing for a unanimous bench) refused to recommend such an increase, noting that the severity of sentences for rape in New Zealand was comparable to the punishment imposed for rape in England during the same period. In New Zealand, the Court noted that while there had been an upward trend in the number of convictions and in the number of complaints made to the police during the preceding ten years, there was no evidence of any marked increase in the actual incidence of rape. At the same time the preceding five years evidenced an upward trend in the severity of sentences being handed down, especially where there were aggravating circumstances. However, this increase in severity did not appear to have had any beneficial effect on the number of rape convictions. Furthermore, in recent years a disproportionately large number of rapists were young Maoris, probably because of underlying social factors, and the Court was hesitant to mandate an increase which would bear particularly heavily on one segment of society or one racial group.

The Court also noted that there was no indication that heavier sentences would have the desired deterrent effect, saying:

It should be recognised that in all the research that has been done here and in other countries there is virtually no evidence which suggests that anything is achieved in a significant way to deter future rape offences when punishment that is already severe is made harsher still. In truth it is the kind of offending which is seldom the product of planning and deliberation or when the likely consequences of conviction are weighed in advance. If it is thought about at all by the offender it is on the basis that he will not be apprehended. _

The Court accepted the proposition that society utterly rejects rape as 'the disgraceful exercise of physical power over the victim and degradation of her human personality', and that sentences should reflect society's severe condemnation of the offence. However, the Court was of the opinion that judges were already reflecting those considerations in discharging their sentencing responsibilities. It is the responsibility of the courts to act, not on the basis of impulse or emotion, but with justice and deliberation. Furthermore, the court must always look at the broad spectrum of offences, leaving a margin to take care of the worst kinds of cases in relation to lesser offences, to avert 'the grave risk of far more serious attacks, even to the point of murder, by offenders who thought that there was nothing to be gained by a residual restraint'.

In summary, the Court stated that 'sentences should be no more as well as no less severe than is justified and required for the protection of women, to mark rejection of such offences, and to punish the offender.' It concluded that no justification had been presented to it for requiring a general increase in the level of sentences. _

(4) Minnesota

The example of the US state of Minnesota provides another point of comparison. As of 1991, in terms of the Minnesota sentencing grid discussed above, an offender with no prior convictions who is found guilty of first degree criminal sexual conduct would be sentenced to 41-45 months' imprisonment. An offender with one previous criminal conviction would be sentenced to 50-58 months' imprisonment, while a third-time offender would be sentenced to 60-70 months' imprisonment.

(5) Southern Africa

Concern about the severity of punishment for rape has been expressed in a variety of ways in southern Africa. Statutes in Swaziland and Mozambique provide minimum sentences for rape, and there have been recent demands for a minimum sentence in Botswana. In Lesotho and Zimbabwe, lenient sentences handed down by lower courts have on a number of occasions been raised on appeal. All rape cases in Swaziland are now heard by the High Court, and this procedural change has been proposed in Lesotho as well.

(a) Swaziland

In Swaziland, a study of all the rape cases heard in the High Court in 1984 and 1985 found that the average sentence imposed was 4,7 years. Of the 68 rapists convicted during this period, ten (mostly young offenders) served no time in prison because they were given suspended sentences or strokes with a cane. Taking only those rapists who were given a prison sentence, the average sentence was 5,5 years. _

According to this study, the Government of Swaziland has consistently expressed concern over the crime of rape and attempted to deter rapists by increasing sentences. Since 1980, all rape cases have been tried in the High Court, to allow for the possibility of longer sentences. Furthermore, in 1986, a minimum sentence of nine years was imposed by statute for rape cases in which

aggravating circumstances are present. _ In an effort to encourage the reporting of rapes, the same amendment provided for rape trials to be held in camera, and made it an offence to publish information about the incident which might identify the victim. _

(b) Mozambique

It has been reported that the offence of rape is punishable in Mozambique 'by imprisonment for a period of between two and eight years', indicating that there is a two-year minimum sentence. _

(c) Botswana

A 1984 study of 85 rape cases which came before the High court of Botswana on appeal or review over a four-year period revealed that, although the maximum penalty for rape in Botswana is life imprisonment, the majority of rapists in these cases received sentences of around three and one-half years. _ This study also noted that there were relatively few convictions for rape during this period, primarily as a result of laws and attitudes that tend to protect men. By the end of the 1980's, women in Botswana were calling for a statutory minimum sentence of ten years. However, no such minimum sentence has been introduced, to the best of our knowledge. _

(d) Lesotho

Although sentences up to a maximum of the death penalty are authorised for rape in Lesotho, official concern has been expressed at the leniency of the sentences which are in fact imposed. The Chief Justice of the High Court suggested in a 1983 case that it might be advisable to refer all rape cases to the High Court to make it possible for stricter penalties to be imposed (as there are legal limits on the sentencing powers of magistrates). Then, in 1988, the Chief Justice sent a circular to all magistrates and practising attorneys expressing his concern at the alarming increase in the incidence of rape and calling attention to cases where sentences which were so 'manifestly inadequate' as to be 'little short of derisory' had been increased on review. _

(e) Zimbabwe

The maximum penalty for rape in Zimbabwe is the death sentence, but this has not been imposed lately. In recent years, sentences for rape have been raised on review on several occasions, giving the lower courts warning that the offence should be treated seriously. _

VI CONCLUSIONS AND RECOMMENDATIONS

There is probably no constitutional barrier to the introduction of a statutory minimum penalty for rape in Namibia, so long as such a minimum penalty is not so severe as to be disproportionate to every imaginable occurrence of the offence. However, there are a number of arguments for preserving at least some measure of judicial discretion.

In addition, there are other reforms to the law of rape which could be equally effective in accomplishing the objective of increasing deterrence, by making it more likely that rapes are reported and offenders convicted.

(1) Constitutional issues

The separation of powers under the Namibian Constitution is similar to that in the United States and in various Commonwealth countries where minimum sentences

have been found not to constitute an interference with the independence of the judiciary.

Article 63(1) of the Namibian Constitution gives the National Assembly the power 'to make and repeal laws for the peace, order, and good government of the country', while Article 78(2) provides that the courts 'shall be independent and subject only to this constitution and the law'.

The analysis of the US Supreme Court and the English Privy Council on the interconnected yet independent functions of the various branches would seem to be equally applicable to the Namibian situation.

An important point which has been cited in other jurisdictions is that it is constitutionally legitimate for the legislature to establish a general legal framework which the courts must apply, while there would be an illegitimate interference with judicial independence only if the legislature attempted to influence the court's decision in an individual case.

Another particularly relevant provision of the Namibian Constitution is Article 8(2)(b) which states:

No person shall be subject to torture or to cruel, inhuman or degrading punishment or treatment.

It remains to be seen whether this provision will be interpreted to apply to degrees as well as to kinds of punishment. However, the experience of other jurisdictions indicates that a minimum sentence for rape would not fall foul of this provision unless it were disproportionate to any instances of rape which it covered.

Similarly, experience elsewhere indicates that a minimum sentence for rape would not vitiate the right 'to a fair and public hearing by an independent, impartial and competent Court or Tribunal' guaranteed by Article 12(1) of the Namibian Constitution, nor interfere with the due process of law guaranteed by Article 7.

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(2) Policy issues

Although comprehensive statistics are not available, it appears that the average sentences handed down for rape in Namibia in recent years are comparable to those handed down in jurisdictions such as New Zealand and Botswana, yet lower than the minimum sentences prescribed or recommended in jurisdictions such as England, Swaziland and Papua New Guinea.

The incidence of reported rape is perceived as being high in Namibia, and there are a shockingly high number of cases in which young girls are victims. _ It is also widely agreed that many rapes go unreported to the police. Violence against women, and particularly rape, has been repeatedly cited as a concern by a broad spectrum of groups and individuals in various public forums. Thus, there is a legitimate basis for taking action to send out a message about the severity of rape by increasing the penalties for the offence.

However, there are also a number of policy arguments against the establishment of a minimum sentence which must be addressed:

(1) It is difficult to establish a minimum sentence which is appropriate for all offenders, given the many different mitigating factors which may be present in individual cases. For example, the study of rape cases heard by the High Court during 1988-90 indicated that about one-third of the defendants in these cases were under the age of 21 _ , and the youth of the offender has traditionally been considered to be a relevant mitigating factor.

However, this problem could be overcome by establishing a minimum sentence which preserved judicial discretion to impose a lower sentence in the presence of mitigating factors such as youth.

(2) The establishment of a minimum sentence might lead to an increase in plea bargaining or an increased exercise of prosecutorial discretion whereby some offenders (particularly youthful ones) are charged with a lesser offence such as indecent assault to avoid the minimum sentence.

However, a minimum sentence which preserved a significant degree of judicial discretion would be less likely to produce an increase in the practice of plea bargaining.

(3) A severe minimum sentence might increase the likelihood that victims and their families will be pressured to resolve rape cases through traditional leaders rather than by laying charges with the police.

On the other hand, if sentences imposed under civil law are perceived as being too lenient, women may feel that recourse to customary law is no less likely to result in a meaningful outcome than action through other channels.

(4) The deterrent effect of increased sentences has been questioned in the case of rape. Rape is not necessarily the outcome of a rational decision-making process. Furthermore, perceptions of the prospect of punishment are influenced not only by the average sentences for rape, but also by assumptions about the probability that the victim will not report the crime or that the state will not be able to obtain a conviction. An increase in the penalty for rape will not in itself be effective in reducing the incidence of rape.

However, it is possible that the imposition of a minimum sentence will encourage more women to report rapes, as they may be more willing to face the trauma of re-living the ordeal in court if they have more confidence that the punishment meted out to the rapist will be significant. If a minimum sentence is combined with other reforms in the law on rape which will provide greater protection for the privacy and dignity of the rape survivor, the possibility of increased reporting will be even greater.

Furthermore, if the absence of consent is removed as an element of the crime of rape (as has been done in many other jurisdictions), the rate of conviction may increase. A minimum sentence should ideally be part of a package of reforms which will increase the certainty as well as the severity of punishment for rape.

(5) Severe overcrowding of prisons has been a problematic outcome of the movement towards fixed sentences in the United States.

This is unlikely to result from the imposition of a minimum sentence for rape in Namibia, however. In the US, the movement towards fixed sentences has been combined with a trend towards eliminating the possibility of early release on parole. Furthermore, the proposal which is being considered in Namibia is a minimum sentence for one specifically-targeted offence, rather than a general move towards determinate sentences.

There are also a number of policy arguments in favour of imposing a minimum sentence for rape:

(1) There is a public perception that rape is not being taken seriously enough, and, more generally, that law reform on issues affecting women is not a high political priority. Government action in this area would send out a strong message of concern for the welfare of women as well as a message of condemnation of a hideous crime. In addition, such a step would be consistent with the spirit of Namibia's international responsibilities under CEDAW and (given the high number of child victims) the Convention on the Rights of the Child.

(2) It would be difficult for the state to fall back on policy arguments against minimum sentences since a minimum sentence of imprisonment for repeat offenders has already been imposed for the offence of stock theft. Surely a particularly invasive and damaging crime against the person is more deserving of a minimum sentence than a crime against property.

(3) It is possible that a minimum sentence might encourage magistrates and judges to discontinue past practices of allowing the character and sexual history of the rape victim to influence the sentence. _ There would be at least a degree of equality if, as a starting point, the rape of any woman -- virgin or prostitute -- was deemed to warrant a fixed number of years of imprisonment.

A minimum sentence which preserves a significant degree of judicial discretion would not fundamentally alter the present approach, but would merely revise sentences upward within the existing framework. Without such a legislative step, courts may feel bound to continue to impose sentences which are consistent with those imposed in the past, to avoid being overturned on appeal.

Furthermore, as already noted, some of the negative consequences which might arguably result from a severe minimum sentence -- such as increased plea bargaining, more pressure on victims not to lay charges and increased resort to traditional courts -- are unlikely to occur in response to a more moderate minimum sentence which makes only an incremental change to present practice.

Finally, implicit in any assessment of a minimum sentence proposal is the question of what theory of punishment is to be served. Rehabilitation of individual offenders has not proven to be very successful with regard to rapists; although no statistics are available for Namibia, studies in other countries indicate a high degree of recidivism among rapists. _ Thus, longer prison sentences are not likely to reform individual offenders.

A minimum sentence alone is not likely to make a huge contribution to deterrence, although this objective might be served to some extent if reform in the area of sentencing were combined with other reforms aimed at encouraging women to report rapes and increasing the likelihood of convictions. _

Longer prison sentences will, however, serve two important functions. Firstly, they will at least help to protect women by keeping the individual offender from repeating his crime as soon as he might do otherwise. Secondly, and more importantly, they will serve the goal of retribution -- what is referred to more broadly in the United States as 'just punishment for the offence'. _ It is a trite maxim that justice must not only be done, but also be seen to be done.

Despite Namibia's constitutional guarantees of sexual equality, Namibian women do not yet see the law doing justice to their rights and their needs. Stiffer condemnation of rape would one step in the right direction.

(3) Setting the minimum

Even if the concept of adopting a minimum sentence is accepted, the difficulty of setting a number remains. In the United States, the statute establishing the new federal sentencing guidelines directed the Commission charged with the responsibility of setting the guidelines to consider past sentencing decisions, while at the same time recognising the fact that past practice has not always reflected the seriousness of the offence. The Commission was explicitly directed to consider 'the community view of the gravity of the offence' and 'the public concern generated by the offence'. _

If a similar approach were adopted in Namibia, the starting point could be the statistics from the late 1980's showing an average of four to six years' imprisonment. (More recent data could be collected in similar fashion if this was deemed necessary.) In order to revise past practice upward, to bring the punishment for rape more in line with the seriousness and prevalence of the problem, the average should become the minimum -- a move which would be certain to increase the average sentence imposed.

Thus, on the basis of the available data, a logical (and conservative) minimum sentence would be at least five years' imprisonment.

(4) Recommendations and responses

The Legal Assistance Centre has recommended to the Law Reform and Development Commission that the legislature enact a minimum sentence for rape which retains a large degree of judicial discretion.

We have suggested that a minimum sentence be set at somewhere in the range of five to seven years in the absence of any mitigating factors. We have also recommended that the courts be left free to define 'mitigating factors', since this is a familiar concept in our legal tradition.

This would, of course, also leave the courts free to exercise a wide discretion to impose sentences of up to life imprisonment in cases where aggravating factors were present.

Such an approach would not raise any questions of proportionality, since such a provision would operate more as a guideline than as an absolute directive, leaving the courts significant discretion to tailor the sentence to the offender in exceptional cases. _

We feel that such an approach would send out a strong message about the seriousness of rape, without constituting undue interference with judicial discretion.

At the same time, we would strongly recommend that this reform be coupled with additional reforms to the law on rape which might encourage higher rates of reporting and conviction. We would suggest that such additional reforms include at a minimum the following:

(1) Redefinition of the crime of rape to make consent of the victim a defence rather than an element of the crime. _

(2) Redefinition of the crime of rape to make it possible for a husband to be charged with the rape of his wife.

(3) Increased protection for the privacy of the victim, by mandating automatic closure of the court to the public during the victim's testimony and by making it a criminal offence to publish the name of the complainant or any information which might reveal her identity. _

(4) Increased protection for the dignity of the victim, by prohibiting the introduction of evidence about her prior sexual experience except by express consent of the court after application in camera. _

The Legal Assistance Centre also recommends investigation of the possibility of establishing a special rape court staffed by specialised personnel, along the lines of the rape court at the Wynberg Regional Magistrates Court in South Africa.

The Law Society of Namibia opposes the imposition of a mandatory sentence for rape on the grounds that: (1) it would restrict the discretion of the judiciary and to that extent be contrary to the spirit of the Constitution; (2) no scientific evaluation has been made of the situation in order to assess the effect of a minimum sentence or what the minimum should be; (3) it would be difficult to establish a minimum sentence which would be appropriate to the differing circumstances of each case.

However, the Law Society suggests that consideration be given to: (1) sentencing guidelines along the lines of those laid down in the English system for the offence of rape; (2) amendments to protect the privacy and dignity of the rape victim, such as those which have already been introduced in South Africa; (3) the removal of the marital rape exemption; and (4) the establishment of a special rape court. _

The matter now lies with the Law Reform and Development Commission, and, ultimately, with the Namibian Parliament.

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_ Information from Namibian Police.

_ Information from Central Statistics Office, National Planning Commission and Namibian Police.

_ The National Institute for Crime and Rehabilitation of Offenders (NICRO) estimates that only one in 20 rape victims reports the crime to the police in South Africa. L Vogelman *The Sexual Face of Violence* (1990) 31. This figure is also quoted from another source in South African Law Commission Women and Sexual Offences in South Africa Project 45 (1985) 5, para. 1.6. Namibian Police Commissioner Siggie Eimbeck has cited the same figure with regard to Namibia. *The Namibian*, 13 November 1990.

_ See, for example, 'Rape under the spotlight' *Windhoek Observer* 18 May 1991; 'Rape outrage: new statistics shock' *The Namibian* 1 February 1991; 'Namibia's women raped at one every hour' *The Times of Namibia* 23 January 1991.

_ Information compiled from statistics in the appendices to D Hubbard A Critical Discussion of the Law on Rape in Namibia (NISER, University of Namibia, January 1991).

_ Rape is one of the 'Schedule A offences' which is excluded from the criminal jurisdiction of chiefs and headmen under RSA Proc. No. R. 348 of 1967.

_ Comments from interviewees in Uukwambi, Ombaluntu and Uukwanyama in Namibia Development Trust (NDT) *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi, Ombaluntu and Uukwanyama Integrated Report, Volume I* (1994) 76, 78; Centre for Applied Social Sciences & Namibia Development Trust (CASS & NDT) *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi, Ombaluntu and Uukwanyama Integrated Report, Volume II: The Legal Aspects* (1994) 42.

_ The issue of sentencing was not specifically mentioned in this petition.

_ See, for example, 'Law on rape demands reform' *New Era* 3-9 September 1992; 'You'll never walk alone: L deritz women stand firm against rape terror' *The Namibian* 6 March 1992; 'Women slam "lenient" rape sentences' *New Era* 20-26 February 1992; 'Women should unite against rape' (editorial) *The Namibian* 31 January 1992.

An example of public opinion on the issue can also be found in a recent survey of the Uukwambi area, where some interviewees suggested that the punishment for a convicted rapist should be the same that as for a murderer. NDT (n 7) 78.

_ See 'Law courts blaze new trail for heavier rape sentences' *The Namibian* 5 March 1992.

_ The Law Reform and Development Commission was established by Act 29 of 1991. The request from the Namibia Women's Agricultural Association, based on a decision taken at the group's annual general meeting, suggested a five-year minimum sentence, pointing out that the prevalence of AIDS means that a rape can constitute a death sentence for the victim. In response to the petition, the Ministry of Justice solicited input from the Law Society of Namibia, which in turn asked the Legal Assistance Centre for comments.

_ See, for example, D Hansson 'Some Reflections on the Cape Attorney-General's Task Group on Rape' (paper presented at the Conference on Women under the Criminal Justice System, Centre for Criminal Justice, University of Natal, February 1993) 9.

_ Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971. In 1978, the minimum sentence relating to marijuana was abolished, and the Act was further amended in 1986 to remove the obligation on the court to impose imprisonment in respect of certain offences, giving the court discretion to impose a fine or imprisonment or both.

However, even prior to these amendments, section 7 of the Act made provision for imposition of a sentence lesser than the prescribed minimum where circumstances justified this, and the penal provisions of the Act gave rise to a number of detailed judicial decisions concerning their interpretation and application. See M A Rabie and S A Strauss *Punishment: An Introduction to Principles* 3ed (1981) 274-5.

- _ Section 2(1) of the Terrorism Act 83 of 1967 (now repealed).
- _ Section 277 of the Criminal Procedure Act 51 of 1977.
- _ Criminal Law Amendment Act 107 of 1990.
- _ Commission report 5.1.4.1.26, as quoted in D P van der Merwe Sentencing (1991) 4-48 and 5-8.
- _ Section 14(1)(b), as amended. The minimum sentence applies to the offences of stock theft; attempted stock theft; receipt of stolen stock; inciting, instigating, commanding or conspiring with or procuring another person to steal stock or to receive stolen stock; or disposing of stolen stock -- provided that the conviction relates to stock other than poultry, a stock carcass or any portion of a stock carcass. The maximum sentence for a second or subsequent conviction on any of these offences is 20 years imprisonment. Section 14(2) provides that the minimum sentence set by statute may not be suspended in terms of section 297(4) of the Criminal Procedure Act 1977, if the offender was 18 years of age or older at the time the crime was committed.
- _ Section 22, Criminal Law Second Amendment Act 126 of 1992.
- _ Sections 27(1)(c), 27(1A) and 28(1). Although the wording of section 27(1A) differs slightly in Namibia and South Africa, the offences covered and the minimum sentence provided is the same in both countries.
- _ Section 283 Discretion of court as to punishment:
 - (1) A person liable to a sentence of imprisonment for life or for any period, may be
 - sentenced to imprisonment for any shorter period, and a person liable to a
 - sentence of a fine of any amount may be sentenced to a fine of any lesser amount.
 - (2) The provision of subsection (1) shall not apply with reference to any offence for
 - which a minimum penalty is prescribed in the law creating the offence or
 - prescribing a penalty therefor. [emphasis added].

Section 297(4) empowers courts to suspend portions of minimum sentences prescribed by law for a period of up to five years on any of a number of prescribed conditions.

- _ In US law, most criminal offences are a matter for state legislatures and state courts. However, there are also a more limited number of federal criminal offences which are the province of the US Congress and the federal courts.
- _ I L Nagel 'Structuring Sentencing Discretion; the New Federal Sentencing Guidelines' (1990) 80(4) Journal of Criminal Law & Criminology 883.
- _ Chapman v US 111 S Ct 1919 (1991) at 1928.
- _ 217 US 349 (1909).
- _ Quoting with approval O'Neil v Vermont 144 US 323 (1892) (Field J, dissenting).
- _ 433 US 584 (1977). In this case, the relevant state statute provided death, life imprisonment, or imprisonment from one to 20 years as competent sentences for rape. The majority opinion held that, while rape is 'highly reprehensible', it is not as serious as the crime of murder and therefore does not warrant the uniquely serious penalty of death. The dissenting opinion felt that the Eighth Amendment did not require interference with legislative discretion in the case at hand, particularly given the fact that 'rape is inherently one of the most egregiously brutal acts one human being can inflict upon another'.
- _ 463 US 277 (1983).
- _ 111 S Ct 2680 (1991).
- _ A long line of US cases on the death penalty have established the 'individualized capital-sentencing doctrine', which requires an individual determination of the appropriateness of the death penalty in each particular case. However, this approach was distinguished by the Court from other mandatory penalties on the grounds of the unique nature of the death penalty.
- _ For example, it was argued that the punishment for drug possession should not be based on the 'ripple effects' of drug possession on society, such as

crime, lost productivity and health problems. Harmelin (n 28) at 2716-17 (White J, dissenting)

_ The Sentencing Commission was created by the Sentencing Reform Act of 1984, as amended, which charges it with the task of establishing 'sentencing policies and practices' for the federal criminal justice system. The Commission is composed of seven members, three of whom must be federal judges. The federal sentencing guidelines are described in *Mistretta v US* 488 US 361 (1989), *Burns v US* 111 S Ct 2182 (1991), *Williams v US* 112 S Ct 1112 (1992) and *Stinson v US* 113 S Ct 1913 (1993).

_ 18 USC, section 3553(b).

_ Like Namibia, the United States has three separate branches of government -- executive, legislative and judicial -- with a constitutional system of checks and balances.

_ *Mistretta v US* 488 US 361 (1989) at 364-5, 380-1, 391.

_ Nagel (n 22) 913 (note 186).

_ van der Merwe (n 17) 5-5 to 5-9 (1992 service), Annex 2-2 (1991 service).

_ D J Rothman, 'The Crime of Punishment', *The New York Review of Books*, 17 February 1994, 34-8.

_ For example, according to Rothman, prison overcrowding in the United States is in large part due to the long sentences served by a large number of drug offenders; he points out that nearly 60% of those incarcerated in federal prisons are serving time for drug offences, while drug offenders make up 22% of the state prison population.

While the problem of discrimination hidden within judicial and prosecutorial discretion is highly relevant to post-apartheid Namibia and South Africa, this is not the motivation behind the proposal for minimum sentences for rapists in Namibia.

_ Murder (Abolition of the Death Penalty) Act of 1965.

_ [1976] 1 All ER 353 at 370 [citations omitted], holding that it was impermissible for the legislature to transfer complete discretion to determine the severity of punishment to be inflicted upon an individual member of a class of offenders to an executive body.

_ [1988] LRC (Const) 361.

_ Citing *Sentencing Reform: A Canadian Approach*, 1987.

_ Criminal Code, sections 265, 271-273.

_ [1985] LRC (Const) 642.

_ The factors cited by McDermott J as being generally relevant to the sentencing of offenders were: the degree of participation; the degree of ignorance of the law; the age of the offender; the fact that the offender is a first offender; the offender's previous good record; restitution; the offender's physical and mental condition; remorse; assistance given to the police; a plea of guilty by the offender; aggravation or provocation by the victim; the effect of a gaol term on the offender's family; the effect of a gaol term on the offender's job, education or income; the technical nature of certain offences; the punishment received or compensation paid in terms of customary law and practice; and the prevalence of the offence.

_ [1989] LRC (Crim) 440.

_ This statute was modelled on a similar Canadian law, but with substantial increases in the minimum and maximum penalties. The Canadian law provided for 1-14 years for a first offence and 3-14 years for subsequent offences, as compared to Bermuda's 10-20 years for a first offence and 20 years to life for subsequent offences.

_ [1990] LRC (Crim) 40.

_ In *Ncube v S* [1988] LRC (Const) 442, the court stated that section 15(1) of the Constitution 'is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are "grossly disproportionate": those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty -- the punishment being so excessive as to shock or outrage contemporary standards of decency.'

_ The Court offered the hypothetical example of a man who picks up what he thinks is a green stone but which unknown to him is in fact an uncut emerald as a case which would probably be sufficient for a finding of a 'special reason'.

_ Arab (n 48) 44.

_ [1986] LRC (Crim) 3.

_ At 10-11.

_ The leading cases cited in this opinion were Deaton v The Attorney-General and The Revenue Commissioners [1963] IR 170; Hinds and Others v The Queen [1977] AC 195; [1976] 1 All ER 353; Liyanage v R [1967] AC 259; [1966] 1 All ER 650.

_ [1982] 1 All ER 609.

_ S Lees, 'Judicial Rape' (1993) 16(1) Women's Studies International Forum 11-36, 30.

_ [1986] 1 All ER 985.

_ At 988 [emphasis added].

_ [1985] LRC (Crim) 817.

_ At 820.

_ The Court had rejected an argument for a general increase in sentences for rape in 1978 on similar grounds. R v Pui [1978] 2 NZLR 193.

_ A Armstrong 'Women as victims: a study of rape in Swaziland' in A Armstrong (ed) Women and Law in Southern Africa (1987) 255ff. This study looked at a broader category of sexual offences; the figures for rape alone have been calculated from the raw data listed in the study.

_ Ibid 272. The amendment referred to is the Criminal Procedure and Evidence (Amendment) Act 6 of 1986. This amendment is quoted in RT Nhlapo, 'The Legal Situation of Women in Swaziland and Some Thoughts on Research' in J Stewart & A Armstrong (eds) The Legal Situation of Women in Southern Africa (1990) 128. The actual text of the amendment seems to indicate that the minimum sentence applies to any 'conviction of rape', with no option of a fine and no option to have any part of the sentence suspended.

_ See Armstrong (n 62) 272; Nhlapo (n 63) 128.

_ I Casimiro, I Chicalia & A Pessoa 'The Legal Situation of Women in Mozambique' in Stewart & Armstrong (n 63) 90.

_ A Molokomme 'Women's Law in Botswana: Laws and Research Needs' in Stewart & Armstrong (n 63) 33, recording results from B K Otlhogile, 'Rape: Nought for Your Comfort' (Gaberone, University of Botswana, Dept. of Law, workshop paper, 1984)

_ Ibid. See also A Mokwe 'Women as Offenders & Women as Survivors' (Human Rights Seminar on the Reform of Criminal Law and Criminal Procedure in Southern Africa, Windhoek, Namibia, 15-17 June 1992, compiled by M Figueira & M Pfeifer, Legal Assistance Centre, Windhoek) 157-8.

_ SM Seeiso, LM Kanono, MN Tsotsi & TE Monaphathi 'The Legal Situation of Women in Lesotho' in Stewart & Armstrong (n 63) 72-73.

_ J Stewart, W Ncube, M Maboreke & A Armstrong, 'The Legal Situation of Women in Zimbabwe' in Stewart & Armstrong (n 63) 213-14.

_ Article 7 states that 'No persons shall be deprived of personal liberty except according to procedures established by law.'

_ For example, the Woman and Child Abuse Centre in Windhoek reported in February 1994 that they receive two to three reports of rape daily, nearly half of which involve children as victims. The main targets are girls aged 5 to 12.

_ Hubbard (n 5) 60-62.

_ See, for example, R v Sibande 1958 (3) SA 1 (A) at 6, where Schreiner JA stated:

The character of the complainant has always, and quite rightly, been regarded as of significance in deciding upon the penalty to be imposed on the raptor. Rape upon a prostitute, for example, though it is the crime of rape would not ordinarily call for a penalty of equal severity to that imposed for rape upon a woman of good character.

See also S v Thamage 1972 (2) PH H143 (W), where social status (which happened to coincide with race) was used to justify two highly divergent sentences imposed in two similar cases of rape, one involving a white victim and the other a black victim.

- _ Vogelman (n 3) 189-90. Vogelman's study of 27 convicted rapists from the community of Riverlea near Johannesburg found that 77% of the rapists in the sample had raped more than once. Vogelman also cites a US study of rapists from two different areas of the United States in which 81% of the rapists from one area and 48% of rapists from the other admitted to committing other rapes.
- _ For example, see Vogelman (n 3) 167ff. The rapists interviewed by Vogelman were not particularly concerned about the consequences of their conduct, and some took it for granted that their victims would not report the rape. While Vogelman states (at 189) that '[t]he prospect of spending time in prison is sufficient to prevent many men, who might otherwise rape, from doing so', his study emphasizes the influence of male socialisation, sexist attitudes and institutions in society, and the many ways in which rapists rationalise their behaviour.
- _ Nagel (n 22) 915-16. This phrase in the Sentencing Reform Act was elaborated in the Senate Committee Report as meaning justice for the public as well as justice for the offender.
- _ Ibid 927, 929.
- _ The degree of discretion left to the judiciary should be significant but not so wide as to undermine the effect of the minimum sentence. As noted above, section 297(4) of the Criminal Procedure Act gives a court discretion to suspend part, but not all, of a statutory minimum sentence. The Legal Assistance Centre would recommend that this particular exercise of judicial discretion be eliminated with respect to a minimum sentence for rape (as was done in respect of Namibia's existing minimum sentence for stock theft), to ensure that the punishment imposed retains a sufficient degree of severity.
- _ Examples of legislation from other jurisdictions which have redefined rape to remove the element of consent are discussed in Hubbard (n 5) 23ff.
- _ These reforms have already been enacted with respect to South Africa by amendments to the Criminal Procedure Act 51 of 1977 contained in the Law of Evidence and the Criminal Procedure Amendment Act 103 of 1987, which was not applicable to Namibia.
- _ This change has already been made in South Africa by the Criminal Law and Criminal Procedure Amendment Act 39 of 1989, which was not applicable to Namibia.
- _ Information from W H Dicks, President, The Law Society of Namibia.