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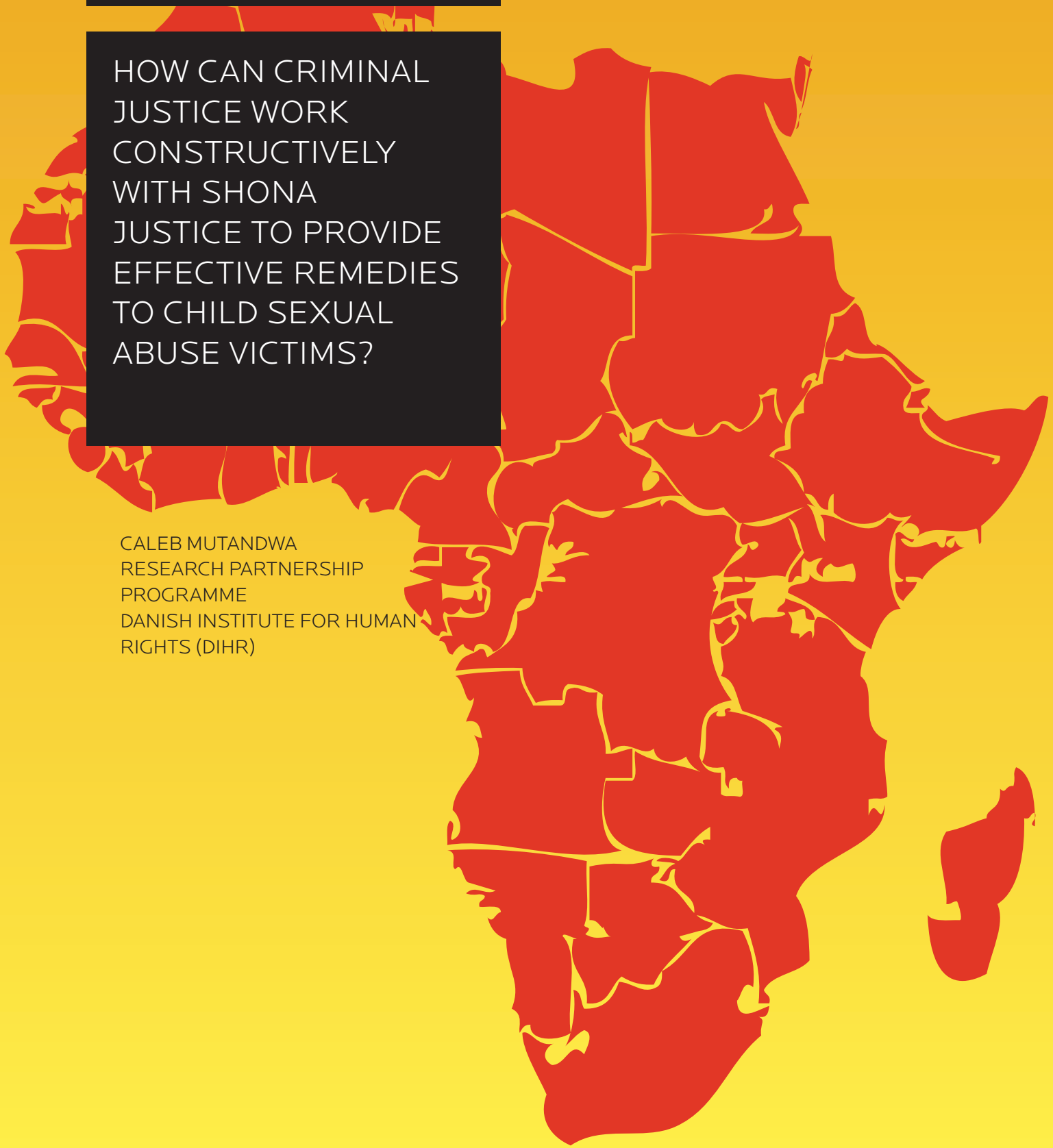

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During his stay at DIHR, Caleb Mutandwa's research work was supervised by Senior Adviser Anette Faye Jacobsen.

CONTENT

ABBREVIATIONS

CPC	Child Protection Committee
CRC	Convention on the Rights of the Child
CPE	Criminal Procedure and Evidence
J	Judge
JP	Judge President

CHAPTER 1

INTRODUCTION

Mufaro, a 14 year old girl, lives with her parents and siblings in Moyo Village, Muzarabani District. She was in Grade 7 in 2011. In June 2011, Mufaro and her young sister, Chipo, were herding cattle when Hazvinei, who lives with his parents in the same village, followed them. Hazvinei who was 16 years at the time, had ended his education in Form 1 in 2011. The two sisters talked to Hazvinei, who they knew, as they herded their cattle. He then demanded sexual intercourse with Mufaro, and she refused. He overpowered her and raped her while Chipo was watching and crying. After the act, he threatened the girls that if they disclosed the rape, they would be beaten at their home. The two sisters continued to herd their cattle until sun set when they went home. They did not disclose the rape to anyone because they were afraid. After some time, their mother observed that Mufaro had changed physically and questioned her. Mufaro revealed that Hazvinei had raped her and that she was pregnant. The case was reported at Muzarabani Police Station where Mufaro was referred to St Alberts Hospital. There, it was confirmed that Mufaro was 4½ months pregnant. Hazvinei was arrested and charged with rape. The case was taken to Bindura Magistrates Court where Mufaro and her mother were called to give evidence to the State in January 2012. In court, Hazvinei pleaded guilty to rape, hence Mufaro and her mother never got to give the evidence or got the opportunity to say what they wished to see happen in the case. He was convicted of rape and sentenced to five strokes with an additional two years imprisonment term. The term was ultimately suspended. The sentence was influenced by his age. Mufaro and her family were not happy with the sentence, which they regarded as too lenient. Apart from the bus fares used to attend court, they were not given any other support. This increased their pain. Mufaro had not been to a clinic or a hospital after the initial examination, which was initiated by the police. They had not prepared anything for the baby to be born as a result of the rape. They had even sold their cow to cover the cost involved in raising the case, only for Hazvinei to get five strokes. Mufaro and her family felt that there was no justice for them.

Was there justice? Whose justice? These are questions at the core of this paper. Evidence is accumulating of the atrocious acts of child sexual abuse committed by family members, relatives, neighbours and others known to the child victim.[1] However, academic research in Zimbabwe, especially on the remedies available to victims of such abuse, is limited. Mufaro, her family, and many others have started questioning the ability of the criminal justice system to provide the child victims with effective remedies, and anecdotal evidence points to cases of child sexual abuse remaining unreported and to cases that are withdrawn from the system, as people resort to informal institutions founded on the Shona justice system. The resort to informal justice institutions has not, however, found favour with human rights proponents on account of violations of the rights of the child.[2] Child sexual abuse itself is recognized as a violation of the child´s rights to health and protection, hence the need for effective remedies. The paper considers ways in which the formal and informal justice systems can work together to provide effective remedies for child victims in rape cases. It argues for recognition of the positive values in the Shona justice system, such as the restorative aspect and wide participation, so that they can be integrated into the criminal justice system. The legal analysis in this paper shows that the national laws can be used to achieve this, but the courts have not readily done that, leaving victims disillusioned with the criminal justice system.

This paper is organised into six sections. This introductory section is followed by a section which discusses the concepts and the methodology used in developing the paper. The third section discusses the problem of child sexual abuse in Zimbabwe. It highlights the dominant trends according to which most children are sexually abused by people they know, and documents the underreporting of, or withdrawal of, such cases from the criminal justice system, as people settle them using informal justice institutions, such as the family and village heads. This is followed by a section, which analyses the formal justice system, focusing on criminal laws and on how courts have handled child sexual abuse cases. The analysis shows that despite the current focus of the courts on due process rights of the accused and the retributive punishment of offenders, the law can still be used to accommodate the needs of the victims. The fifth section discusses the responses of the community outside the formal justice system. It reveals the people´s sense of justice, which is centred on the Shona philosophy of **unhu.** In the last section, we remark on how the criminal justice system can work with the Shona justice system to provide justice for victims of child sexual abuse.

CHAPTER 2

CONCEPTUAL FRAMEWORKS AND METHODOLOGY

2.1 DEFINITIONAL ISSUES

In the context of this paper, the criminal justice system refers to the system recognised by formal law for handling cases of child sexual abuse. This system is also referred to herein as the formal justice system. The paper however shows that this system does not have the monopoly over child sexual abuse cases. In most Shona communities, people use informal institutions such as the family and – in the case of rural areas – their village head, to resolve their disputes. This is demonstrated by Mativire.[3] The family and village heads do not form part of the criminal justice system and are therefore regarded as informal justice institutions in the ambit of this paper. The use of the family, which is not sanctioned by law, has been referred to as the "living law"[4]. Anthropological studies have described the family court (**dare remusha**) as the first court in the Shona traditional justice system.[5]

The Traditional Leaders Act [Chapter 29:17] provides for the appointment of village heads.[6] The duties of the village head include assisting the chief and headman in the performance of their duties; leading his village in all traditional, customary and cultural matters; settling disputes involving customary law and traditions; promoting sound morals and good social conduct among members of his village; and assisting, by all means within his power, in apprehending and securing offenders against the law as well as ensuring the observance of the law by all inhabitants, and the immediate reporting of any contravention of the law to the police.[7] The Act clearly lays the foundation for the involvement of village heads in resolving disputes governed by customary law as well as participating in the criminal justice system where crimes are committed. The establishment of the institution of village head and conferment of such powers through the Act, may lead to the argument that the institution is not, in effect, informal. However, village heads are regarded as informal justice institutions for the purpose of this paper because they are excluded from the formal justice system court hierarchy. The Customary Law and Local Courts Act [Chapter 7:05] only recognise primary court headed by a headmen and a community court headed by a chief.[8]

This paper limited the generic subject of child sexual abuse to rape. In this context, rape has two dimensions from the criminal justice system´s perspective determined age and consent of the child. First, rape is committed by a male person (above 12 years[9]), who has non-consensual sexual or anal intercourse with a female person, and the crime is punishable with up to imprisonment for life.[10] It is critical to note that girls under 12 years are irrefutably presumed to be incapable of consenting to sexual and anal intercourse.[11] Thus, the accused cannot plead the defence of consent where the girl is under 12 years.[12] Second, any person who has consensual extra-marital sexual intercourse with a girl above 12 years but below 16 years shall be guilty of having sexual intercourse with a young person and liable to a fine or imprisonment for a period not exceeding ten years or both.[13] This is popularly known as statutory rape[14] and may be referred to as such here, where there is need for the distinction to be drawn. The criminalisation is meant to protect young persons from sexual exploitation by older persons, and against the harmful consequences that can emanate from early sexual relations, such as early pregnancies and sexually transmitted diseases.[15] Within this formal set up, the commission of the offence is intrinsically linked to punishment by imprisonment, as motivated by the theory of retribution. Such punishment should also serve a deterrent function.

Under the Shona justice system, having sexual intercourse with a girl with her consent is treated as seduction. The system esteems the consent or lack of it of the father of the girl in that case.[16] Moreover, under customary law the concept of a child is not exclusively dependent on age. A child who has reached puberty may be considered an adult, hence she can engage in sexual intercourse while at the same, as long as she is not married, she may be considered a child who needs her guardian´s consent to engage in such sexual intercourse.[17] This concept of a child influences the action taken by communities in responding to sexual abuse.[18] What is common with rape cases under the Shona justice system are the remedies, which may include compensation and marriage, especially in statutory rape cases. The philosophy of **unhu (ubuntu)** plays a critical role in the conduct and outcome of proceedings in the Shona justice system.

The philosophy of **unhu** was first written about by Zimbabwean scholars at the dawn of independence from colonialism, as a basis for the new society, however, the philosophy has not been embraced in the criminal justice system.[19] The philosophy of **unhu** is expressed in the phrase **munhu munhu nekuda kwevanhu (**a person is a person through other persons). This underscores the interdependence and interconnectedness of people within their groupings, starting with the family. Jensen observed that in Zimbabwe "...each person is like a single link in a chain (...) and only

has meaning as such. The person has nearly no meaning as an individual."[20] She further illustrated by this conversation:

> **'Why did you shoot me?' an older African asked a white person in an interview after someone in his family had been shot. The single link in the chain does not exist by itself; to shoot his sibling was to shoot him. One IS family/ancestry.**[21]

The importance of this philosophy in informal justice jurisprudence, is that individual liability and rights are extended to the group. Further, the remedy pursued primarily aims at restoring harmony - "reconcile disputing parties"[22] - rather than seeking mere retributive punishment. This brings informal justice jurisprudence into the domain of restorative justice discourse.

This paper accepts that rape is a serious violation of the girl child´s rights[23] to which justice can only be done by ensuring effective remedies. The availability of a remedy for rights violations forms one of the pillars of international human rights law.[24] There is an inseparable connection between a right and a remedy.[25] The Universal Declaration of Human Rights[26] and the International Covenant on Civil and Political Rights[27] amply demonstrate this. The word remedy, has both procedural and substantive conceptual meanings. As a procedural concept, "remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by the courts, administrative agencies, or other competent bodies."[28] This aims at providing access to justice by creating avenues for those whose rights are violated, to claim remedies and enforce their rights. In its substantive sense, a remedy means: "the outcome of the proceedings, the relief afforded the successful claimant"[29]. Within this conceptual framework, we consider the remedies in child sexual abuse cases. It is however not possible within the confines of this paper, to be exhaustive in relation to all the aspects of the procedural and substantive remedies available.

2.2 METHODOLOGICAL FRAMEWORK

The paper is based on a qualitative review of primary sources, such as statutes, court judgments and field studies, and secondary sources such as books, articles, reports and newspapers. These sources were consulted to determine how and why cases of child sexual abuse are dealt with both under the criminal justice system and the Shona justice system. The dearth of specific academic research on the subject is apparent. Alice Armstrong wrote most of the relevant material in the 1990s and she left many suggested areas for further research, which have not been pursued. The gap in information contributed to the use of reports by nongovernmental organisations and newspapers on the magnitude of the problem to avoid absolute reliance of the law as contained in statutes and court judgments. Care

was taken to refer to reliable reports or those quoting government officials because, besides being academic, the paper should persuade the government of Zimbabwe to mainstream the positive values of the Shona justice system in the formal justice system, to ensure justice for child victims of rape. The reports revealed the extent of the problem and the response of communities to the formal legal framework. This study further reviewed and analysed both the international and national legal frameworks in relation to the remedies available to the child victim. This considered international and national laws as well as court judgments relevant to the subject. The document review revealed that although Zimbabwe´s criminal justice system is focused on the offender, there still exists opportunities for embodying the aspirations of the victim within the same system.

The field study consisted of two case studies on rape which were dealt with in the criminal justice system and, furthermore draws on focus group discussions in Muzarabani and Chegutu Districts which are inhabited by the Shona people. Muzarabani is a rural district situated along the Mozambique-Zimbabwe border in Mashonaland Central Province. The first focus group discussions took place in Muzarabani district, Chadereka ward, which is 362km from Harare. Chegutu district, in Mashonaland West Province, includes the urban towns of Chegutu and Norton, while the rest is either communal, small scale or commercial farming area. We focused on the rural communities and held the second focus group discussions in Mhondoro at Madzongwe Plaza which is 79km from Harare.

The first case is that of Mufaro, whose experience provided the impetus for this research. The other case was Gift.[30] She lives with her grandparents in Gudo village in Buhera District. She was in Grade 7 in 2011 when Makore who is her neighbour raped her on four different occasions. Gift was only 12 years old. The first occasion was when her grandmother had sent her to have her mobile phone battery charged at Makore´s homestead. Thereafter, Makore would waylay her as she went about her chores in the village. She only disclosed the rape when her teachers noticed that she was pregnant. Case studies included interviewing the two girls and their family members, studying their court documents and watching the court proceedings in Gift´s case. These two cases of Mufaro and Gift were referred to the researcher by lawyers in private practice who had determined the need for assistance in the pursuit of justice. They are used here to reflect more on how the criminal justice system deals with child sexual abuse. Case studies were particularly useful given that not much research material on the subject exists. Unlike the case of Mufaro, which was referred after its conclusion at the criminal court, the case of Gift was referred to the researcher when it was still pending. The court proceedings were therefore observed to find out how the process was conducted. The approach of “watching

brief"[31] used in court could have influenced the conduct of the trial, but the case remains important in reviewing the criminal justice system, as a remedy for child sexual abuse cases.

Focus group discussions in which the participants actively discussed with each other how child sexual abuse cases are handled in their communities, and why people use families and village heads in such cases, despite the existence of the criminal justice system. This was particularly useful in getting the village heads to participate in the research without having to deal with the possible bureaucratic obstacles in Zimbabwe. The researcher held seven focus group discussions with 74 participants in July and August 2012. Two were with 16 children, (nine girls and seven boys), drawn from Child Led Child Protection Committees[32] in Muzarabani. Five were with adults who included village heads, councillors and members of the Child Protection Committees (CPC). 42 male village heads participated with the majority (30) being from Chegutu.[33] In addition, there were 16 adult members of CPC made up of six females and 10 males. The majority (13) of these were from Muzarabani. The total of adults was therefore 58, 52 males and six females. The participants from Muzarabani came from one ward, while those from Chegutu came from five wards. Unlike in Mhondoro, Muzarabani wards are sparsely populated, hence we could only involve participants in one ward because of the distance to the venue. Participants were randomly selected by community representatives to cover the wards.

In their groups, participants were allowed to discuss using guiding questions[34], without much probing by the facilitator. This allowed them to take positions on the issues during discussion. Some of these positions were then changed as the facilitator probed them. The group discussions also involved sharing life stories of child sexual abuse cases, experienced in their communities. In some cases, this helped in ascertaining what actually happens as opposed to what the participants would have said happens, the latter being influenced by some knowledge of what is expected by the formal justice system. By virtue of their involvement in the Child Protection Committees or their position as village heads, most of the participants had received some "training" on child abuse and the law.

CHAPTER 3

PROBLEM OF CHILD SEXUAL ABUSE IN ZIMBABWE

Notwithstanding the limited empirical research, it is generally accepted that child sexual abuse is rife in Africa, as it is in the rest of the world. Statistics from government and nongovernmental organisations indicate that Zimbabwe is not an exception. In 2009, the Zimbabwe Republic Police and the Victim Friendly Court recorded 3 448 cases of sexual abuse and 1 222 child sexual abuse cases, respectively. The majority of the cases dealt with by the Victim Friendly Courts are those where the accused is charged with rape whereas statutory rape is handled in the Provincial Magistrates Court. Speaking specifically of rape, the National Spokesperson for the Zimbabwe Republic Police, Assistant Commissioner Charity Charamba, disclosed that the police recorded 2 883 child rape cases in 2010 and 3 172 in 2011. Family Support Trust, an organisation, which offers medical services to sexual abuse victims, is reported to attend to an average of five new sexual abuse cases per day of which 97% of the victims are females. While the statistics for child sexual abuse may include other forms of abuse, it is apparent that many of the cases are rape.

The high numbers of child sexual abuse cases have been attributed to poverty, orphan-hood, economic hardship and the impact of the HIV and AIDS pandemic which is sometimes accompanied by the myth that having sexual intercourse with a virgin girl cures AIDS. A number of authors have claimed that child sexual abuse is a recent phenomenon, which has been fuelled by social change, and a breakdown of the traditional family, as the people of Sub Saharan Africa come under western influence. While all these factors may in their interaction contribute to the problem of child sexual abuse, empirical evidence has however been lacking, and this paper is not aimed at filling that gap. The focus is on how the child sexual abuse is addressed, as opposed to why it happens, although knowing the latter may influence the responses.

Many children experience violence, exploitation and abuse within their families and communities by people they trust or know. UNICEF reported that in 40 per cent of the cases, the abuser is a close family member. A study by Family Support Trust of cases received

from July 2004 to June 2005, revealed that on average only 9% of children described the perpetrator as a stranger. In most cases, the perpetrator was identified as a neighbour or a relative by young girls and boys (<12 years), and as a boyfriend by adolescent girls. Another recent study of the child sexual abuse cases received by Childline Zimbabwe revealed that 74% of the child survivors of sexual abuse knew the perpetrator, with 24% of the perpetrators being members of the immediate family, and 37% of the perpetrators living in the same house as the survivor. Government officials have confirmed this trend. For instance, the police have stated that this is confirmed by their investigation and also confirmed that children are more at risk when left in the custody of non-parents. It is compelling to argue that while the family is highly esteemed as the central unit of societal organisation, which offers support and protection to children, left alone it is not a sanctuary. This emerging dimension must inform strategies for dealing with child sexual abuse.

Notwithstanding the statistics, which have been used to show an increase in reporting of child sexual abuse cases, it is widely accepted that the majority of cases go unreported. This is not unique to Zimbabwe. Child sexual abuse has been described as the crime of secrecy. The reasons for this are varied. That the majority of the children are raped by people known to them, including family members, contributes to the culture of silence. In African society, a child is socialised into respecting elders and those in authority, and this inhibits her from reporting abuse by them. The abuse violates trust in other people, hence children keep it to themselves. Further, where the abuse becomes known, many cases remain unreported as families fear stigmatisation and tarnishing the family name. The police have accepted that "The public on noticing such cases try to resolve them at village level and only report to the police when such attempts have failed." This is not confined to rural areas as the police in Harare have also noted that: "there is concealment of rape cases in the city..." as families compensate each other with livestock and money and in some cases have the child married to the rapist, without involving the police. This, to the police, is not justice "as the victim will always see the perpetrator walking free, which is a more tormenting experience." Faced with this tendency towards underreporting, statistics of incidences of child sexual abuse are only the tip of the iceberg. More importantly, it becomes imperative to understand how and why the families settle the cases outside the criminal justice system.

Adding to the underreporting of child sexual abuse cases, child victims sometimes change their testimonies in court to exonerate the accused or they or their families, request that the cases be withdrawn based on out-of-court settlements reached with the accused and his family.[35] Such settlements are usually arrived at after considering the allegiance paid to due

process rights of the accused and the possible outcome of the criminal justice system. The accused, if convicted of rape, may be sentenced to imprisonment - in the case of statutory rape – community service. Juvenile offenders may be sentenced to corporal punishment, as in the two case studies of Mufaro and Gift. While the criminal justice system regards this as justice, how does it translate into an effective remedy for the child and her family? The child and her family may not applaud such remedies[36] hence they turn to institutions that are based on the Shona values of justice. The law in Zimbabwe, which we turn to in the next section, does however offer opportunities to meet some of the aspirations of the people, as embodied in such values.

CHAPTER 4

LEGAL FRAMEWORK

This section discusses the procedural and substantive remedies in the criminal justice system, drawing from international law on children´s rights, national laws, court judgments and the two case studies of Mufaro and Gift. There is more focus on issues of compensation and participation of victims in criminal procedures, such as bail and sentencing.

4.1 INSPIRING PROVISIONS IN THE INTERNATIONAL LEGAL FRAMEWORK

Zimbabwe has ratified both the United Nations Convention on the Rights of the Child,[37] and the African Charter on the Rights and Welfare of the Child.[38] The rights and obligations in these instruments are anchored in, **inter alia**, the best interests of the child[39] and the right of the child to be heard[40] which are explored in this paper in relation to protection of the child from sexual abuse. These human rights instruments recognise the fundamental rights, responsibilities and duties of the parents, members of the extended family and legal guardians, in providing appropriate direction and guidance to the child in the exercise of her rights,[41] and they recognise the primary responsibility of family and guardians for the upbringing and development of the child.[42] The state must give them appropriate assistance in the discharge of their child-rearing responsibilities[43] as well as protect the family for its establishment and development.[44]

Left alone, the family can however be a haven for child abuse and exploitation. The state should therefore protect the child from sexual abuse while in the care of parents, or any other person,[45] and from all forms of sexual exploitation[46]. State parties are enjoined to take all appropriate measures to promote physical and psychological recovery and social reintegration of the child victim of abuse in an environment, which fosters her health, self-respect and dignity.[47] Within this framework, children are, with legal ramifications, still viewed as people who need protection hence while others argue that children are now subjects of rights,[48] O´Donovan maintains that they are still legal objects.[49] There remains, even in international human rights law, a contradiction between the concepts of

children as holders of rights, and childhood as the concept of childhood denotes children as lacking in maturity and judgment.[50]

In recent years, the international community has paid more attention to the position of the victim in criminal justice, as expressed by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[51] This Declaration triggered reforms in many national criminal justice systems to accommodate the interests, needs and rights of the victims of crime.[52] It is critical to note that in Zimbabwe, international human rights instruments, even when ratified, are not self-executing. Parliament should approve and incorporate them in the laws of Zimbabwe.[53] This has not been wholesomely done. The criminal justice system is still inclined towards Parker's crime control and due process models,[54] which do not prioritise the rights of child victims of sexual abuse.

4.2 FORMAL JUSTICE IN ZIMBABWE: TRACING THE VICTIM

Zimbabwe has a dual legal system, comprised of general law (Roman-Dutch common law and statutes), and African customary law. This dual legal system is sanctioned by the Constitution.[55] Customary law should only apply to civil cases.[56] It does not apply to criminal cases.[57] Customary law however continues to be used in criminal cases by informal justice institutions, such as the family and the village head.[58] This is because there is no clear distinction between a civil and criminal wrong under customary law.[59]

The Constitution of Zimbabwe sets the standard against which to measure other laws.[60] It enshrines every person´s right to the protection of the law.[61] While the Constitution does not provide for specific rights for victims of sexual abuse, it is logical to state that the protection enshrined here extends to them. Indeed, Zimbabwe has promulgated laws such as the Criminal Law (Codification and Reform) Act [Chapter 9:23] and the Domestic Violence Act [Chapter 5:16] to protect children who are victims of sexual abuse. The latter Act recognises the growing evidence that child sexual abuse is occurring in the family setup, and that there are certain cultural or customary practices such as child marriage, which are more localised in the family.[62] These are criminalised and punishable by a fine or imprisonment.[63] The criminal justice system therefore requires that any person accused of child sexual abuse be brought to court for prosecution aimed at punishment upon conviction. In this way, it relies on a report being made to the police who should arrest the accused or bring him to court on summons.[64] In the case of Mufaro, she had to travel for nearly a 100 km from her village using a dust road to Muzarabani Police Station, to make the report.

The prosecution is usually done by the State represented by the Attorney General,[65] although there is a provision for private

prosecution.[66] It is difficult to meet the statutory requirements and be given the certificate in which the Attorney General declines to prosecute, which paves the way for private prosecution.[67] The Attorney General who is usually represented by a public prosecutor has the power to stop prosecution of a crime at any stage before a conviction of the accused.[68] This may be done where the prosecutor feels there is no sufficient evidence. When Gift first attended at Rusape Magistrates Court, the prosecutor referred the docket back to Dorowa Police Station because Gift was said to be confusing the number of times Makore raped her. Makore was granted bail on that day. There was then no progress in the matter for more than five months until Justice For Children Trust, a legal aid organisation, intervened. The case is between the State and the accused, in which the victim is reduced to a mere witness. The prosecutor has the prerogative to decide which witnesses to call to prove that the accused is guilty of the offence charged. In the case of Mufaro, she did not even testify in court since Hazvinei pleaded guilty. This questions the idea that the criminal justice system allows the child to participate and gives her a chance to confront the offender, a chance that may be important to the healing process.

Where a child participates, the primary aim is for the state to secure a conviction of the accused, and not to benefit her. She has to answer questions in a form determined by rules of procedure and evidence, which may negate how she views the case. It is her duty and not her right, to appear and testify when called to do so, and she can be punished for breaching that duty.[69] This, in fact, has been described as "blatant ill-treatment of victims by the criminal justice authorities."[70] Jusa argued that Zimbabwe recognised, that the criminal procedure was traumatising to the victim of sexual abuse and that the focus on the accused´s rights was not matched with an appropriate and corresponding attention to victim´s rights and interests. This led to the introduction of the Victim Friendly Court system, which mainly deals with rape cases.[71]

The Criminal Procedure and Evidence Act [Chapter 9:07] (CPE Act) was amended in 1997 to allow a criminal court to adopt protective measures for vulnerable witnesses. Such measures include appointing intermediaries and support-staff for the witnesses; ensuring that the witness gives evidence in a position or place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the witness suffering stress or being intimidated; and excluding all persons or any class of persons from the proceedings while the witness is giving evidence.[72] The State and the accused should be given an opportunity to be heard before any measure is taken.[73] A support person may be a "parent, guardian or other relative of the witness, or any other person who the court considers, may provide the witness with moral support whilst the witness gives evidence"[74] by sitting

or standing near the witness and performing other functions for that purpose, as directed by the court[75]. An intermediary forms a cushion between the parties and the witness. Questions by the former are put through the intermediary who only conveys their substance and effect to the witness, while repeating to the court the witness´s precise words.[76] This became the legal framework for the Victim Friendly Courts system, which Jusa posits, aims to protect victims of crime, and promote their active participation in the criminal justice system. Indeed Gift´s case demonstrates how the system can work to protect children and enhance their participation.

On the 24th of May 2012, Gift and her family attended Rusape Regional Magistrates Court for the trial of the case. The author also attended the hearing to observe the proceedings. On this day, eight relatives (who included the grandparents, aunties and uncles) came to support Gift. We talked to them before and during the trial. They were all concerned with the case; their view of Gift was that of a slow child. Interestingly, Gift has a twin sister who, although small in her physical stature, is very bright at school, and unfortunately Gift, who sometimes copied her sister's school work, was being compared with her. Makore was charged with four counts of rape. He denied the charge. The Victim Friendly Court was used, which allowed Gift to give evidence from a separate room through a television, using anatomically correct dolls to demonstrate what happened. Gift even breastfed her baby in the room and she was there with the intermediary and her aunt who was holding the baby. Gift gave evidence well, as confirmed by the Regional Magistrate in his judgment of the 30th of May 2012 in which he found Makore guilty as charged. Gift´s relatives were impressed with her, given their earlier concerns, and given the fact that the case had been stalled after the prosecutor had decided, that Gift was inconsistent as to the number of times she was raped.

The criminal justice system however, still suffers from a number of challenges, which compromise its ability to provide effective remedies to victims of child sexual abuse. There are currently 17 Victim Friendly Courts, mainly in major cities and towns, in Zimbabwe. Victims have to travel to these courts and it may take time before the case is heard. Mufaro and her family had to travel more than 200km from Muzarabani to Bindura to attend court where they then did not have an opportunity to be heard because Hazvinei pleaded guilty. Gift´s case was heard after the intervention of Justice for Children Trust. The delays accompanying the criminal justice system are sometimes blamed for the high rates of non- reporting, and the withdrawal of cases and their settlement to institutions outside that system.[77] It is clear from the provisions of the CPE Act[78] that the protective measures for vulnerable witnesses introduced by the 1997 amendment were not meant to be limited to the Victim Friendly Court as has been the practice which leaves

some child victims of statutory rape without this protection. The system is often challenged in the aspects of bail and its outcomes, hence these are given more attention below.

4.2.1 BAIL

The criminal justice system emphasises the rights of the accused at the expense of protecting the child victims of sexual abuse. This is not surprising given the elaborate list of accused´s rights in the Constitution, which on the other hand, goes no further than providing, in a general clause, protection of the law to child victims of sexual abuse. An accused person is entitled to, **inter alia**, be presumed innocent until proven or has pleaded guilty.[79] The presumption of innocence is taken further in the CPE Act, which provides that an accused person shall be entitled to be released on bail at any time before sentence, with the exception of when it is not in the interest of justice.[80] Bail is one area in which the criminal justice system does not live up to the aspirations of the people. People

> **cannot identify with the processes and procedures, such as the fact that a thief is moving about freely on bail. To them, this is a miscarriage of justice. They have lost faith in the Magistrates' Court.**[81]

The feeling of disillusionment with the criminal justice system is worse in sexual abuse cases where the victims in most cases know the accused persons. The Domestic Violence Act envisaged the establishment of safe-houses for the purpose of sheltering the victims of domestic violence, which is defined to include child sexual abuse, pending the outcome of court proceedings under that Act.[82] These houses have never been established, but the question is whether it would be in the best interests of the children to put them in such institutions, given that the criminal justice system respects the rights of the accused to liberty pending sentence. The courts continue to admit the accused on bail, and thus fails to adequately protect the victim.[83]

The CPE Act provides for grounds to be considered in determining whether it is in the interest of justice to deny an accused person bail. These grounds may result in change of this sense of disillusionment with the criminal justice system if interpreted by a judiciary that is conscious of the rights, interests and needs of the victims. Paraphrased, the grounds are the likelihood that, if admitted on bail the accused will:

(i) endanger the safety of any particular person; or
(ii) not stand his trial or appear to receive sentence; or
(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
(iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system; and

(v) the likelihood that the release of the accused will disturb the public order or undermine public peace or security.[84]

There are various factors, which the court should consider in determining whether any of the grounds above have been established.[85] For instance, in determining the existence of the first ground, the court should consider, **inter alia**, the degree of violence towards others implicit in the charge against the accused and any threat of violence, which the accused may have made to any person. Rape constitutes violence against the victim, and both Mufaro and Gift were threatened by the accused who lived in the same village as them. Gift was threatened with a knife and other unspecified harm, which would be caused by apostolic prophets. Regarding the third ground, the court should consider, among other things, whether the accused is familiar with any witness or evidence, and consider the accused's relationship with any witness, and the extent to which the witness may be influenced by the accused. Regarding the final ground, the court should consider, **inter alia**, whether the nature of the offence and the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed, or whether the release of the accused will undermine or jeopardise the public confidence in the criminal justice system. While the court must endeavour to balance the interest of justice with the accused´s rights,[86] it is argued here, that in many cases where children are abused by their family members bail should be refused, unless it is coupled with conditions that separate the victim and the accused, bearing in mind what is in the best interests of the child.

While the general practice is to exclude victims and their families in bail proceedings, the CPE Act may be used to allow their involvement. In considering bail application the court may, among other things, receive evidence on oath, including hearsay evidence or affidavits and written reports, which may be tendered by the prosecutor.[87] Such evidence is particularly important in establishing the above factors and gives the victims and their family a sense of having been heard. The prosecutors should therefore always inform the victims of bail proceedings and seek their contributions. This enhances the chances that the victims will consider the criminal justice system fair and satisfactory.[88]

4.2.2 SENTENCING AND COMPENSATION

Following upon conviction, the court has to decide on the appropriate sentence. The court may admit evidence on oath, including hearsay evidence and affidavits and written reports from either party before passing sentence for purposes of informing itself as to the proper sentence to be passed. The parties can also address the court on the appropriate sentence.[89] This may be used to hear the views of the victim regarding the

impact of the offence and how she wants the offence to be rectified. This is particularly useful in ascertaining the financial, physical or psychological effect of the crime on the victim. It keeps pace with developments in other jurisdictions such as New Zealand where victims are increasingly participating in deciding punishment.[90] **Mungwira J** made the point in **Charles Kelly v The State** where she said

> **in as much as one appreciates that crimes are generally committed against the State, a sentencing authority ought to attach weight to the expressions of a complainant as such a factor has an impact on the form of sentence imposed.**[91]

Victims of sexual abuse are rarely consulted on the issue of sentence. Gift was not even required to attend court on the 30th of May 2012, day of the judgment, where the addresses were made by the parties. The prosecutor only stated that "there are no known previous convictions," in his address. He did not attempt to assist the court as to the appropriate sentence or highlight the circumstances of Gift, who now has a child because of the rape. Makore then lied that he was 17 years and the prosecutor never challenged his statement, resulting in the former being sentenced to corporal punishment. He was not required to produce his birth certificate. The birth certificate later obtained from the Registrar General by Gift´s family, showed that Makore was to turn 21 years on the 13th June 2012. Gift´s needs were not considered. As a result of the rape she had given birth to a child whom she wanted to have the name of the father, Makore, on the birth certificate. In communities where culturally having children outside marriage is shunned and people believe the child must carry the name of his father to show that the mother is a moral person, this was important to her. It is also important to the child, in order for him not to get labelled as an illegitimate child or fatherless child. Gift is using her maiden surname, having been born out of wedlock, and she understands the negative implications of this. Makore cannot be compelled to obtain the birth certificate in terms of the Birth and Death Registration Act [Chapter 5:02].[92] The neglect of what victims and their families consider important, contributes to their loss of faith in the criminal justice system. Gift further feels there was no justice, since Makore was sentenced to corporal punishment, which is the only form of punishment dealt to people below the age of 18.[93]

Motivated by the crime control model, a sentence is supposed to serve a deterrent function hence the frequent agitation for stiff penalties. Zimbabwe has introduced a maximum sentence of life imprisonment for rape. The courts however, have not imposed such a sentence. Hazvinei and Makore got away with corporal punishment and the effectiveness of corporal punishment, in achieving the deterrent function, may be questioned. This

fortifies the need to reconsider the criminal justice system, and the law has already been amended to move the system towards a focus on victim satisfaction.

The CPE Act empowers a criminal court to award compensation to a person who would have suffered personal injury upon the conviction of the offender.[94] This provision is however subject to other provisions in Part XIX of the Act, which deals with the subject of compensation and restitution. The court can only make the award after the prosecutor acting on the instructions of the injured party, or the injured party has applied for it.[95] Further, a court cannot make such an award:

(i) where the amount of compensation due to the injured party is not readily quantifiable; or
(ii) where the full extent of the convicted person's liability to pay the compensation is not readily ascertainable; or
(iii) unless it is satisfied that the convicted person will suffer no prejudice as a result of the court dealing with the claim for compensation.[96]

In making an award in terms of Part XIX, the criminal court is not limited to its civil monetary jurisdiction.[97] The award will, however, have the effect of a civil judgment[98] and cannot be automatically suspended by noting an appeal or application for review[99]. The cases of **S v Banana**[100] and **S v Tivafire**[101] demonstrate the challenges, which have been encountered in applying these provisions. These could explain why Part XIX of the Act has not been widely used by the courts to award compensation for personal injury.

In the **Banana** case the complainant had been sodomized by the accused, who was the first President of Zimbabwe. The complainant had gone on to murder someone who had called him "Banana´s wife". The court, in a decision later questioned in the **Tivafire** case, awarded compensation to the complainant and the family of his victim against the accused. The court observed that while section 365 of the CPE Act empowers the court to award compensation for personal injury, in that case it could not be used because there was no application for compensation, and the level of compensation was not easily ascertainable. The court did not therefore deal with the requirements set out above for awarding compensation for personal injury. The court however relied on section 358 (3) (b) and (h) of the same Act to suspend a portion of the imprisonment sentence on condition of payment of compensation. The section provides that the court may suspend a portion of the sentence on conditions relating to payment of compensation for damage caused by the offence or any other matter, which the court considers necessary or desirable to specify in consideration of the interests of the offender, of any other involved person, or of the public generally.

Chidyausiku JP (as he then was) reasoned that section 358 (3)

> **confers on the court wide discretion regarding the conditions of suspension of sentence. In particular, the restrictions imposed on a court when making an award [in terms of section 365] do not apply to the granting of compensation for damages as alternative to a custodial sentence. While I accept that most of the orders for compensation that have been made by the courts in terms of s 358 have related to proprietary loss, I see no basis for a restricted interpretation of the words "compensation for damage" as to mean damage to property only.**[102]

He concluded that the complainant had suffered damage at the hands of the accused, and that the complainant´s victim was covered by section 358 (3) (h) of the Act. In addition to the challenges highlighted in the Tivafire case, discussed shortly hereunder, an accused may still face a civil suit where compensation is granted under the section used in Banana case. This is undesirable as it exposes the accused to possible double suits for compensation.

The Tivafire case was decided shortly afterwards and, without overruling it, criticised the approach taken in the Banana case. In S v Tivafire the accused was convicted of assault with intent to cause grievous bodily harm. He was fined and, in addition, sentenced to a term of imprisonment, which was suspended on the condition that he paid a specific sum of money to the complainant as compensation for the injuries she had suffered. The complainant had made no application for compensation. The question arose on review as to whether it was competent, in a case where personal injury is involved, to make an order for compensation a condition for suspension of a portion of a sentence. Chinhengo J noted that this question was extensively addressed in S v Banana and he had some difficulty with the approach taken in that case. He, however, could not say that the approach was wrong on the reading of the relevant provisions of the Act. The court could be said to have used its discretion and made the order "as part of the wider question of imposing a suitable sentence." The order for compensation made in the Banana case could also not be labelled wrong because the word "damage" in section 358(3)(b) of the CPE Act is liable to be understood to mean a sum of money awarded in compensation for loss or injury, which is its legal meaning. However, he did not think that the approach in the Banana case should be encouraged for general adoption by judicial officers. In his view, section 358 (3) (b) used in the Banana case, was intended to deal with compensation for damage or loss which is not of a personal injury kind but loss or damage to property which is readily ascertainable. Damages for personal injury can only be claimed under Part XIX, which permits the court to call evidence to determine

the victim's entitlement to compensation, the liability of the convicted person to pay the compensation, and the amount of the compensation. This would avoid prejudice to both the accused and the complainant. He concluded by noting the need for amending legislation to define "personal injury" in a way that would include injury of the nature dealt with in the **Banana** case. He set aside the order, suspending a term of imprisonment on the condition that compensation was paid. **Garwe J** joined in this judgment adding that: "personal injury can hardly amount to 'damage' as envisaged in s 358 (3) (b). Section 358 (3) (b) specifically refers to 'damage' and not 'damages'." He, like **Chinhengo J**, however accepted that "the interpretation of s 358(3) (b) is one that gives rise to some difference in opinion" and concluded that it is necessary that the legislature amend the law to make its intention clear.

While the two cases show that it is possible to claim compensation for personal injury within the criminal justice system, the difference in opinion are part of the reason why this is rarely done. In the **Banana** case, the court took the literal interpretation of section 366 (1) of the Act, which only leaves those situations where the accused agrees to considering the damages that are granted, under Part XIX. It is submitted that this could hardly have been the intention of the legislature. The **Tivafire** case is more compelling, as it established that evidence can be led under Part XIX to establish the requirements of section 366 (1) of the Act. Besides this uncertainty, there is still ignorance of these provisions and the courts have not ensured, as they are mandated to, that any injured party is acquainted with his right to apply for compensation.[103] In both cases, there was no application for compensation. It is critical that the injured party be informed about her right to claim compensation so that she can benefit from these provisions, which were designed to give her the opportunity to obtain compensation "in an inexpensive way and expeditiously"[104].

It is important to observe that Part XIX does not limit the operation of any other law relating to compensation for personal injury caused by the offence. The fact that a person failed to apply for compensation, or such an application was refused, does not affect his right to claim compensation in civil proceedings.[105] The Act also provides that any person, who may have suffered any injury because of an offence committed, may institute a civil action for damages notwithstanding the accused´s conviction or acquittal following on a prosecution.[106] The Criminal Code further supports this. A conviction or acquittal in respect of any crime does not bar civil proceedings in relation to any conduct constituting the crime, at the insistence of any person who has suffered loss or injury in consequence of the conduct. The civil proceedings may be instituted at any time before or after the commencement

of criminal proceedings, provided that they do not prejudice the criminal prosecution of that same conduct.[107] This is only where compensation has not been awarded under Part XIX. It is submitted from the above, that claiming compensation using informal justice institutions is competent and allowed as long as that does not prejudice the criminal justice system. The next section shows that some people are not aware of this.

It has always been competent for a victim of rape to claim civil damages for personal injury under the Roman-Dutch common law.[108] Very few people however do so due to reasons including ignorance of their rights, lack of the financial resources required to make the claim, and the assumed futility of suing an incarcerated wrongdoer who may not have any property or money outside prison that could be used to satisfy the judgment debt.[109] Armstrong also argued that the focus on imprisonment of the offender in the criminal justice system conflicts with the remedy of compensation, since the offender would not be able to raise the money while in prison.[110] This influences families to shun the criminal justice system, and in some instances rape cases would be treated as seduction cases before informal justice institutions.[111] Feltoe has further argued that the CPE Act was meant to alleviate this situation since a criminal court is now empowered to award compensation to injured parties at the conclusion of the criminal case.[112] However, this has not been widely used to provide compensation to victims of sexual abuse. Mufaro and her family particularly wanted compensation from Hazvinei. He had impregnated her, and she was due to give birth, yet he had not paid anything. Mufaro´s family had relocated from Buhera District to Muzarabani following the land reform programme in 2000. They were considering relocating from the area because of the case; it pained them to see Hazvinei walking freely when their child had suffered at his hands. Responding to this case, a child rights lawyer said that it is time to:

> **brainstorm on what justice means and whether it is necessary to go through the criminal justice system for rape and get this in return ... that's why others are going to the chief in the community where they can get a cow and goat which will enrich the family.**[113]

Mufaro´s case also shows that the CPE Act has not dealt with all the challenges identified above. Hazvinei had no property of his own, yet the criminal justice system requires that the judgment be binding on him in his individual capacity. The criminal justice should do more to accommodate the interests of victims of sexual abuse. **Chidyausiku JP** in the **Banana** case observed that the approach of merely sentencing the offender to imprisonment, without providing any compensation to the victim "leaves the victim high and dry."[114]

As we end this section, it is appropriate that we reflect on the best interests of the child in criminal justice system. We argue that with all the challenges, including the distance travelled, the delays in prosecution, and the limited participation of the child, the criminal justice system may not always promote the best interests of the child. Without the active participation of the child victims, the remedies of prosecution and punishment may not be what they desire. Better efforts should be made to consider the interests, which may be overlooked by the remedies currently available. Mufaro wanted compensation, which is possible under the criminal justice system, and Gift wanted her child to have a birth certificate with the accused´s name. These interests were not considered. In the case of Gift, Makore actually stated in his mitigation that he wanted to look after his late brother´s children, whom he said had no birth certificates, yet the court was not concerned about examining his intentions as regarded his own child with Gift. In both cases, as in many other cases where children are sexually abused by people they know, the victims have to continue living in the same environment as the offenders, yet the criminal justice system does not consider this. Some victims and their families cannot live with this form of justice, hence they turn to the informal justice institutions, even where the criminal justice system is readily accessible to them.

CHAPTER 5

COMMUNITY RESPONSES

Existing in parallel to the criminal justice system is the Shona justice system, where some victims and their families seek justice. In this case, the paper is restricted to the family and village heads as institutions within the Shona justice system, which although unrecognised by the criminal justice system, continue to be used as a way of seeking remedies in child sexual abuse cases. Within the Shona justice system, values of the philosophy of unhu are still evident. Some of the values may provide the missing link in the criminal justice system. This paper however reveals that left alone, the Shona justice system may not always promote the best interests of the child hence the argument that the positive values of the system, should be integrated into the formal justice system.

The focus group discussions in Muzarabani and Mhondoro identified rape and statutory rape among the common forms of child sexual abuse. The discussions further revealed the role of culture and religion in the conception of and the community reaction to the two forms of abuse. For instance, one of the cultural practices identified in both Muzarabani and Mhondoro is the pledging of a girl child to appease an avenging spirit (kuripa ngozi). A family in Mafunga village in Muzarabani experienced some misfortunes and consulted a prophet who diagnosed that an avenging spirit was causing the misfortunes. The family was told to give a girl to a 60-year-old man, a relative of the person who had died and whose spirit was now avenging. The family decided that a 12-year-old girl who was an orphan, could be used to appease the spirit. She was given to the old man to be his wife. This case was not reported to the criminal justice system. This could be because the Muzarabani participants pointed out, that the people in their community viewed marriage of girls above 12 years as normal. Except for one female councillor, the Mhondoro participants argued that regardless of what the law says, this practice would continue. When a family experiences death and other misfortunes associated with the avenging spirit, it is left with no choice but to give the girl child away to appease the spirit. There can be no negotiations, and neither can the voice of the child be heard, since the avenging spirit

names its price. The female councillor thought that people should resort to other means of compensation such as money and cattle, and refrain from using girl children to appease the avenging spirit.

The participants in these group discussions had some knowledge of the criminal justice system hence they started by arguing, that cases of child sexual abuse are reported to the police. This turned out to be a reflection of their knowledge of what is required by the criminal justice system, rather than the lived reality, as the life stories which they shared showed that some cases are not reported to the police, or are not pursued all the way to a decision in the criminal justice system. With further probing, the participants shared life stories that reveal some people´s displeasure with a criminal justice system that emphasises imprisonment of the offender at the expense of the needs of victims and their families. They further highlighted other challenges, which they associate with the formal justice. For instance, the participants in Mhondoro argued that the criminal justice system is not victim friendly, as it focuses on protecting the offender who can be released on bail and resume living in the same environment with the child victim. It is also marred with delays. The participants in Muzarabani highlighted the long distance one would have to travel to access the formal justice system as another barrier. Sometimes the accused runs away before the police react to a report. These challenges combined, contribute to the difficulty which child victims experience in their attempts to obtain justice. It was apparent from Muzarabani focus group discussions that the participants had very little interaction with the court system since their knowledge of the life stories reported to the criminal justice system appear to end at the police station. This could be a result of the long distance to the courts. We were, however, more concerned with how and why some cases are dealt with outside the criminal justice system, assuming that the system is accessible.

The participants noted that some families settle cases out of the criminal justice system because they do not see any benefit to either themselves or the child victim of abuse. One group in Mhondoro pointed out that in addition to benefiting the government and possibly the community, through imprisonment and community service respectively, the criminal justice system benefits defence lawyers who make money off the abuse cases. On the contrary, when families negotiate, be it on their own or with the involvement of the village heads, there is a chance that the child and her family are compensated. Another group in Mhondoro narrated a life story of a 15-year-old girl who was made pregnant by her boyfriend while completing her Form 4. This is statutory rape in the criminal justice system, and should be reported to the police. The girl was staying with her grandmother while her mother was in South Africa. The parents of the boy approached the grandmother and offered to

settle the case out of court. The grandmother accepted so that the girl could be supported. The girl and her grandmother did not want to report the case to the police, although she was now out of school, as long as the boy´s family was willing to support the girl and the baby that was to be born. They saw no benefit in the criminal justice system. Unlike in the formal justice system where liability is borne by an individual who would have offended, in this case the parents of the offender took on the responsibility of supporting the victim. This story also considered the interests of the victim who did not want the offender to be arrested but rather whished for his family to support her. She was pregnant with his child. The support is dependent on maintaining harmonious relations with, not only the offender, but also his family. This aspect of restoring and preserving relationships where people have to continue relying upon each other, is lacking in the criminal justice system despite evidence that many children are being sexually abused in circumstances where they have to continue living within the environment of the offender.

This and other life stories that are highlighted below, show that compensation has remained the accepted concept of justice with some people. Others however, are not aware of the opportunity for claiming compensation, using formal or informal justice institutions, while at the same time pursuing criminal justice, and others realize that when the accused is imprisoned, the chances of obtaining compensation may be limited. Some village heads mistakenly stated that they do not have jurisdiction to handle cases of child sexual abuse, before the conclusion of the criminal cases. This has led to some people resorting to marrying off the abused girl child so that the compensation is disguised as lobola. This, in many cases, has sacrificed the rights of the girl child, as discussed below.

One group in Muzarabani had a life story of a 14-year-old girl who was made pregnant by her 29-year-old brother-in-law. Her poor parents decided to marry her off to the brother in law. The head teacher, at the primary school where she was attending her grade 5, and the Child Protection Committee intervened and reported the matter to the police. The police did not do anything, and the village head said he could do nothing. The girl is now married to her brother in law. This case shows the influence of culture, which allowed the brother in law to regard the girl as his wife. Another group in Mhondoro narrated a life story of another 14-year-old girl who was married off by her parents to a member of an apostolic sect that had raped her. The matter was reported to the police, but the parents claimed that the girl was 18 years. The parents had been given cattle by the offender and thought it was better to be paid than to have the offender arrested, in which case they would receive nothing. The police again did nothing. In both cases, the children had not consented to sexual intercourse but economic cultural and religious factors influenced the decisions to

marry them off to their abusers. The participants noted that cases where the police do not act when children are married off to the offenders, encourage the settlement of cases by families. In fact, one group in Mhondoro highlighted how some cases are even settled at the police station. In Muzarabani, participants mentioned that the police sometimes advise people to settle cases of child sexual abuse at community level, because of the long distance to the courts. This is especially so where the child is considered old, between the age of 12 and 18 years, and the accused is willing to pay the parents of the child.

The major challenge is that the payment of compensation is often tied to the marriage of the girl to the offender. In addition to other life stories mentioned above, one group in Mhondoro had a story of a 13 year old, that was married off to her rapist. The family was given a television, and the village head was given some money by the offender. This could be seen as sexual exploitation, which thus would appear to be tolerated by the formal justice system. The Customary Marriages Act [Chapter 5:07] does not set a minimum age of marriage for girls. This is contrasted with the Marriage Act [Chapter 5:11], governing civil marriages, which stipulates sixteen years as the minimum age of marriage for girls provided that the Minister responsible for that Act may still permit a girl under that age to marry where he considers such marriage desirable. Young girls are therefore married off on the pretext that custom permits it. Prosecution in cases of child marriages governed by customary law is hampered in that the Criminal Code only criminalises having "extra-marital sexual intercourse" with a young person.

Within the Shona justice system the individual is viewed as part of a group. Justice should therefore advance the wellbeing of the members of such collective groups. The offender´s family shares in his responsibility to restore the damaged relationship in a concept akin to vicarious liability. On the other hand, the victim´s family also shares in her rights, hence the compensation is usually given to the family as a unit. This philosophy can benefit child victims of sexual abuse, not only because of the compensation but also the psychosocial support which the family can provide. Armstrong pointed out that "rape victims recover better when they have a strong extended family support system."

The focus on collective interests has been criticized for suppressing the individual´s rights and for being a way of compensating the family for the lost or reduced lobola. The exploitation of children is apparent in cases where girls are married off without their consent to the offenders. In relation to compensation, one group in Mhondoro argued that the father or guardian claims the same in his representative capacity, and that the compensation awarded is supposed to restore relations between the two families. The compensation is referred to as

"sungawirirano or kusvutidzanafodya". Literally, sungawirirano means that the compensation binds the two parties to a peaceful agreement while kusvutidzanafodya means that the compensation signifies that the two families can now relate well, to the extent of sharing their traditional snuff. The significance is that the case is resolved in manner that restores harmonious relations between the parties, who extend beyond the two involved individuals. Taken in this context, it is not obvious that compensation exploits the child. Moreover, it is critical to observe that under general law, a father can also claim damages on behalf of his child in rape cases, and he could use the money in the same manner in which he uses the compensation that is claimed using informal justice institutions. At least, Armstrong recognised this point and concluded that remedies under both the formal and informal justice systems can either exploit or protect the child victim of sexual abuse. She also argued that to simply emphasise the child´s individual rights and her autonomy, may not benefit her since she needs the protection from abuse, and support in her process of healing form the abuse, that her family and community can give her. She proposed an approach, which supports her individual rights and autonomy, as well as the family and her relationship with the family. This is an approach, which balances the individual interests and the collective interests.

The participants in both Muzarabani and Mhondoro emphasised that where a child is raped, the family should inform the village head. This is done in most cases before reporting to the police. In cases where a report is made to the police before reporting to the village head, the police sometimes refer the family to the village head, or inform the village head so that he carries out investigations. The village head calls for a meeting of the victim and the accused´s families. Gift and Makore´s families attended such a meeting where Makore admitted to raping Gift, although he later changed his statement when the case was taken to the police. The meeting requires that parties tell the truth, and that the truth can be verified. Where reports are false, this can be proven by what Gwaravanda termed the process of falsification. One group in Mhondoro gave an example of this process. The village head who receives a report of child sexual abuse asks elderly women to examine the girl, to ascertain if she was really abused. The way this is done may however violate the dignity of the child, and breach the Domestic Violence Act, which criminalises practices like virginity testing.

Participation at the meeting is based on consent of the parties who, traditionally, are required to evidence this consent by paying a token to the village head before they are heard. A person accepting that they are wrong may give an additional token before the matter is settled. The parties to such a case are the families of the accused, and the victim. In both Mhondoro and Muzarabani, the participants however observed that the victim´s role is to

give evidence of how the case happened. Her views may therefore be excluded in the final decision. They further noted that despite the fact that in most cases, the village head is the first official authority to be informed of the case and the investigations he carries out, he is not much involved in the criminal justice system. Village heads are rarely used as witnesses in the criminal justice system. This contributes to the community´s loss of confidence in the criminal justice system, especially when the accused returns to the same community without anyone knowing how the case was handled within the criminal justice system. The Shona justice system values wide participation of those concerned with the matter. At family level, this could include family members from both the accused and the victim´s families, and at village meetings it could include members of the public. This participation reveals the hidden facts of the case, as those participating may know them, and encourages the offender to accept responsibility and abide by the decision reached. This is a process, which is missing in the criminal justice system. In the case of Gift such participation could have proved that Makore admitted at a village meeting that he had raped her, and that he was above the age of 18 years. In the Shona justice system, the decision reached would also have taken into account the factors that influence the restoration and maintenance of social harmony as the victim, the accused and their families continue to live in the same village.

The fieldwork however also revealed that the informal justice institutions do not always promote the best interests of the child. This finding was particularly linked to the limited involvement of the girl child in decision making in matters that concern her. For instance, a child who has been raped may be forced to marry the rapist and she may not participate in the decision regarding compensation. The participants described her role as that of a witness who gives evidence of the offence. The limitations in such informal justice institutions, resulted in the participants acknowledging the uses of the criminal justice system, especially where it is well functioning, to the victim of child sexual abuse. One group in Muzarabani also argued that the criminal justice system might protect children from further abuse by the offenders. The child can receive medical treatment, including post exposure prophylaxis to reduce the chances of contracting HIV, and professional counselling. It is however argued, that the shortcomings do not go to the core of the values in the Shona justice system, but reveal that the system can also be abused. The participants therefore suggested that the criminal justice system should be reconciled with the Shona justice system with the focus being on effective participation and compensation. Families should not be left to bear the brunt of the abuse of their children, without any support from the formal justice system.

CHAPTER 6

CONCLUDING REMARKS

Child sexual abuse is a widespread problem in Zimbabwe. Many children are sexually abused by people they know, including their family members. It is widely accepted that many such cases are either not reported to, or withdrawn from, the criminal justice system. Some victims and their families are not satisfied with the criminal justice system. One of the reasons for this is the focus on due process rights of the accused during criminal prosecution, and the retributive punishment of the offender that takes place with no consideration of the needs of the victims and their families. Victims are regarded as mere witnesses who testify at the pleasure of the state prosecutors, and cannot contribute to the decision-making during the criminal prosecutions. On the other hand, the accused´s rights are not only well articulated in the law, but are also given priority. The accused are frequently released on bail much to the chagrin of the victims and their families. The punishment imposed by the criminal justice system often leaves the victims and their families with a sense that injustice has been committed. Hence, they see no compelling benefit to the criminal justice system. This causes them to opt for institutions such as families and the village heads, which are influenced by the Shona traditional philosophy of **unhu.** In these institutions, they seek justice based on their participation and seek outcomes that address the damage caused to the victim by the offender. Such justice looks beyond the offender and the victim and includes their families and the community that is affected by the offence. While compensation forms the core of this concept of justice, there is a flexibility, which allows the parties to decide on appropriate outcomes in each case. The aim is to go beyond mere punishment of the offender, and restore broken relations for the sake of harmonious existence in society. This is now critical, given the emerging trend of children being sexually abused by people they know. They have to continue living in the same environment with these people. The child victim also needs the support of the family to survive the sexual abuse.

The fieldwork showed that the Shona justice system also has its own shortcomings relating to the rights of the child victim of the abuse.

For instance, compensation appears to be linked to marrying off the child victim to the offender, and the child seldom participates in the decision-making. This has led to the conclusion that there is a need to integrate the criminal justice system and the Shona justice system. This may limit the tendency for people choose the Shona justice system instead of reporting child sexual abuse cases to the police, or pursuing the criminal justice system to its finality. It further offers an opportunity to ensure that the remedies such as marriage and compensation preferred in the informal justice institutions are used to protect rather than exploit the child. It also redirects the focus of the criminal justice system from merely pursuing imprisonment as the ultimate punishment of offenders, to having them compensate the victims of their crimes. This is more important where there is no government-funded compensation scheme for victims of child sexual abuse. There are also cases, which may not fit neatly into either retributive punishment or compensation. An example is if a father rapes his child. The Shona justice would still be valuable in that it allows for wide participation of those affected, but the criminal justice should ensure that the case is not swept under the carpet.

As shown in this study, the CPE Act provides the basis for integrating the values in the Shona justice system, into the criminal justice system to provide effective remedies to child victims of sexual abuse. This could be both procedurally and substantively. The Act can accommodate the effective participation of victims and their families in criminal proceedings. For instance, the views of the victims and their families can be considered in bail and sentencing proceedings, which are current areas of serious concern to them. The Act allows criminal courts to award compensation to persons who would have suffered personal injury because of the offence. The cases of **Banana** and **Tivafire** clearly support the reading that the Act covers victims of sexual abuse. The accused can be given the incentive to compensate the victim by considering such compensation in sentencing. What is lacking is the use of this legal framework to benefit child victims of sexual abuse. It is argued that that lack of implementation can be addressed by having a criminal justice system, inspired by the positive values of the Shona justice. This may require empowerment of the police, prosecution and judiciary who so far, do not appear to have used the law in a manner inspired by such positive values. The victims and their families have to be informed of their right to claim compensation within the formal justice system.

Such an approach moves the criminal justice towards victim satisfaction, without thus neglecting the rights of the accused/offender. It recognises the vital role of the family and the community in protecting children, and restores social harmony without ignoring the potential abuse that children may suffer at the hands of their families. It is recognised that the

approach advanced in this paper does not deal with all challenges that may hinder access to the criminal justice system hence in some areas people may continue to use the Shona justice system. Efforts should therefore continue, to ensure that the criminal justice system, which provides justice to the offender and the victim, is accessible to everyone.

7 ANNEXES

ANNEX: QUESTIONS GUIDE

How are families dealing with cases of child sexual abuse?
How are sexual abuse cases handled in communities?
Who is involved in solving the cases?
What is the role of the family, child and village head in dealing with child abuse cases?
How does the girl child participate in solving such cases?
Who benefits from the way cases are handled?
Do you have examples of cases dealt with in the community (story telling)?
Would you suggest changes in handling such cases?

NOTES

INTRODUCTION

1 Kevin Lalor "Child sexual abuse in sub-Saharan Africa: child protection implications for development policy makers and practitioners" Development Research Briefings Number 3 Centre for Development Studies University College Dublin 2005 p1.
2 See Oko O Elechi "Human Rights and the African Indigenous Justice System" a Paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law Montreal Quebec Canada 8-12 August 2004 for broad discussion on the arguments.

CONCEPTUAL FRAMEWORKS AND METHODOLOGY

3 Monica Matavire "Interrogating the Zimbabwean Traditional Jurisprudence and the Position of Women in Conflict Resolution. A Case of the Shona Tribes in Muzarabani District" International Journal of Humanities and Social Science Volume 2 Number 3 February 2012.
4 Alice Armstrong "An African Contribution to Western Women´s Law Methodology and Theory" Institute of Legal Science B Paper Number 51 University of Copenhagen 1993 p3.
5 Ephraim Taurai Gwaravanda "Philosophical Principles in the Shona Traditional Court System" International Journal of Peace and Development Studies Volume 2(5) June 2011 p148; Michael Bourdillon **The Shona Peoples** Mambo Press Gwelo 1976 p147.
6 See section 11 of Traditional Leaders Act [Chapter 29:17].
7 Ibid. Section 12.
8 See sections 10 and 11 of the Customary Law and Local Courts Act [Chapter 7:05].
9 There is an irrefutable presumption that a boy below 12 years is incapable of sexual intercourse, see section 63 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (hereinafter referred the Criminal Code).
10 Ibid. Section 65.
11 Ibid. Sections 64 (1) and 70 (4) .
12 Geoff Feltoe Commentary on the Criminal Law (Codification and Reform) Act [Chapter

9:23] Legal Resources Foundation Harare 2010.
13 Criminal Code op cit Section 70.
14 Geoff Feltoe **A Guide to the Criminal Law of Zimbabwe** Legal Resources Foundation Harare 2006 p107.
15 Feltoe 2010 op cit.
16 Alice Armstrong "Rape and Customary Law in Zimbabwe" Legal Forum Volume 3 Number 2 June 1991 p10-16.
17 Alice Armstrong **Culture and Choice Lessons from Survivors of Gender Violence in Zimbabwe** Violence Against Women in Zimbabwe Research Project Harare 1998 (Armstrong 1998a) p125.
18 Alice Armstrong "Consent and Compensation: The Sexual Abuse of Girls in Zimbabwe" in Welshman Ncube (ed.) Law, Culture, Traditions and Children´s Rights in Eastern and Southern Africa Ashgate Dartmouth 1998 (Armstrong 1998b) p132.
19 See Christian B.N. Gade "The Historical Development of the Written Discourses on Ubuntu" South African Journal of Philosophy 30(3) 2011 p303 – 329 who referred to S Samkange & T M Samkange Hunhuism or Ubuntuism: A Zimbabwe Indigenous Political Philosophy Salisbury Graham Publishing 1980 as the first book to be written on the subject.
20 Sonja Mølgård Jensen Our Forefathers´Blood Interviews in Zimbabwe MS Dokumentation Mellemfolkeligt Samvirke 1992 p97.
21 Ibid. p106.
22 Bourdillon op cit p149.
23 Pesanayi Gwinyayi "The Role of Macro-systemic Contexts in Understanding the Aetiology and Epidemiology of Child Sexual Abuse in Southern Africa" Journal of Sustainable Development in Africa Volume 12 Number 2 2010 p254.
24 Lisa Tortell **Monetary Remedies for Breach of Human Rights: A Comparative Study** Oxford and Portland Hart Publishing 2006 p1.
25 Venn A Dicey **Introduction to the Study of the Law of the Constitution** (10th Ed.) London MacMillan 1959 p199.
26 Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 Article 8.
27 International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976 Article 2(3).
28 Dinah Shelton **Remedies in International Human Rights Law** (2nd Ed.) Oxford Oxford University Press 2005 p7.
29 Ibid. p7.
30 Regional Eastern Division Rusape R111/12.
31 This is appearing before the court to observe the proceedings as the victim´s lawyer.
32 Child Protection Committees are established by the government consisting of stakeholders in child protection such as teachers, pastors, health workers and

community mobilisers. Child Led Child Protection Committees are constituted of and led by children.

33 The Shona traditional society was male dominated and succession to the village headship has been patrilineal hence most village heads are males.

34 The guiding questions are attached as annexure A to this paper.

PROBLEM OF CHILD SEXUAL ABUSE IN ZIMBABWE

35 Tafadzwa Mumba "There are Other Options" in Woman Plus Women and Rape Zimbabwe Woman´s Resource Centre and Network 1998 p22 records the case of girl who withdrew her case from formal justice because the rapist had promised to marry her and given her money. Her parents approved of the relationship.

36 Armstrong 1998a op cit p130.

37 United Nations Convention on the Rights of the Child U.N. Doc A/44/49 (1989) (CRC).

38 African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) (African Charter).

39 Article 3 of the CRC and Article 4 (1) of the African Charter.

40 Article 12 of the CRC and Article 7 of the African Charter.

41 Article 5 of the CRC .

42 Article 18 of the CRC and Article 20 of the African Charter.

43 Article 18 (2) of the CRC and Article 20 (2) of the African Charter.

44 Article 18 of the African Charter.

45 Article 19 (1) of the CRC and Article 16 (1) of the African Charter.

46 Article 34 of the CRC and Article 27 (1) of the African Charter.

47 Article 39 of the CRC.

48 Jackson Wafula Muyila "African Values and the Rights of the Child: A View of the Dilemmas and the Prospects for Change" in Stephanie Lagoutte and Nina Svaneberg (eds.) Women and Children´s Rights AFRICAN VIEWS Editions Karthala 2011 p93.

49 Welshman Ncube "The African Cultural Fingerprint? The changing Concept of Childhood" in Welshman Ncube (ed.) Law, Culture, Tradition and Children´s Rights in Eastern and Southern Africa Ashgate Dartmouth 1998 p16.

50 Ibid. p16-7.

51 The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) UN General Assembly Resolution 40/34, see also the Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court on 12 July 1998 and entered into force on 1 July 2002.

52 Worku Yaze Wodage "Status and Role of Victims of Crime in the Ethiopian Criminal Justice System" Bahir Dar University Journal of Law Volume 2 Number 1 2011 p120-1.

53 Section 111B of the Constitution of Zimbabwe.
54 See John W Stickels "The Victim Satisfaction Model of the Criminal Justice System" Journal of Criminology and Criminal Justice Research and Education Volume 2 Issue 1 2008 for a discussion of the models.
55 Section 89 Constitution of Zimbabwe.
56 Section 3(1) Customary Law and Local Courts Act.
57 S v Matyenyika & Another 1996 (2) ZLR 536 (H).
58 Armstrong 1998b op cit p129.
59 Geoff Feltoe **A Guide to the Zimbabwean Law of Delict** Legal Resources Foundation Harare 2009 p5.
60 See Section 3 of the Constitution of Zimbabwe which declares the supremacy of the Constitution.
61 Ibid. Section 18 (1).
62 Section 3 of the Domestic Violence Act [Chapter 5:16].
63 Ibid. Section 4.
64 Sections 24-38 of the Criminal Procedure and Evidence Act [Chapter 9:07] (hereinafter referred to as the CPE Act).
65 See Section 76 of the Constitution of Zimbabwe together with Section 5 of the CPE Act.
66 Sections 12-22 of the CPE Act.
67 Levy v Benatar 1987 (1) ZLR 120 (SC) .
68 Section 9 of the CPE Act.
69 See sections 229-239 of the CPE Act.
70 Jo-Anne Wemmers "Where do they belong? Giving victims a place in the criminal justice process" paper presented at the National Victims of Crime Conference Adelaide, Australia 23&24 September 2008 p4.
71 Davide Jusa "Country Report – Zimbabwe" in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders Resources Material Series Number 70 Fuchu Tokyo Japan November 2006 p156.
72 Section 319B of the CPE Act.
73 Ibid. Section 319D.
74 Ibid. Section 319F (2).
75 Ibid. Section 319G (3).
76 Ibid. Section 319G (1) and (2).
77 Gwinyayi op cit p260.
78 See Section 319B of the CPE Act.
79 Section 18 of the Constitution of Zimbabwe.
80 Section 117(1) of the CPE Act.
81 African Rights Justice in Zimbabwe 1996 p34.
82 Section 16 (9) (f) of the Domestic Violence Act.
83 World Health Organization Child Sexual Abuse: A Silent Health Emergency AFR/RC54/15 Rev. 1 18 June 2004 paragraph 6.
84 Section 117 (2) of the CPE Act.
85 See 117 (3) of the CPE Act which contains the factors.
86 Ibid. Section 117 (4).
87 Ibid. Section 117A .
88 Wemmers op cit p16.
89 Section 334(3) of the CPE Act.
90 Stickels op cit p4.
91 Charles Kelly v The State HH 33-2004 p6.

92 See section 12 of the Birth and Death Registration Act [Chapter 5:02] which provides that a father of a child born out of wedlock has to voluntarily acknowledge himself the father before his name can be included on the birth certificate.
93 See section 15(3)(b) of the Constitution of Zimbabwe.
94 Section of 363 of the CPE Act.
95 Ibid. Section 368(1).
96 Ibid. Section 366 (1) (b).
97 Ibid. Section 367.
98 Ibid. Section 372.
99 CFX Bank Limited v RTO Engineering [Private] Limited and Messenger of Court HH 8-2000.
100 S v Banana 1999 (1) ZLR 50 (H).
101 S v Tivafire1999 (1) ZLR 358 (H).
102 S v Banana supra p56.
103 Section 368 (2) of the CPE Act.
104 S v Tivafire supra p361.
105 Section 375 of the CPE Act.
106 Ibid. Section 4.
107 Section 278 of the Criminal Code.
108 See for instance, Banda v Ministry of Home Affairs and Ors HH-243 -87 where the Plaintiff was awarded damages after being raped on several occasions by a police officer who was threatening her with detention for alleged possession of madrax. In her own words, she "felt terrible. I felt hate for him." The High Court ruled that rape constitutes a grave and serious impairment of the person, dignity and reputation of the victim and awarded damages against the Ministry of Home Affairs and the police officer, being jointly liable.
109 Feltoe 2009 op cit p84.
110 Armstrong 1998a op cit p131.
111 Armstrong 1991 op cit p13.
112 Feltoe 2009 op cit p84 .
113 Petronella Nyamapfene, Director of Justice For Children Trust email to author of 2 March 2012.
114 S v Banana supra p54.