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The Viability of the Death Penalty as an Alternative to Life Imprisonment in South Africa

A dissertation submitted in completion of a Master's Degree in Research (LLM) by

Katelyn-Mae Carter

Student Number: 18046178

Under the supervision of Dr Llewelyn G. Curlewis (Department of Procedural Law)

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PREFACE:

I begin this dissertation in the words of Louis Schoeman:[1]

"I have often wondered whether those persons who are so anxious to convince us that, despite the fact that those people who through their deeds have demonstrated quite clearly that there is no justification for not removing them from our society, would feel differently if one of their daughters, their mothers, or their wives were brutalised in the manner in which countless women in our country have been."

It is apparent that South Africa has only worsened since 1998 as such when reading through this dissertation, I urge you to picture yourself, your child, your parent, your sibling or spouse as the victims of the most serious and violent crimes presently taking place. Take note of the feelings that develop therefrom and carry them with you as you read.

I am aware that the arguments made and the conclusions reached in this research will not find favour with many people in the academic field of the South African society however (with all due respect) this research is not for you.

As a South African citizen and victim of crime myself this research was written for the people of South Africa. While I have not been the victim of some of the most heinous crimes that continue to be committed, I have sat and watched the crime rates continue to rise and the words of Presidents and Minister of Justice continue to call it a problem but do nothing about it.

I am of the belief that South Africa needs a drastic change and while I am aware that the death penalty would not solve every problem it could at least solve the prison overcrowding, economic problems and to a reasonable extent deter some persons from committing serious offences and save the lives of others. The truth is radical change requires radical solutions.

[1] L Schoeman 'Curlewis Supported on the Death Penalty' a letter by Louis Schoeman to Zehir Omar in response to his letter chiding Judge Curlewis (1998).

ACKNOWLEDGEMENTS:

I would like to acknowledge the love and support of my parents throughout this entire process. Thank you for always being willing to read, edit and be interested in my work.

I would like to thank my supervisor, Dr Llewelyn Curlewis, for always being willing to answer every question I had regarding this dissertation and for being so patient with me. I greatly appreciated your help and this would not have been possible without you.

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CHAPTER 1: INTRODUCTION:

1.1: INTRODUCTION:

Since the earliest recorded human history punishment in the form of death has existed and South Africa is no stranger to such punishment.

In the 1755 to 1750 BCE, the Code of King Hammurabi of Babylon codified the death penalty as a punishment for 25 different crimes.[2] In 500 BCE, the Roman's codified the death penalty in the Twelve Tablets.[3] The most common forms of this penalty were crucifixion, drowning, beating, burning alive and impalement.

Hanging of offenders only became a prevalent form of punishment in the 10th century BCE in Britain.[4] However, this progressed when Henry the VIII took the throne and during his reign he is estimated to have executed no less than 72 000 people using methods such as hanging, beheading, drawing and quartering, boiling alive and burning at the stake.[5]

In South Africa, hangings were a common practice both prior to and after the Union of 1910.[6] Between 1910 and 1975, 2740 people were executed and between 1981 and 1989, 1100 people were executed. In 1989 President F.W. de Klerk stopped imposing capital punishment (however, this did not prevent judges from handing down the death penalty as a sentence but just the execution of the sentence) during the negotiations of the Convention for a Democratic South Africa (CODESA). During the negotiations surrounding the creation of the Constitution of the Republic of South Africa, 1993 ('the Interim Constitution'), the death penalty was not decided upon but was rather left to the courts to decide.

On the 6th of June 1995 in the Constitutional Court of South Africa, the death penalty was decided upon in the case of *S v Makwanyane and Mchunu.*[7] Chaskalson J came

[2] FindLaw 'History of Death Penalty Laws' 7 February 2019 https://www.findlaw.com/criminal/criminal-procedure/history-of-death-penalty-laws.html (accessed on 4 December 2022).
[3] FindLaw (n 1 above).
[4] FindLaw (n 1 above).
[5] FindLaw (n 1 above).
[6] The South African Institute of Race Relations Policy Paper 'Capital punishment in South Africa: was abolition the right decision? Is there a case for South Africa to reintroduce the death penalty' November 2016 at 1.
[7] S v Makwanyane and Another 1995 (6) BCLR 665.

to the conclusion in his judgment that the death penalty prescribed in section 277(1)(a) of the Criminal Procedure Act[8] was unconstitutional with regards to the following rights: section 9 (right to life), section 10 (right to dignity) and section 8(1) (the right to equality before the law)[9]. The reasoning behind this decision was that the imposition of the death penalty for murder is a cruel, inhumane or degrading punishment inconsistent with the unqualified right to life and human dignity,[10] cannot be rectified in the case of error or enforced in a manner that is not arbitrary.[11]

Despite, a steady decline in crime in South Africa from 1994 to 2005, South Africa has seen a growing increase in violent crimes in the last 17 years. Of special mention among these violent crimes are: murder, robbery with aggravating circumstances, rape (including that of children), kidnapping and gender based violence against women. As the *Makwanyane* case was decided over 27 years ago, South Africa is left to question whether the decision made in 1995 is still applicable and correct for the South Africa of 2023.

1.2: RESEARCH PROBLEM STATEMENT:

In South Africa in 2019,[12] there were 21022 murders and 52420 sexual offences with an alarmingly high rate of women and children being the victims of these crimes. As a result of this communities of all races, ages, ethnicities, religions and genders began demanding accountability of the government departments responsible for citizen safety, policing and corrections of offenders as well as the judicial system.[13] These communities wanted a reintroduction of the death penalty as a sentence in the South African criminal system in order to curb the high levels of crime taking place throughout the country.[14] This occurred again in 2020 where the public opinion was in favour of reinstating the death penalty for the punishment of violent and sexual crimes.[15] This

[8] Act No. 51 of 1977.
[9] The Constitution of the Republic of South Africa, 1993.
[10] Makwanyane (n 7 above) at [26] and [145].
[11] Makwanyane (n 7 above) at [146].
[12] J Weiner Oxford Human Rights Hub 'Bringing Back the Death Penalty in South Africa for crimes Against Women.' 1 October 2019 https://ohrh.law.ox.ac.uk/bringing-back-the-death-penalty-in-south-africa-for-crimes-againstg-women/ (Accessed on 21 November 2022).
[13] Weiner (n12 above).
[14] Weiner (n12 above).
[15] E Naidu 'South Africans debate the death penalty amid rise in gender-based violence.' Sunday Independent 20 December 2020 found at: https://www.iol.co.za/sundayindependent/news/south-

occurred in a time where there was a global shift from abolition to seeking alternative retribution to life imprisonment and the reinstatement of capital punishment.[16] In contrast, the government responded by stating this was an emotional response to the rise in violent, sexual and gender-based crimes and not based on legal conventions or rational thinking.[17] This statement is almost absurd in a country that aims to premise its legal and adjudicative function on 'Transformative Constitutionalism'. 'Transformative Constitutionalism', in the adjudicative sense, is large-scale radical change through which judges are required to move away from neutral judgements and come to terms with their own bias and make a value-based judgement.[18] Thus would it not be contrary to such large-scale radical change if we did not take into consideration the feelings of the public around certain alarming issues in our country that place our citizen's lives at risk?

Judges are asked to balance competing rights in the judicial sphere when making judgments[19]. Essentially this research would encourage readers to question whether the South African executive, legislature and judiciary favour the rights of their criminals over the rights of their citizens, which is precisely the image they project when continuously rejecting the possibility of reinstating capital punishment. Do we not institutionalise murder, brutality and sexual violence by protecting the life of a convicted murderer, rapist or abuser over the life of their past and potential victims? [20]

It has been over 27 years since the fate of the death penalty was decided upon and received its own death sentence in *S v Makwanyane and Mchunu.*[21] Chaskalson J came to the conclusion that the death penalty, as it was prescribed in section 277(1)(a) of the Criminal Procedure Act,[22] was unconstitutional and arbitrary in respect of the right to life (section 9), the right to dignity (section 10) and the right to equality before the law (section 8 (1)).[23] The judges in this case were of the opinion that the imposition of the death penalty for any crime was a cruel, inhumane and degrading punishment

africans-debate-the-death-penalty-amid-rise-in-gender-based-violence-1c681776-884a-42ea-ab06-33df672ad916 (Accessed on 21 November 2022).
[16] Naidu (n15 above).
[17] Naidu (n15 above).
[18] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 157.
[19] Klare (n 18 above); sec 36 of the Constitution of the Republic of South Africa, 1996.
[20] Rev H Syre The Cape Times, 'UK shows death penalty works', 2 January 1998.
[21] Makwanyane (n 7 above)
[22] Act No.51 of 1977.
[23] The Constitutional of the Republic of South Africa, 1993.

inconsistent with the rights to life and human dignity and could not be rectified in the case of error or enforced in a manner that is not arbitrary.[24] Given the above information and the socio-political sphere at the time of this decision, Chaskalson J and his colleagues may have been correct. However, within the current South African demographic with rising crime rates almost to the point of such brutality that we could claim war as well as the inhuman conditions of maximum security prisons in South Africa, I dispute that this decision can still be considered correct or reflective of the opinion in the present South Africa.

The research plans to examine the viability of capital punishment in South Africa if it were to be applied presently. It plans to examine whether it is a punishment that is arbitrary and cruel and inhumane in the face of current South African prison conditions. It also plans to make a comparative analysis of how the death penalty is viewed in international and foreign law. It will look at the public opinion towards the death penalty comparing this opinion in the 1990s to the opinion currently. Furthermore, it will examine whether those serving life imprisonment should be allowed to choose death as an alternative to serving life in prison. Lastly, it will examine whether the high levels of violence currently in South Africa can be comparable to that of an armed conflict in which the early abolitionists and Chaskalson J said that the death penalty would be admissible.

1.3: RESEARCH QUESTIONS:

The research aims to address the question of the viability of the death penalty in the current South African demographic but will take place and explore the parameters of this through the following questions:

1.3.1. Research Question 1:

What is the purpose of sentencing in a criminal justice system and what are the theories of punishment surrounding it?

1.3.2. Research Question 2:

[24] Makwanyane (n 7 above) at [146].

Is the death penalty an arbitrary sentence with regards to the current legal demographic in South Africa?

1.3.3. Research Question 3:

How is the death penalty applied in foreign and international law? This research question will make specific reference to the following jurisdictions with regards to the application of the death penalty and the prevalence of violent crime therein: The United Kingdom; The United States of America; Zimbabwe and Saudi Arabia.

1.3.4. Research Question 4:

What is the role and view of the public opinion with regards to the sentencing of convicted offenders in South Africa? How does the public opinion view the death penalty as a potential sentence?

1.3.5. Research Question 5:

Is the death penalty a cruel, inhumane and degrading treatment with specific regard to the right to dignity and looking at the current conditions in South African prisons?

1.3.6. Research Question 6:

Could the current violent crime statistics in South Africa be classified as the 'time of war' or 'exceptional circumstances' in which the court in *Makwanyane* gave an exception to the use of the death penalty?

1.4: RESEARCH OBJECTIVES:

This research aims to reach the following conclusions:

- That an application of the death penalty in present-day South Africa will not always be arbitrary and useless.
- That the application of the death penalty in foreign and international law reaps different results dependent on the country in which it is applied but ultimately has a positive effect.
- That the public opinion in South Africa favours a reinstitution of the death penalty.

- That in comparison to the conditions of life imprisonment in a South African prison, the death penalty can no longer be referred to as a cruel, inhumane and degrading punishment.
- That South Africa's level of violence can possibly be likened to the level of violence experienced in an armed conflict which could allow for a permissible application of the death penalty within the current South African sentencing framework.

1.5: RATIONALE:

With a growing violent crime rate in South Africa, this research plans to offer an alternative sentence for the most serious and prevalent crimes in our country. This research finds its significance in the fact that the public opinion of South Africa for well over 27 years does not reflect the decision made in *Makwanyane.* The viability of the death penalty as sentence will be explored in order to determine whether it is arbitrary or useful. This research is not a manifesto for mass genocide of offenders but is rather an exploration of a possible solution to an ongoing and rapidly growing crisis in our country.

1.6: BACKGROUND AND LITERATURE REVIEW:

In the landmark case of *S v Makwanyane and Mchunu,*[25] the two appellants were charged with four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances.[26] Essentially the facts of the case were that the Volkskas Bank sent an armoured vehicle to give wages to two hospitals at the end of every month.[27] On the 31st of August 1990, exactly this took place and the armoured vehicle was followed by a police vehicle. They first stopped at the JG Strijdom Hospital and dropped off R900 000.[28] Thereafter the vehicle went to the Coronation hospital with the police vehicle in tow. The bank car entered the area of the Coronation hospital and came to a standstill. Shortly thereafter, shots were fired at the police vehicle and the bank van.[29] Two police officers were fatally injured, Pretorius (another officer) was

[25] Makwanyane (n 7 above)
[26] Makwanyane (n 7 above) at [1].
[27] S v Makwanyane and Another 1994 92 (AD) 233 at 2.
[28] Makwanyane (n 27 above) at 3.
[29] Makwanyane (n 27 above) at 4.

injured but managed to start the car and drive off, crashing into the attackers' escape vehicle.[30] Pretorius came to a stop two kilometres away, he was fatally wounded and so was the other officer, Havenga.[31] Botha, survived the attack and was a state witness at the trial.[32] The attackers attempted to escape the scene on foot and according to an eyewitness there were 6 of them armed with rifles and a pistol.[33] The police later recovered 5 AK-47s that were linked by ballistic evidence to the accused.[34] The case against accused 1 was withdrawn at the beginning of the trial.[35] During the ongoing trial, the 5 accused attempted to escape custody, accused 2 was fatally shot and accused 5 managed to get away. [36] The remaining accused, 3 and 4, were found guilty of the charges and contested their involvement therewith in the Witwatersrand Local Appellate Division. The Appellate Division found both accused 3 and accused 4 guilty of the charges and believed they should receive the most severe punishment in our penal system at the time.[37] The two accused raised appeal to the Constitutional Court on the death sentences received for the four murders they committed on the grounds that section 277(1)(a) of the Criminal Procedure Act,[38] was unconstitutional with regards to the right to life as enclosed in section 9 of the Constitution.[39] On the 6th of June 1995 in the Constitutional Court of South Africa, the fate of the death penalty was decided upon.[40] Chaskalson J came to the conclusion in his judgment that the death penalty prescribed in section 277(1)(a) of the Criminal Procedure Act, was unconstitutional in respect of the following rights; section 9 (right to life), section 10 (right to dignity) and section 8(1) (the right to equality before the law).[41] The reasoning behind this decision was that the imposition of the death penalty for murder is a cruel, inhumane and degrading punishment inconsistent with the unqualified right

[30] Makwanyane (n 27 above) at 4.
[31] Makwanyane (n 27 above) at 4.
[32] Makwanyane (n 27 above) at 4.
[33] Makwanyane (n 27 above) at 4.
[34] Makwanyane (n 27 above) at 5.
[35] Makwanyane (n 27 above) above at 3.
[36] Makwanyane (n 27 above) at 6.
[37] Makwanyane (n 7 above) at [1].
[38] Act No, 51 of 1977.
[39] Constitution of the Republic of South Africa, 1996.
[40] Makwanyane (n 7 above).
[41] Constitution of the Republic of South Africa, 1996.

to life and human dignity,[42] and a punishment which cannot be rectified in the case of error or enforced in a manner that is not arbitrary.[43]

The following table depicts the change in prevalence of murder, rape, kidnapping and robbery with aggravated circumstances within South Africa for the years of 1994 and 2022. The table makes use of these specific crimes (with the exception of child-stealing and treason) because these are the crimes for which one could receive the death penalty in terms of the original section 277(1)(a) of the Criminal Procedure Act,[44] and the most serious crimes for which the death penalty would be imposed.[45] Child-stealing is synonymous with kidnapping and therefore the research plans to focus on kidnapping.[46] The crime of treason during the Apartheid-era was used to suppress any forms of opposition to the apartheid government and to date there has been only one successful treason conviction in the post-apartheid-era and therefore it would not appear as a prevalent crime currently.[47] It is important to note when looking at the table that prior to May 2007, rape could only be committed against a woman by a man through vaginal penetration referred to as 'common law rape'.[48] However,[49] after this point rape could be committed by a man against a woman through anal penetration. After 16 December 2007, the definition in the Criminal Law (Sexual Offences and Related Matters) Amendment Act at section 3 became ungendered and was broadened to penetration of the mouth, anus or genital organs of another.[50] The importance that lies herein is that the rape figures prior to 2007 will only depict common law rape. Sexual crimes as a whole in their figures are greatly underestimated due to the fact that they often go unreported,[51] therefore the true extent of sexual crimes

[42] Makwanyane (n 7 above) at [26] and [145].
[43] Makwanyane (n 7 above) at [146].
[44] Constitution of the Republic of South Africa, 1996.
[45] International Covenant on Civil and Political Rights, 16 December 1966 at Article 6.
[46] Mosdell, Pama & Cox 'Access, care & contact of your child in relation to trafficking, abduction and kidnapping' Cindy Allan 2 September 2019 https://www.mpc.law.za/OurInsights/BlogDetail.aspx?BlogID=43 (10 December 2022).
[47] Helen Suzman Foundation 'Treason in Southern Africa' Rafael Friedman 1 June 2017 https://hsf.org.za/publications/hsf-briefs/treason-in-southern-africa#:~:text=There%20has%20only%20been%20one%20treason%20conviction%20in%20post%2Dapartheid,in%20South%20African%20legal%20history%20 (10 December 2022).
[48] *Masiya v The Director of Public Prosecutions* Pretoria and Another 2007 5 SA 30 (CC).
[49] Masiya (n 47 above).
[50] Criminal Law (Sexual Offences and Related Matter) Amendment Act 32 of 2007.
[51] CR Bartol & AM Bartol Criminal Behaviour. A Psychological Approach. (2017) Customised Edition for KRM310 (B) Psychocriminology pg 194.

committed in South Africa cannot be accurately represented through the reported case figures.

A table of the prevalence of serious crimes in 1994 and recently in 2022		
Crime	**Total Reported Cases for 1994**	**Total Reported Cases for 2022[52]**
Murder	25 964[53]	27 066
Rape	47 506[54]	43 343
Kidnapping	4101[55]	15 008
Robbery with Aggravated Circumstances	84 785[56]	144 257

Considering the above exposition of serious crime in South Africa at the present time, as against what was happening during 1994, it can be observed that the rates of crime are different. Can we still consider the decision made by judges 27 years ago correct for the present serious crimes?

The research plans to address the question in the following structure:

In chapter two, the research will look at the theories and purposes of punishment within a judicial system. It will also observe the practical administration of punishment in a South African court and what a court takes into consideration when imposing a sentence.

[52] Police Recorded Crime Statistics, Republic of South Africa for the Fourth Quarter of 2021/2022 Financial Year (January 2022-March 2022); the First Quarter of 2022/2023 Financial Year (April 2022-June 2022); Second Quarter of the Financial Year 2022/2023 (July 2022-September 2022) & the Third Quarter of 2022/2023 Financial Year (October 2022-December 2022).
[53] ISS Crime Hub National Crime Statistics by Crime Type https://issafrica.org/crimehub/facts-and-figures/crimehub/crime-trends-1994-to-2004/crimehub/national-crime-statistics-by-crime-type#murder (Accessed on 9 December 2022).
[54] PW Coetzer 'Rape Against the Background of Violent Crimes in Contemporary South Africa' *Southern Journal for Contemporary History* (1) 2018 27 pg 103.
[55] ISS Crime Hub National Crime Statistics by Crime Type https://issafrica.org/crimehub/facts-and-figures/crimehub/crime-trends-1994-to-2004/crimehub/national-crime-statistics-by-crime-type#kidnapping (Accessed on 9 December 2022).
[56] ISS Crime Hub National Crime Statistics by Crime Type https://issafrica.org/crimehub/facts-and-figures/crimehub/crime-trends-1994-to-2004/crimehub/national-crime-statistics-by-crime-type#robberyac (Accessed on 9 December 2022).

The third chapter will focus on the so-called 'arbitrariness' of the death penalty as a sentence. Under this chapter the unfair application or the discriminatory maldistribution of the death sentence will be explored. The research will explore the possible miscarriages of justice that can occur as a result of the application of the death penalty. Lastly, this chapter will consider the usefulness of the death penalty as a punishment.

There is no international law, covenant or treaty that bars or abolishes the use of capital punishment. Chapter four will explore the international and foreign law surrounding the death penalty and its application in different countries. This chapter will have a comparative study between developed and developing countries that are both abolitionist and retentionist. The first world countries are the United Kingdom and the United States of America and the third world countries are South Africa and Zimbabwe. There will also be a comparison between these countries and Saudi Arabia, who is chosen as an outlier country that uses extreme methods of the death penalty that border along infringing international law with regards to it.

Public opinion, its role in formulating social policies and thus its impact on the imposition of sentences will be explored. This research posits that there has been a shift in public opinion since 1995 and as such its impact on sentences in the present should be considered. Chapter 5 will explore the arguments made by members of the public at reinstating the death penalty and decipher from case law, the courts' opinion on whether the public should have a say in how someone is sentenced.

Chaskalson J,[57] referred to the death penalty as a cruel, inhumane and degrading punishment. Chapter six plans to argue that the death penalty can no longer be referred to as cruel, inhumane and degrading punishment when the alternative is life imprisonment in a South African prison where incarceration violates more human rights than the death penalty would. The conditions of South African prisons will be explored and the meaning behind the terms "cruel, inhumane and degrading" will be delved into within the context of punishment with specific reference to the death penalty and life imprisonment.

In the *Makwanyane case* Chaskalson J stated that the death penalty could be permissible during times of conflict.[58] With the growing crime rates as they are

[57] Makwanyane (n 7 above) at [26].
[58] Makwanyane (n 7 above) at [33].

depicted in the table above, this research plans to argue in its final chapter that the extent of our violence could be likened to that during the time of armed conflict therefore allowing for the death penalty to be permissible.

1.7: RESEARCH METHODOLOGY:

This research paper plans to use qualitative research at its basis focusing on legislation, the Interim and current Constitution of South Africa, journal articles, books and foreign and international case law and legislation passed on this specific subject.

This research will observe the use of the death penalty in multiple jurisdictions in order to compare the crime rates with abolitionist countries. I have chosen two developed countries, the United Kingdom and the United States of America. I have chosen two developing countries, South Africa and Zimbabwe. I have also chosen an outlier country which makes use of controversial practices when using the death penalty, Saudi Arabia.

1.8: DELIMITATIONS AND LIMITATIONS OF RESEARCH:

There are multiple limitations with this research. Firstly, majority of the literature that has been published is focused on the abolitionist movement and why the death penalty should not be imposed.

Secondly, during the anti-apartheid demonstrations by the African National Congress (ANC), Inkatha Freedom Party (IFP) and Pan-Africanist Congress (PAC) their focus was on abolition of the death penalty on the premise that it was discriminatory as more black offenders were sentenced to death than any other race. In essence the limitation here is that any argument made within this research in favour of the death penalty would only be possible and can only be envisioned in a South Africa where any other party other than the ANC is not in power or where the ANC is willing to revisit its stance with regard to the death penalty. The basis of this research will not fall around race or the impact of the death penalty upon a specific race but rather an equally applied death penalty against all offenders regardless of race focusing rather on the types of crimes they have committed.

Thirdly, there are very few cases in which offenders who have been convicted to life imprisonment and have applied to alternatively be executed have been successful.

However, this research plans to show that this may be one of the most dignified ways, for both the offender and the state, in which the death penalty may be applied.

Furthermore, whenever considering the option of death as a sentence or even a choice to an offender it is important to take into account the capacity of the offender. Kahn suggested in his research that if the death penalty were to be applied it should only be applied in those cases where there exists no doubt as to the accused committing the crime, having the capacity to do so and to stand trial. In hand with this it is important to mention that a large portion of the adult South African population is illiterate. Illiterate adults are defined as being over the age of 20 who have not completed grade 7 and above.[59] In 2020 it was determined that 10% of the adult population in South Africa is illiterate.[60] In order for the death penalty to be properly and fairly applied in South African courts there would need to be measure in place to ensure persons who are illiterate either understand the proceedings and consequences faced or alternatively that they will not face such sentence.

Lastly, there is no definitive research to suggest that capital punishment has a substantial deterrent effect on crime.

[59] M Khuluvhe 'Fact Sheet: Adult Illiteracy in South Africa' (2022) Department of High Education and Training, Pretoria 3.
[60] Khuluvhe (n 59 above) 4.

CHAPTER 2: PUNISHMENT AND SENTENCING: THEORIES AND PRACTICE

2.1: INTRODUCTION:

The imposition of punishment upon wrongdoers is one of the most widely practiced, accepted and customary activity amongst all civilizations. Punishments developed as a result of societal fears of acts, which unsettle the social equilibrium. The development of punishment arose from the feelings of moral disgust on the part of the injured party toward the injuring party. In this chapter the theories, approaches and purposes of punishment will be discussed in order to understand why human beings impose punishment. Thereafter, the administration and approach to punishment by South African courts through sentencing will be elaborated upon. This will include a discussion on how the courts are required to address sentencing and what the courts take into consideration when considering a sentence.

2.2: THEORIES AND PURPOSES OF PUNISHMENT:

Punishment can be defined as the method used by society to enforce a desired standard of conduct as well as methods used on an offender after committing a crime.[61] It is worth mentioning that the theories of punishment, while being a justification therefore, are purely an academic consideration and are never considered during practice. These theories are not considered in practice because the court finds its justification in imposing a sentence from its inherent existence found within the Constitution and legislation and does not concern itself with the justification that the state requires for punishing a criminal.[62] Terblanche states that there are two general theories.[63] These are the retributive and the utilitarian theories.

The retributive theory has been referred to, since the 1970s, as the 'just desserts' theory.[64] This theory is premised on the idea that the extent of one's punishment

[61] J Meyer 'Reflections on Some Theories of Punishment' (1968) 59 *The Journal of Criminal Law, Criminology and Police Science* 4 at 595.
[62] SS Terblanche *A Guide to Sentencing in South Africa* (2016) 187.
[63] Terblanche (n62 above) 187.
[64] Terblanche (n62 above) 188.

should be relative and proportionate to the seriousness of the crime.[65] Thus in this instance punishment is a justified reaction to the commission of a crime because punishment is deserved. From a community perspective, retribution involves an isolation and denunciation of the offender and his crime.[66] For the offender in this instance, punishment should be viewed as an atonement for one's unlawful conduct.[67] This theory encompasses both a perspective of the community, who has been affected by the crime, and that of the offender essentially creating a balance where the offender is made to atone for the act for which the community requires a form of suffering. The main criticisms of retributive theory are that it is barbaric and in line with vengeance.[68] It has also been called indifferent toward both the offender and the crime giving them both little to no regard.[69] However, it is a well understood concept that vengeance and retribution are inherently different and cannot be equated to one another.[70] Retributive theory finds its justification within criminal law itself. Criminal law, at its core, involves apprehending; trying; convicting and thus punishing a person for their wrongful and unlawful conduct and as such punishment cannot be without retribution.[71] Criminal law is the means through which society articulates its disapproval of the offender's actions.[72] Thus retribution for punishment is the only way in which a criminal sanction can be distinguished from any other. [73] Although on the face of it, retribution may appear to be a vengeful theory of justification of punishment, it serves the interests of society to see the offender atone for their actions which it has deemed unacceptable conduct. The retributive theory is inherently aligned with criminal law which finds its application in the apprehension and punishment of those persons who deserve such punishment.

Alternatively, the utilitarian theory is based on the notion that the purpose of the law is to ensure the greatest good for the greatest amount of people regardless of the extent the punishment that this requires.[74] The theory posits that human beings, being rational, would calculate all the potential risks and benefits involved with an act which

[65] Terblanche (n62 above) 188.
[66] Terblanche (n62 above) 188.
[67] Terblanche (n62 above) 188.
[68] Terblanche (n62 above) 188.
[69] Terblanche (n62 above) 188.
[70] Terblanche (n62 above) 189.
[71] Terblanche (n62 above) 189.
[72] Terblanche (n62 above) 189.
[73] Terblanche (n62 above) 189.
[74] Terblanche (n62 above) 189.

they plan to perform and as such refrain from the act which could potentially cause them pain (punishment).[75] Thus the utilitarian theory justifies punishment on the foundation of the calculation between the utilities and disutility of an act. The utilitarian theory encompasses a range of principles of punishment including deterrence, prevention, rehabilitation and incapacitation.[76] These principles all share the basis of a crime preventative understanding and the benefits therefore are derived from these principles. The benefits are: it deters the offender from recidivism, it deters potential offenders from committing crimes, it attempts to rehabilitate offenders and it incapacitates the offender, preventing them from committing further crime.[77] The main criticisms of utilitarian theory are that there is no evidence to prove that punishment achieves these aims, it requires to some extent innocent persons to be punished for the good of the greater population as well as requiring certain offenders to be punished excessively to achieve this aim.[78] However, the utilitarian theory is the generally accepted theory of punishment by both courts and the public.[79] The benefits of the utilitarian theory of punishment however posit more positive outcomes for punishment than negatives.

Meyer theorises that there are also certain approaches to punishment which should be considered. The two approaches that Meyer considers are the legalistic and the behaviouristic approaches.[80] The legalistic approach believes that criminals must be made to suffer for their actions and the hurt that they have caused.[81] It is only through the imposition of fear and punishment that society as a whole will be prevented or deterred from committing a crime.[82] Thus the legalistic approach takes on elements of deterrence and retribution and believes punishment should be justified upon these grounds. The criticism of the legalistic approach is that the isolation of offenders from greater society often results in detrimental consequences. When an offender is separated from society, they begin to view the community as their enemy and vice versa.[83] Thus the legalistic approach is not conducive to a criminal justice system in

[75] Terblanche (n62 above) 189.
[76] Terblanche (n62 above) 189.
[77] Terblanche (n62 above) 189.
[78] Terblanche (n62 above) 190.
[79] Terblanche (n62 above) 190.
[80] Meyer (n61 above) 598.
[81] Meyer (n61 above).
[82] Meyer (n61 above).
[83] Meyer (n61 above).

which the goal of such justice is to rehabilitate and conform an offender back into society. The legalistic approach is focused on apprehension, punishment and deterrence of an offender and potential offenders of crime.

Alternatively the behaviouristic approach requires an individualised attitude to punishment. The behaviouristic approach is premised on the belief that crime is not completely the product of forces which are in the control of the offender.[84] This approach to punishment gives particular attention to the personality and mind of the offender, furthermore any pathologies which may have predisposed the offender to partake in such behaviour.[85] The criticism of this approach is that it will result in an unfair distribution of punishment for the same crimes for different offenders.[86] In doing so the application of different punishments to different offenders for committing the same or similar crimes will result in claims of unfair discrimination. In an idealistic criminal justice system, both the legalistic and the behaviouristic approaches would be addressed in punishment.

It is generally accepted that the four purposes of punishment described in the case of *R v Swanepoel* are those held within South African courts.[87] These purposes are retribution, deterrence, prevention and rehabilitation. It has also been accepted by our courts that of those four principles deterrence is the most important.[88] Deterrence, retribution and prevention all involve some form of suffering and deprivation of one's freedom and as such the nature of the crime determines the punishment.[89] Alternatively rehabilitation is treatment which is based off of the personality of the offender.[90] Essentially the first three purposes are based on the prevention of the crime and the last is based on the offender, aimed at solving the issues which led the offender to commit the crime.

Throughout history, deterrence has been the main aim of punishment.[91] It has been stated that punishment is "…to prevent crime in the future by disabling particular

[84] Meyer (n61 above).
[85] Meyer (n61 above).
[86] Meyer (n61 above).
[87] *R v Swanepoel* 1945 AD 444.
[88] Terblanche (n62 above) 171.
[89] Meyer (n61 above) 595.
[90] Meyer (n61 above) 595.
[91] Terblanche (n62 above) 175.

offenders and terrifying others into obeying the law."[92] Deterrence can be defined as the use of punishment to prevent the offender from reoffending and potential offenders from beginning a criminal career by depicting what will happen if the criminal actions are followed through.[93] Human beings, being rational, would refrain from the commission of a crime if they know the unpleasant consequence that will result therefrom.[94] Essentially this is a calculation of the benefits and disadvantages of a particular act which, if the punishment is accurate, should result in the human being choosing not to offend because they have previously received punishment for the same act or have witnessed another receive it. In order to ensure that deterrence is successful, the punishment must be considerably undesirable to ensure it will ultimately outweigh the benefits of committing the crime. Within Meyer's definition of deterrence, both types of deterrence are mentioned. The two types of deterrence are general and individual.[95] Individual deterrence impacts the offender who has committed the crime in the hopes that by receiving punishment they will not continue to offend.[96] General deterrence is aimed at deterring the general populous (potential offenders) from committing crime, by seeing an offender be punished.[97] In terms of general deterrence, there is an acknowledgement that there will be some persons in the community who will be deterred from criminal activity by observing the sentences imposed by courts upon convicted persons.[98] It is the general assumption of courts that any sentence handed down will deter potential offenders.[99] As such it is believed that the more severe the sentence imposed, the greater the deterrent value. Terblanche believes that severe sentences should only be handed down in two instances: where the crime is particularly serious and where the crime is prevalent.[100] This should be done in order to ensure that the public does not lose faith in the judicial system and take the law into their own hands, failure by the judiciary would result in increased pressure upon the police.[101] There exists doubt as to the effectiveness of general deterrence because if it was one hundred percent effective there would be no

[92] Terblanche (n62 above) 175.
[93] Meyer (n61 above) 596.
[94] Terblanche (n62 above) 172.
[95] Meyer (n61 above) 596.
[96] Meyer (n61 above) 596.
[97] Meyer (n61 above) 596.
[98] Terblanche (n62 above) 173.
[99] Terblanche (n62 above) 173.
[100] Terblanche (n62 above) 173.
[101] Terblanche (n62 above) 174.

crime being committed. Terblanche believes that the effectiveness of deterrence is dependent on the certainty of the imposition of punishment however, the uncertainty and tumultuousness of the entire judicial process should be enough to ensure deterrence.[102] Meyer states that it is not the uncertainty and unpleasantness alone that should deter the offender but an offender should be deterred by the moral conviction of the community.[103] Furthermore the effectiveness of deterrence is determined by the public's respect for the law and the administration thereof.[104] Deterrence is thus dependent on how the community as a whole respects the law and its procedures.

General deterrence is more likely to work on those individuals who are of sound and sane mind, who before acting calculates the benefits and disadvantages of his actions and the consequences thereof. However, the mind of a criminal is far more irrational and they are likely to make more impulsive decisions regardless of the consequences they may face.[105] Deterrence also fails where the offender, through a grandiose sense of self-worth, considers the violation of socially acceptable conduct his duty thus punishment of such an offender excessively may result in their martyrdom.[106] Punishment in this instance is more likely to force the criminal to create more effective methods of evasion from the law rather than to completely remove or prevent them from committing the crime.[107] Although there appears no evidence as to the effectiveness of deterrence, death (which is the common fate of all human beings) would by its finality strike a greater fear amongst offenders or potential offenders of serious and violent crimes.

Prevention, if determined broadly, can be construed to include both deterrence and rehabilitation. Sentencing provides a physical sense of prevention by incapacitating the offender from committing further crime.[108] Prevention was most effectively exercised when the death penalty was considered a viable punishment because incarceration only removes the offender from society for a limited period of time.[109] In

[102] Terblanche (n62 above) 173-174.
[103] Meyer (n61 above) 597.
[104] Meyer (n61 above) 597.
[105] Meyer (n61 above) 597 & Terblanche (n62 above) 176.
[106] Meyer (n61 above) 597.
[107] Meyer (n61 above) 597.
[108] Terblanche (n62 above) 177.
[109] Terblanche (n62 above) 177.

contrast the death penalty removes the offender from society and prevents them from committing crime eternally. Incapacitation of an offender is only effective where the offender is a danger to society which results in the imposition of longer incarceration periods.[110] However, the imposition of longer prison sentences can negatively impact both the offender and society.

Retribution can be defined as the instinctive reaction by society and the victim for the criminal act and the offender who committed the act.[111] Retribution is an instinct of self-preservation of a human being when they experience pain. This instinct was experienced by primitive man against another who injured him or his property.[112] In order for the balance to be restored between the victim and the offender, the offender must be made to suffer.[113] This pain was originally inflicted by the injured individual upon the offender however now this right has been given up in return for a promise by the state to punish the criminal.[114] Therefore, it can be said that at present the feelings of an individual, who is the victim of a crime, are subordinate to the interest of society. Terblanche believes that retribution has no singular meaning but can be attributed to multiple meanings including society's moral outrage or natural indignation at a crime.[115] This should not however be equated to vengeance. In the case of *R v Karg*, the court stated that retribution should be recognised as a substantial purpose of punishment and as such should be reflected in the sentence that is imposed.[116] Retribution should be considered during the 'seriousness of the crime' leg of the Zinn triad.[117] The sentence should recognise the attitude of the reasonable and rational members of society in order to prevent them from taking the law into their own hands as a result of the perceived failure by the judiciary to impose an appropriate sentence. The punishment that is imposed must reflect the seriousness and the blameworthiness of the conduct. [118] South African courts practice this through a rights balancing test which entails the balancing of different competing rights and interests of the offender and the victim.[119] Punishment should be swift and proportionate to the crime,

[110] Terblanche (n62 above) 178.
[111] Meyer (n61 above) 595.
[112] Meyer (n61 above) 595.
[113] Meyer (n61 above) 595.
[114] Meyer (n61 above) 595.
[115] Terblanche (n62 above) 181.
[116] *R v Karg* 1961 1 SA 231 (A) 236.
[117] Terblanche (n62 above) 182.
[118] Terblanche (n62 above) 182.
[119] Terblanche (n62 above) 182.

regardless of the mitigating factors that the offender presents to the court.[120] In this instance punishment must be imposed within the conformity of the commands of society and in accordance with the law to the benefit of society and reflecting its conviction.[121] Retribution requires that the punishment imposed by a court should reflect the moral conviction of the society toward the offender and their act.

Rehabilitation relates to the individual offender themselves and the reasons behind why they committed a crime. Rehabilitation refers to the improvement of the offender by persuading them to become a law-abiding citizen.[122] The reasons behind one committing a crime can be due to substance dependency,[123] which is relatively treatable compared to personality disorders, mental pathologies or paraphilias which often predisposes an offender to certain behaviours including those which are criminal. Persons who commit crime due to personality disorders, mental pathologies or paraphilias are more difficult to rehabilitate. It was stated by medical experts in the case of *S v De Klerk* that there are certain such persons who cannot be rehabilitated such as paedophiles. In terms of the definition provided in the DSM-V, paedophilic disorder can be defined as intense sexually arousing fantasies, urges or behaviours that involve sexual activity with a prepubescent child (a child younger than 13 years of age).[124] In order to be convicted of such a crime an individual with paedophilic disorder must have acted on these sexual urges with a child.[125] Thus the impact of such person not being able to be rehabilitated mean that they will perpetually be a danger to society and the only way to ensure that such a person does not pose a threat to society again is to either impose a sentence of incarceration that ensures they will never enter society again or death. Both Meyer and Terblanche acknowledge that miracles cannot be performed, not every person can be rehabilitated. Meyer states that rehabilitation requires a constructive program with adequate facilities and professional personnel who are geared toward the reconstruction and reorganising of criminal attitudes toward that of a law-abiding offender.[126] Terblanche states that rehabilitation is likely to only

[120] Meyer (n61 above) 596.
[121] Meyer (n61 above) 596.
[122] Terblanche (n62 above) 178.
[123] Terblanche (n62 above) 179.
[124] American Psychiatric Association *Diagnostic and statistical manual of mental disorders: DSM-5* (2013) 697.
[125] American Psychiatric Association (n124 above) 697-698.
[126] Meyer (n61 above) 597.

be successful for a small minority of offenders with the following conditions:[127] the criminal behaviour is caused by a well-known condition; treatment of such condition is well-known; the likelihood of success of the treatment must be relatively considerable and if rehabilitation is not affected on the offender, the danger of recidivism is high. It is well-established that imprisonment is ineffective when it comes to the rehabilitation of an offender as well as the fact that an offender who suffers from engrained psychological issues or an offender who lacks insight into their issues, there exists little to no hope for success of rehabilitation.[128] Above all else, rehabilitation is an expensive practice that requires a considerable amount of funds, professionals and facilities to deal with each type of offender.[129] During the 1970s, Robert Martinson, after reviewing programmes and evaluating the treatment methods of offenders, stated that "nothing works", in response to the finding that rehabilitation methods were largely ineffective.[130] As a result multiple criminal justice systems began to develop their sentencing structure away from rehabilitation as an aim of punishment.[131] The modern view of rehabilitation is that there are some programmes that can be effective in changing the behaviour of offenders however there are certain conditions that must be met in order for such programmes to be effective.[132] As a result these programmes are only effective for the right candidates of offenders, with the correct personnel, facilities, attitudes and funds which South Africa lacks. In the 2009 Budget Speech of the Deputy Minister of Correctional Services, it was stated that there are many challenges facing the Department of Correctional Services such as overcrowding, under-qualified and under-prepared officials who are acting as caretakers, a lack of psychologists; social workers and other specialist workers who could help rehabilitation and high levels of illiteracy among offenders.[133] It can be seen that South Africa lacks the necessary manpower, finances and space to ensure a well-rounded and successful rehabilitation program of offenders.

[127] Terblanche (n62 above) 181.
[128] Terblanche (n62 above) 179-180.
[129] Terblanche (n62 above) 180.
[130] P Muthaphuli & S Terblanche 'A Penological Perspective on Rehabilitation as a Sentencing Aim' (2017) 30 *Acta Criminologica: Southern African Journal of Criminology* 25.
[131] Muthaphuli & Terblanche (n130 above) 26.
[132] Muthaphuli & Terblanche (n130 above) 27.
[133] Muthaphuli & Terblanche (n130 above) 27.

2.3: SOUTH AFRICAN COURTS' APPROACH TO SENTENCING:

According to Terblanche,[134] the sentencing procedure is the most neglected phase of the South African criminal justice system and that all attention is paid to the finding of whether a person is guilty or not. Due to this neglect, the sentencing phase of a criminal trial usually only lasts a few minutes after a person is convicted which creates the impression that it is not of much importance to the courts. The judicial authority is vested in the courts which are required to be independent and subject only to the Constitution and the law, it must operate as such without fear, favour or prejudice.[135] In terms of section 276 of the Criminal Procedure Act, the court may impose any punishment that it deems fit with regards to the crime and the offender.[136] The relevant judicial officers must exercise discretion with regards to the choosing of the most appropriate sentence from a list of probabilities.[137] The term 'most appropriate sentence' does not mean that there exists one correct sentence that is applicable. The 'appropriateness' of a sentence is dependent on the presiding officer.[138] Terblanche believes that the presiding officer should rather be led by the severity of the crime rather than the 'appropriateness' of the sentence.[139] Such a yardstick would be more suitable and in line with the Triad of Zinn which is also applied during sentences.

In terms of section 274 of the CPA,[140] a court can receive any evidence which it deems fit in order to pass a fit and proper sentence. The evidence and factors which the court take into account are known as mitigating and aggravating circumstances and can either alleviate or exacerbate one's sentence. In the case of *S v Zinn* it was determined that the following triad of considerations are of paramount importance during sentencing:[141] the seriousness of the offender, the personal circumstances of the offender and the interests of society. The court stated that these factors should be in equilibrium with one another and no one should be disproportionately emphasised

[134] Terblanche (n62 above) 3.
[135] The Constitution at s165(1)-(2).
[136] Act 51 of 1997.
[137] Terblanche (n62 above) 151.
[138] Terblanche (n62 above) 151.
[139] Terblanche (n62 above) 151.
[140] Act 51 of 1997.
[141] *S v Zinn* 1969 2 SA 537 (A).

over another.[142] The court when sentencing is required to balance each of these factors in order to determine the most appropriate sentence.

The seriousness of the crime has the greatest impact on the nature and extent of the sentence to be imposed. In the case of *S v Dodo*, the court stated that the severity of the sentence should be proportional to the seriousness of the crime committed.[143] As such it can be said that the sentence should reflect the severity of the crime. The seriousness of the crime is determined based on the circumstances and the facts of the case which is being dealt with. When tailoring a sentence according to the seriousness of the offence, the point of departure should be those suggested in legislation as well as the view which society holds for that particular crime.[144] The modern approach to addressing the seriousness of a crime in sentencing involves a consideration of the degree of harmfulness which the offence has and the degree of blameworthiness which the offender holds.[145] When considering the seriousness of the crime, the court is required to consider the prevalence of the particular crime, the sentence which legislation prescribes for such a crime and society's moral view of the crime. All of these factors must be balanced proportionally to one another.

The second leg of the triad involves the personal circumstances of the offender. In essence this is a subjective test which requires the court to gain insight into the life and mind of the offender. The court will consider the blameworthiness of the offender, their personal life aspects (For example: marital status, children, job prospects, monetary factors and education level) and any underlying personality traits or motives which the offender may hold which led to them committing the crime.[146] The severity of the sentence should be informed by the extent to which the offender is blameworthy for the offence and whether such blameworthiness manifests as *culpa* or *dolus.*[147] The court's task in this instance is to determine accurately the entirety of the offender's life, attitudes and personality. The consideration of the offender is often overshadowed by the consideration for the seriousness of the crime especially where there exists aggravating circumstances surrounding the crime however, a multitude of appeals on

[142] A van Der Merwe 'Sentencing' (2022) 35 *South African Computer Journal* 269.
[143] *S v Dodo* 2001 1 SACR 594 (CC) at [26] and [37].
[144] Terblanche (n62 above) 165.
[145] Terblanche (n62 above) 164.
[146] Terblanche (n62 above) 167-168.
[147] Terblanche (n62 above) 167.

sentence have succeeded on the basis that the trial or appeal court did not give due regard to the personal circumstances of the offender.[148] The courts should give substantial regard in understanding the offender in order to understand their motive and blameworthiness for the crime in order to determine an appropriate sentence.

Under the second leg of the triad, other substantial and compelling circumstance are often considered. In terms of section 51(3)(a) of the Criminal Law Amendment Act, the court can take into consideration any substantial and compelling circumstances which could justify the imposition of a lesser sentence, the court must be satisfied by such circumstances in order for such lesser sentence to be imposed.[149] The meaning of the term "substantial and compelling circumstances" has not yet been determined by South African courts and as such much debate surrounds the term and it is open to a myriad of interpretations.[150] However, it is determined that in order to be considered 'substantial and compelling' the circumstance need not be exceptional nor should such circumstance be viewed in isolation but rather the cumulative weight of all the circumstances should be considered.[151] Some common factors that the court takes into consideration are youthfulness of the offender, previous convictions and victim impact statements however there are many more factors that have been accepted by the court when considering a sentence. Youthfulness of an offender usually results in the court imposing a more lenient sentence upon the offender because neither the court nor society can expect a child to act with same responsibility as an adult.[152] Children do not have the experience or perception of an adult and are prone to acting upon impulse and as such are led to committing crimes thoughtlessly.[153] Previous convictions of an offender play a significant role in considering the severity of a sentence because a person who continually offends expresses a disregard for the law and as such will progressively receive more severe sentences after each conviction.[154] Lastly, victim impact statements are written or oral statements given by the victim or persons known to the victim in which they give their personal account of the effect of

[148] Terblanche (n62 above) 166-167.
[149] Act 105 of 1997.
[150] S T Mdhluli 'What are the substantial and compelling circumstances in terms of s 51(3)(a) of the Criminal Law Amendment Act?' (2021) 7 *De Rebus* https://www.derebus.org.za/what-are-substantial-and-compelling-circumstances-in-terms-of-s-513a-of-the-criminal-law-amendment-act/ (Accessed on 20 April 2023).
[151] Mdhluli (n150 above).
[152] SS Terblanche 'The Sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2020) 415-416.
[153] SS Terblanche 'The Sentence' in Joubert (n152 above) 416.
[154] SS Terblanche 'The Sentence' in Joubert (n152 above) 416.

the crime on their life. These are particularly important for sexual offence and murder cases.[155] These, with multiple other factors, are considered by courts in order to determine an appropriate sentence. Each factor, to some extent, either mitigates or aggravates the severity of the sentence to be imposed.

The final leg of the triad involves a consideration of the interests of society. The interest of society could either increase or decrease a sentence.[156] Case law suggests that there are two distinct definitions of what the interests of society are.[157] The first refers to the moral indignation of society toward the offender and their expectations of what the sentence should be.[158] The second definition refers to the definition implied in *S v Zinn* which is that the sentence to be imposed should serve the public interest by meeting the purposes of punishment.[159] With regards to the former, the denunciation by society of the offender and the crime is usually considered under the first leg of the triad. Terblanche agrees with this and states courts often still revisit this component during sentencing.[160] Under this consideration, society's demands and expectations require of the courts to impose an appropriate sentence which is neither too lenient nor too severe.[161] The latter definition refers to serving the interests of society by passing a sentence which has the ability to do so. Society's interests are best served by a sentence which produces that greatest advantage or the least harm to society.[162] Any sentence that can prevent future crime by deterring the offender and potential offenders or be reforming the offender or by any other mean incapacitating the offender away from harming society is what the interest of society require.[163] Therefore the interests of society are served best when the courts impose a sentence which is likely to incapacitate the offender from committing crime for the longest period. The financial and social costs of a particular sentence also play a role in determining what sentence would best serve society. Keeping offenders imprisoned or in treatment centres for extended periods of time is a very expensive practice and as such the economic weight the government must bear to ensure this, weighs negatively on the

[155] Van Der Merwe (n142 above) 269.
[156] Terblanche (n62 above) 168.
[157] Terblanche (n62 above) 168.
[158] Terblanche (n62 above) 168.
[159] Terblanche (n62 above) 168.
[160] Terblanche (n62 above) 168.
[161] Terblanche (n62 above) 169.
[162] Terblanche (n62 above) 169.
[163] Terblanche (n62 above) 169.

interest of society.[164] However, South African courts have been reluctant to deal with the issue of finance and imprisonment.[165] The interests of society demands a sentence which is equally proportionate to the crime that was committed in order; to ensure that the overly severe sentence does not negatively impact the financial interests of society. A lenient sentence would harm the protection of society from the offender. In the case of *DPP, North Gauteng v Thabethe* it was stated that our courts are obliged to impose a sentence which reflects the "natural outrage and revulsion felt by the law-abiding members of society."[166] The court stated that failure to reflect such feelings in a sentence would result in a loss of public confidence in the criminal justice system.[167] In order to ensure the public continues to support the judicial system as a whole, their feelings toward the crime and the criminal should be reflected in the sentence imposed.

Terblanche states that crime as a whole requires the courts to take cognisance of and give due regard to the demands of the time within which the crime took place.[168] Sentencing should occur as a reaction to the crime as it takes place in the present and as such requires consistent and strict sentencing which aims to curb crime. This is what South Africa's present crime rates require.[169] Courts should be mindful of the greater surrounding circumstances in which the crime has taken place and as such impose a sentence which aims to reflect the demands of those circumstances.

2.4: CONCLUSION:

From the above it can be determined that punishment is a well-practiced and accepted custom among human beings and only differs on how punishment should be justified, administered and what its purposes should be. South African courts have determined that there are essentially four main purposes of punishment: deterrence, prevention, rehabilitation and retribution. When considering a sentence, a court should keep these purposes in mind in order to deliver what it considers an 'appropriate' sentence.

[164] Terblanche (n62 above) 170.
[165] Terblanche (n62 above) 170.
[166] *DPP, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) at [22].
[167] Thabethe (n 166 above).
[168] Terblanche (n62 above) 160.
[169] Terblanche (n62 above) 161.

Courts should be led by the triad of considerations which were stated in the case of *Zinn*: the interests of society, the seriousness of the crime and the personal circumstances of the offender. These three considerations include tensions and an equilibrium. The court is tasked with finding the equilibrium based on the particular facts of the case. It is however generally accepted that the yardstick for severity of a sentence should be the seriousness of the offence committed. Thus the punishment to be administered should be proportionate to the severity of the crime. The court should not consider a sentence within a vacuum and when considering an appropriate sentence the courts should take into account a myriad of factors which can either aggravate or mitigate an offender's sentence. There exists no closed list of factors the court considers, however, the law requires such factors to be substantial and compelling in order for the court to deviate from the prescribed minimum sentence of a specific crime. The court should also be cognisant of the demands of society at the time of the commission of the crime. The crime and its severity should be viewed within the present circumstances of society and the sentence should address this.

CHAPTER 3: THE DEATH PENALTY AS IT IS VIEWED INTERNATIONALLY WITH A COMPARATIVE STUDY BETWEEN ABOLITIONIST AND RETENTIONIST; DEVELOPED AND DEVELOPING COUNTRIES:

3.1: INTRODUCTION:

In this chapter there will be a discussion surrounding the international law framework on the use of the death penalty and the current treaties which are in place that refer to the death penalty. There shall also be a comparative study between the history, procedure and methods of the death sentence between the following countries: The United Kingdom, The United States of America, Zimbabwe and Saudi Arabia. In order to understand the impact of the imposition of the death penalty within a country and the comparison to those where it has been abolished the most recently published rate of murder will be given for each country. The crime of murder will be used because it is regarded, internationally, as one of the most serious crimes a person can commit and the definition of murder between the jurisdictions does not significantly differ from one another.

3.2: INTERNATIONAL LAW FRAMEWORK:

To date there exists no international law, covenant or treaty that prohibits or abolishes capital punishment. There does, however, exist an international trend toward abolitionism.[170] The most relevant international treaty relating to the death penalty is the International Covenant on Civil and Political Rights (ICCPR) that states at Article 6 that every person who has the right to life cannot be deprived arbitrarily therefrom; the death penalty can only be imposed for the most serious of crimes committed by adult and non-pregnant offenders; the death penalty cannot be retroactively applied and an offender who has received the death penalty must be capable of seeking pardon therefrom.[171] In essence Article 6 states that the death penalty is not an internationally prohibited sanction for criminal convictions but that it can only be applied where the offender has received a fair trial (a right of an offender contained in the Constitution of the Republic of South Africa, 1996)[172], the offender must be over

[170] 'The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty' International Bar Association (2008) pages 3-4.
[171] International Covenant on Civil and Political Rights, 16 December 1966.
[172] The Constitution of the Republic of South Africa, 1996 at section 35(3).

the age of 18 and must not be pregnant, the offence for which the offender is convicted is serious and the offender must be capable of appealing the sentence or seeking pardon for the sentence if he so wishes. It is submitted that with the present rate of violent and serious crime in South Africa the imposition of the death penalty may be beneficial provided the death penalty is implemented strictly within these parameters.

In 1989, the ICCPR presented the *Second Optional Protocol to the International Covenant on Civil and Political Rights.* This protocol was aimed at the abolition of the death penalty in its totality internationally.[173] It was adopted by the United Nations General Assembly in 1989.[174] Although lobbying for the abolition of the death penalty on a worldwide scale, it allows the party states to retain its use during times of war provided they made a reservation to such effect during ratification.[175] South Africa and the United Kingdom are both party states to the ICCPR and this second optional protocol.

Other protocols which are relevant to the administration or abolition of the death penalty internationally are the following: 1) The 2007 United Nations General Assembly resolution which expressed deep concern about the continued use of the death penalty and began to call upon all countries who still practiced this sanction to place a moratorium upon it;[176] 2) The United Nations Special Rapporteur on Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment which stated that the Convention against Torture is likely to classify the death penalty as a violation of this.[177] South African and international courts are yet to conclude what exactly 'cruel, inhumane and degrading' treatment or punishment is, this will be considered in Chapter 6.

3.3: SOUTH AFRICA:

3.3.1: HISTORY & PROCEDURE OF SENTENCE:

For the sake of brevity, an exposition on the history and procedure of implementing a sentence of death in South Africa will be excluded as this was focused on in Chapters

[173] United Nations General Assembly, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989, A/RES/44/128.
[174] n 173 above.
[175] n 173 above.
[176] United Nations General Assembly, 18 December 2007, A/RES/62/149.
[177] 'Statement by Mr. Juan E. Mendez Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' 16th Session of the Human Rights Council 7 March 2010.

1 and 2. However, in order for a comparison on the use of the death penalty and the rate of murder taking place in countries at present it can be stated that as of 2020 the murder rate in South Africa is 33.46 per 100 000 people.[178] With a population of 58, 8 million people,[179] this means that around 19 674 people are being murdered in South Africa a year. This rate of murders is exponentially high, the second highest in Africa and exceeded only by Lesotho.[180]

3.3.2: METHODS OF EXECUTION:

Throughout the 1900s, South Africa executed the death sentence through hangings and, less frequently, by firing squad. [181] There are very few accounts of how execution by firing squad was carried out in South Africa however the Death Penalty Information Centre describes how the method of firing squad takes place in the state of Utah:[182] The prisoner is either bound to a chair surrounded by sandbags or made to stand against a wall. A black hood is placed over the head of the prisoner while a doctor locates his heart and places a white cloth target over it. Five shooters are made to stand in an enclosure 20 feet (6 meters) away with rifles with single rounds, however one of the shooters has blank rounds. Each of the shooters aim their rifles at the prisoner and, when signalled, open fire at the prisoner. The prisoner will either die of blood loss caused by a gunshot wound to the heart or rupturing of the lungs. Where the shooters miss the heart of the prisoner, they are left to bleed out. The method of execution described here is particularly gruesome and cruel especially where the prisoner is left to bleed out following a failure to instantly lethally wound the prisoner.

3.4: THE UNITED KINGDOM:

3.4.1: HISTORY & PROCEDURE OF SENTENCE:

Capital punishment existed in the countries that would later come together to form the United Kingdom (UK). Hanging was specifically introduced into Britain by the Saxons

[178] United Nations Office on Drugs and Crime https://dataunodc.un.org/content/country-list (Accessed on 28 June 2023).
[179] World Bank https://data.worldbank.org/indicator/SP.POP.TOTL?end=2020&locations=ZA&start=1960 (Accessed on 29 June 2023).
[180] World Health Organization https://apps.who.int/violence-info/homicide/ (Accessed on 29 June 2023).
[181] The South African Institute of Race Relations Policy Paper 'Capital punishment in South Africa: was abolition the right decision? Is there a case for South Africa to reintroduce the death penalty' November 2016 at page 1
[182] Death Penalty Information Centre 'Methods of Execution: Description of each Method' https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method (Accessed 28 June 2023).

during the 6th century AD for serious criminal transgressions.[183] 'Court' for the Anglo-Saxons consisted of local courts (presided over by a Lord of that specific area), and a royal court (presided over by the King).[184] Guilt was determined by ordeal,[185] which were trials in which one would be required to do a physically gruelling task and if they could complete it, they were innocent and if not, they were guilty. An example of such an ordeal was to pick up a hot iron, if their hands healed within three days then they were innocent.[186] The determination of guilt was thus tumultuous and based on farcical physical traits that had no bearing on real guilt. The modern system of justice in the UK today was begun by Henry II who established a jury consisting of twelve knights whose main purpose was to settle disputes over land.[187] In the Tudor period, the infamous 'Bloody Code' was imposed. The 'Bloody Code' drastically increased the number of capital crimes and by the end of the century the total number of capital crimes would reach over 200.[188] During this time public executions were common with the intention of being used as a deterrent for others to observe the law.[189] Sentencing and executions were carried out promptly after conviction especially where an accused was convicted of murder.[190] The Tudor period, rightfully referred to as the bloody period, was named as such for the array of crimes for which one could receive capital punishment, the speediness and the undignified manner in which it was administered. At the beginning of the 1800s, much attention was being created around the death sentence in a plan to reform it.[191] In 1823, the Judgement of Death Act was passed in which mandatory death sentences were abolished.[192] This gave judges the discretion to reduce the mandatory death sentence for all capital crimes other than murder or treason.[193] From 1861, the number of crimes for which one could receive the death penalty reduced to only four, however essentially had the effect that murder would always be capitally punished.[194] This was the beginning of the abolition of the death

[183] JB Knowles *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why it Still Matters* (2015) 6.
[184] Knowles (n 183 above) 7.
[185] Knowles (n 183 above) 7.
[186] Knowles (n 183 above) 7.
[187] Knowles (n 183 above) 7.
[188] Knowles (n 183 above) 9.
[189] Knowles (n 183 above) 9.
[190] Knowles (n 183 above) 10.
[191] Knowles (n 183 above) 11.
[192] Knowles (n 183 above) 12.
[193] Knowles (n 183 above) 12.
[194] Knowles (n 183 above) 13.

penalty in the UK. It is important to note that the abolition was not the result of event but a culmination of historical progression, social and political shifts as a result of world war and controversial capital sentencing contrary to public opinion.

During the 20th century, death was an obligatory punishment for any person convicted of murder except where they were under the age of 18 or pregnant.[195] The judge had no discretion in this instance and could not impose a lesser sentence even where there existed mitigating factors. The rigidity of this law was only alleviated by the royal prerogative of mercy.[196] It is posited that the main shift in attitude toward the death penalty in the UK was as a result of World War II.[197] Due to the horrors unearthed in the concentration camps of Nazi Germany, more weight was given to the value of human life.

There were three controversial cases in the UK which had a large impact in the move towards abolition. The first case was that of Timothy Evans in 1950.[198] Evans was falsely accused and wrongfully convicted of the murder of his wife and daughter who had actually been murdered under the guise of an abortion by his neighbour, Christie.[199] When Evans was arrested, he confessed to the murders because of his illiteracy and shock.[200] Evans later retracted his confession and attempted to blame Christie for the murder but the court was not convinced.[201] Evans was convicted and executed in March 1950.[202] Three years later, the bones of three women, including the wife of Evans, were found under the floorboards of Christie's home.[203] Thus proving Evans right and depicting one of the first encounters with false confessions due to shock and illiteracy.

The second case was that of Derek Bentley from 1952 to 1953.[204] Bentley and his 16 year old accomplice (Craig), attempted to burgle a confectionary company. Both were armed with weapons provided by Craig.[205] Police were called on them while they were

[195] V Bailey 'The Shadow of the Gallows, The Death Penalty and the British Labour Government, 1945-51' (2000) 18 *Law and History Review* 305.
[196] Bailey (n 195 above) 306.
[197] Knowles (n 183 above) 20.
[198] Knowles (n 183 above) 32.
[199] Knowles (n 183 above) 33.
[200] Knowles (n 183 above) 33.
[201] Knowles (n 183 above) 33.
[202] Knowles (n 183 above) 33.
[203] Knowles (n 183 above) 33.
[204] Knowles (n 183 above) 39.
[205] Knowles (n 183 above) 40.

committing the act, the sergeant climbed the roof of the company to apprehend the suspects.[206] Bentley was apprehended and informed the officer of Craig's ammunition.[207] When more police arrived on the scene, Craig shot one in the head and both Bentley and Craig were charged with murder based on the concept of joint enterprise.[208] Bentley was classified as mentally-retarded but nonetheless fit to stand trial.[209] In 1952 both were found guilty and Bentley was sentenced to death and denied an appeal.[210] Bentley was also denied the royal prerogative of mercy.[211] There was public outrage and protests against the death sentence of Bentley, however he was hanged on the 23rd of January 1953.[212] It was later determined, in 1993, by the Home Secretary that Bentley should have been pardoned given his mental capacity.[213]

Lastly, the case of Ruth Ellis in 1955.[214] Ellis worked as a manager of a nightclub when she met the deceased, Blakley.[215] Blakley was a violent and abusive drunk who would often beat Ellis.[216] On 10 April 1955, Ellis took a taxi to a flat in Hampstead where she suspected Blakley to be after he did not return home.[217] However Blakley drove off to a pub and Ellis pursued him on foot.[218] Blakley emerged from the pub at 9:30pm and ignored Ellis.[219] While Blakely searched for his keys, Ellis took out a revolver and fired at Blakley.[220] Ellis pursued him around the car until he collapsed on the pavement where she proceeded to fire three more shots at him.[221] Ellis was charged with his murder and made a full confession.[222] Ellis was found guilty and sentenced to death. Ellis, although blatantly guilty of the murder, received an enormous amount of public sympathy because she was an attractive, young woman who also happened to be a single mother of two.[223] In contrast, Styllou Christofi received no public sympathy for

[206] Knowles (n 183 above) 40.
[207] Knowles (n 183 above) 40.
[208] Knowles (n 183 above) 40.
[209] Knowles (n 183 above) 41.
[210] Knowles (n 183 above) 41.
[211] Knowles (n 183 above) 41.
[212] Knowles (n 183 above) 42-43.
[213] Knowles (n 183 above) 45.
[214] Knowles (n 183 above) 46.
[215] Knowles (n 183 above) 46.
[216] Knowles (n 183 above) 46.
[217] Knowles (n 183 above) 47.
[218] Knowles (n 183 above) 47.
[219] Knowles (n 183 above) 47.
[220] Knowles (n 183 above) 47.
[221] Knowles (n 183 above) 47.
[222] Knowles (n 183 above) 47.
[223] Knowles (n 183 above) 48.

being executed for murdering her daughter-in-law because she was middle-aged and far less influential and attractive.[224] Ellis was hanged on the 13th of July 1955 and was the last woman to be executed in the UK.[225]

The last execution in the UK took place in 1964, the execution of Peter Allen.[226] The following year Parliament suspended the death penalty. However, the death penalty in the UK was only formally abolished in 1998 by the Human Rights Act of 1998 at Article 1 of Protocol 13.[227] In this same year, a barrister reported to the Cape Times, that the abolitionists were wrong to believe that the abolition of the death penalty would decrease the homicide rate.[228] Alternatively, it had actually caused the homicide rate to double.

As of 2018,[229] the murder rate in the UK is 1.12 per 100 000 persons which is low with a population of 66 million people.[230] The UK's low murder and crime rate despite their large population begs the question of whether effective policing and ensured justice could be more effective than severe punishment of serious crimes.

3.4.2: METHODS OF EXECUTION:

During the early history of the United Kingdom, the death sentence was carried out by way of various alternative methods: beheading; boiling in oil; burning alive; crucifixion; drowning; disembowelment; hanging; impalement; stoning and quartering.[231] Through time this list reduced to hangings being the main form of execution. [232] Hanging was originally publicly held and the offender had a ladder or cart removed from under him which resulted either in the instantaneous snapping of one's neck or (more commonly) slow and painful strangulation which regularly lead to the offender urinating or defecating themselves while the public watched on.[233] Such method of execution can

[224] Knowles (n 183 above) 48.
[225] Knowles (n 183 above) 47.
[226] The British Institute of Human Rights 'Abolition of the death penalty' 9 November 2022 https://www.bihr.org.uk/get-informed/what-rights-do-i-have/abolition-of-the-death-penalty (accessed on 2 March 2023).
[227] Human Rights Act of 1998.
[228] 'UK shows death penalty works' The Cape Times H Syre 2 January 1998.
[229] United Nations Office on Drugs and Crime https://dataunodc.un.org/content/country-list (Accessed on 28 June 2023).
[230] World Bank https://data.worldbank.org/indicator/SP.POP.TOTL?end=2018&locations=GB&start=1960 (Accessed on 29 June 2023).
[231] Knowles (n 183 above) 8.
[232] Knowles (n 183 above) 9.
[233] Knowles (n 183 above) 9.

be seen as degrading and in complete violation of the right to human dignity and as such is void of humanity. The Death Penalty Information Centre describes a modern method of hanging as is prescribed in the US Army Manual of 1969:[234] The prisoner is weighed the day prior to the execution and a rehearsal is conducted using sandbags of the same weight, to ensure that the correct drop length is measured to guarantee that the neck of the prisoner is immediately snapped or that the strangulation is swift. Immediately before the execution, the prisoner's hands and feet are secured; they are blindfolded and the noose is placed around their neck. The prisoner is made to stand on a trap-door and when such trap-door is opened, the bodyweight of the prisoner should cause a rapid fracture-dislocation of the neck however this is very rare. Hanging is a hazardous form of execution which can result in the prisoner experiencing seriously degrading and torturous effects to the human body prior to death.

3.5: THE UNITED STATES OF AMERICA:

3.5.1: HISTORY & PROCEDURE OF SENTENCE:

The United States of America (USA) received the death sentence as a form of punishment from the colonialists of the United Kingdom. The earliest recorded executions in the American colonies were from the 1600s.[235] Originally persons could receive the death sentence for many crimes including those trivial crimes such as pick-pocketing.[236] Gradually the number of capital offences reduced to such an extent that the focus would be placed on murder with intention, wilfulness and premeditation.[237] At the same time executions were moved from a public setting to behind closed doors within prisons. During the 1950s there began a rise in abolitionism amongst the public of America.[238] In 1972, the case of *Furman v Georgia* attempted to address the constitutionality of the death sentence as a punishment. [239] The Supreme Court declared the death sentence unconstitutional due to how it is arbitrarily applied within the American criminal justice system.[240] The court further stipulated the standards for

[234] Death Penalty Information Centre 'Methods of Execution: Description of each Method' https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method (Accessed 28 June 2023).
[235] Constitutional Rights Foundation 'A History of the Death Penalty in America' (2012) Found at: https://www.crf-usa.org/images/pdf/HistoryoftheDeathPenaltyinAmerica.pdf (Accessed on 28 June 2023)
[236] Constitutional Rights Foundation (n 235 above).
[237] Constitutional Rights Foundation (n 235 above).
[238] Constitutional Rights Foundation (n 235 above).
[239] *Furman v Georgia* 408 U.S. 238 (1972).
[240] *Furman v Georgia* 408 U.S. 238 (1972).

new prospective laws relating to the death penalty. [241] This resulted in the states formulating new laws, in order to comply with the standards, which resulted in two distinct groups of law forming. The first group formulated laws which defined the capital crimes and set up a weighting system in which a jury would be required to consider both the mitigating and aggravating circumstances in order to determine whether the death sentence would be justifiably applicable.[242] The second required an obligatory death sentence to be imposed for any person who was convicted of a capital crime.[243] In the case of *Gregg v Georgia*,[244] the court determined that the first group of laws were correct and as such is constitutional. As of October 2021, twenty-seven out of the fifty states continue to implement the death penalty as a sentence in the USA.[245]

As a result of the historical developments, specific procedures and requirements were determined in order for a case to be eligible for the death sentence. The death sentence is only applicable where: a defendant is charged with committing a capital offence; the defendant had a high degree of culpability with regards to the death of the victim and there exists one or more statutory aggravating factors present.[246] In order for the death sentence to be considered as a punishment in any case, the prosecutor must file a notice of intention to seek the death sentence containing the relevant aggravating circumstances they intend to justify it with.[247] The prosecution cannot proceed without the prior written authorisation of the Attorney-General. [248] Prior to entering the intention to seek the death sentence in a case, a review committee will consider the case and the prosecutor and defence attorney will have a chance to plead with the committee regarding their respective cases.[249] Defendants who face the death penalty are entitled to two legal representatives, one of which should be learned in capital cases.[250] Potential jurors are subject to the scrutiny of both the State and the

[241] *Furman v Georgia* 408 U.S. 238 (1972).
[242] Constitutional Rights Foundation (n 235 above).
[243] Constitutional Rights Foundation (n 235 above).
[244] *Gregg v Georgia* 428 U.S. 153 (1973).
[245] Independent 'America's Death Map: Which US states still have capital punishment and who uses it the most?'7 October 2021 https://www.independent.co.uk/news/world/americas/death-penalty-us-states-map-b1932960.html (Accessed on 28 June 2023).
[246] U.S. Department of Justice 'The Federal Death Penalty System' https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm#feddeathpenaltylaw (Accessed on 17 May 2023).
[247] U.S. Department of Justice (n 246 above).
[248] U.S. Department of Justice (n 246 above).
[249] U.S. Department of Justice (n 246 above).
[250] U.S. Department of Justice (n 246 above).

Defence in order to determine whether they have any specific bias.[251] Where a defendant is convicted of a capital offence, a special hearing follows in which the sentence of death is considered. In this hearing there are twelve jurors and the prosecutor and defence must present aggravating and mitigating factors to determine whether the death sentence is justified. [252] The state must prove beyond a reasonable doubt that there exists aggravating factors and the jury must agree with this unanimously.[253] If the jury does not agree unanimously, the sentence of death should not be imposed. [254] It can be observed from the above procedure that the seeking of a death sentence in the criminal justice system of the USA is thorough and has multiple relevant safeguards to protect against an arbitrary application thereof. As of 2020, the USA has a rate of murder of 6.52 per 100 000 people.[255]

3.5.2: METHODS OF EXECUTION:

States can implement any nationally recognised form of execution and as such choose a specific method within their own constitutions and legislation. The most common primary method of execution in the USA is lethal injection.[256] The ethics and humanity surrounding the use of the lethal injection is dependent on the drugs used, how it is administered, who administers it and whether the drug is successfully lethal. Originally lethal injection was administered by using prussic acid or cyanide but this was later declared unethical.[257] During the 1970s, three classes of drugs were classified for the use of lethal injection.[258] These are an anaesthetic (to ensure the person is unconscious); a paralysing agent (to stop breathing) and a toxic agent (to ensure death).[259] It can be observed that when the toxic agent is administered to person they are no longer conscious or breathing and as such would not be aware or suffering. A doctor that worked in the Potosi Correctional Centre in Missouri described the procedure as follows:[260] Prior to the execution, the doctor does a pre-execution

[251] U.S. Department of Justice (n 246 above).
[252] U.S. Department of Justice (n 246 above).
[253] U.S. Department of Justice (n 246 above).
[254] U.S. Department of Justice (n 246 above).
[255] United Nations Office on Drugs and Crime https://dataunodc.un.org/content/country-list (Accessed on 28 June 2023).
[256] https://www.ncsl.org/civil-and-criminal-justice/states-and-capital-punishment (Accessed on 24 June 2023)
[257] Amnesty International 'Lethal Injection: The Medical Technology of Execution' (1998) 4.
[258] Amnesty International (n 257 above) 4.
[259] Amnesty International (n 257 above) 4.
[260] Amnesty International (n 257 above) 9-10.

physical exam in which high dosages of anxiety medication are administered to the inmate to alleviate the anxiety surrounding the procedure. An inmate is then taken from their cell, made to lie down on a gurney and strapped to it. The arm which is to receive the injection is exposed. The nurse injects the intravenous line needle into the arm of the inmate and after a signal is alarmed, the button of the machine is pressed. First, it administers sodium pentothal (anaesthetic) and the inmate falls asleep. Secondly, Pavulon which paralyses the lungs and causes the inmate to enter a state of terminal respiration. Lastly, potassium chloride is administered, the dosage thereof being three times the lethal amount. Thereafter, the deceased inmate is collected by the mortician.

Some states make use of a secondary execution method. Secondary executions are used where the lethal injection is found to be unconstitutional or unavailable in that specific state. Secondary execution methods are electrocution, lethal gas, hanging, firing squad and nitrogen hypoxia. [261] As such these execution methods will be used where the lethal injection is not possible, but are however, less ethical and humane than the procedure implemented when administering the lethal injection.

3.6: ZIMBABWE:

3.6.1: HISTORY & PROCEDURE OF SENTENCE:

Zimbabwe's inception of the death penalty is much like that of the other African countries, through colonialism. Of the two indigenous groups in Zimbabwe, Shona and Ndebele, only the Ndebele society made use of the death penalty for the crime of murder.[262] The Constitution of Zimbabwe at section 48(2) states that the death penalty can be imposed for a person who is convicted of murder with aggravating circumstances provided they are not a woman; a man over the age of 70 or under the age of 21.[263] Section 47 of the Criminal Law Code as well as sections 337-342 of the Criminal Procedure and Evidence Act leave the discretion of the death penalty's imposition to the judges.[264] The death penalty in Zimbabwe can only be imposed where there exists aggravating circumstances however,[265] in terms of the *S v Chihota*

[261] https://www.ncsl.org/civil-and-criminal-justice/states-and-capital-punishment (Accessed on 28 June 2023).
[262] Veritas "Should Zimbabwe Abolish the Death Penalty" (2019) 3.
[263] Constitution of Zimbabwe, 2013.
[264] Criminal Law (Codification and Reform) Act Chapter 9:23; Criminal Procedure and Evidence Act Chapter 9:07.
[265] *S v Chihota* HH-234-15

case even where there exists aggravating circumstances, the judge has the discretion to impose the death penalty. It is the discretion of the judges and assessors of the High Court to determine what aggravating circumstances are, on a case by case basis.[266] Once it has been determined by the court that there exists aggravating circumstances, the court must also consider the possible mitigating circumstances and determine whether the death penalty in this instance is justified. [267] Feltoe and Others suggest that after convicting a murderer the following sequence should be followed by the court in order to determine whether the death penalty is justified:[268] 1) decide whether there are any aggravating circumstances as they are specified in the Criminal Law Code; 2) decide whether there are any other circumstances that should be considered as aggravating; 3) are any of these aggravating circumstances serious enough to justify the imposition of the death penalty; 4) if it is justified then the mitigating circumstances should be balanced against this aggravating circumstance and lastly, 5) if there exists no aggravating circumstances then the court must impose a lesser sentence.

Although the courts in Zimbabwe have been handing down sentences of death, no one has been executed in Zimbabwe since 2005 because they no longer have anyone to act as their hangman.[269] The courts in Zimbabwe have also become more lenient when it comes to the defences raised in cases of premeditated murder as well as murder with aggravating circumstances. This can be viewed from a recent case in which a young man brutally murdered his elderly father and aunt as a result of putative witchcraft. The presiding judge, Mungwari, was uncertain about whether the defence of witchcraft could act as a mitigating factor where the murders are particularly cruel.[270] In this case the accused, who had recently experienced misfortune, brutally attacked his father (87) with an axe and his aunt (89) with the handle of a garden hoe until they were dead.[271] The accused believed that they had been involved with witchcraft and as a result he was experiencing misfortunes. The accused claimed the defence of

[266] *S v Kufakwemba & Ors* 2016 ZLR 627 (H) at 635H.
[267] G. Feltoe, J Reid-Rowland & B Crozier 'Sentencing Murderers Part 1:Introduction' Zimbabwe Legal Information Institute.
[268] n 267 above.
[269] Veritas (n262 above) 4.
[270] C Rickard 'Court says accused in double witchcraft murder a 'suitable candidate' for death penalty, imposes lesser sentence because of sincere beliefs' 17 January 2023 https://africanlii.org/article/20230117/court-says-accused-double-witchcraft-murder-%E2%80%98suitable-candidate%E2%80%99-death-penalty (Accessed on 2 March 2023).
[271] Rickard (n 270 above).

provocation, however this defence requires one to act on impulse as a result of an altercation without premeditation or a 'cooling-off' period.[272] The judge held that from the evidence presented by the chief of the village, the accused was well-known for accusing persons of dabbling in witchcraft, especially his father and aunt, as such the accused did not act when provoked but held onto this vengeful thought and retaliated when he saw the opportunity.[273] The accused's actions display premeditation and direct intention to commit the act. Moreover, the accused appeared apathetic when committing the murders as he smashed his aunt's head in and walked away leaving her in a pool of her own blood.[274] The cruelty displayed during these actions is incomprehensible and as such it is understandable why the judge believed this person would be a good candidate for the death sentence. The judge was convinced that the accused displayed the demeanour of a remorseful killer rather than that of a mentally disturbed person.[275] However, due to the fact that the accused believed whole-heartedly that his relatives were involved in witchcraft, they could balance this against the savagery of the murders to give him a more lenient sentence than death.[276] Considering the barbarism involved in these murders, the remorseless demeanour of the accused, the leniency of the judge and the moratorium on the use of the death penalty as a sentence since 2005, this research posits that Zimbabwe is likely to be heading towards the abolition of the death penalty.

Lastly,[277] the UNODC recorded a murder rate of 7.48 per 100 000 persons in 2012 which is high considering the population of only 13 million people.[278] Can it truly be said that an abolition of the death penalty or a moratorium on the use of the death penalty is better than the imposition thereof?

[272] Rickard (n 270 above).
[273] Rickard (n 270 above).
[274] Rickard (n 270 above).
[275] Rickard (n 270 above).
[276] Rickard (n 270 above).
[277] United Nations Office on Drugs and Crime https://dataunodc.un.org/content/country-list (Accessed on 28 June 2023).
[278] Zimbabwe Population Census 2012 found at: https://www.zimstat.co.zw/wp-content/uploads/publications/Population/population/census-2012-national-report.pdf (Accessed on 28 June 2023).

3.6.2: METHODS OF EXECUTION:

In terms of the Criminal Procedure and Evidence Act of Zimbabwe,[279] a person convicted of a capital offence must be "hanged by the neck until he is dead." As such the method of execution is hanging.

3.7: SAUDI ARABIA:

3.7.1: HISTORY & PROCEDURE OF SENTENCE:

Saudi Arabia is governed by Islamic Law which is often viewed as violent and violative of human rights and as such is often referred to as one of the most deadly and eager executioners in the world. Islamic criminal law is premised upon the ideals of justice and due process.[280] Saudi Arabia is often viewed, in the international sphere, as brutal, harsh and inhumane in its treatment of offenders as well as the punishments which they implement.[281] The main sources of Islamic Law are the *Qur'an* and the *Sunnah*. The principles enclosed within the *Qur'an* are those of compassion, fairness and justice amongst all living peoples.[282] The *Qur'an* dictates that everyone has the right to life unless a court of law demands a killing, however the use of the death penalty is met with strict evidentiary rules and burdens as well as providing for other adequate punishments to impose.[283] There are three types of crimes described within the *Qur'an*. It is agreed upon amongst academics that the death penalty is more commonly used for *Hudud* crimes and *Qisas* crimes.[284]

Hudud crimes are crimes which threaten Islam and the implementation of a punishment as harsh as death is used to deter those who may be a threat to an Islamic society.[285] Judges have an obligation to impose the punishments prescribed for these crimes and have no discretion with regards to the extent or severity thereof.[286] The four *Hudud* crimes that one can receive the death penalty for are:[287] adultery; apostasy (to change ones religion); armed robbery and rebellion. *Qisas* crimes are offences that

[279] Criminal Procedure and Evidence Act Chapter 9:07 at section 339(2).
[280] E Peiffer 'The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria' (2005) 11 *William & Mary Journal of Women and the Law* 507.
[281] Peiffer (n 280 above) 507.
[282] Peiffer (n 280 above) 508.
[283] Peiffer (n 280 above) 508.
[284] Peiffer (n 280 above) 508.
[285] Peiffer (n 280 above) 508.
[286] Peiffer (n 280 above) 508.
[287] Peiffer (n 280 above) 509.

are the subject of personal claims such as the crimes of murder or bodily injury.[288] It is generally accepted that the death penalty for these crimes is only appropriate where a killing is unjust and intentional, as such a relative of the victim can bring a charge against the perpetrator and the death sentence can be imposed.[289] Lastly, *Ta'zir* crimes which are optional punishments imposed by a judge for contraventions not covered by the above two categories.[290] The punishments are determined by what the society and the injured party believe to be right and just.[291] The injured party will request the judge to impose a specific punishment.[292] Alternative to the crimes prescribed by the *Qur'an*, there are crimes prescribed by royal decree or government edicts. These are usually referred to as *fatwas* and can allow for delineation from the general rules regarding the punishments prescribed for specific crimes.[293]

Peiffer describes the procedures with regards to how a criminal case is carried out in Saudi Arabian courts. Saudi Arabian law provides evidentiary safeguards to ensure severely harsh punishments are not imposed.[294] Saudi law, much like the law of criminal procedure in South Africa, provides that an accused is innocent until proven guilty beyond a reasonable doubt.[295] If there exists doubt, either in the form of ambiguity surrounding the correct imposition of the law or questions over the act itself, punishment cannot be imposed.[296] A sentence of death can also be imposed upon women and children in terms of Islamic Law.[297] Judges of the court generally have a wide discretion in terms of imposition of punishment but are subject to those punishments which may be fixed for certain crimes and the review of an executive branch.[298] Despite what is described here, a fair and just form of trial, what is known at present about Saudi Arabian court and its determination of guilt is very minimal. All

[288] Peiffer (n 280 above) 516.
[289] Peiffer (n 280 above) 517.
[290] Peiffer (n 280 above) 518.
[291] Peiffer (n 280 above) 518.
[292] Peiffer (n 280 above) 518.
[293] Peiffer (n 280 above) 522.
[294] Peiffer (n 280 above) 523.
[295] Peiffer (n 280 above) 524.
[296] Peiffer (n 280 above) 524.
[297] Reprieve 'Saudi Arabia and the death penalty: Everything you need to know about the rise in executions under Mohammed bin Salman' 31 January 2023 https://reprieve.org/uk/2023/01/31/saudi-arabia-and-the-death-penalty-everything-you-need-to-know-about-the-rise-in-executions-under-mohammed-bin-salman/#:~:text=Does%20Saudi%20Arabia%20have%20the,least%20147%20people%20were%20executed.
(Accessed on 2 March 2023).
[298] Peiffer (n 280 above) 525.

trials, legal decisions, sentencings and executions are shrouded in secrecy and the publication of legal documents is forbidden.[299] However it was determined that in 2022, 147 people were executed and 81 of those people were executed on the same day. [300] Due to the secrecy surrounding the Saudi Arabian legal system and executions, it is impossible to determine the true impact and use of the death penalty within the state. It is worth mentioning however, that Saudi Arabia is known to have one of the lowest murder rates in the world with only just over 0,80 per 100 000 people per year in 2019. [301] Thus it can be shown with a strict implementation of the death penalty for serious crimes, the death penalty can act as a deterrent for such crimes.

3.7.2: METHODS OF EXECUTION:

According to Amnesty International, the most common method of execution in Saudi Arabia is beheading with a sword or by firing squad. [302] Executions are implemented publically in the centre of a town or city.[303] Beheading, throughout the centuries, was a punishment reserved for the noble as it was considered one of the least inhumane and most merciful ways in which to execute a person due to the instantaneousness of death.[304] Beheading is however considered to be one of the most gruesome forms of execution. Often screens must be implemented to prevent an array of spraying blood.[305] There is also a possibility of the head not instantly severing from the body where the blade is not sharp enough or the force thereof is not enough to ensure that one is decapitated. This often occurred during the period in which France implemented the use of the guillotine which often jammed while cutting through the neck resulting in the executioner having to hack the prisoners' heads off by hand.[306] In the late 1900s arguments also arose surrounding the possibility of post-decapitation consciousness. In 1975, a study on rats found that their brains continued to produce electromagnetic impulses, consistent with the levels experienced during pain and discomfort, after

[299] Reprieve (n 297 above).
[300] Reprieve (n 297 above).
[301] United Nations Office on Drugs and Crime https://dataunodc.un.org/content/country-list (Accessed on 28 June 2023).
[302]Amnesty International https://www.amnesty.org/en/latest/news/2015/08/the-death-penalty-in-saudi-arabia-facts-and-figures/ (Accessed on 24 June 2023)
[303] Amnesty International (n 302 above).
[304] MD. Turner "The Most Gentle of Lethal Methods": The Question of Retained Consciousness Following Decapitation (2023) 15 *Cureus* 1-2.
[305] Turner (n 304 above) 2.
[306] Turner (n 304 above) 2.

decapitation.[307] As such there is a wide belief that human beings also experience a moment of post-decapitation consciousness before dying and for that moment may actually be capable of experiencing pain and discomfort from the decapitation itself. To make a human being experience this discomfort or to have the agonising pain of a botched beheading would be both cruel and torturous.

3.8: CONCLUSION:

The conclusion to be drawn from the above comparison is that each country has its own political, historical and legal development with the death sentence. As such the effect of the death penalty within each country is vastly different dependent on these factors. It must be pointed out that it is effectively implemented in both the United States of America and Saudi Arabia, allowing both countries to have low murder rates compared to the sizes of their populations. Zimbabwe has a relatively high murder rate considering the small size of their population which leads one to question whether the moratorium upon the execution of the death penalty is effective in maintaining its society. The United Kingdom has a very low murder rate considering the size of its population however, this research posits that this is a result of good policing; an effective justice system and ensured punishment. As already mentioned, South Africa has an exponentially high murder rate and as such, with mixed international results, this research questions whether the death penalty could be the answer to our present rates of violent crime and as such have a deterrent effect.

The methods of execution commonly used within each country is explained above so as best to understand the procedure of execution. Although there exists a myriad of methods in which to administer death, this research suggests that the most humane method thereof is through lethal injection. Through the three-phase process of injections, the prisoner does not experience any pain or discomfort other than that experienced prior to the administration of the injection. Conversely, the methods of beheading, firing squad and hanging have a high potential of being botched in that if they are not executed with exact precision, the prisoner is left to die in pain and discomfort. In conclusion this research suggests that lethal injection would be the most humane and merciful way in which to execute the death penalty.

[307] Turner (n 304 above) 2.

CHAPTER 4: THE ARBITRARINESS OF THE DEATH PENALTY AS A SENTENCE IN THE CURRENT SOUTH AFRICAN DEMOGRAPHIC:

4.1: INTRODUCTION:

This chapter aims to provide arguments for why the death penalty cannot be considered arbitrary. It will set out the human rights which the judges in *Makwanyane* stated that the death penalty would infringe. When considering the arbitrariness of the death penalty there are certain key arguments made by abolitionists, these being: a maldistribution of punishment based on judicial bias; that the death penalty does not achieve the purposes of punishment and that the death penalty often results in innocent persons being sentenced to death. This chapter aims to prove to its readers that the death penalty is not arbitrary by, attacking these arguments.

4.2: THE CONSTITUTION AND RIGHTS FRAMEWORK:

4.2.1: LIFE:

"**11.** Everyone has the right to life."[308]

The most integral and basic of human rights. It is a common belief amongst academics that the right to life is not derived from the law but from the fact the one is a human being.[309] As such it is considered as the prerequisite to all other rights within the Constitution. There is a lack of consensus as to the exact content and understanding of what the right to life entails.[310] Serfontein, however, is of the belief that a broad interpretation should be ascribed by courts to the right to life to include both the existence and enjoyment of one's life.[311] The right to life is one in which the state allows an individual to exist and enjoy such existence within the bounds of the law. In the realisation of the right to life, all human beings must be guaranteed a life worth

[308] The Constitution of the Republic of South Africa, 1996.
[309] E Serfontein 'The Mammoth Task of Realising the Right to Life: A South African Perspective' in Intech *Quality of Life and Quality of Working Life* (2017) 166.
[310] M Pieterse 'Chapter 39: Life' in Constitutional Law of South Africa found at: http://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chapt39.pdf (Accessed on 3 August 2023).
[311] Serfontein (n 309 above) 167.

living where they can enjoy the benefits thereof equally and without diminishing their dignity.[312] The right to life and the right to human dignity are naturally intertwined.

The realisation of the right to life is one with many challenges. It is challenging to realise the right to life because there are a myriad of encounters that can inhibit the human experience from being one that is enjoyable and can limit the right to life.[313] The right to life in its simplest form is a right which stands to protect human life from extinction and to kill a human being is an infringement of this right.[314] However there exists certain circumstances within open and democratic societies that accept and justify the use of the death penalty as a form of punishment. Furthermore, the right to life (although important and inherent to humanity) should not limit the state's ability to defend itself and its citizens against certain dangerous persons.

4.2.2: DIGNITY:

> "**10.** Everyone has inherent dignity and the right to have their dignity respected and protected."[315]

I would like to begin the discussion on the right to dignity with a quote by Steven Pinker: "The problem is that 'dignity' is a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it."[316]

The concept of dignity is complex. Dignity consists of both a legal and a moral interpretation.[317] Essentially it is the essence of what it means to be human and by virtue of this it must be legally recognised.[318] The problem understanding and defining what dignity is, is that its legitimacy is not derived from an embodiment of law. [319] The right to dignity has been ascribed the greatest of moral standards and requirements (particularly in the law and courts of South Africa), however it is so abstract and subjective that it cannot be defined or tested for in a way that is certain and unified.

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[312] Serfontein (n 309 above) 168.
[313] Serfontein (n 309 above) 169.
[314] Pieterse (n 310 above).
[315] The Constitution of the Republic of South Africa, 1996.
[316] S Pinker "The Stupidity of Dignity' 12 May 2008 found at: http://richarddawkins.net/print.php?id=2567 (Accessed on 9 August 2023).
[317] R Steinmann 'The Core Meaning of Human Dignity' (2016) 19 *PER/PELJ* 3.
[318] Steinmann (n 317 above) 3.
[319] Steinmann (n 317 above) 4.

The modern concept of dignity is different from the Roman concept of *dignitas* from which the word dignity was derived. *Dignitas*, in Roman law, refers to someone's societal standing.[320] Kant, with the other writers of the Enlightenment period, argued that dignity is a combination of one's ability to reason, make decisions and to obey or be bound to one's rightful moral duties.[321] Kant's understanding of dignity relates to one's autonomy as a human being.

Steinmann argues that dignity is derived from three elements. Firstly, a logical element which, similarly to the ideas of Kant, relates to the uniqueness of one's being which must be preserved.[322] Secondly, the treatment that one receives from other persons in society which can either be in line with dignity or outside the bounds thereof. [323] Lastly, the state is required to fulfil the minimum requirements for the realisation of one's existence.[324] If the reader is wondering why this sounds so familiar it is because these are the same elements ascribed to the right to life and the realization thereof.

Courts have not fared well in the defining of the right to dignity. Courts often differ in what they consider to be undignified treatment.[325] They have also not formulated the basic elements upon which to test human dignity or a test upon which it can be determined that one's dignity has been infringed. [326] As far as courts are concerned, there is an infringement of dignity when the conduct directly offends or degrades the self-worth of an individual.[327] The determination of one's self-worth and when this has been offended is subjective to the person who it is aimed at. Resultantly, the determination of what dignity is and when it is infringed is problematic from a legal standpoint.

This research argues that dignity is difficult to define because it is subjective to each person's idea of what dignity is. It also argues that dignity is so closely related to the right to life that it should not be considered as a separate right therefrom.

[320] Steinmann (n 317 above) 5.
[321] Steinmann (n 317 above) 5.
[322] Steinmann (n 317 above) 7.
[323] Steinmann (n 317 above) 7.
[324] Steinmann (n 317 above) 7.
[325] Steinmann (n 317 above) 8.
[326] Steinmann (n 317 above) 8.
[327] Steinmann (n 317 above) 20.

Abolitionists and Chaskalson J argue that the death penalty is degrading to human dignity. They specifically argue that the death penalty is more degrading than life imprisonment. Ernest van den Haag states that no punishment can be more degrading than another.[328] He argues that the persons who make these statements, define the death penalty as degrading rather than explaining why.[329] As such the abolitionists are not defining human dignity and how the death penalty degrades it, they are merely using it as an argument which cannot be justified.

4.2.3: A FAIR TRIAL:

"**35(3).** Every accused person has the right to a fair trial…"[330]

Section 35 is the right in which the Constitution guarantees the rights of the accused, detained and arrested persons in the South African criminal justice system. Of specific importance for this research is subsection (3). Subsection (3) relates to the rights of accused persons and the rights that they have during a trial.[331] This contains a myriad of rights which includes the right to: be sufficiently informed of the charge; get time and facilities to prepare a defence; have a public trial conducted by an ordinary court; have the trial begin and conclude in a timeous manner; be present when tried; to choose who they are represented by and be informed of the right to legal representation; to have legal representation assigned by the state and at the state's expense; to be presumed innocent until proven otherwise; remain silent and not to give self-incriminating evidence; not to testify; adduce and challenge evidence at the trial; have the procedure conducted in a language which they understand; not be convicted of a crime which was not considered as such in terms of the law at the time of the commission of the crime; benefit from the least severe punishment where the prescribed punishment has changed from the time of commission to the time of sentencing and to appeal or review the decision in a higher court.[332] These are the procedural guidelines required to be fulfilled to ensure a fair trial of any accused person.

[328] E van den Haag 'Death penalty Once More' (1985) 18 *Davis Law Review* 4 969.
[329] Van den Haag (n 328 above) 969.
[330] The Constitution of the Republic of South Africa, 1996.
[331] T Van der Walt 'The Right to a Fair Criminal Trial: A South African Perspective' (2010) 7 *US-China Law Review* 29 33.
[332] The Constitution of the Republic of South Africa, 1996 ss35(3)(a)-(o).

Van der Walt argues that in order to ensure that the right to a fair trial is realised, the following five things need to be done: 1) All courts need to ensure substantive fairness; 2) All courts must give definition to what a fair trial means; 3) The myriad of rights within the right to a fair trial must all be realised; 4) The fairness of the trial must be ensured for the accused but the concept of a fair trial is not limited to this and 5) it is the duty of judicial officers to respect, promote, protect and realise the fundamental rights of the accused.[333] It is apparent that this right is comprehensive, all-encompassing and integrative of the entire procedure that an accused is required to go through during a criminal trial.

The purpose of this right as stated in the case of *S v Dzukuda & Others* is "…for justice to be done and also seen to be done…"[334] As such the interpretation of what is considered to be a fair trial, must be determined on a case by case basis.

4.2.4: LIMITATION:

> "**36(1).** The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> **(a)** the nature of the right;
>
> **(b)** the importance of the purpose of the limitation;
>
> **(c)** the nature and extent of the limitation;
>
> **(d)** the relation between the limitation and its purpose; and
>
> **(e)** less restrictive means to achieve the purpose.
>
> **(2)** Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."[335]

This right is an expression of the fundamental truth that all rights are not absolute but can and must be restricted where there are important societal interests at stake.[336]

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[333] Van der Walt (n 331 above) 36.
[334] *S v Dzukuda & Others; S v Tshilo* 2000 2 SACR 443 (CC) at [455].
[335] The Constitution of the Republic of South Africa, 1996.
[336] J de Ville 'Interpretation of General Limitation Clause in the Chapter of Fundamental Rights' (1994) *SA Public Law* 289.

However, as always in law, there are exceptions to the general rule. There are certain rights within the Bill of Rights that can either not be limited at all or can only be limited to a certain extent.[337] The right to dignity and the right to life are rights that cannot be limited. This research argues that in the face of grave prison overcrowding (as will be discussed in Chapter 6) and an exponential rise in violent crime in South Africa, this should be considered as an exceptional circumstance in which we should allow for these rights of a convicted violent offender to be limited for the sake of societal safety.

An integral part of the limitations clause is the proportionality test. When interpreting and analysing the limitations clauses, the proportionality test is concerned with the limitation of the right and the purpose thereof.[338] Proportionality should not be understood as a compromise which will allow for the opposing parties to benefit equally, but rather a balancing of rights or interests.[339] Balancing requires a weighing process in which conflicting rights are put against one another and the court will determine who will win. [340] The balancing of rights is not a new concept, it is often used in legal disputes both public and private.

The limitation of a right cannot be without a purpose which justifies it. The term 'proportionality' refers to the relation of one thing to another.[341] This means that neither of the two can exist in isolation. The proposed limitation must have a justifiable purpose.[342]

What this research would like its readers to consider is a proportionality test in which the right to life of a convicted murderer is weighted against the right to life of all of their victims and those they may kill if released on parole. Alternatively consider the right to life of a convicted rapist who, in the likelihood of South Africa's criminal justice system, is released on parole and the rights to bodily integrity and safety of their past victims, their possible victims and the greater populous. In these instances the right to life of one person who has violated the rights of a myriad of others cannot be seen to have

[337] The Constitution of the Republic of South Africa, 1996 pg17.
[338] IM Rautenbach 'Proportionality and the Limitation Clauses of the South African Bill of Rights' (2014) 12 *PER/PELJ* 6 2231.
[339] Rautenbach (n 338 above) 2231.
[340] Rautenbach (n 338 above) 2231.
[341] Rautenbach (n 338 above) 2232.
[342] Rautenbach (n 338 above) 2232.

more value than the rights of those who they have violated, will violate and those of society.

4.3: MALDISTRIBUTION OF PUNISHMENT:

Maldistribution in terms of the implementation of the death penalty is usually argued on the basis of racial discrimination; capriciousness and with regards to justice and equality.

Maldistribution in terms of the South African context usually relates to the unfair application of the law between races. Sociologists and abolitionist writers alike, argue that the death penalty is applied on a racially discriminatory basis. Ellison Kahn,[343] a prolific writer on the abolition of the death penalty in South Africa, argued that the use of the death penalty in South Africa was expected to face allegations of racial unfairness due to the unfair application by judges during the 1970s. Abolitionists argue that the death penalty is more commonly applied to black and poor offenders.[344] To continue to make statements such as this, is to deny the possibility that our judicial system has not moved past the systematic racism of the Apartheid regime.

In paradox to Kahn, in the 1980s, Van Niekerk observed through a survey, that the majority of the black population in South Africa were in favour of the retention of the death penalty and the abolitionist movement was led by 20-30% of the white population.[345] Today, the black population makes up the majority of the ethnicity pool in South Africa. As of 2022 the statistics of South Africa's population according to ethnic groups is as follows: 49.1 million Black; 5.34 million Coloured; 4.63 million White and 1.56 million Asian and Indian.[346] Therefore no matter what percentage of the general populous is estimated to commit crime, it is more likely that these persons will come from the majority ethnic group than not.

Let us consider this in a less controversially charged manner. A jar is filled with 100 jelly beans and the colour division thereof is 80 yellow; 9 green; 8 red and 3 blue. If

[343] E Kahn 'The Death Penalty in South Africa' (1970) 33 *THRHR* 108 119.
[344] Van den Haag (n 328 above) 960.
[345] B Van Niekerk 'The Death Penalty in South Africa: Some Psychiatric and Psychological Elements.' (1977) 278.
[346] N Cowling 'Total Population of SA 2022 by Ethnic Groups' Statistica 20 September 2023 found at https://www.statista.com/statistics/1116076/total-population-of-south-africa-by-population-group/ (Accessed on 30 September 2023).

someone is asked to place their hand in the jar and take out a jelly bean; at any given moment there is an 80% chance that they will pull out a yellow jelly bean. This is not a discriminatory maldistribution of jelly beans. As such when this happens in a population it is not a discriminatory maldistribution of the application of the law.

Van den Haag observed that discrimination actually occurred based on the victims of the offenders. In the USA, judges were more likely to sentence a black offender to death where his victim was white.[347] While he agrees that this is unjustified, he also acknowledges that this cannot amount to discrimination of the victimizer.[348] Although the actions of judges in this instance is wrong, the discrimination of the accused cannot stand in this instance and as such is insufficient to support an abolition of the death penalty.

Ernest van den Haag, stated that when observing and considering the death penalty as a punishment it is often intermingled with objections of discrimination in distribution.[349] In this instance, 'maldistribution' refers to the situation where two accused, who have committed the same or similar crimes, receive different punishments. Maldistribution, will always occur when applying any type of punishment to criminals.[350] Conviction and punishment for each offender is determined by different courts filled with different judges, prosecutors, and defence attorneys and as such this will always produce different results.

The death penalty, like most severe penalties, will only be applied where during the sentencing phase of a trial the aggravating circumstances outweigh the mitigating circumstances of the accused. Abolitionists, such as Professor Charles Black, argue that the death penalty is applied capriciously by judges without any consideration therefore.[351] However, van den Haag argues that all forms of penalization are applied by chance.[352] Capriciousness has determined the existence of the accused committing a crime; being caught and brought to trial. Not all criminals are caught and some are executed while others are not.[353] The capriciousness of sentencing the death penalty

[347] Van den Haag (n 328 above) 961.
[348] Van den Haag (n 328 above) 961.
[349] E van den Haag 'The Ultimate Punishment: A Defense' (1986) 99 *Harvard Law Review* 7 1662.
[350] Van den Haag (n 349 above) 1662.
[351] Van den Haag (n 328 above) 960.
[352] Van den Haag (n 328 above) 960
[353] Van den Haag (n 328 above) 961.

can be related to the instance of implementing the life sentences. Consider two murderers are brought before a court, both have been found guilty of one count of murder however the one murderer receives 15 years and the other 25 years. This is accepted as fair in our present legal system.

It is of importance to note that equality and justice are not synonyms of one another. Often in South African courts these two terms are intertwined with one another. Equality requires all things, especially the law, to be applied to all persons equally.[354] Justice requires every possible person guilty of a crime to be apprehended, convicted and sentenced or more simply that all persons deserving of punishment must receive it.[355] In this consideration it can be concluded that, justice is morally more important than equality and our fight for equality should not surpass the need for justice. Instead justice should be applied equally to all. [356] This means that even "unequal" justice can still continue to be considered justice because persons who bear guilt are being punished.[357] This is an argument for substantive equality and justice. South Africa strives for the implementation of substantive equality and as such the argument of equating justice should be irrelevant in as every accused is judged and sentenced on a case by case basis.

Guilt is by its very nature personal and is applied to the individuals who bear it and not their ethnic or economic group.[358] When the possibility of the death penalty arises in sentencing the only question that should be asked is whether the guilty person deserves execution. The consideration of whether another person who has committed the same crime has received the same punishment is irrelevant to the guilt that the accused in question bears. Some form of inequality, no matter how trivial, will always occur in any system and is unavoidable.[359] Just because one person has not been sentenced to execution, this does not make any other man undeserving of such punishment.

The chance involved in committing crime, being apprehended, the composition of the court on the days of conviction and sentencing have no impact on the inherent guilt of

[354] Van den Haag (n 328 above) 962
[355] Van den Haag (n 349 above) 1663.
[356] Van den Haag (n 349 above) 1663.
[357] Van den Haag (n 328 above) 962
[358] Van den Haag (n 349 above) 1663.
[359] Van den Haag (n 349 above) 1663.

the accused. Maldistribution of punishment to those who deserve punishment is not unjust unless such punishment is applied to an innocent person.

4.4: 'SENTENCING THE INNOCENT MAN TO THE GALLOWS' – MISCARRIAGES OF JUSTICE:

When considering the distribution of the death penalty as a punishment, the argument repetitively raised by abolitionists is that the courts are likely to sentence an undeserving innocent person to death. However, the likelihood of an innocent person being sentenced is almost zero as will be displayed in the following paragraph.

Between the years of 1900 and 1985, 7000 persons were executed in the United States of America and only 25 persons thereafter were found to be innocent.[360] This calculates into a 0.36% miscarriage of justice which is relatively negligible considering that 99.64% of the persons executed were correctly convicted. Furthermore, even Kahn agrees that it is a very rare possibility that someone who is sentenced to death is likely to later be found innocent, especially considering the onus on the state to prove beyond a reasonable doubt that the accused is guilty of the crime.[361] These statements were made in a time when the collection of evidence as well as technological advancements in forensics were not even remotely close to the present standards. Therefore, this research argues that the probability of wrongful conviction and as such sentencing of an innocent person would be less than the 0.36% stated above.

The truth is all human activities are open to error regardless of the extremity of precautions taken. This can be observed in even the simplest human activities and yet we continue to practice such activities. For example, on the 24th of December 2022, a truck carrying liquefied petroleum gas (LPG) became wedged under a bridge which resulted in an impact upon the tank carrying such gas.[362] As a result of this impact the tank ending up exploding, killing a total of 40 innocent bystanders. [363] However, we still continue to transport LPG via truck through South African cities. It is apparent in

[360] Van den Haag (n 349 above) 1664.
[361] SS Terblanche *A Guide to Sentencing in South Africa* (2016) 123.
[362] IOL 'Boksburg Tanker explosion claims three more lives' Siyabonga Sithole 5 January 2023 https://www.iol.co.za/the-star/news/boksburg-tanker-explosion-claims-three-more-lives-310dd35b-0794-4e6a-bdb9-4e3d24018364 (accessed on 1 March 2023).
[363] IOL 'Boksburg gas explosion death toll has risen to 40' Sisipho Bhuta 12 January 2023 https://www.iol.co.za/news/south-africa/gauteng/boksburg-gas-explosion-death-toll-has-risen-to-40-lesufi-d3c2cc9a-59e6-4bc8-9e47-e49d2b02ee77 (accessed on 1 March 2023).

this instance that the benefits of truck transportation of LPG outweigh the negligible and possible harm it can cause in such an instance.

The injustice experienced by an innocent person who is sentenced to punishment should not lie in the punishment itself but in the maldistribution of guilt. Van den Haag argues that it is the trial in this instance which is unjust and not the punishment imposed.[364] However,[365] he also states that where a person's life is at stake; the trial is more likely to be fair and well examined because the nature of the death penalty is that it is irrevocable.[366] It takes very little thought to imagine the pressure upon both defence, prosecution and presiding officers when conducting a trial where someone's life is at the stake of such conclusion. Such pressure will ensure that all parties involved are competent in their part therein.

It is worth noting at this point that all punishments are irrevocable.[367] Where life imprisonment is wrongfully imposed, the years spent incarcerated cannot be 'returned' to the accused nor can the trauma of being placed in incarceration be erased from one's mind. Usually the only form of solace in these instances is a sum of money which, while a vindicated person would be grateful for, is not enough to repair the harm caused.

No matter the punishment imposed, there is always a possibility of an innocent person receiving such punishment.[368] However, such punishments continue to be imposed. The fact of the matter is that, miscarriages of justice will occur regardless of the precautions, activities or punishments but the amount thereof is so negligible in comparison to the broader population that it cannot be used as a deterministic factor when considering the viability of the death penalty. The death of innocent persons as a result of unjust judicial actions cannot be more unjust than the death of an innocent person by murder.

[364] E van den Haag 'On Deterrence and the Death Penalty' (1969) 60 *The Journal of Criminal Law, Criminology and Police Science* 2 142.
[365] Van den Haag (n 364 above) 142.
[366] Van den Haag (n 364 above) 142.
[367] Van den Haag (n 364 above) 142.
[368] Van den Haag (n 364 above) 142.

4.5: THE DEATH PENALTY AS A USEFUL DETERRENT FORM OF PUNISHMENT:

It is often stated that the death penalty has not proven to be an effective form of punishment with regards to the purposes thereof. It has also been argued that there exists no conclusive evidence which proves the deterrent effect of the death penalty. For example, Zeno (the Greek philosopher) could not prove that motion is scientifically possible, (his formulae actually proved that it is impossible) however nobody countered that motion should cease because it cannot be scientifically proven.[369] As such the death penalty should not be abolished just because there does not exist the statistical evidence to prove its practicality.[370]

According to the natural human experience the greater the threatened punishment or injury; the more likely we are to deter from the actions that could result in it. Contrary to the arguments of Terblanche, deterrence is not determined on a rationalistic calculation by the offender prior to committing a crime. Van den Haag argues that the deterrent effect of any punishment is dependent on the regularity of human behaviour toward danger and the possibility of a human being to control certain internal impulses as a result of certain external experiences.[371] Human beings, unless inflicted upon by mental illness or substance abuse, generally are avoidant of dangerous experience where there exists the possibility of risk or injury. Legislators often construct legislation in such a manner that it deliberately causes the reader to want to refrain from acting outside of the social norms.[372] Civilians will refrain from offences because they feel an obligation to behave in accordance with the law to avoid the imposition of punishment. Therefore human subjects need not be rational but only responsive to the law.[373] However, where the threatened punishment is so light, responsiveness is unlikely to translate positively into human behaviour because there will no longer exist a sense of obligation to comply with the law.[374] As such where the society sees a serious offender receive a sentence that is not severe enough; the society will no longer trust in the criminal justice system or the law that governs it.

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[369] E Van den Haag & JP Conrad excerpts from 'The Death Penalty: A Debate' (1983) in Plenum Press *Rights and Responsibilities* 355.
[370] Van den Haag & Conrad (n 369 above) 355.
[371] Van den Haag (n 364 above) 142.
[372] Van den Haag (n 364 above) 143.
[373] Van den Haag (n 364 above) 143.
[374] Van den Haag (n 364 above) 143.

It is often argued that the death penalty does not deter criminals any more than other punishments. It is important to note in this instance that no other punishment within the criminal justice system can be compared to the death penalty because it is unique in nature. Life imprisonment still guarantees one life, no matter the unpleasant conditions that may be attached to it but the death penalty threatens to take life altogether.[375] As such one will be deterred more by what one fears most and in most instances this is death.

The imposition of the death penalty and of its deterrent effect is more easily understood in the following terms: if we are to ignore the possible deterrent effects of the death penalty, we are left with a choice between the life of a convicted murderer and the likelihood of survival of future victims of new murderers and the survival of his possible new victims.[376] In this instance, even abolitionists can agree that the lives of the greater population is more important than the life of a convicted murderer. Where there exists even a possibility that a certain punishment could even prevent one person from becoming a murderer and citizens becoming victims, such punishment should be imposed.

In the criminal justice system, the number of punishments that can be handed down are limited however the number; extent and seriousness of crimes is not. As such the law can only impose death as a severe enough sentence and should not be made to threaten any less.[377] The state is responsible for the safety of its citizens and as such requires a way in which to protect its citizens especially those who are innocent. Thus it should be allowed to use the controls it requires to do so. It is apparent from the table in Chapter 1 of the prevalence of serious crimes in South Africa that imprisonment is not fulfilling this responsibility.

Contrary to the arguments of abolitionists, between the years of 1933 and 1965, Isaac Elrich (previously an abolitionist) estimated that where an additional execution is made per year, at least eight fewer murders were committed.[378] Where there is even a possibility of saving one innocent person per year by using the death penalty; then it should be considered as effective.

[375] Van den Haag & Conrad (n 369 above) 355.
[376] Van den Haag & Conrad (n 369 above) 356.
[377] Van den Haag & Conrad (n 369 above) 358.
[378] Van den Haag (n 331 above) 965.

4.6: CONCLUSION:

From the above exposition it is apparent that the death penalty can no longer be considered an arbitrary punishment with regards to maldistribution, injustice, innocence and deterrence.

While it is obvious that all forms of bias cannot be eradicated in the court room, the argument of 'racial maldistribution' of the death penalty can no longer be used. Within the South African demographic there exists a vast array of persons of which the majority race is black. As such no matter the percentage of the population that commits crime, there will always exist a higher likelihood of the person who commits crime to come from the majority race.

All court cases, trial and sentencing, is based on the capriciousness of the court room. Every case is presided over by a different combination of judges; defence attorneys and prosecutors, as such the conclusion of each case is different. In a country that strives toward substantive equality, which requires the law to be applied equally to each person according to their circumstances, the alternative sentences handed down upon two different offenders who have committed the same crime should not come as a surprise. This argument can thus not apply in the South African context with regards to the death penalty.

All human activity has the potential to claim the lives of innocent persons and the death penalty is no different. However, in a court where the burden of proof is to prove that the accused is guilty beyond a reasonable doubt; the possibility of wrongful convictions is exceedingly rare. The advancement of evidence collection and investigative technique has also played a role in reducing the likelihood of an innocent person being sentenced wrongfully. Therefore, the possibility of this taking place is almost negligible, it can no longer be an argument against the viability of the death penalty.

Furthermore, where an accused's life is at stake during a trial; the parties involved therein are more likely to participate in a manner that ensures all possibilities of doubt are examined.

While abolitionists continue to argue that the death penalty has no significant deterrent effect, this research argues that even where there is even the slightest possibility of one murderer being deterred and as such his victims' lives being saved, the death

penalty should be imposed. The lives of innocent persons should always outweigh the lives of convicted persons. To deny the legalised state execution of convicted serious offenders, is to deny a state's citizens their rights to life, dignity, safety and security and to consider these rights as subordinate to those of an offender. As such we are perpetuating this idea that a legalised, reasonable and justified execution is unjust and an illegal, unreasonable and unjustified murder of an innocent person is fair enough for the state to keep an offender alive.

CHAPTER 5: THE ROLE OF PUBLIC OPINION WITH REGARDS TO SENTENCING:

5.1: INTRODUCTION:

This chapter will deal with public opinion and its impact or the possible impact it could have on sentencing. The theories of public opinion being included during sentencing will be observed briefly. The writings of academics with regards to the role of public opinion during sentencing will be discussed. Lastly, how public opinion has been used previously in judgments of the South African courts will be examined.

This chapter aims to prove that we can no longer deny the public opinion towards harsher sentencing of offenders and where such public opinion calls for the death penalty this should be considered.

5.2: THEORIES OF PUBLIC OPINION IN SENTENCING:

There exists conflicting thoughts as to what extent public opinion should be considered during the sentencing phase of a criminal trial. Tumwine suggests that there are three schools of thought with regards to the role of public opinion during court cases specifically with regards to the sentencing of an offender.[379] These will be discussed briefly.

5.2.1: 'PUBLIC OPINION HAS NO ROLE':

This theory states that public opinion has no role; place or weight which allows it to be applied in a court. The court is required to play a judicial role which reviews and restrains the decisions, beliefs and ideas of the public toward an offender or offences. Judge Murray Gleeson believes that judges are the decision-makers above everyone else and although they are required to be in-touch with public opinion and aware of community values, they should not seek the approval of the public or to influence it.[380] Essentially Gleeson argues that if the decisions of judges were to fall consistently with the public opinion or bend to its will, the independence and impartiality of the judiciary would be undermined.

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[379] W Tumwine 'The Role of Public Opinion in Court Decisions on the Legality of the Death Penalty: A Look at Uganda and South Africa' published LLM dissertation, University of Pretoria, 2006 13-14.

[380] M Gleeson 'Out of Touch or Out of Reach?' (2004) Judicial Conference of Australia Colloquium Adelaide.

As previously stated, Karl Klare posited that South Africa's judiciary is continuously striving toward transformative adjudication in accordance with the aims of 'transformative constitutionalism'. Transformative adjudication requires judges not to not follow a normative objective way of judgment but rather for judges to take into consideration the values of the community, the Constitution and a recognition of one's own bias to make an informed value judgment.[381] Thus it can be concluded that this theory is not in line with the South African goals for adjudication.

Furthermore, this research argues that such a school of thought creates an idea of judges as persons 'holier than thou' who are the only persons whose opinions and ideas are worthy of being taken into consideration during sentencing.

5.2.2: 'PUBLIC OPINION HAS SOMEWHAT OF A ROLE':

This can also be considered as the non-deterministic theory.[382] This is a balanced school of thought which requires judges to take into consideration public opinion during trial and sentencing but not for it to be a deterministic factor upon which to make a judgment or sentence. It is apparent that a form of proportionality test must take place during this consideration. Such proportionality test is between the rights and beliefs of the general public and the rights of the offender.

This school of thought poses challenges to the sentencing process because who exactly should form part of such a public opinion which the court should take into consideration? Kanyeihamba argues that the judges should take into consideration the opinions of the "responsible members of society".[383] In *Makwanyane* the court stated similar such sentiments and followed a role of public opinion similar to this school of thought.[384]

While this is often viewed as the favourable form in which to incorporate public opinion, this research argues that it does not fare well in practice. Courts often disregard the opinion of the public under the guise of arguments that the courts are not 'political'

[381] Klare (n 18 above) 157.
[382] Tumwine (n 379 above) 14.
[383] G Kanyeihamba 'Reflections of a Judge on the Death Penalty in Uganda' (2004) 2 *The Uganda Living Law Journal* 1 96.
[384] Makwanyane (n 7 above) [300] - [303].

actors and that taking into consideration such opinions would disregard their expertise as the gate-keepers of Constitutional adjudication.[385]

5.2.3: 'PUBLIC OPINION HAS AN IMPORTANT ROLE':

This school of thought posits that public opinion should have a direct impact on sentencing and this should be reflected in the decisions made by the court. In *Mbushuu*,[386] a Tanzanian case, the court stated that where the death penalty is questioned as to whether it is necessary and reasonable to protect the rest of society's right to life, the decision of the society shall determine the outcome.

In a country that prides itself on its democracy, should the public not have a say in how its criminals are treated as much as it has a say in who they shall be governed by? At the very least their opinion on how contentious, violent and serious crimes should be dealt with should be considered.

5.3: THE ROLE OF PUBLIC OPINION IN SENTENCING:

In this section the role of public opinion during sentencing as expressed in academic writing will be discussed. Essentially two questions arise in the discussion and these are: to what extent should public opinion inform a court's decision with regards to sentencing? And what is the influence of public opinion on sentencing? This section will attempt to answer these questions.

James Midgley in 1974,[387] stated that the role of public opinion in the formation of social policies has not been adequately assessed. It is often believed that public opinion has no role whatsoever in the creation of criminal justice policy.[388] Midgley also posited that the white population was at the time against abolition and refused to see the hangman become redundant.[389] However, as determined by Van Niekerk's research the contrary was found to be true.[390]

[385] Makwanyane (n 7 above) generally [300]-[304].
[386] *Mbushuu and Another v Republic of Tanzania* 1995 TLR 97 (CA) [117].
[387] J Midgley 'Public Opinion and the Death Penalty in South Africa' *The British Journal of Criminology* 14 1974 4 at 345.
[388] Midgley (n 387 above).
[389] Midgley (n 387above).
[390] Van Niekerk (n 328 above).

In practice courts are encouraged, during the sentencing phase, to take public opinion into consideration when considering the seriousness of the crime committed. The courts consider more specifically how society views that particular crime.[391]

It is important for the public opinion to be reflected in sentencing because if it does not, the public will begin to lose confidence in the criminal justice system. However it is difficult for the public to have confidence in a system that they are unfamiliar with how the procedure works or what is considered during such procedure.[392] The information received by the public about cases is often from the media through which they are manipulated to believe a specific perspective which usually emphasises the leniency or problematic aspects of the decision.[393] However, the effect of negative opinions of the community about the criminal justice system is widespread.

Sentencing, by its nature and what is known, is perceived by the public as straightforward compared to the consideration of guilt.[394] However, it is apparent that because the public receives their information from the media, this can often be misinformed.[395] The media often chooses the specific cases that they want to make the public aware of.[396] Resultantly, the public only becomes versed in such a case and will begin to harbour antagonism toward the criminal and empathy toward the victim.[397] This research suggests that if the public were given a more active role within the criminal justice process, they are more likely to understand the cases, become versed with more than just what the media feeds them and will actively play a role in a legitimate system which they trust.

The appropriateness of a sentence, by the public, is very quickly determined and held with much confidence. It is also common for the public to want to implore sentencing options which the judicial officers do not readily have at their disposal (such as the death penalty). Where the public perceives a sentence as lenient, the legitimacy of the criminal justice system is undermined.[398] This is problematic, particularly in South

[391] Terblanche (n62 above) at 165.
[392] JV Roberts & MM Plesničar 'Sentencing, Legitimacy, and Public Opinion' in Trust and Legitimacy in Criminal Justice: European Perspectives Publisher: Springer Eds: G Meško &J Tankebe (2015) 35.
[393] Roberts & Plesničar (n 392 above) 35.
[394] Roberts & Plesničar (n 392 above) 35.
[395] Roberts & Plesničar (n 392 above) 37.
[396] Roberts & Plesničar (n 392 above) 37.
[397] Roberts & Plesničar (n 392 above) 37.
[398] Roberts & Plesničar (n 392 above) 35.

Africa, because the public is likely to resort to vigilante justice or to taking the law into their own hands because they believe that the criminal justice system is not doing so accurately.

In order to promote legitimate belief by the public in the criminal justice system, academics argue that the best response is to involve the public during sentencing. Roberts and Plesničar disagree in this instance. They argue rather that the public is likely to lose legitimate belief in a system that they have a stake in or if they are completely excluded.[399] Therefore they argue for a balanced system of involvement by the public during sentencing.

However, several scholars believe that the democratisation of punishment can bring greater legitimacy within it. Robinson argues that sentencing practices should align with the public opinion because it will enhance the legitimacy of the criminal justice system.[400] The understanding in this instance is that people are more likely to obey a law that they perceive to be responsive to public concerns. Similarly, Dzur argues for the involvement of lay persons during sentencing with the view of enhancing public belief and trust in the system.[401] This research is of the opinion that the public opinion should be given a more interactive role within sentencing.

For a more South African perspective of academics, the work of Dr Ntlama will be observed. Ntlama begins by stating that the rates of gender based violence are reaching alarming rates in South Africa.[402] This is problematic because it is negatively impacting the rights based approach and the society constructed upon this basis because a lack of belief in sentencing lead to a lack of belief in the law. A public perception of leniency by the judiciary upon offenders, raises doubt as to their independence.[403]

In *Makwanyane,* the Constitutional Court made it abundantly clear that the role of public opinion with regards to sentencing was limited. Ntlama argues that this statement was made during a time of infancy of our constitutional dispensation and allowing the public to have an impact upon sentencing would have undermined the

[399] Roberts & Plesničar (n 392 above) 40.
[400] Roberts & Plesničar (n 392 above) 40.
[401] Roberts & Plesničar (n 392 above) 40.
[402] N Ntlama 'Gender-based Violence Ignites the Re-Emergence of Public Opinion on the Exercise of Judicial Authority' (2020) *De Jure Law Journal* 287.
[403] Ntlama (n 402 above) 296.

development of a rights framework.[404] However, a call by the public for stiffer sentencing means that the public has turned its focus from constitutional adjudication to one which would solve present problems.[405] The courts are tasked with judicial review because of the limited say the public has in the determination of sentencing,[406] and as such they are required to represent the public in the decision that they make.

Ntlama suggests that a societal change is required but the legislature is required therein to be responsive and alert to the problems of society at present and to create the law to solve such problems.[407] He further states that the continuously escalating rates of gender based violence undermines the rights based system because it means that certain persons are hindered from exercising their rights freely.[408] Because of this the public places unnecessary pressure on the judiciary for a problem they cannot solve without overstepping the separations of power. How can the courts be tasked with the elimination of violent and serious crime when there exists no way to ensure the elimination of the persons who perpetuate such behaviour?

5.4: THE SOUTH AFRICAN PUBLIC OPINION ON THE DEATH PENALTY:

Just a year after the decision in *Makwanyane*, the death penalty was debated in the public due to the increasing crime rate which occurred between the years of 1995 and 1997.[409] The opinions of both the general public and the opinions of judges will be expressed in this instance.

The findings made by Parekh and de la Rey in their public opinion study was that the death penalty should be applied more frequently,[410] and that it should applied for murder, rape and terrorism.[411] At the time of the study these were the most prevalent crimes within South Africa and as such, this research believes that if the public was asked about which crimes should be considered for the death penalty in the present,

[404] Ntlama (n 402 above) 297.
[405] Ntlama (n 402 above) 297.
[406] Ntlama (n 402 above) 298.
[407] Ntlama (n 402 above) 303.
[408] Ntlama (n 402 above) 305.
[409] A Parekh and C de la Rey 'Public attitudes towards the death penalty in South Africa: a life or death decision' (1996) 9 *Acta Criminologica* 1 108.
[410] Parekh & de la Rey (n 409 above) at 110.
[411] Parekh & de la Rey (n 409 above) at 112.

they are likely to express a similar sentiment toward the most prevalent crimes now (murder, rape, kidnapping and robbery with aggravating circumstances).

As will be discussed in Chapter 6, Moses Sithole was convicted of 40 counts of rape and 38 counts of murder. Judge David Curlewis was the presiding officer and sentenced him to 2410 years imprisonment,[412] however this was not enough for Judge Curlewis and he was very open about this. He denounced the Constitutional Court for abolishing the death penalty without the consideration for what impact this would have on the crime rate.[413] However his sentiments were met with mixed remarks by other legal experts.

Zehir Omar (an attorney in Springs, Gauteng) stated he was disturbed by the statements of Judge Curlewis as well as the editor of the Sunday Times for allowing such statements to be published in a country which was entering into a democracy.[414] Omar then went on to state that Curlewis's statements were wrong in law and that to want Parliament to re-enact death penalty law contrary to the Constitutional Court findings was disturbing. [415] Furthermore, he stated that the remarks made by Judge Curlewis as well as the remarks by another judge made towards the Truth and Reconciliation Commission made him "apprehensive about the loyalty of some of the judges have towards our current political order."[416]

It does not take a legal professional to find fault in the words of Omar. Firstly, a country which strives for democracy should also be striving for transparency within the executive, legislative and judicial arenas and as such any statements made in these spheres should be published for the greater society to determine their own conclusions therefrom. Secondly, Omar contradicts himself in that he stated that Curlewis's remarks were wrong in law and then proceeds to state that the judges do not have loyalty to the political order. The judiciary is required to be independent and impartial specifically from politics. [417] This research is of the opinion that Omar's statements were anomalous and made without a true understanding of Judge Curlewis's words.

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[412] Mail & Guardian 'EDITORIAL: Judge Curlewis is his own worst enemy' (1997) Found at: https://mg.co.za/article/1997-12-12-editorial-judge-curlewis-is-his-own/
[413] Mail & Guardian (n 412 above).
[414] Z Omar 'Judge Curlewis chided for death penalty remarks' A letter by Zehir Omar in February 1998.
[415] Omar (n 414 above).
[416] Omar (n 414 above).
[417] The Constitution of the Republic of South Africa, 1996 at s165(2).

In response to Omar, Louis Schoeman (an attorney in Port Elizabeth – as it was then – Eastern Cape) wrote a letter. Schoeman begins by praising Curlewis for making such statement in his high profile which would make people sit up and take notice of the concerns that the rest of society have.[418] Schoeman chides the people who make comments about 'human rights' while surviving "on the thin air of academia…" in the "secure environs of a plush suburb in Johannesburg…" away from the dangerous streets where the most violent crimes are commonplace.[419] Schoeman argues here that it is very easy for persons who are not experiencing the crime to dictate how offenders should be dealt with and the persons who are experiencing crime must sit back and accept this.

Furthermore Schoeman states that the death penalty must be brought back for the commission of crimes (or attempts thereof) which demonstrates to the rational thinking persons of society that these offenders have no place in the society we are trying to create.[420] While this may sound contradictory, Schoeman is stating that there exists exceptions within the law where certain considerations must be put aside in order for the survival of the greater society.[421] The rights of persons who commit violent, brutal and serious crimes must be circumscribed less the government and legislature of our society want to continue to express to the people who put them into power that their rights are less concerning. The truth is no person when faced with their survival turns to their assailant and makes utterances of human rights, the respect thereof and the need to rehabilitate such person.[422] Any person faced with such situation will fight tooth and nail for their survival, why should a state be prevented from doing this in the fight for the rights of their law abiding civilians?

Schoeman continues that the vast majority of society agrees with the remarks of Curlewis and as such the death penalty should be re-introduced.[423] Schoeman makes a direct statement to Justice Omar in which he states that the argument of reintroducing the death penalty would emasculate the settlement made in Kempton Park is nonsensical. He goes on to state that there is no point of having such noble

[418] Schoeman (n 1 above).
[419] Schoeman (n 1 above).
[420] Schoeman (n 1 above).
[421] Schoeman (n 1 above).
[422] Schoeman (n 1 above).
[423] Schoeman (n 1 above).

sounding rights to life, dignity, freedom and property if such rights cannot be enjoyed freely and easily by the law abiding citizens of society.[424] This research agrees with Schoeman in that it is unfair that during sentencing we must glorify the rights of persons who disobey the law and contravene the rights of others so violently. It is farcical to continue to state that this is 'civilised' when the persons who contravene the law are clearly not.

Lastly, Schoeman rightfully sets Omar straight on what a judge's true purpose is by stating that a judge is required to interpret the law and apply it to the best of his abilities without fear, favour or prejudice and as such should have no allegiance to the political order of the time.[425] A judge is the closest any person from the higher profiles will ever get to understanding the public and what it suffers, as such judges should not be making decisions in favour of any political order but rather to the favour of the people it is there to serve.

The death penalty debate still continues in more recent years among the South African society. In 2018, the Inkatha Freedom Party (IFP) called upon the government to open up national debate surrounding the reinstitution of the death penalty after the discovery of the murder of a 9 year old school boy.[426] The leader of the IFP, Narend Singh, said that many members of the South African public who were calling out for the death penalty and as such he wrote to the Constitutional Review Committee to bring about a national debate surrounding this.[427] In his radio interview, Singh went on to explain how even though the death penalty has been declared unconstitutional, it is a living document that can be amended and changed and should be in order to reflect the opinions and views of the people for whom it serves.[428] This research is inclined to agree with the views of Singh in that the Constitution can be amended and should be if the views expressed therein no longer represent the opinion of the people of South Africa. This research is of the belief that national public debate must be had surrounding the issue in order to determine where exactly the public stands on the

[424] Schoeman (n 1 above).
[425] Schoeman (n 1 above).
[426] N Koza 'The party has reacted to the discovery of a murdered school boy in Phoenix, Durban.' (2018) found at https://www.702.co.za/articles/317987/ifp-says-sa-should-be-talking-about-the-death-penalty (accessed on 10 September 2023).
[427] Koza (n 426 above).
[428] Koza (n 426 above).

death penalty. In a country that strives for democracy and has a long history with referendums, why is the death penalty not being tabled in such a manner to the public?

In 2019,[429] and 2020,[430] there was a rise in murder, rape and gender-based violence predominantly of women and children which lead the public to question whether the death penalty could be viable option to solve such problem.

In 2019 there was a public outcry to reinstitute the death penalty after the rape and murder of a 19-year-old student, Uyinene Mrwetyana by a post-office worker.[431] It was determined that at least one woman is murdered every three hours in South Africa every day.[432] All communities of different races, ethnicities, ages, religions and economic statuses came together to demand accountability from the relevant government departments even demanding the death penalty to combat the rise in violent crime.[433]

In 2020 a member of the public, Waseela Jardine, begged the Review Committee of the National Assembly and National Council of Provinces to reinstate the death penalty.[434] The submission posited that a return of capital punishment would reduce the high rates of senseless murders and rapes and protect the alarming amount of women and children who are the victims thereof.[435] The public expressed a feeling of unfairness that murderers and rapists were allowed to "relax in jail" and subsequently secure parole for good behaviour.[436] A member of the ANC, Maseko-Jele, stated that the reinstitution of the death penalty has always been the opinion of the South African population but that under ANC rule and policies this was not considered a solution to the crime problem in South Africa.[437] Upon reflection of these statements by the members of the ANC, it becomes implied that our government would rather keep our

[429] J Weiner Oxford Human Rights Hub 'Bringing Back the Death Penalty in South Africa for Crimes Against Women' 1 October 2019 https://ohrh.law.ox.ac.uk/bringing-back-the-death-penalty-in-south-africa-for-crimes-against-women/ (Accessed on 21 November 2022).
[430] E Naidu 'South Africans debate the death penalty amid rise in gender-based violence.' Sunday Independent 20 December 2020 found at: https://www.iol.co.za/sundayindependent/news/south-africans-debate-the-death-penalty-amid-rise-in-gender-based-violence-1c681776-884a-42ea-ab06-33df672ad916 (Accessed on 21 November 2022).
[431] Weiner (n429 above).
[432] Weiner (n429 above).
[433] Weiner (n429 above).
[434] Naidu (n430 above).
[435] Naidu (n430 above).
[436] Naidu (n430 above).
[437] Naidu (n430 above).

criminals alive and allow them out on parole to possibly commit crime again, than even consider the possible solution of the death penalty.

In 2023, the case of Gerhardus Ackerman (a sex trafficker) caused public outcry for the death penalty. The 51 year old offender, was charged of some 740 charges including but not limited to: multiple counts of possession, creation and benefitting from child pornography; trafficking of persons and facilitating the trafficking of persons; trafficking of children for the purpose of child pornography; exposing oneself to a child, attempted murder and malicious injury to property.[438] It is an understatement to say that the public was disgusted at the acts of Ackerman. However, it was once again only the legal and criminal 'experts' who were asked to give their opinions and such opinions where published.

As such the heirs of academia debated between themselves the opinions they have surrounding the death penalty. Professor Barkhuizen stated that the problem lies not in the sentencing of offenders but rather the parole guidelines which allow even some of the most violent of offenders to apply for parole after serving a certain term of their sentence.[439] Dr Curlewis stated that the harshest punishment that could be given to Ackerman was life because this country still considers the death penalty as unconstitutional.[440] Dr Sadiki suggests that the death penalty should not be considered because punishment is required to rehabilitate offenders and not to punish them.[441] Dr de Kock stated that given the circumstances of the case and given the lack of remorse and possibility of rehabilitation of Ackerman, life was most definitely not enough. Dr de Kock went further to state that if South Africa expects to see any form of radical change within the rate of crime, the only option is to reintroduce the death penalty because imprisonment deters nobody.[442]

This research agrees with both the sentiments of Barkhuizen and Curlewis in that the parole guidelines of South Africa are presently a serious issue and that at present the most severe sentence that can be given is life. In other countries offenders such as Ackerman would not be eligible for parole throughout their entire sentence. As such

[438] S v Ackerman (SS090/2021) [2023] ZAGPJHC 383 at [1] – It is worth noting that paragraph 1 which recounts the charges is 8 pages long.
[439] M Coetzer "Experts Divided on New Call for the Death Penalty: The Effectiveness of Severe Sentences for a Convicted Sex Trafficker Sparks Debate." The Citizen (2023).
[440] Coetzer (n 439above).
[441] Coetzer (n 439 above).
[442] Coetzer (n 439 above).

the deterrent effect of imprisonment is undermined in South Africa by the parole guidelines. However, it appears Dr Sadiki is unaware of the present possibilities and results of rehabilitation of serious offenders in South Africa. As will be discussed in Chapter 6, South Africa does not have the funds, the facilities or the professionals to deal with the amount of serious offenders in this country in order to ensure effective rehabilitation. Lastly, Dr de Kock's sentiments are similar to that of this research, if we are to expect any substantial change in the crime rate we need to do something radical and as such the death penalty is the only radical answer.

5.5: THE COURT'S APPROACH TO PUBLIC OPINION:

As stated previously, the inclusion of public opinion during the sentencing of an offender has been viewed and taken into consideration inconsistently in practice. This will be depicted below.

In the case of *S v Mhlakaza*, the two accused were part of a gang of five men who attacked a small police office in the Cape Flats in an attempt to obtain the firearms and ammunition held there.[443] The men shot an officer, Fielies, who resultantly died and shot at a group of security officers who attempted to investigate the shooting.[444] The men were charged with one count of murder; three counts of attempted murder; one count of attempted robbery, one count of possession of firearms and ammunition and one count of possession of a machine gun.[445] It was stated during the trial court that a sentence should reflect the moral outrage and resentment of the law-abiding citizens at a particular crime and that the more severe the crime is viewed by the public, the more severe the sentence should be. [446] However, in the Appellate Division the court retorted with the statement that the aim of sentencing is not to appease the public opinion and that the court should agree with the public interest for a harsher sentence where it believes that such sentence is deserved and such interest is correct.[447]

In *S v Di Blasi*, the accused was charged with murder of his ex-wife (Francesca Di Blasi) and the illegal possession of a firearm and ammunition therefore.[448] Vivier J

[443] S v Mhlakaza & Another 1997 2 All SA 185 (A) 2.
[444] Mhlakaza (n443 above) 3.
[445] Mhlakaza (n443 above) 4.
[446] Mhlakaza (n443 above) [518b-c].
[447] Mhlakaza (n443 above) [518e-f].
[448] S v Di Blasi 1996 1 SACR 1 (A) 2.

expressed his disagreement with the trial court's lack of regard for the aspects of deterrence and retribution which should reflect in a punishment.[449] He stated that to ensure the administration of justice is not brought into disrepute, society requires a sentence that is not too lenient and reflects the "shock and indignation of interested persons and of the community at large".[450] As such a harsher sentence was imposed for what was a premeditated, callous murder.

In *S v M* the court stated that the demands of society must be taken into account and may have an exponential impact during sentencing and as such the handing down of a lenient sentence will not equate the outrage felt by the community especially those affected directly by the crime.[451] The statement made from this case was made during the handing down of a death sentence in which the court felt that any sentence less than death for the murder of the deceased would lead to societal outrage.

In the case of *S v Mafu*, the accused was found guilty of murder. Briefly the facts were as follows:[452] the accused was part of a gang known as the 'comrades' who apprehended the deceased for practicing witchcraft. The group took the deceased back to his home in search of evidence of such witchcraft however when none was found the other members of the group insisted that he be released. The accused however, did not agree and gave a bottle of petrol to the deceased's son and demanded at knife-point that he pour it over his own father. The son did so and then fled the scene. The accused then proceeded to light a match and set the deceased alight. It was stated in the trial court by Page J that the severity of the crime, callousness, remorselessness and the interests of society demanded that the most serious of sentences be imposed. [453] Page J was quoted as saying:

"I cannot conceive of any right-minded member of society thinking that anything less than the death sentence would be a fitting retribution for your deed or would furnish an effective deterrent against similar crime." [454]

[449] Di Blasi (n448 above) [10e-f].
[450] Di Blasi (n448 above) [10e-f].
[451] S v M 1994 2 SACR 24 (A) [29f-g].
[452] S v Mafu 1992 2 SACR 494 (A) 2-3.
[453] Mafu (n452 above) 6.
[454] Mafu (n452 above) 7.

Nestadt JA agreed therewith.[455] This research is inclined to agree there with the words of Page J. The acts of the accused were particularly callous and the society at large, particularly those within the African community, who engage in 'witchcraft' culturally, needed to be protected from the accused. The sentence imposed also sent a clear message to other persons that such actions were not tolerated in the criminal justice system.

Alternatively, Harms AJA stated in a concurring judgment stated that the view of the public is often not known by the judicial officer and as such they are left to make their own determination as to the seriousness of the crime and the appropriateness of the sentence through value-based judgment which includes a 'surmised' view of what the public opinion actually is.[456]

In *S v Gardener*, the two accused were convicted of fraud on the basis that they were both executive officers in LeisureNet Limited and International Limited which were both companies owned by Dalmore Limited.[457] However both accused held share interests in Dalmore at 20 percent each and failed to disclose such interest to LeisureNet.[458] It was stated that the natural indignation of society should be taken into account when the court imposes a sentence especially where the crimes are serious and a lenient sentence would lead to the administration of justice falling into disrepute.[459] However, the court also specified that the public indignation of a particular crime can only be one factor taken into consideration by the court when sentencing because the ordinary members of society lack the full information of the case and the objectivity which is required.[460]

In the case of *S v Robertson* the accused was convicted on nine charges namely: three in terms of section 17(a) of the Domestic Violence;[461] one for robbery with aggravating circumstances; two charges of assault with the intent to cause grievous bodily harm; one charge of assault; two charges of rape and one charge of murder.[462] All the complainants and the deceased in these instances were intimate partners of

[455] Mafu (n452 above) 7.
[456] Mafu (n452 above) at [495h-i] and [496g -497a].
[457] S v Gardener 2011 1 SACR 570 (SCA) [2].
[458] Gardener (n 457 above) [3].
[459] Gardener (n 457 above) [67].
[460] Gardener (n 457 above) [68].
[461] Act 116 of 1998
[462] S v Robertson 2023 2 SACR 156 (WCC) at [3].

the accused at the time of the crimes.[463] After the court considered all of the manners and means through which Robertson brutally abused these women, the court stated that the punishment should fit the crime, criminal and society to be well served.[464] Kusevitsky, J, stated that a punishment that serves only the public interest is flawed but given the current levels of violence (particularly that of sexual violence) deterrence and retribution should be emphasised through a sentence.[465]

The accused in *S v Mudyiwayana* was convicted of six counts of murder; two counts of contravening the Refugee Act,[466] and a single count of robbery with aggravating circumstances.[467] Wille J focused particularly on the seriousness of the crimes and the impact of the crimes on the immediate family of the victims as well as the interests of greater society. Wille J classified the crimes against women and young children, and the rate thereof, as a detriment to our claims as a civilised society.[468] While acknowledging that the sentence is not required to serve public interest, it must reflect the measure of disapproval to this kind of conduct and behaviour.[469] In his final paragraphs, Wille J stated that while punishment should not be considered as revenge, it could be justified in these circumstances.[470] He agreed that the imposition of six life sentence for his habitual serious offences was the only practical way in which to ensure the benefit of the public which yearns for retribution, prevention and deterrence for crimes such as these.[471] He further stated: [472]

"I find favour with the submission advanced on behalf of the prosecution to the effect that public interest must be properly served in the sentencing of this particular offender…"

Considering these words and the prevalence of violence, particularly against vulnerable women and children, something greater must be done to ensure that persons such as Brian Mudyiwayana are completely removed from society. It is apparent that Wille J was aware of the public opinion toward the crimes such as these

[463] Robertson (n 463 above) [4].
[464] Robertson (n 463 above) [24].
[465] Robertson (n 463 above) [24].
[466] Act 130 of 1998.
[467] S v Mudyiwayana (CC17/2020) [2022] ZAWCHC 23 at [6].
[468] Mudyiwayana (n468 above) [9].
[469] Mudyiwayana (n468 above) [9].
[470] Mudyiwayana (n468 above) [31].
[471] Mudyiwayana (n468 above) [34].
[472] Mudyiwayana (n468 above) [44].

and ensured that justice was done to the greatest extent that the law presently allows. However, from a reading of the judgment and an understanding of the tone taken both by Wille J and the submission of Ms Myburgh (an expert in psychology), it is apparent that Mr Mudyiwayana has no hope of rehabilitation and the best option is to have him eradicated from society. Furthermore this research submits that had the death penalty been a viable option, this would likely have been the optimal sentence.

In *S v Ackerman*,[473] the most recent controversial case surrounding the sentencing of a serious violent offender, Gerhardus Ackerman (as discussed in Paragraph 5.4) The accused was resultantly sentenced to 12 life sentences of imprisonment and the Film and Publication Board welcomed this sentence as they considered it hefty enough to dissuade others from committing similar heinous crimes against children.[474] However this judgment has struck major public debate surrounding 'sufficient sentencing' of serious, violent and sexual offenders particularly those who commit these crimes against women and children. The public of South Africa is no longer willing to accept the sentencing of offenders such as Gerhardus Ackerman to life imprisonment where there exists a possibility of parole.

5.6: CONCLUSION:

The influence of public opinion in the sentencing process plays a vital role in upholding the legitimacy of the criminal justice system. The involvement of the public during the process of sentencing ensures that justice is perceived to be served by those who are most affected by crime. The public, as the stakeholders in the criminal justice system, can provide a necessary balancing system to judicial decision-making. This is done in order to ensure that sentencing decisions made are fair, transparent, and reflective of society's present values and expectations toward the treatment of violent offenders.

Where members of the public have the opportunity to participate in the sentencing process, it can foster a sense of trust in the system. Their engagement enhances the credibility of the process, offering reassurance to victims; potential and present offenders and the broader community that justice is being served.

[473] S v Ackerman (SS090/2021) [2023] ZAGPJHC 383.
[474] Film and Publication Board welcomes sentencing of Gerhard Ackerman on charges of possession of child pornography 15 August 2023 https://www.gov.za/speeches/film-and-publication-board-welcomes-sentencing-gerhard-ackerman-charges-possession-child (Accessed on 8 September 2023).

Furthermore, public involvement adds an important dimension to the sentencing process by bringing varied perspectives and community values into consideration. Judges, who are very often detached from the daily realities and experiences of the general populous, can benefit from the insight offered by those who are the direct victims of the crime/s.

It is important that a balance be struck with the incorporation of public opinion during sentencing with the upholding of due process and fairness. The active involvement of the public should be guided by the courts in order to ensure the enhancement of justice.

At present in South Africa the opinions, values and beliefs of the public are being ignored for what is believed to be the 'morally right' decisions of academics and judicial officers. Very often the persons whose opinions are voiced, published and taken into consideration are not the persons who experience the criminal activity. As such the decisions presently being made with regards to sentencing are disappointing and appalling to the South African public because they are not reflective of the present values and beliefs.

Although the courts should not be manipulated or bound to the interests of public opinion, is it not wrong to continually deny the interest of the persons who are directly suffering from the heinous crimes? Is it not unfair that the rights of persons who suffer at the hands of criminals, are consistently determined by the persons who receive a government funded salary or academics who believe they are 'holier than thou' and as such we cannot execute one man who has seriously violated the rights of others?

CHAPTER 6: CAN THE DEATH PENALTY STILL BE CONSIDERED AN INHUMANE, CRUEL AND DEGRADING TREATMENT WITH REGARDS TO THE CONDITIONS OF SOUTH AFRICAN PRISONS:

6.1: INTRODUCTION:

It cannot be stated enough that South Africa's crime rates are reaching alarming rates. Curlewis states that such crime rates are so alarming that they should be considered to be on an epidemic scale.[475] It is irresponsible to continue to ignore this as well as the prison conditions which have resulted from the implementation of summary imprisonment found within minimum sentencing legislation. This chapter aims to discuss what inhumane, cruel and degrading punishment is; what the present South African prison conditions are and the rates of rehabilitation and recidivism. The goal of this chapter is to depict how the death penalty can no longer be considered as a cruel, inhumane and degrading punishment when considering the state of affairs of South African prisons.

6.2: WHAT IS INHUMANE, CRUEL AND DEGRADING TREATMENT OR PUNISHMENT?

In terms of the Constitution of the Republic of South Africa, all persons have the right to freedom and security of persons, which includes the right to not be tortured and to not be treated or punished in a cruel, inhumane or degrading way.[476] At section 35(2)(e), the Constitution states that every prisoner has the constitutional right to conditions of detention that are consistent with human dignity.[477] Furthermore in 2013, the Prevention of Combating and Torture of Persons Act was established.[478] The long title to the act states that it was enacted to give effect to the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; to create the offence of torture and others associated therewith and to prevent and combat the torture of persons within or outside the borders of South Africa. It is

[475] L Curlewis 'Ghastly Prison Overcrowding Presents Huge Problem: Yet Another Example of Justice Turning Sour and Judicial Inefficiency and Idleness – What Happened to the Rule of Law?' 18 October 2021 Menlyn, Pretoria.
[476] The Constitution of the Republic of South Africa, 1996 ss12(1)(d) and (e).
[477] The Constitution of the Republic of South Africa, 1996 ss12(1)(d) and (e).
[478] Act No. 13 of 2013.

therefore apparent that South Africa considers torture, and any act or treatment associated therewith, as a punishable crime.

As previously stated (Chapter 3), there only exists one express covenant within which the use and limitations of the use of the death penalty are addressed internationally (Article 6 of the ICCPR).[479] Article 7 of this covenant states that the use of torture, cruel, inhumane or degrading treatment or punishment is prohibited. Therefore, the use of the death penalty as a legal sanction must comply strictly with these provisions ensuring an offender receives a fair trial, only receives the death penalty for a serious and legally recognised crime, with the opportunity for appeal or pardon. This covenant failed to define what is regarded as torture or cruel, inhumane or degrading treatment.

The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (hereafter 'the CAT') at Article 1.1. states that torture is "any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by, or with the instigation or consent of a public official or a person acting in an official capacity so as to intimidate, punish or obtain information from the person (among other motives)."[480] Article 1.1 also states that torture does not include pain or suffering which is integral or related to a legal sanction.[481] The CAT however, fails to provide a comprehensive definition of what 'cruel, inhumane or degrading punishment' is, but merely states that acts which do not reach the severity of or fall short of the intentions of torture, are prohibited. [482]

Express provisions about "cruel, inhumane or degrading punishment" can also be found in Article 3 of the European Convention on Human Rights,[483] and Article 5 of the African Charter on Human and Peoples' Rights created by the Organisation of African Unity.[484] However none of these provisions provide a comprehensive list of examples or explanations of what exactly punishment or treatment of this kind entails.

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[479] International Covenant on Civil and Political Rights, 16 December 1966.
[480] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 ('the CAT').
[481] CAT.
[482] CAT Art 16.1.
[483] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html (2023-06-02).
[484] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html (2023-06-02).

Chaskalson J expressed that death should be considered a cruel punishment because of the legal processes involved with its application as well as the uncertainty which can result from these processes.[485] Its inhumanity can be found in its execution which denies one their humanity. Lastly, according to Chaskalson J, the death penalty is a degrading punishment because it strips one of their human dignity and treats them rather as an object who, due to their disruption of social codes, should be eliminated by the state. As such, the court came to the conclusion that the death penalty is a cruel inhumane and degrading punishment. The words, in context, should be understood through the application of the Constitution and not necessarily through the ordinary meaning of the words.

In opposition, this research raises the arguments made by Ernest van den Haag. Van den Haag argues that to refer to a punishment of a crime as degrading is unfounded.[486] The degradation of the human life of the offender began the moment the offender voluntarily chose to commit the crime and therefore assume all the risks associated therewith.[487] Due to the fact that the offender could have avoided punishment by refraining from committing crime, the punishment imposed for the criminal act cannot be regarded as degrading or against human dignity.

Execution, specifically in *Makwanyane*, was referred to as contrary to the right to dignity. However, it can be argued that the act of execution affirms ones mortality. Execution affirms the mortality of the convicted person by affirming his rationality and responsibility for taking the actions he committed and accepting the punishment therefore.[488]

Death is inherently a common human fate which cannot be considered inhumane.[489] Death is an integral part of the human experience, as integral as life. Considering this 'inhumanity' it is often argued that capital punishment is 'uncivilised'. Death as a form of punishment has been used by almost every emerging civilization throughout history and therefore is fundamentally civilised.[490] The alternative to death, life imprisonment, contravenes more human rights than the death penalty and deprives the prisoner of

[485] *S v Makwanyane* [26].
[486] Van den Haag (n 328 above) 1668.
[487] Van den Haag (n 329 above) 1668.
[488] Van den Haag (n 328 above) 1668.-1669.
[489] Van den Haag (n 328 above) 1668.-1669.
[490] Van den Haag (n 328 above) 1669.

freedom, safety, bodily integrity and autonomy.[491] Van den Haag, by using the very definition of the words used to prohibit and aggravate the use of the death sentence, mitigates its use as a form of punishment.

When the United Nations Human Rights Committee (hereafter 'the UNHRC') was asked to make a comment on the definition of the term as it used in the ICCPR, they stated that they did not consider it necessary to assemble a comprehensive list of which acts constitute cruel, inhumane or degrading treatment or punishment or to establish precise distinctions between the different kinds of punishments or treatments.[492] The UNHRC stated that in order to determine what is cruel, inhumane and degrading the circumstances and facts of each individual case would need to be considered such as: the duration of the treatment, the manner of the treatment, its physical or mental effects as well as the sex, age and relative health of the person.[493] Therefore the understanding of what constitutes 'cruel, inhumane and degrading treatment or punishment' cannot be determined from the ICCPR, UNHR or any legislation relating thereto, but should rather be considered through the practical application and understanding in case law.

6.2.1: CASE LAW:

DENMARK ET AL V GREECE

The applicant governments in this case, Denmark; Norway and Sweden, had made the application due to the Royal Decree of the 21st of April 1967 in which a state of siege had been declared in Greece and as such certain parts of the Greek Constitution had been suspended.[494] The European Commission of Human Rights ('European Commission') stated that inhumane treatment is that which "causes severe suffering, mental or physical, which in the particular situation is unjustifiable."[495] The European Commission also defined torture as "an aggravated form of inhumane treatment."[496]

[491] Van den Haag (n 328 above) 1669.
[492] General Comment 20.4 of the Human Rights Committee 1992 Report.
[493] *Vuolanne v Finland* 96 ILR 649 par [657].
[494] *Denmark et al v Greece*: The European Commission of Human Rights (31 May 1968) par [A1].
[495] *Denmark et al v Greece*: Report of 5 November 1969, Yearbook of the European Convention on Human Rights XII (1969) par [186].
[496] *Denmark et al v Greece*: Report of 5 November 1969, Yearbook of the European Convention on Human Rights XII (1969) par [186].

THE REPUBLIC OF IRELAND V THE UNITED KINGDOM

The court in this case was required to determine whether the interrogation techniques used by the United Kingdom in Northern Ireland between the years of 1971 and 1975 were acts which amounted to torture, inhumane or degrading treatment.[497] In the European Court of Human Rights, the difference between torture and inhumane treatment was considered. The court stated that torture attaches "a special stigma to deliberate inhumane treatment causing very serious and cruel suffering."[498] The court also determined that 'degrading' conduct is that which induced fear in its victims including feelings of agony and subservience which leads to humiliation and degradation of one's being.[499]

TYRER V UNITED KINGDOM

The applicant in this case, Mr Tyrer, at age 15, pleaded guilty before the Isle of Man local juvenile court to unlawful assault with the intent to do actual bodily harm to another pupil in his school.[500] The assault that occurred was allegedly motivated by the fact that the victim reported the applicant, with three other boys, for bringing beer into the school.[501] Due to the victim reporting this, the boys had all been caned.[502] The applicant was also sentenced to three strokes of the rod on the same day in accordance with the legislation.[503] The applicant appealed against this sentence but this was dismissed and a medical practitioner examined and ensured that the applicant was fit to receive the punishment.[504] The applicant was birched that afternoon where he was asked to lower both his trousers and underwear and to bend over a table.[505] The applicant was held down by two police officers, the first stroke of the birch caused it to splinter.[506] After the third stroke, the applicant's father lunged at the police officer.[507] The applicant raised this concern because the punishment was required to be administered over one's clothing regardless of age.[508] The

[497] Webb *Republic of Ireland v United Kingdom (1979-80) 2 EHRR 25, European Court of Human Rights* (2020).
[498] *The Republic of Ireland v The United Kingdom* (1979-1980) 2 EHRR 25 80 [167].
[499] *The Republic of Ireland v The United Kingdom* [167].
[500] *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 9 par [9].
[501] *Tyrer v United Kingdom* [9].
[502] *Tyrer v United Kingdom* [9].
[503] *Tyrer v United Kingdom* [9].
[504] *Tyrer v United Kingdom* [9].
[505] *Tyrer v United Kingdom* [10].
[506] *Tyrer v United Kingdom* [10].
[507] *Tyrer v United Kingdom* [10].
[508] *Tyrer v the United Kingdom* [12].

European Court on Human Rights in this case had to distinguish between inhumane and degrading punishment. The court held that in order to be considered an inhumane punishment, suffering had to reach a certain level of severity.[509] The court stated that although the applicant's sentence did not amount to the level of suffering required, it did amount to a degrading punishment.[510]

S V WILLIAMS & OTHERS

In this case the applicants were a group of juveniles who had all been sentenced by different magistrates to receive a sentence of strokes with a light cane, commonly referred to as 'corporeal punishment'.[511] The applicants appealed this sentence on the grounds that it was undignified and unconstitutional to continue to administer such a punishment. The court was left to consider whether this punishment was 'cruel, inhumane and degrading' or 'severely humiliating'.[512] The court stated that when considering what is 'cruel, inhumane and degrading punishment or treatment', it is dependent on an assessment of what the society acknowledges to be decent and in line with human dignity.[513] In order to determine where a punishment can be defined as cruel, inhumane or degrading, the court must assess it with due consideration of the values that underpin the Constitution.[514] As such the court determined that any punishment administered must respect human dignity and be consistent with the Constitution.[515]

STRANSTHAM-FORD V THE MINISTER OF JUSTICE & OTHERS

In this case the applicant applied to have physician assisted suicide (euthanasia) administered to him. The applicant was diagnosed with terminal stage 4 cancer and was informed that he only had a few weeks left to live.[516] The applicant brought an urgent application to the court in order to obtain permission to have a medical practitioner end his life or for a medical practitioner to provide him with lethal agents to enable him to end his own life and as such the medical practitioner would not be

[509] *Tyrer v the United Kingdom* [29].
[510] *Tyrer v the United Kingdom* [29].
[511] *S v Williams* (1995) 7 BCLR 86 1 (CC) par [1].
[512] *S v Williams* [11].
[513] *S v Williams* [35].
[514] *S v Williams* [37].
[515] *S v Williams* [38].
[516] *Stransham-Ford v Minister of Justice* (2015) 6 BCLR 737 (GP) par [3].

held accountable for such an act.[517] The applicant had, many a time, been rushed to hospital for extreme pain as a result of his cancer.[518] The applicant argued that palliative care did not satisfy his needs and was against his right to die in a dignified manner.[519] The applicant's quality of life had severely deteriorated where even the medication administered to him to help with the symptoms were contributing to such deterioration.[520] The applicant could no longer do normal human daily activities without assistance and was fully aware that as the cancer progressed this would become worse and as such he would be made to suffer until his death.[521] The court was made to consider the right to dignity, the right to not be made to endure torture and the right not to be treated in a cruel, inhumane and degrading manner. The applicant based his argument on the grounds of sections 2(1)(e), 5(1) and 8 (1)(d) of the Animals Protection Act which obliged an owner of an animal to destroy such animal which is seriously injured or diseased or in such a condition that prolonging their life would be cruel and result in unnecessary suffering and that such mercy and dignity in death should be afforded to him.[522] The applicant also referred to the case of *Carter vs Canada (Attorney-General) 2015 SCC5* in which the court stated that people who are terminally-ill should not be condemned to a life of eternal suffering.[523] Without the option of physician assisted suicide, such a person is left with the choice of either taking their own life which could be violent, dangerous or possibly unsuccessful or to have to allow their illness to degrade them to such an extent that they eventually die due to natural causes after a long time of suffering.[524] Essentially the court came to the conclusion that it is both degrading and undignified to leave a person in a state of suffering for extended periods of time.

LLEWELLYN SMITH & OTHERS V THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

This is a case awaiting judgment which was brought by a group of applicants who claimed that while serving their sentence in Leeuwkop Maximum Correction Centre in Gauteng, they endured torture and cruel treatment at the hands of the correctional

[517] *Stransham-Ford v Minister of Justice* [4].
[518] *Stransham-Ford v Minister of Justice* [6].
[519] *Stransham-Ford v Minister of Justice* [6].
[520] *Stransham-Ford v Minister of Justice* par [7].
[521] *Stransham-Ford v Minister of Justice* par [9].
[522] *Stransham-Ford v Minister of Justice* par [16].
[523] *Stransham-Ford v Minister of Justice* par [18].
[524] *Stransham-Ford v Minister of Justice* par [18].

officers.[525] The applicants alleged that they were beaten with batons, shocked with electric shock shields, attacked by dogs and made to squat in painful positions for prolonged periods of time.[526] The applicants claimed that their right not to be tortured and their right not to be treated or punished in a manner which is cruel, inhumane or degrading was violated.[527] The court is yet to make a judgement as to this claim. However, it can be observed that the court will be required to address the definition of 'cruel, inhumane and degrading punishment and treatment' and 'torture'. Considering the definitions provided by international law and case law, the methods of punishment administered to these inmates can fall within the parameters of what one would consider cruel, inhumane and degrading.

6.3: SOUTH AFRICAN PRISON CONDITIONS:

In the case of *R v Swanepoel* it was determined that the purposes of punishment are: deterrence, retribution, rehabilitation and prevention.[528] As such the punishment of imprisonment should serve these purposes without encroaching upon the fundamental rights of an offender. It is the duty of the Department of Correctional Services (Hereafter 'the DCS') to ensure that the rights and needs of the offender are met.

Imprisonment was originally used as a means of detention in order to serve the purposes of: holding awaiting trial detainees; keeping a person in custody or a collection of debt but never as a punishment.[529] Punishment, as discussed in Chapter 2, took the form of physical chastisement upon the perpetrator or the payment of a fine. Punishment by way of imprisonment was introduced as a more humane approach to the punishment of offenders.[530] By the end of the 1700s, it was observed that prisons had become a hive for growing criminal knowledge, activity and disease, it is apparent that South Africa has not improved from the 18th century.[531]

South African prison conditions are, at the best of times, poor and degrading. South African inmates experience extreme overcrowding and inhumane living conditions

[525] Redress "Llewellyn Smith v The Minister of Justice and Correctional Services, South Africa (third party intervention)" (2020) https://redress.org/casework/llewellyn-smith-v-the-minister-of-justice-and-correctional-services-south-africa-third-party-intervention/ (Accessed on 19 May 2023).
[526] Redress (n 525 above).
[527] Redress (n 525 above).
[528] *R v Swanepoel* (1945) AD 444.
[529] Curlewis (n 475 above).
[530] Curlewis (n 475 above).
[531] Curlewis (n 475 above).

including: poor ventilation; lack of sanitation facilities; little to no privacy; a shortage of adequate beds and bedding; poor health and mental care facilities; lack of sufficient supervision and inadequate rehabilitation facilities and opportunities.[532] The DCS have stated that within their prisons, South Africa has space for approximately 114 000 prisoners.[533] However, at present we have approximately 187 000 prisoners.[534] Whether this is a true reflection of the state of overcrowding is unknown because the figures are often difficult to obtain or obscured by the relevant government departments. Regardless, where there exists overcrowding the conditions of sanitation, living, sleeping, nutrition and rehabilitation is highly unlikely to be of a dignified standard.

Due to the overcrowding and a culture of toxic masculinity among prisoners, prisons have the highest frequency of sexual violence and sexual disease transmissions.[535] The most frequently transmitted being Human Immunodeficiency Virus (HIV) and Tuberculosis (TB) being higher than that of the general population.[536] Essentially prisons and sentences of imprisonment should only impact on the right to freedom.[537] The present conditions in South African prisons are, however, violating more human rights than simply that. By violating all of these rights, South Africa fails to meet the minimum standards for imprisonment established in national and international law.[538]

Severe sexual violence is highly prevalent in South African prisons amongst inmates. This sexual violence can be attributed to overcrowding, a culture of toxic masculinity within male prisons and a shortage of (uncorrupted) staff to watch over inmates.[539] The perpetuation of gender constructs within male prisons, influences men to use rape and sexual violence as a way of expressing male dominance and establishing a hierarchical structure among all-male inmates.[540] Hlongwane posits that weaker, younger and first-time offenders are often forced to assume the perceived roles

[532] Wasserman "Prison Violence in South Africa: Context, Prevention and Response" (2023) https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand%20detainees%20experience,oversight%3B%20and%20poor%20healthcare%20provision (Accessed on 21 November 2022).
[533] Curlewis (n 475 above).
[534] Curlewis (n 475 above).
[535] *R v Swanepoel.*
[536] Wasserman (n 532 above).
[537] The Constitution of the Republic of South Africa, 1996 at s12.
[538] Wasserman (n 532 above).
[539] Wasserman (n 532 above).
[540] Wasserman (n 532 above).

assigned to women in the outside world.[541] The psychological and physical impact of sexual violence upon these men has a serious negative impact upon rehabilitation.[542] The men who commit the rape, as well as the men who experience the rape and other violent sexual offences are prone to perpetuate this behaviour upon release or parole.[543] Victimised offenders or witnesses thereto are unlikely to report the acts or volunteer information out of fear for their lives.[544] Thus by keeping persons in prison for extended periods of time forces them to endure the inhumanity, suffering and degradation of being raped or sexually violated by their fellow inmates and resultantly this increases the prevalence of reoffending upon release.

6.4: REHABILITATION AND RECIDIVISM:

South African prisons are often referred to as 'Universities of Crime'.[545] There are multiple reasons for this title. Firstly, because there exists very little opportunity for rehabilitation of offenders due to the vast overcrowding taking place within prisons. Secondly, the consolidation of different types of prisoners within an enclosed area results in the passing on of criminal knowledge amongst prisoners. Lastly, the rate of overcrowding and anti-social behaviour often leads to the corruption of prison officials with more criminal activity actually taking place within prison walls. It is often stated that if one were to enter a prison innocent, they would surely leave it a criminal.

Rehabilitation, although not an express right of an offender, is an important goal of the DCS. The resources and opportunity to provide this to inmates is severely lacking. Omar states that rehabilitation is not aimed at the curing of an offender but rather an attempt to restore the relationship between society and the offender to ensure successful reintegration with society and prevent reoffending.[546] Thus rehabilitation should not be viewed as a 'fixing' tool but rather as a tool through which the DCS aims to ensure that the offender is reintegrated into society and can become a functional member thereof. However, this research questions the ability of rehabilitation to do this without 'curing' the offender of what caused them to commit crime.

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[541] Hlongwane *Life Imprisonment in Penological Perspective* (Doctoral Thesis, University of South Africa) 1998 117.
[542] Hlongwane (n 541 above) 117.
[543] Wasserman (n 532 above).
[544] Hlongwane (n 541 above) 118.
[545] Curlewis (n 475 above).
[546] Omar "A Prisoner's Right? The legal case for rehabilitation" (2011) 37 *SA Crime Quarterly* 19 20.

Terblanche argues that imprisonment has proven to have almost zero potential of achieving rehabilitation. [547] In order for rehabilitation to be successful there must exist a sufficient amount of funds, education, infrastructure and professionals to ensure such a result.[548] It is common knowledge that South Africa does not possess the finances, facilities and professionals to rehabilitate every type of offender. Terblanche argues that rehabilitation will only be effective in cases where: an offender commits a crime as a result of a well-known and understood condition; the treatment of such a condition is well-practiced; the success rate of such treatment is high and that if the offender is not rehabilitated for this condition there is a high chance of recidivism regardless of the length of their sentence.[549] Thus where these conditions do not exist, incarceration is likely to make the offender a greater danger to society upon release.

There also exists specific types of conditions which cannot be treated, or the treatment whereof is very rarely successful such as that of paedophiles.[550] In such instances where a person cannot be rehabilitated or 'cured' of their mental ailments that lead to committing crime, their release is a grave danger to society. For example because there exists no medication through which to control paedophilic thoughts, castration or chemical castration is often raised as an option. However, paedophilia is a mental illness or defect which means that regardless of working genitalia, gratification of such thoughts can be achieved through molestation of children.

Finally, there exists no definitive research to show that rehabilitative programmes reduce reoffending rates or that it is substantially successful.[551] Taking all of the above into due consideration, the DCS's failure to rehabilitate offenders, while it exposes them to inhumane conditions during long prison sentences and then releases such offenders into society, is more harmful to society and offenders alike.

Recidivism refers to the repetition of criminal behaviour once released from imprisonment after serving one's sentence or on parole. The rate of recidivism in South Africa is relatively unknown. However, Schoeman suggests that it is somewhere between 55% and 97%.[552] Considering the secrecy and complexity of measurement

[547] Terblanche (n 62 above) 180.
[548] Terblanche (n 62 above) 181.
[549] Terblanche (n 62 above) 182.
[550] *S v De Klerk* (2010) 2 SACR 40 (KZP) par [8].
[551] Omar (n 546 above) 21.
[552] M Schoeman 'Recidivism: A Conceptual and Operational Conundrum' (2010) 1 *Acta Criminologica* 81.

of the true representative figures of recidivism, the latter of the percentages appears more plausible.

In order to display the lack of rehabilitation and the rate of recidivism within South Africa; the case study of the prolific serial murderer and rapist, Moses Sithole, will be discussed. Moses Sithole, was born in Vosloorus, South Africa.[553] His father died when he was a young boy and his mother abandoned him and his siblings.[554] Sithole and his siblings were placed in an orphanage where they received mistreatment.[555]

In his early twenties, Sithole began raping women and was arrested, charged and convicted of three counts of rape.[556] Sithole was sentenced to imprisonment for rape where he was repeatedly the victim of sexual assaults by other inmates.[557] In 1994, Sithole was released from prison.[558]

After his release, Sithole's criminal activity began to escalate. Sithole committed his crime in Pretoria, Boksburg and Cleveland.[559] He would bait women into a job at a fake children's home in Benoni under the pretences of a fake charitable organization.[560] When these women came to the 'job interview', Sithole would walk them across a field to the 'headquarters' whereby he would overpower the women, rape them and then strangle them with their own underwear.[561]

Sithole killed a total of 38 women and committed 40 rapes within a year (1994-1995).[562] Judge David Curlewis sentenced Sithole to 2410 years imprisonment for his crimes,[563] however chastised the Constitutional Court for declaring the death penalty unconstitutional. [564] As of 2000, Sithole is known to have HIV aids and perpetuates his hatred for black women to whomever will listen.[565]

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[553] S Yesufu 'An Insight into the Socio-psycho Contexts and Modus Operandi of South Africa's Worst Serial Killers over Time' (2022) 4 *EUREKA: Social and Humanities* 105.
[554] Yesufu (n 553 above) 105.
[555] Yesufu (n 553 above) 105.
[556] Yesufu (n 553 above) 105.
[557] Yesufu (n 553 above) 105.
[558] Yesufu (n 553 above) 105.
[559] Yesufu (n 553 above) 106.
[560] Yesufu (n 553 above) 106.
[561] Yesufu (n 553 above) 106.
[562] Yesufu (n 553 above) 106.
[563] Yesufu (n 553 above) 106.
[564] Mail & Guardian (n 412 above).
[565] Yesufu (n 553 above) 106.

It is apparent from the sentence served upon Sithole by Judge Curlewis that he will not be leaving prison any time soon however this sentence is not the one this research is concerned about. During the time between 1993 and 1994 (as previously stated) there was confusion surrounding the use of the death penalty with regards to the Constitution that was coming into force and the impact of the political negotiations taking place. Rape was a crime for which the death penalty could have been imposed and the only reasonable conclusion to be drawn as to why it was not was because of the new Constitutional dispensation that was taking place.

This research argues that had Sithole been sentenced to death in his initial case for the rapes; the lives, bodily integrity and safety of 40 women would not have been infringed upon. Any other conclusion that is drawn from this case can only be of a subsidiary and superficial nature because there can be no argument that Sithole's life is more important than that of his 40 victims.

Furthermore, the case study of Moses Sithole also depicts the conditions of a South African prison. Sithole was often the victim of rape amongst other sexually violent acts from his fellow inmates as a result of which he contracted HIV aids. The prison environment has only further angered and perpetuated his mental instability and hatred for black women. Essentially, even if Sithole were to be released today, there is a high probability that he would continue to commit offences.

What should be apparent from this chapter is that imprisonment in South Africa is failing to fulfil the requirements it has set and as such is endangering lives and safety of greater society.

6.5. CONCLUSION:

In the case of *S v Makwanyane*[566] it was stated that when considering the abolition of the death penalty it was important to consider the courts' role as the protector of the outcast and the marginalised. In the case of *Van Biljon v Minister of Correctional Services*,[567] the court stated that the DCS bears a higher duty of care towards inmates and remand detainees because it has placed them in incarceration. As such the DCS

[566] *S v Makwanyane* [26].
[567] *Van Biljon v Minister of Correctional Services* (1997) 4 SA 441 (C).

is required to fulfil all the detained persons' rights and ensure that they are not arbitrarily deprived of same.

At present the DCS is not fulfilling their obligations. South African prisons are overcrowded which has led to a poor level of sanitation, sleeping and living arrangements and nutritional health of offenders. Overcrowding has also decreased the possibilities for meaningful rehabilitation of offenders. There also exists a high level of corruption and criminal activity among prisoners and officials within prisons as a result of which encourages such prisoners to continue their criminal behaviour. The transmission of sexually transmitted diseases and infections, particularly that of HIV aids, is exceptionally high in prisons as a result of the prevalence of sexual violence amongst inmates in order to establish hierarchical structures. As such the present conditions within prisons can be likened to that of inhumane, cruel and degrading punishment.

By instituting the death penalty, the DCS would bear less of a duty in respect of the incarcerated than they currently do. Capital punishment, although infringing on the right to life (s11)[568], would only impede on one human right of the inmate rather than the multiple that are currently and continue to be violated on a daily basis in prisons.

[568] The Constitution of the Republic of South Africa, 1996.

CHAPTER 7: THE STATE OF CONFLICT EXCEPTION:

7.1: INTRODUCTION:

In the *Makwanyane case* Chaskalson J stated that the death penalty could be permissible during times of conflict.[569] Kahn, although opposed to the death penalty, stated that there is a valid and understandable exception to the use of the death penalty if it is used in times of war and conflict within a country.[570] This chapter will explore the conflict exception by looking at the forms of intrastate conflict, the rate of violence experienced during times of conflict and compare this with the culture of violence and present rate of conflict in South Africa.

It is important to note that there exists no single definition of what exactly 'violent conflict' refers to. The term 'violent conflict' has been used to refer to civil wars; interstate wars; violence falling short of war; terrorism; disputes; riots and strikes.[571]

7.2: FORMS OF INTRASTATE CONFLICT:

Intrastate conflict refers to a state of unrest that occurs within the borders of a state. Conflict can begin within a country for many reasons and not necessarily in the traditional form of a civil war.[572] While there has been a steady decline in interstate wars after World War II ended in 1945, there has been an incline in intrastate wars.[573]

There are a myriad of reasons for intrastate conflict including fights that erupt between government and citizens over corruption and declining economies.[574] It is argued that weak or failing states are more vulnerable to conflict because they are unable to control what is taking place within their borders.[575] Failing or weak states are those in which the government can no longer or insufficiently performs state functions such as providing the basic necessities to live (electricity, health care or education).[576] It is apparent with the constant rolling black outs (which we have coined 'loadshedding'); the overcrowded government hospitals; under-educated population and crime rates of an epidemic level that South Africa is most definitely a weak failing state.

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[569] Makwanyane (n7 above) at [33].
[570] Kahn (n 343 above) 119.
[571] WR Avis 'Current Trends in Violent Conflict' (2019) K4D 2.
[572] World 101 'Understanding Intrastate Conflict' found at https://world101.cfr.org/understanding-international-system/conflict/understanding-intrastate-conflict (Accessed on 20 September 2023).
[573] World 101 (n 572 above).
[574] World 101 (n 572 above).
[575] World 101 (n 572 above).
[576] World 101 (n 572 above).

World 101 from the Council of Foreign Relations states that there are essentially five distinct types of intrastate conflict which are recognised.[577] These being:[578]

1. War of Secession: Conflict initiated by people who are united by a common belief, aim or territory that they fight to establish as a country.
2. War of Succession: Conflict started by persons who seek to overthrow and replace a country's government.
3. Violence Waged by Terrorist or Criminal Organizations: Conflicts lobbied by terrorist or criminal groups for an ideological, political or financial reason.
4. State-Sanctioned Violence: Conflicts involving police, military and government groups that persecute the citizens in the country.
5. Resource-Driven Conflict: Conflicts that involve two or more groups that are competing for the control or profits from a country's natural resources.

Although the above depicts the classic forms of intrastate conflicts, many academics argue that contemporary forms of conflict do not fit into these. Gregor argues that contemporary conflicts do not resemble those of the past recognised forms of intrastate war.[579] Modern-day conflicts no longer represent the polarised duel sided conflicts of the past, its parties are usually more obscured.[580]

Skocpol identifies four forms of contemporary revolutionary warfare. The first theory follows Marxist theory which identifies that revolution is a result of a revolutionary class to overthrow the ruling power.[581] The second is referred to as the aggregate-psychological theory which says that conflict results because of the psychological motivations of a society.[582] Thirdly is the value consensus theory which determines that conflict results from a lack of equilibrium in society.[583] Lastly, the political-conflict theory which requires its actors be a part of an organised group.[584] Each of these theories are based on the theory that social order is dependent on the greater part of society's needs being met.

[577] World 101 (n 572 above).
[578] World 101 (n 572 above).
[579] W Gregor 'Intervention in Interstate Wars the Military Planning Problem' 5 *Prism* 1 36.
[580] Gregor (n 579 above) 36.
[581] Gregor (n 579 above) 39.
[582] Gregor (n 579 above) 39.
[583] Gregor (n 579 above) 39.
[584] Gregor (n 579 above) 39.

The modern view of contemporary conflict is that it has evolved and shifted in recent years specifically surrounding intrastate conflicts. It is no longer considered as conflict between the state and militia groups but insurgency, guerrilla warfare, terrorism, organised and large-scale criminal activity and protests. [585]

The UN recognises that while the number of war related death around the world are declining there is a consistent war being waged between non-state actors that is leading to an increase in both violence and conflict.[586] Conflicts no longer have clearly defined groups and as such it has become almost impossible to determine the fighters in contemporary conflict such as that in Syria, which has gone from eight armed groups to over a thousand.[587]

The advancement of technology has resulted in the expedition of conflict. Such technological advancements have led to concerns about the potential for certain machinery (manned or unmanned) to enhance and wage war on a myriad of levels such as: cyber, biological, physical and aeronautical. [588]

The essential argument to be drawn from the above is that modern intrastate conflict can arise from multiple issues within a state. It is not required to fit into a specific mould of a type of warfare. States that lack the ability to control what takes place within its borders are more vulnerable to intrastate conflict.

It is apparent that South Africa is one such weak state which fails to control what takes place within its borders. This research argues that considering the change in forms of intrastate violent conflict, South Africa is experiencing an intrastate conflict as a result of large-scale violent crime rates.

7.3: THE RATE OF VIOLENCE EXPERIENCED DURING AN ARMED CONFLICT:

The rate of violence in South Africa is often compared to that experienced during the time of armed conflict. On the 19th of September 2019, the BBC News quoted President Cyril Ramaphosa as saying that the violence against women and children

[585] Avis (n 571 above) 4.
[586] UN75 2020 and Beyond 'A New Era of Conflict and Violence.' Found at https://www.un.org/en/un75/new-era-conflict-and-violence (Accessed on 21 September 2023).
[587] UN75 2020 and Beyond (n 586 above).
[588] UN75 2020 and Beyond (n 586 above).

in South Africa is similar to that experienced in a country at war.[589] Thus it is only right to examine what the rate of violence looks like during an intrastate conflict. For the purpose of this study, the rate of rape and death during conflict will be examined.

Death during war or times of conflict is almost considered as a given and as such opposing parties often attempt to kill as many of their enemy as they can. However it can be observed from the studies conducted by the UN that armed conflicts are killing less people than that of crime within countries.[590] About half a million people were killed as a result of homicide in the world during 2017, however only 89 000 persons were killed during armed conflicts.[591]

In 2020, it was recorded that Africa alone had 19 internationalised civil wars taking place.[592] Although the rates of intrastate violence and deaths related thereto decreased between 1900 and the early 2000s, they began to increase during 2018.[593] In 2020 and 2021 there was 10 978 and 19 325 conflict related deaths respectively.[594]

It is important to note that the Uppasala Conflict Data Program ('UCDP') classifies conflicts upon two different levels. 'Conflict' occurs where there is 25 999 battle related deaths a year.[595] 'War' is a conflict for which more than a 1000 battle-related deaths occur per year. [596] The figures depicted above and the definitions provided should be compared with the table in Paragraph 7.4 with regards to the rate of murder in South Africa within one calendar year.

When considering rape in the context of war or conflict, it is often referred to as a weapon of war. Rape is often used as a weapon to reinforce ideologies often related to patriarchy and heteronormativity.[597] During times of war, women are often depicted as symbols of the nation through which the enemy can harm communities, punish and destroy. [598] This socio-symbolic positioning of women during times of war stems from

[589] BBC News 'South Africa: Violence against Women Like a war – Ramaphosa' found at https://www.bbc.com/news/world-africa-49739977 (Accessed on 13 September 2023).
[590] UN75 2020 and Beyond (n 586 above).
[591] UN75 2020 and Beyond (n 586 above).
[592] J Palik, A M Obermeier & S A Rustad 'Conflict Trends in Africa, 1989 – 2021' (2022) *Prio Paper* 10.
[593] Palik, Obermeier & Rustad (n592 above) 11.
[594] Palik, Obermeier & Rustad (n592 above) 11.
[595] Palik, Obermeier & Rustad (n592 above) 12.
[596] Palik, Obermeier & Rustad (n592 above) 12.
[597] CS Westman 'Lessons from War Rape: How Can War Rape Help Understandings of Rape in South Africa?' (2022) 10 *Unisapressjournals* 2 2.
[598] Westman (n597 above) 6.

habitual practices in a society during a time of peace.[599] War rape is elated to 'ethnic cleansing' through which the rape is used as a tool to undermine national identities.[600] It does not take much creativity or knowledge to realise that such underlying influences of war rape can be related to rape experienced daily in a country.

During the following devastating times of conflict in countries, women were raped:[601]

- The Rwandan Genocide (1994): it is estimated between 100 000 and 250 000.
- Sierra Leone (1991-2002): 60 000
- Libera (1989-2003): 40 000
- Yugoslavia (1992-1995): 60 000
- Democratic Republic of Congo (1998): 200 000

Such numbers of rape and death become jarring when considering the present rates in South Africa.

7.4: THE CULTURE OF VIOLENCE IN SOUTH AFRICA:

South Africa is classified as one of the most violent and dangerous places in the world.[602] To put this into perspective, if you attempt to book a flight to South Africa from a different country (particularly from the United Kingdom), the flight centre warns you to not come to South Africa and if you insist on doing so, to take extra precautions. However, violence as a tool of power has been used in South Africa all throughout history.

Violence has become a legitimised and institutionalised form of coercion which has been used by both the oppressors and those being oppressed throughout the history of South Africa. Colonialists used violence as a way to repress and control the indigenous population in order to overrule them.[603]

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[599] Westman (n597 above) 7.
[600] Westman (n597 above) 7.
[601] Note on the Rwandan Genocide 'Sexual Violence: A Tool of War' found at https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf (Accessed on 28 September 2023).
[602] Institute for Economics & Peace 'Global Peace Index 2018' found at https://www.economicsandpeace.org/wp-content/uploads/2020/08/Global-Peace-Index-2018-2-1.pdf (accessed on 28 September 2023).
[603] The Conversation 'What's behind violence in South Africa: a sociologist's perspective' found at https://theconversation.com/whats-behind-vilence-in-south-africa-a-sociologists-perspective-128130 (Accessed on 13 September 2023).

During the time of Apartheid (1948-1994) society was characterised by violence from both the apartheid government and the resistance movements. During the time of transition from parliamentary sovereignty to democracy it was characterised by violence in which it is estimated that about 20 000 persons were killed as a result of political conflict.[604] There was conflict between the apartheid government and the resistance movements as well as conflict between resistance movements such as the ANC and IFP in what was referred to as 'black-on-black' violence.[605]

Protest action during Apartheid by resistance movements is often depicted as peaceful however this was not always the case. During the protest actions there did exist acts of stay-aways, strikes and boycotts which often characterises the ANC in history books.[606] However these acts soon turned violent during the 1980s especially in the townships.[607] Students, political activists and ordinary people took to the streets engaging in escalating violent acts which were targeted at specific objects of the Apartheid institution such as police stations, policemen's homes and government building.[608] The political nature of these protests soon took on criminal elements of looting and rampaging which destroyed businesses and ended in the deaths of persons.[609]

Large-scale attacks were also common place in Apartheid South Africa. During these instances large groups of persons would sweep through areas like locusts taking out homes and businesses, stealing live-stock and threatening, beating and killing those who were not lucky enough to flee.[610] Such attacks were also launched against persons who were gathered for specific events such as a funeral.[611]

Assassinations were also a common practice used by the Apartheid government to take out any political resistance leaders.[612]

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[604] M Schuld 'The Prevalence of Violence in Post-conflict Societies: A Case Study of Kwazulu-Natal, South Africa' (2013) 8 *Journal of Peacebuilding and Development* 1 63.
[605] Schuld (n604 above) 63.
[606] Schuld (n604 above) 64.
[607] Schuld (n604 above) 64.
[608] Schuld (n604 above) 64.
[609] Schuld (n604 above) 64.
[610] Schuld (n604 above) 64.
[611] Schuld (n604 above) 64.
[612] Schuld (n604 above) 65.

It is apparent that South Africa has not changed very much since the 1970s. While similar practices are deployed by groups (both politically affiliated and not) in the present, South Africa has become extremely violent among its citizens. In 2019, it was reported that 3700 women and children were murdered by men and an average of 100 rapes were taking place on a daily basis.[613]

The table below depicts the rate of prevalent violent serious crime (for which one would have received the death penalty) recorded between July 2022 and June 2023. When comparing these statistics with what the UCDP considers to be 'war' and 'conflict' it is apparent that South Africa's rate of murder is beyond both classifications.

It is important to note when looking at these figures that sexual crimes (due to their nature and a lack of trust in the police) are greatly underestimated due to the fact that they often go unreported,[614] therefore the true extent of sexual crimes committed in South Africa cannot be accurately represented through the reported case figures. It is argued by the Rape Survivors' Justice Campaign that approximately only 7.7% of sexual offences are reported.[615] Effectively this means that annually there is an estimated 555 494 rapes taking place in South Africa. Rape is considered in South Africa as a crime committed against an individual in an autographic sense and thus forming part of the culture of violence in the nation.[616]

[613] BBC News (n 589 above).
[614] CR Bartol & AM Bartol Criminal Behaviour. A Psychological Approach. (2017) Customised Edition for KRM310 (B) Psychocriminology pg 194.
[615] Westman (n597 above) 3.
[616] Westman (n597 above) 2.

Prevalence of Serious Crimes from July 2022 to June 2023 in South Africa					
CRIME	**July – September 2022**[617]	**October – December 2022**[618]	**January – March 2023**[619]	**April – June 2023**[620]	**TOTAL IN THE REPUBLIC**
MURDER	7004	7555	6289	6228	**27 076**
RAPE	10 590	12 419	10 512	9252	**42 773**
KIDNAPPING	4028	4124	3641	3854	**15647**
ROBBERY WITH AGGRAVTED CIRCUMSTANCES	38 412	37 829	34 460	35 579	**146 280**

These figures, when considering the rates experienced during times of war, are devastating. What should become obvious from this table of reported figures is that South Africa is experiencing seriously high levels of violence on a daily basis. This research argues that such a rate of violence mirrors (and in some instances exceeds) that experienced by persons during an armed conflict and as such a radical solution is required.

7.5: STATE OF EMERGENCY - A SOLUTION:

From the above, it can be deduced that South Africa is in a state of major conflict. A state of major conflict or war, was a ground upon which the court in *Makwanyane* agreed that the death penalty would be acceptable. This research argues that a solution to such implementation can possibly be found within the State of Emergency Act 64 of 1997.

The State of Emergency Act,[621] was enacted in 1997 in South Africa to allow for the president to make regulations related to matters that were declared a state of emergency within the Republic. A state of emergency can be defined as a declaration

[617] Police Recorded Crime Statistics, Republic of South Africa for the Second Quarter of the Financial Year 2022/2023 (July 2022-September 2022).
[618] Police Recorded Crime Statistics, Republic of South Africa for the Third Quarter of 2022/2023 Financial Year (October 2022-December 2022).
[619] Police Recorded Crime Statistics, Republic of South Africa for the Fourth Quarter of 2022/2023 Financial Year (January 2023 to March 2023).
[620] Police Recorded Crime Statistics, Republic of South Africa for the First Quarter of the 2023/2024 Financial Year (April 2023 to June 2023).
[621] Act 64 of 1997.

made by the government in response to an extraordinary threatening situation posing a threat to society.[622] While this research does not posit that this is the only solution, it does argue that it could be a possible solution in order for South Africa to implement the death penalty in order to take control of the present rate of violent crime.

At the Preamble it states that in terms of section 37 of the Constitution,[623] a state of emergency can be declared by an Act of Parliament when "the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or any other public emergency" provided such declaration is required to restore peace.[624] The purpose of this Act is to allow the state to regain control of the country in order to establish peace and order effectively. Thus there are two questions that must be answered in the affirmative before a state of emergency can be declared:[625]

1. Does the disturbance qualify as a threat to the life of the nation?
2. Is the declaration necessary in order to restore peace and order within the society?

With regards to the first question there does not exist much information from South African courts thus we must turn to the rulings of international courts. The European Court of Human Rights has held that a state of emergency is only required in exceptional circumstances in which the entire population as well as organised life is threatened.[626] The same court later went on to provide criteria which should be met before derogation of human rights can take place.[627] Such criteria are: the threat must be imminent or actual; the effects thereof must encompass the entire nation; the continuance of organised life must be threatened, and the crisis or danger must be of such an exceptional nature that the normal measures of public safety, health and order cannot adequately serve it.[628]

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[622] Geneva Centre for the Democratic Control of Armed Forces 'States of Emergency' DCAF Backgrounder (2005)
[623] The Constitution of the Republic of South Africa, 1996.
[624] Act 64 of 1997.
[625] N Fritz 'Chapter 61: State of Emergency' in *Constitutional Law of South Africa* found at https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap61.pdf (Accessed on 28 September 2023) 17.
[626] Fritz (n 625 above) 18.
[627] *Lawless v Ireland (No. 3)* (1961) 1 EHRR 15 at para 28
[628] European Court of Human Rights *Greek Case* (1969) 12 *Yearbook of the European Convention on Human Rights* at para 72.

In application to the case at hand the following conclusions can be determined using the criteria stated above:

- The rate of violent and serious crime in South Africa poses an imminent and actual threat to the lives of the population.
- Violent crime in South Africa is widespread and has the potential to affect any person in the nation.
- Due to the rate of crime, regular organised life cannot continue because persons of South Africa fear for their lives on a daily basis.
- The normal measures of public safety and order are not adequately resolving this issue as can be observed from the present crime rates in South Africa.

The second criteria requires that the declaration and the extraordinary powers availed to the government thereby are necessary (not desirable) for the purpose of restoration of peace and order.[629] This means that the situation must be of such a nature that the ordinary processes provided by the criminal justice system will not sufficiently resolve the issue at hand.

As stated above, the present procedures and measures being used are insufficient to deal with the rate of crime taking place or to protect the society of South Africa from crime. The South African society, as previously stated, has lost all faith in the general procedures provided by the criminal justice system to deal with crime. Therefore, a greater form of powers and procedures are necessary for the purpose of restoring peace and order to the population of South Africa's organised life.

The powers presented by the declaration of a state of emergency are that the President can make any such regulations that are necessary and expedient to restore the peace and order to the state.[630] This research argues that the implementation of the death penalty as a form of punishment, through such regulations, for serious and violent crimes (murder, rape, kidnapping and robbery with aggravated circumstances) or the attempt thereof could possibly restore peace and order by reducing the present prison population and by deterring persons from committing such crimes.

A state of emergency also has internal safeguards to ensure that a declaration of a state of emergency or any extension thereof is not unjustified or without reason by

[629] Fritz (n 625 above) 18
[630] State of Emergency Act No. 64 of 1997 at s2(1)(a).

supervision of Parliament (made up of all different political parties).[631] The National Assembly is required to review the declaration of state of emergency; table any extension thereof and any regulations created by the President during that time.

Any regulation made during a state of emergency does not exist indefinitely and will cease to be of force if: the state of emergency is withdrawn; it is not extended; the National Assembly disapproves of such a regulation or the state of emergency lapses.[632]

Like all forms of legislation, the State of Emergency Act and the powers availed therein contain limitations. The most apparent for the purpose of the argument made in this research is the limitation on non-derogable rights. At section 37(5)(c) of the Constitution,[633] it states that no Act of Parliament that is authorised during a state of emergency may permit any derogation of any section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated. The rights to dignity (s10) and life (s11) are protected entirely in this instance. Essentially this means that these rights cannot be limited by any regulation or legislation created in terms of a state of emergency. However, it was argued previously in this paper (Chapter 4) that both the rights to life and dignity should be limited for the purpose of serious and violent offenders in order to properly realise the rights of both the victims of such crimes and that of the greater populous.

7.6 CONCLUSION:

South Africa is experiencing crime at a rate greater than that experienced during a time of conflict or war. Times of conflict are no longer depicted through a polarised duel form of conflict but have rather become fragmented and have occurred for a myriad of reasons.

At present crime within South Africa is affecting its population at a greater rate, especially in terms of murder and rape, than a war. In order to create a radical change in the state of the present South African society, a radical solution is required.

This research argues that one possible solution, if the death penalty cannot be implemented through general legislation, is for a state of emergency to be declared

631 State of Emergency Act 64 of 1997 at s3.
632 State of Emergency Act 64 of 1997 at s4.
633 The Constitution of the Republic of South Africa, 1996.

and for the implementation of the death penalty through such regulations. This would require however, a derogation of the rights to life and dignity of prisoners and offenders in order for peace and order to be restored and for the rights of the greater populous to be fully realised.

CHAPTER 8: CONCLUSIONS:

On the 6th of June 1995 in the Constitutional Court of South Africa, the death penalty was handed its own death sentence in the case of *S v Makwanyane and Mchunu.*[634] Chaskalson J came to the conclusion in his judgment that the death penalty prescribed in section 277(1)(a) of the Criminal Procedure Act[635] was unconstitutional with regards to the rights to life; dignity and equality before the law.[636] The reasoning for this decision was that the imposition of the death penalty for murder is a cruel, inhumane or degrading punishment inconsistent with the unqualified right to life and human dignity, [637] that cannot be rectified in the case of error or enforced in a manner that is not arbitrary.[638]

Despite, a decline in crime in South Africa from 1994 to 2005, South Africa has seen a growing increase in violent crimes in the last 17 years. Specifically a rise in the following violent crimes: murder, rape (of adults as well as children), kidnapping and robbery with aggravated circumstances. As *Makwanyane* was decided over 27 years ago, this research aimed to question and answer whether the decision made in 1995 is still applicable and correct for the South Africa of 2023.

It addressed this question by looking at punishment and the purposes thereof, the application of the death penalty within the international landscape as well as the methods to carry it out, the supposed arbitrariness of the death penalty as a punishment, the role of public opinion with regards to sentencing, whether the death penalty can still be considered as cruel, inhumane and degrading and lastly, whether South Africa could claim that it is in a state of conflict. The following conclusions are drawn therefrom.

Punishment (as a whole) for persons who transgress laws is a well-practiced and accepted custom among human beings and generally only differs on how punishment should be justified, administered and what the purpose derived therefrom should be. In South Africa, the courts have determined and long since accepted that there are

[634] S v Makwanyane and Another 1995 (6) BCLR 665.
[635] Act No. 51 of 1977.
[636] The Constitution of the Republic of South Africa, 1993.
[637] Makwanyane (n7 above) [26] and [145].
[638] Makwanyane (n7 above) [146].

four normative purposes of punishment: deterrence, prevention, rehabilitation and retribution. As such when a court is considering a sentence, these purposes should be kept in mind in order to deliver a sentence that is 'appropriate'. When considering a sentence, a court should keep these purposes in mind in order to deliver what it considers an 'appropriate' sentence.

The courts should be led by the triad of *Zinn*: the interests of society, the seriousness of the crime and the personal circumstances of the offender. These three considerations include tensions and an equilibrium. The most important task of the court is to determine the equilibrium based on the particular facts of the case. However, it is generally accepted that the yardstick for severity of a sentence should be determined by the seriousness of the offence committed. Thus the punishment to be administered should be proportionate to the severity of the crime. The court should not consider a sentence within a vacuum and when considering an appropriate sentence; the courts must take into account a myriad of factors. The court should also be cognisant of the demands of society at the time of the commission of the crime. The crime and its severity should be viewed within the present circumstances of society and the sentence should address the concerns therein.

Considering the application of the death penalty internationally, it is important to note that each country has its own political, historical and legal development. As such the effect of the death penalty within each country is different and dependent on these factors. It was determined that it is effectively implemented in both the United States of America and Saudi Arabia, allowing both countries to have low murder rates compared to the sizes of their populations. Zimbabwe has a relatively high murder rate considering the small size of their population since its moratorium on the use of the death penalty. However, the United Kingdom has a very low murder rate considering the size of its population. This low murder rate is due to good policing; an effective justice system and swift and ensured punishment. South Africa has an exponentially high murder rate and with the mixed international results, this research argues that the death penalty could be the answer to our present rates of violent crime.

Various methods of execution commonly used (within the countries examined) were explained above so to determine the most humane procedure of execution. Although there exists a myriad of methods in which to administer death, this research concludes

that the most humane method thereof is lethal injection. The three-phased process of injections allows the prisoner to die without experiencing any pain or discomfort other than that experienced prior to the administration of the injection. Any other alternative method has a high potential of failing if not executed with exact precision and as such has the potential for the prisoner to die painfully.

The death penalty can no longer be considered an arbitrary punishment with regards to maldistribution, injustice, innocence and deterrence. The arguments of abolitionists in this regard were considered and picked apart to determine that they are almost farcical.

It is obvious, and no secret, that all forms of bias cannot be eradicated in the court room, the argument of 'racial maldistribution' of the death penalty can no longer be considered as base upon which to deny the death penalty. The South African population has a majority black ethnicity and therefore, as earlier explained, no matter the percentage of a population that commits crime there will always exist a higher likelihood of that person coming from the majority race.

Every court case is determined by the capriciousness of the court room. Every single case is presided over by a different combination of judges; defence attorneys and prosecutors, as such the conclusion of each case will always be different. In a country that strives toward substantive equality, requiring the law to be applied equally to each person according to their circumstances, the alternative sentences handed down upon two different offenders who have committed the same crime should not come as a shock.

All human activity, regardless of its level of danger, has the potential to claim the lives of innocent persons; the death penalty is no different in nature. However, this research argues that in a court where the burden of proof is to prove that the accused is guilty beyond a reasonable doubt; the possibility of wrongful convictions is exceedingly rare. The technological advancement of evidence collection and investigative techniques has also played a significant role in reducing the likelihood of an innocent person being sentenced wrongfully. The possibility of wrongful conviction in these instances is almost negligible.

This research is also of the belief that where an accused's life is at stake during a trial; the parties involved therein are more likely to participate in a manner that ensures all possibilities of doubt are examined with immense scrutiny.

While abolitionists, and academics alike, continue to argue that the death penalty has no deterrent effect, this research concludes that even where there exists even the slightest possibility of one murderer being deterred and as such his victims' lives being saved, the death penalty should be imposed. To deny the legalised state execution of a convicted serious offenders, is to deny a state's citizens the realization of their rights to life, dignity, safety and security and to consider these rights as subordinate to those of an offender. By denying the death penalty, South Africa is perpetuating this idea that the commission of illegal, unreasonable and unjustified violent offences committed against an innocent person is fair enough for the state to keep an offender alive.

The influence of public opinion in the sentencing process plays a vital role in upholding the legitimacy of the criminal justice system. By involving the public in the process of sentencing, we ensure that justice is perceived to be served by those who are most affected by crime. The public, as the stakeholders in the criminal justice system and the ones affected by its results, can provide a necessary balancing system to judicial decision-making. Where the public is involved in sentencing decisions, such decisions are more likely to be perceived as fair, transparent and reflective of society's present values and expectations.

By allowing members of the public to have the opportunity to participate in the sentencing process, a sense of trust in the system is created. Engagement on a societal level enhances the credibility of the process, offers reassurance to victims and displays to offenders and the broader community that justice is being served.

Public involvement adds a dimension to the sentencing process by bringing varied perspectives from the community into consideration. Judges are often detached from the daily experiences and concerns of the general populous and as such can benefit from the insight offered by those who are the direct victims of crime.

However, a balance must be struck with the incorporation of public opinion during sentencing to ensure the upholding of due process and fairness.

At present in South Africa, the courts and even mainstream media ignore the opinions, values and beliefs of the public for what is believed to be the 'morally right' decisions of academics and judicial officers. Those persons, while being experts on crime and criminal law, are not the persons who experience the criminal activity. As such the sentencing decisions presently being made with regards to serious violent offenders is disappointing to the South African public because they do not reflect their indignation of the crime.

We cannot continue to ignore the interests of the persons for whom the criminal justice system is supposed to serve for the sake of protecting the life of someone who so ruthlessly destroys the lives of others.

The court has a role to protect those who are outcast and marginalised. The Department of Correctional Services too bears a higher duty of care towards inmates and remand detainees because it has placed them in incarceration and as such is required to fulfil all the detained persons' rights and ensure that they are not arbitrarily deprived of same.

At present the DCS is violating the rights of prisoners and not fulfilling any such obligations to prisoners or remand detainees. As a result of the high violent crime rate and minimum sentencing legislation, South African prisons are overcrowded which has further led to the degradation of sanitation, sleeping and living arrangements and nutritional health of offenders. Overcrowding has obliterated any possibility for meaningful rehabilitation of offenders due to a lack of funds, facilities and professionals. There exists a high level of corruption and criminal activity among prisoners and prison officials as a result of which encourages such prisoners to continue their criminal behaviour both inside and outside the walls of the prison. The prevalence of sexual violence among inmates has resulted in a high transmission of sexually transmitted diseases and infections as well as trauma in order to establish hierarchical structures resembling heteronormativity. Such sexual violence often translates into offenders upon release committing sexual violence towards others in order for them to establish dominance.

It is apparent that South African prison conditions can be considered as cruel, inhumane and degrading.

By instituting the death penalty as a form of punishment, the DCS would bear less of an obligation in respect of the incarcerated than they do presently. Capital punishment, although infringing on the right to life (s11)[639], would only violate the human right to life of the inmate rather than the multiple that are currently and continue to be violated on a daily basis.

South Africa's rate of violence and crime is at such an epidemic level that it almost, and in most cases does, exceed that experienced during conflict and war. Conflict and war no longer take a duel form and often occur for reasons other than religious prosecution, equality strife and arms.

At present crime within South Africa is affecting its population at a greater rate, especially in terms of murder and rape, than a war. Such desperate times, call for radical solutions.

In the alternative to a generally based form of the death penalty that is applied every day through an Act of Parliament, this research argues that a solution can possibly be found in the declaration of a state of emergency. The emergency being the state of disorder and public emergency of the rate of violent crime in South Africa. Once declared, the death penalty can be implemented through regulations declared by the President and overviewed by Parliament. These regulations however will lapse when peace and order is restored in the Republic.

Although the death penalty may violate the rights to life and dignity of an offender, a choice must be made. If the South Africa Government want to see a significant change in the present rate of crime, radical choices and changes must be made. Until such choices are made, the public will continue to distrust the present criminal justice system and the idea that the lives of law-abiding citizens are subordinate to those of violent offenders will be perpetuated.

[639] The Constitution of the Republic of South Africa, 1996.

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