

**SENTENCING IN BOTSWANA:
A COMPARATIVE ANALYSIS OF LAW AND PRACTICE**

by

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DECLARATION

I, Elizabeth Nyawira Macharia, hereby declare that this thesis is my original work and it has not been previously submitted for the award of a degree at any other university or institution.

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DEDICATION

For my children

Kgotla Zachary

Raha Khumo

Tashatha Ng'endo Keseitse

Neema Mmabotho

Yamasa Njeri

Sechaba Macharia

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SUMMARY OF THESIS

‘Sentencing in Botswana: A comparative analysis of law and practice’

This thesis considers capital punishment, corporal punishment and mandatory minimum sentencing in Botswana and the continued usefulness of these three sentencing options.

The thesis adopts a comparative approach. Firstly, the thesis examines the abolition of capital punishment in South Africa, and the United Kingdom, as well as inroads made in the manner of application of capital punishment in retentionist commonwealth Caribbean states. Secondly, the process leading to prohibition of judicial corporal punishment in South Africa, Namibia, Zimbabwe, England and Wales, as well as the United States is analysed. Thirdly, the thesis considers mandatory minimum sentencing in South Africa, England and Wales and Australia. The imposition of judicial corporal punishment on juvenile offenders is also examined. Alternative sanctions that may replace these sentencing options are investigated.

The findings are that the selected sentencing options fall short of international human rights standards and, in particular the right to life and the right to human dignity. The primacy of these rights is notable in sentencing law and practice of each comparative jurisdiction.

The promovenda identifies current barriers to dispensing with these sentencing options in Botswana. Drawing from the comparative jurisprudence, she proposes how Botswana may successfully achieve abolition of the death penalty, prohibition of judicial corporal punishment and improvement of the mandatory minimum sentencing regime. Recommendations are also made for suitable alternative sanctions such as life imprisonment, correctional supervision and restorative justice approaches to sentencing of adult and juvenile offenders, which, if incorporated, will advance sentencing law in Botswana.

Key terms

Sentencing – Botswana – human rights – capital punishment - judicial corporal punishment - mandatory minimum sentencing - sentencing of juveniles - alternative sentencing- comparative perspective – law reform.

LIST OF ABBREVIATIONS

| | |
|-------|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| CAT | Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment |
| CJA | Child Justice Act |
| CP&E | Criminal Procedure and Evidence Act |
| ICCPR | International Covenant on Civil and Political Rights |
| SALRC | South African Law Reform Commission |
| TRC | Truth and Reconciliation Commission |
| UDHR | Universal Declaration of Human Rights |
| UNCRC | United Nations Convention on the Rights of the Child |
| UN | United Nations |

GLOSSARY

| | |
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| <i>Botho</i> | Setswana term for the idea or philosophy of human-ness or personhood |
| <i>Dikgosi</i> | Setswana term for Chiefs |
| <i>Go kgwathisa</i> | Setswana term for judicial corporal punishment under Tswana Customary Law |
| <i>Kibiko</i> | Swahili term for hippopotamus and the name of a whip made from hippopotamus hide. However the term has become synonymous with any instrument of corporal punishment like a cane or switch |
| <i>Kgosi</i> | Setswana term for Chief |
| <i>Kgosana</i> | Setswana term for headman who assists the Chief with his duties |
| <i>Kgotla</i> | Setswana term for the traditional meeting place for tribal communities living in Botswana where the Chief meets his tribe <i>or morafe</i> . In the <i>Kgotla</i> every person has a right to be heard and it is in the <i>Kgotla</i> where decisions are taken after a consultative process. |
| <i>Morafe</i> | Setswana term for members of a tribe. |
| <i>Mophato</i> | Setswana term for an age group of persons initiated in the same season. It is a manner of organising members of a tribe. <i>Mephato</i> can be requested to perform specific tasks for the Chief. |
| <i>Mephato</i> | plural of <i>mophato</i> |
| <i>Motshwarelela Bogosi</i> | Setswana term for a regent to the Chief |
| <i>Therisanyo</i> ideal taken for | Setswana term for consultation. <i>Therisanyo</i> is an important in Setswana culture where decisions affecting the tribe are after broad consultation. The principle has found its way into modern life and is often applied by the Government. Before the passing of important new legislation the minister responsible the statute will hold <i>Kgotla</i> meetings country-wide to gauge the wishes of citizens. |
| <i>Thupa</i> | Setswana term for a cane |
| <i>Ubuntu</i> | Nguni Bantu term for the idea or philosophy of human-ness or personhood |

Table of Contents

| | |
|--|-------------|
| LIST OF ABBREVIATIONS | VII |
| GLOSSARY | VIII |
| CHAPTER ONE | 1 |
| INTRODUCTION | 1 |
| 1 INTRODUCTION | 1 |
| 2 CONCEPTUAL FRAMEWORK | 2 |
| 2.1 Description of terms: Sentence, sentencing and punishment | 2 |
| 2.2 Why study sentencing? | 3 |
| 2.3 Sentencing and the Constitution | 4 |
| 3 LITERATURE REVIEW | 6 |
| 4 RESEARCH PROBLEM | 8 |
| 5 RESEARCH OBJECTIVES | 8 |
| 6 RESEARCH METHODS, DESIGN, METHODOLOGY, AND ETHICS | 9 |
| 6.1 Research methods | 9 |
| 6.2 Research design and methodology | 11 |
| 6.2.1 The doctrinal method | 11 |
| 6.2.2 The comparative method | 12 |
| 6.3 Outcomes | 14 |
| 6.4 Ethics | 14 |
| 6.5 Citation style | 15 |
| 7 STRUCTURE OF THE STUDY | 15 |
| CHAPTER TWO | 18 |
| CAPITAL PUNISHMENT IN BOTSWANA: THE CASE FOR ABOLITION | 18 |
| 1 INTRODUCTION | 18 |

| | | |
|------------|--|-----------|
| 2 | DEFINING THE DEATH PENALTY AND MANNER OF EXECUTION | 18 |
| 3 | THE DEATH PENALTY IN BOTSWANA | 21 |
| 3.1 | Introduction and historical overview | 21 |
| 3.2 | The death penalty under the Botswana Constitution and Statutory Law | 28 |
| 3.3 | Limitations on the imposition of the death penalty | 35 |
| 3.4 | The Presidential warrant and the prerogative of mercy | 35 |
| 3.5 | The constitutionality of the death penalty in Botswana | 37 |
| 3.6 | The death penalty in Botswana: Decisions of the African Commission | 47 |
| 3.7 | Botswana's international obligations and the death penalty | 51 |
| 3.7.1 | The place of international law in Botswana's national law | 51 |
| 3.7.2 | Treaties guaranteeing the right to life | 52 |
| 3.7.3 | Treaties prohibiting the torture, cruel, inhuman and degrading punishment | 55 |
| 3.8 | Discourses on the death penalty in Botswana | 56 |
| 3.8.1 | The constitutional savings clause | 56 |
| 3.8.2 | Public opinion | 57 |
| 3.8.3 | Adequacy of representations | 58 |
| 3.8.4 | The prerogative of mercy | 59 |
| 3.8.5 | Secret executions | 60 |
| 4 | INTERNATIONAL AND REGIONAL PERSPECTIVES | 60 |
| 4.1 | The United Nations | 63 |
| 4.2 | The European Union | 66 |
| 4.3 | The inter-American human rights system | 68 |
| 4.4 | The death penalty in Africa | 71 |
| 4.5 | Death penalty: International trends | 75 |
| 5 | COMMON ARGUMENTS IN FAVOUR OF THE DEATH PENALTY | 77 |
| 5.1 | Individual and general deterrence | 77 |
| 5.2 | Retribution | 77 |
| 5.3 | Public opinion | 78 |
| 5.4 | Efficient punishment | 78 |
| 5.5 | Other arguments | 79 |

| | | |
|-------------|--|------------|
| 6 | ARGUMENTS AGAINST THE DEATH PENALTY | 79 |
| 6.1 | The death penalty is not a deterrent | 79 |
| 6.2 | The death penalty brutalises all those involved in the process | 82 |
| 6.2.1 | The prisoner | 82 |
| 6.2.2 | The executioners | 83 |
| 6.2.3 | The families and friends of the victim and the prisoner | 84 |
| 6.3 | The death penalty and poor and marginalised communities | 84 |
| 6.4 | The death penalty is imposed arbitrarily | 85 |
| 6.5 | The death penalty may result in execution of the innocent | 86 |
| 6.6 | The death penalty is a violation of the fundamental human rights of prisoners | 87 |
| 6.7 | Ineffective clemency process | 88 |
| 6.8 | Death penalty is sometimes imposed for less serious offences | 89 |
| 6.9 | Retroactive use of the death penalty | 90 |
| 6.10 | Death penalty against juveniles, the elderly, pregnant women and the mentally incapacitated | 90 |
| 6.11 | The death penalty and public opinion | 91 |
| 7 | ACHIEVING ABOLITION: A COMPARATIVE STUDY | 93 |
| 7.1 | South Africa | 93 |
| 7.1.1 | Introduction | 93 |
| 7.1.2 | Historical overview | 94 |
| 7.2 | The United Kingdom | 109 |
| 7.3 | The Commonwealth Caribbean | 111 |
| 8 | LIFE IMPRISONMENT AS AN ALTERNATIVE TO THE DEATH PENALTY | 116 |
| 8.1 | Advantages of life imprisonment | 120 |
| 8.2 | Disadvantages of life imprisonment | 121 |
| 8.3 | Life imprisonment in South Africa | 122 |
| 8.4 | Life imprisonment in England and Wales | 123 |
| 9 | ATTAINING A PROHIBITION OF THE DEATH PENALTY IN BOTSWANA: A PROPOSED ROADMAP | 125 |

| | | |
|---|---|------------|
| 9.1 | Overcoming the constitutional saving clause | 126 |
| 9.1.1 | Recommendations addressing constitutionality of the death penalty | 129 |
| 9.2 | Addressing public support for the death penalty | 130 |
| 9.2.2 | Recommendations regarding public opinion | 132 |
| 9.3 | Activism of medical professionals | 132 |
| 9.3.1 | Recommendation on activism of medical professionals | 134 |
| 9.4 | Signing international treaties to abolish the death penalty | 134 |
| 9.4.1 | Recommendation on signing of international treaties regarding the death penalty | 135 |
| 9.5 | Non-extradition to retentionist countries | 135 |
| 9.5.1 | Recommendation on extradition to retentionist countries | 136 |
| 9.6 | Enhancing alternative sentencing options | 136 |
| 9.6.1 | Recommendation on life imprisonment as an alternative to the death penalty | 137 |
| CHAPTER 3 | | 139 |
| JUDICIAL CORPORAL PUNISHMENT IN BOTSWANA: A ROAD MAP TO LAW REFORM | | 139 |
| 1 | INTRODUCTION | 139 |
| 2. | THE RATIONALE FOR JUDICIAL CORPORAL PUNISHMENT | 140 |
| 2.1 | The divine right to punish | 140 |
| 2.2 | Punishment by social contract | 141 |
| 2.3 | Corporal punishment, racial oppression and sovereignty in colonial Africa | 142 |
| 2.4 | Corporal punishment as a response to ‘folk devils’ and ‘moral panics’ | 145 |
| 2.5 | The link between corporal punishment and sex | 146 |
| 2.6 | Corporal punishment and religion | 146 |
| 2.7 | Corporal punishment, paternalism, power and discipline | 148 |
| 3 | JUDICIAL CORPORAL PUNISHMENT IN BOTSWANA | 149 |
| 3.1 | Judicial corporal punishment in the Constitution | 149 |
| 3.2 | Offences attracting corporal punishment | 150 |
| 3.3 | The manner of application of corporal punishment | 151 |
| 3.4 | Statutory limitations on the imposition of corporal punishment | 152 |

| | | |
|------------|---|------------|
| 3.5 | Corporal punishment in the Customary Courts | 152 |
| 3.6 | Judicial corporal punishment of juveniles in Botswana | 153 |
| 3.7 | Corporal Punishment of juveniles in Customary Courts | 157 |
| 3.8 | Important Considerations in the sentencing of juvenile offenders | 161 |
| 3.8.1 | The best interest of the child principle | 161 |
| 3.8.2 | Defining a child for purposes of the sentencing of children in Botswana | 161 |
| 4 | CONSTITUTIONAL CHALLENGES TO JUDICIAL CORPORAL PUNISHMENT | 166 |
| 4.1 | The <i>Clover Petrus</i> decision | 166 |
| 4.2 | The <i>Desai</i> decision | 169 |
| 4.3 | The <i>Kgafela Kgafela</i> decision | 170 |
| 5 | BOTSWANA'S OBLIGATIONS UNDER INTERNATIONAL LAW | 175 |
| 6 | ALTERNATIVES TO JUDICIAL CORPORAL PUNISHMENT | 177 |
| 6.1 | Alternatives for adult offenders in Botswana | 177 |
| 6.2 | Alternative sentencing options for juvenile offenders | 178 |
| 6.2.1 | Probation | 178 |
| 6.2.2 | Ikago School of Industries | 179 |
| 6.2.3 | Community service | 180 |
| 6.2.4 | Imprisonment of children | 181 |
| 7 | DISCOURSES | 182 |
| 7.1 | Popular opinion | 182 |
| 7.2 | Extrajudicial flogging | 183 |
| 7.3 | Lack of a robust alternative sentencing system | 184 |
| 7.4 | Summary of challenges facing Botswana in abolishing judicial corporal punishment | 184 |
| 8 | COMPARATIVE JURISPRUDENCE | 186 |
| 8.1 | South Africa | 187 |
| 8.2 | Zimbabwe | 196 |

| | | |
|-------------|---|------------|
| 8.3 | Namibia | 201 |
| 8.4 | The United Kingdom | 205 |
| 8.5 | The United States | 210 |
| 9 | THE TURNING OF THE TIDE: THE REASONS FOR THE DECLINE OF JUDICIAL CORPORAL PUNISHMENT | 211 |
| 9.1 | The dignity of the human being is inviolable | 211 |
| 9.2 | The manner of infliction of the punishment is objectionable | 216 |
| 9.3 | Judicial corporal punishment demeans the punisher and organised society | 217 |
| 9.4 | Judicial corporal punishment has no deterrent or rehabilitative effects | 217 |
| 9.5 | Severity of the punishment depends on the character of the punisher | 219 |
| 9.6 | Judicial corporal punishment administered by a stranger is humiliating | 221 |
| 10 | POSSIBLE ALTERNATIVES TO CORPORAL PUNISHMENT | 222 |
| 10.1 | South Africa | 222 |
| 10.1.1 | Correctional supervision of adults | 223 |
| 10.1.2 | Restorative Justice for adult offenders | 225 |
| 10.1.3 | Community-based sentencing and restorative justice for juveniles | 229 |
| 10.2 | Australia | 233 |
| 11 | ROADMAP TO ACHIEVING PROHIBITION IN BOTSWANA | 234 |
| 11.1 | Overcoming the constitutional savings clause | 236 |
| 11.1.1 | A constitutional clause cannot be unconstitutional | 236 |
| 11.1.2 | Parliament should amend the constitution to uphold the dignity of persons | 237 |
| 11.1.3 | Recommendations | 238 |
| 11.2 | Addressing public support for judicial corporal punishment | 239 |
| 11.2.1 | Recommendations | 241 |
| 11.3 | Strengthening alternative sentencing options for adult and juvenile offenders | 243 |
| 11.3.1 | Recommendations | 245 |
| | CHAPTER FOUR | 248 |
| | RECONSIDERING THE USE OF MANDATORY MIMIMUM SENTENCING IN BOTSWANA | 248 |
| 1. | INTRODUCTION | 248 |

| | | |
|-------------|---|------------|
| 1.1 | Types of mandatory minimum sentences | 248 |
| 2. | COMMON ARGUMENTS IN FAVOUR OF MANDATORY MINIMUM SENTENCING | 250 |
| 2.1 | Deterrence, retribution and incapacitation | 250 |
| 2.2 | A response to serious crime | 251 |
| 2.3 | Pursuit of consistency, predictability and uniformity in sentencing | 251 |
| 3. | COMMON OBJECTIONS TO MINIMUM SENTENCING | 252 |
| 3.1 | Mandatory sentencing is not an effective deterrent | 252 |
| 3.2 | Mandatory sentences breach human rights standards | 253 |
| 3.3 | Mandatory minima are often politically motivated | 254 |
| 3.4 | Mandatory sentences usurp judicial discretion | 255 |
| 4 | MINIMUM MANDATORY SENTENCES IN BOTSWANA | 257 |
| 4.1 | The history of minimum mandatory sentencing in Botswana | 258 |
| 4.2 | Reservations to the minimum mandatory sentence regime | 261 |
| 4.3 | Mitigating the rigours of minimum mandatory sentences through the Courts | 263 |
| 4.4 | The enactment of section 27(4) of the Penal Code | 265 |
| 4.5 | Interpreting ‘exceptional extenuating circumstances’ | 266 |
| 4.6 | Exceptional extenuating circumstances through the cases | 270 |
| 4.6.1 | Youth and first offenders | 270 |
| 4.6.2 | Circumstances surrounding the offence and the offender | 274 |
| 4.6.3 | Value of the property stolen | 275 |
| 4.7 | Reservations to section 27(4) Penal Code | 277 |
| 4.8 | Mandatory minima and juveniles | 277 |
| 4.9 | Mandatory minima and the possible imprisonment of juveniles | 278 |
| 4.10 | Conclusions | 278 |
| 4. | MANDATORY SENTENCING: A COMPARATIVE SURVEY | 279 |
| 4.1 | South Africa | 280 |
| 4.1.1 | Rationale for the introduction of mandatory minima in South Africa | 281 |
| 4.1.2 | The impact of the 1997 amendment | 281 |

| | | |
|------------|--|------------|
| 4.1.3 | Mandatory sentencing and juveniles in South Africa | 289 |
| 4.2 | MANDATORY SENTENCING IN ENGLAND AND WALES | 291 |
| 5.2.1 | Impact of minimum sentencing in England and Wales | 293 |
| 4.3 | MANDATORY SENTENCING IN AUSTRALIA | 293 |
| 4.3.1 | The Northern Territory | 294 |
| 4.3.2 | Western Australia | 296 |
| 4.3.3 | Impact of minimum sentencing in Australia | 297 |
| 4.3.4 | Mandatory sentencing and juveniles in Australia | 299 |
| 4.3.5 | Mandatory sentencing and indigenous communities in Australia | 299 |
| 5. | ALTERNATIVES TO MANDATORY MINIMUM SENTENCES | 300 |
| 5.1 | Presumptive sentences in the United States | 300 |
| 5.2 | Guideline judgements in England and Wales | 301 |
| 6. | LESSONS FOR THE FUTURE: PROPOSALS FOR LAW REFORM IN BOTSWANA | 302 |
| 6.1 | Research into the efficacy and possible abolition of mandatory minima | 302 |
| 6.1.1 | Recommendations regarding efficacy of mandatory minima | 303 |
| 6.2 | Interpretative guidelines on the scope of application of section 27(4) Penal Code | 303 |
| 6.2.1 | Recommendations regarding the application of section 27(4) Penal Code | 304 |
| 6.3 | Statutory limitations on the application of mandatory minima to juveniles | 306 |
| 6.3.1 | Recommendations regarding mandatory minima in sentencing juveniles | 306 |
| | CHAPTER FIVE | 308 |
| | RECOMMENDATIONS FOR LAW REFORM | 308 |
| 1. | INTRODUCTION | 308 |
| 2. | PROPOSALS FOR LAW REFORM | 308 |
| 2.1 | Capital punishment | 308 |
| 2.1.1 | Abolition of the death penalty | 308 |
| 2.1.2 | Challenging the manner of administration of capital punishment | 309 |
| 2.1.3 | A moratorium on the death penalty | 310 |
| 2.1.4 | Addressing public support for the death penalty | 310 |
| 2.1.5 | Activism of medical professionals | 310 |
| 2.1.6 | Signing international treaties to abolish the death penalty | 310 |
| 2.1.7 | Non-extradition to retentionist countries | 311 |
| 2.1.7 | Life sentences should also be extended to persons convicted of capital crimes | 311 |

| | | |
|------------|---|------------|
| 2.2 | Judicial corporal punishment | 312 |
| 2.2.1 | Abolition of judicial corporal punishment | 312 |
| 2.2.1 | Addressing public support for judicial corporal punishment | 313 |
| 2.2.3 | Introduction of community-based sentencing following a prohibition | 313 |
| 2.2.4 | Introduction of restorative justice approaches for juvenile offenders | 314 |
| 2.2.5 | Engagement with <i>Dikgosi</i> | 314 |
| 2.2.6 | Evaluation of the impact of alternative sanctions | 314 |
| 2.3 | Minimum Mandatory sentencing | 315 |
| 2.3.1 | Research into the efficacy of mandatory minima in Botswana | 315 |
| 2.3.2 | The adoption of guideline judgements | 315 |
| 2.3.3 | A moratorium into the promulgation of further mandatory minimum sentences | 316 |
| 2.3.4 | Interpretative guidelines on the scope of application of section 27(4) Penal Code | 316 |
| 2.3.5 | Amending section 27(4) of the Penal Code to restore judicial discretion | 316 |
| 2.3.6 | Statutory limitations on the application of mandatory minima to juveniles | 317 |
| 3. | CONCLUSION | 318 |
| | BIBLIOGRAPHY | 319 |
| | ARTICLES | 319 |
| | BOOKS | 325 |
| | E-BOOKS | 328 |
| | BOOK CHAPTERS | 328 |
| | LEGISLATION | 331 |
| | Australian Legislation | 331 |
| | Botswana Pre-Independence Legislation | 331 |
| | Botswana Primary Legislation | 331 |
| | Botswana Subsidiary Legislation | 332 |
| | England and Wales Legislation | 332 |
| | South African Legislation | 332 |
| | Zimbabwe Legislation | 332 |
| | BOTSWANA REPORTS | 332 |
| | UNPUBLISHED DISSERTATION | 333 |

| | |
|---|------------|
| CASE LAW | 333 |
| Australia | 333 |
| Botswana | 333 |
| Canada | 335 |
| Commonwealth Caribbean | 335 |
| England and Wales | 335 |
| Namibia | 335 |
| South Africa | 335 |
| Tanzania | 336 |
| United States | 337 |
| Zimbabwe | 337 |
| INTERNATIONAL CASE LAW | 337 |
| African Commission on Human Rights | 337 |
| European Court of Human Rights | 338 |
| Inter-American Commission on Human rights | 338 |
| Inter-American Court on Human rights | 338 |
| European Commission of Human Rights | 338 |
| United Nations Human Rights Committee | 339 |
| TREATIES | 339 |
| UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS | 339 |
| UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL RESOLUTIONS | 340 |
| AFRICAN UNION RESOLUTIONS | 340 |
| OTHER INTERNATIONAL INSTRUMENTS / SOFT LAW | 340 |
| HUMAN RIGHTS BODIES: COMMENTS AND OBSERVATIONS | 340 |
| REPORTS FROM OTHER JURISDICTIONS AND ORGANISATIONS | 341 |

| | |
|--------------------------------------|------------|
| Australia | 341 |
| England and Wales | 341 |
| South Africa | 342 |
| OTHER REPORTS | 342 |
| ACADEMIC WEB ARTICLES | 343 |
| ELECTRONIC NEWSPAPER ARTICLES | 343 |
| NEWSPAPER ARTICLES | 344 |
| WEB PAGES | 344 |

CHAPTER ONE

INTRODUCTION

1 INTRODUCTION

This thesis considers three selected sentencing options in Botswana, namely capital punishment, corporal punishment and mandatory minimum sentencing. In this study, the researcher investigates the continued use of the three selected sentencing options in Botswana's criminal justice system using the doctrinal and comparative methods. The thesis commences by discussing each sentencing option in detail and highlights the problems that are identifiable in its continued. Thereafter, using the comparative method, the thesis investigates the experience of different jurisdictions, with respect to the selected sentencing options, with a view to discovering how each jurisdiction has dealt with similar problems presented by the use of these sentencing options. The selection of comparative jurisdictions is based on each country's unique experience with the particular sentencing option, which may be instructive for Botswana. Alternative sentencing is discussed as a solution to fill the gap that would be created by abolition of the selected sentencing options. Recommendations on law reform conclude the discussion.

Sentencing options in use in Botswana are prescribed in the Penal Code which was first promulgated in 1964.¹ These are death, imprisonment, corporal punishment, fines, forfeiture and security to keep the peace.² The manner in which these punishments should be imposed is set out in sections 298 to 315 of the Criminal Procedure Act.³ Over the years, there has been no change in the sentencing options available to the courts. Botswana is a retentionist

¹ Laws of Botswana Cap 08:01.

² Section 25 Penal Code.

³ Laws of Botswana Cap 08:02.

country, which continues to use the death penalty.⁴ In contrast, a fair number of countries are abolitionist while some countries retain the death penalty in their laws but have a moratorium on its execution.⁵ Particular dissatisfaction has been expressed in case law with Botswana's continued use of the death penalty.⁶ Judicial corporal punishment has been used in the Common Law and Customary Law Courts of Botswana commencing long before her independence. One of the few changes in sentencing law in Botswana over the years has been the introduction of the minimum mandatory sentence regime.⁷ This sentencing regime has also attracted intense criticism in Botswana for its perceived fettering of judicial discretion in sentencing.⁸

The analysis of these sentencing options is coupled with an inquiry into restorative justice particularly its use in the diversion of young offenders. The researcher has selected the comparative method to review the selected sentencing options. The methodology is discussed in full in the research methodology section.

2 CONCEPTUAL FRAMEWORK

2.1 Description of terms: Sentence, sentencing and punishment

A sentence is defined as an order of court, which finalises a criminal case against an

⁴ According to Amnesty International as of December 2010, 96 countries had abolished the death penalty in law or practice <http://www.amnesty.org/en/death-penalty/numbers> (accessed 20 January 2016).

⁵ Countries that are abolitionist in practice total 35 in number <http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice> (accessed 20 January 2016).

⁶ *Ntesang v The State* 1995 BLR 151 (CA), in which the constitutionality of the death penalty in Botswana was challenged and affirmed; *Ditshwanelo and Others v The Attorney General and Another* 1999 (2) BLR 56(HC) in which the death penalty was challenged on further constitutional grounds and *Emmanuel Tsebe and Another v The Minister of Home Affairs and others* Case no 27682/10 South Gauteng High Court Johannesburg in which the South African Bench criticised the continued use of the death penalty in Botswana and declined to extradite the First Applicant who had been charged with murder in Botswana.

⁷ Minimum mandatory sentences were first introduced into Botswana law in the Motor Vehicle Theft Act 17 of 1995 Cap 09:04 and the Stock Theft Act 21 of 1996 Cap 09:01. Since then, similar penalties have been introduced for rape and robbery.

⁸ See *Matomela v The State* 2001 (1) BLR 396 (HC) 399.

offender.⁹ Sentencing is ‘an action by an official criminal court imposing a sentence on a convicted offender.’¹⁰ Punishment attaches to a crime following a conviction for criminal conduct.¹¹ Terblanche distinguishes sentencing from punishment by stating that punishment involves discomfort, pain or some adverse sanction to the recipient, whereas sentencing does not always have an element of punishment for example, a suspended sentence.¹²

2.2 Why study sentencing?

The sentencing process is an important field of study in its own right. Whilst recognising that sentencing research has intensified from the early 1970’s, reform in sentencing has generally been neglected in comparison to other areas of criminal law and procedure.¹³

This view is shared by other leading authors in sentencing notably Terblanche who refers to sentencing as ‘the neglected phase of the trial process.’¹⁴ Motivating for more research into the law of sentencing, Terblanche gives three arguments in support of its importance. Firstly, he states that sentencing is a process that takes place frequently hence the need to increase knowledge in the area. Secondly, he states that there is a view that sentencing is difficult and complicated. Thirdly, he notes that sentencing is the interface between the ordinary citizen and the workings of the law.¹⁵

Frankel, writing in 1972 about sentencing in the United States, stated that sentencing is ‘a

⁹ SS Terblanche *The guide to sentencing in South Africa* (2007) 5.

¹⁰ SS Terblanche *The guide to sentencing in South Africa* (2007) 2.

¹¹ SS Terblanche *The guide to sentencing in South Africa* (2007) 3.

¹² SS Terblanche *The guide to sentencing in South Africa* (2007) 3. Terblanche, at page 5, mentions that not all sentences have an element of punishment for example, cautions and suspended sentences. However, he concedes that this view is debatable.

¹³ M Wasik *The sentencing process* (1997) xi.

¹⁴ SS Terblanche *The guide to sentencing in South Africa* (2007) 1.

¹⁵ SS Terblanche *The guide to sentencing in South Africa* (2007) 7.

wasteland in the law'¹⁶ ignored 'as an anti-climactic, unruly, doctrinally unalluring area'¹⁷ whereas it is in fact the 'primary if not wholly dispositive stage of the correctional processes.'¹⁸ In fact, sentencing is a decision of critical importance and the sentence the primary decision made in a criminal trial.¹⁹ It can be surmised from comments of the above jurists, wiring from different jurisdictions, that reform in sentencing is often slow and sometimes absent despite the importance of this area of law.

Considering the distinct impact that sentencing has on the public interacting with the courts as offenders and victims who have handed over their right of retribution to the state,²⁰ it is important to study sentencing and deepen knowledge in the area. It should be noted that the aims and underlying theories of punishment have been the subject of discussion and critical evaluation by numerous authors and shall not be repeated here.²¹

2.3 Sentencing and the Constitution

The Constitution forms the basis of all laws in Botswana. The validity of laws must be tested against the Constitution.²² Thus, in *Petrus and Another v The State* Aguda JA held:

Under a written constitution such as we have in Botswana, the national assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation, even if it is *ultra vires* any provision of the constitution. I believe that it is clear, and this point must be clearly made, that every piece of legislation is subject to the scrutiny of the courts at the instance of any citizen, or indeed in an appropriate case, at the instance of any non-citizen living in the country, who has the necessary *locus* to challenge the constitutionality of legislation.²³

¹⁶ ME Frankel 'Lawlessness in sentencing' in Martin Wasik (ed) *The sentencing process* (1997) 56. First published in (1972) 41(1) *University of Cincinnati Law Review* 1.

¹⁷ ME Frankel 'Lawlessness in sentencing' in Martin Wasik (ed) *The sentencing process* (1997) 4 - 5. First published in (1972) 41(1) *University of Cincinnati Law Review* 1.

¹⁸ ME Frankel 'Lawlessness in sentencing' in Martin Wasik (ed) *The sentencing process* (1997) 4 - 5. First published in (1972) 41(1) *University of Cincinnati Law Review* 1.

¹⁹ A von Hirsch & A Ashworth (eds) *Principled sentencing: Readings in theory and policy* (1998) v.

²⁰ JJ Joubert (ed) *Criminal procedure handbook* 11th ed (2013) 43.

²¹ SS Terblanche *The guide to sentencing in South Africa* (2007) 177 – 210; CR Snyman (2002) *Criminal Law 4 ed* 12-31; J Burchell & J Milton (1997) *Principles of Criminal Law 2 ed* 38-56; T Metz 'Legal punishment' in C Roederer & D Moelendorf (2004) *Jurisprudence* 555-587; A Ashworth *Sentencing and Criminal Justice 3 ed*(2000) 59-89; M Wasik (1998) *Emmins on Sentencing 3 ed* 44-51; A Von Hirsch and A Ashworth (1998) *Principled Sentencing: Readings on Theory and Policy* 1-208.

²² CM Fombad & EK Quansah *The Botswana legal system* (2006) 66.

²³ 1984 BLR 14 (CA) 33.

With regard to the South African Constitution, Justice Langa held that, ‘the Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines’.²⁴ This also holds true of the Botswana Constitution.

Langa argued that the South African constitution is transformative. This he took to mean that the constitution embraces ‘the idea that change is constant’.²⁵ This should be true of all constitutions including that of Botswana. Although no transformative ideals are enshrined in its language, the Botswana Constitution should not, as Langa laments, be read technically and interpreted formally to provide justifications for decisions taken by the courts.²⁶ This formal reasoning prevents inquiry into the law and engagement with the law, presenting the law as neutral and objective.²⁷ What is to be preferred is reasoning that examines the underlying principles that inform laws themselves and judicial reaction to those laws.²⁸

It must be noted that the Botswana Constitution, even though dated, has been interpreted by Botswana Courts in a progressive manner over the years. In the *Unity Dow Case*²⁹ (the Citizenship Case), discrimination on the basis of sex in the Citizenship Act was ruled unconstitutional in a judgement that recognised developments in Botswana society and the world with respect to women’s rights in the 30 years following independence. In the 2011 decision *Mosetlhanyane Case*³⁰ (the Water Rights Case), the Court of Appeal ruled in favour of granting water rights to *Basarwa* in the Central Kalahari Game Reserve (CKGR) citing that any denial of such rights would effectively be the exaction of cruel and inhuman treatment contrary to the Constitution, this in the face of a Constitution that contains no socio-economic

²⁴ P Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* 351 at 353.

²⁵ P Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* 351 at 354.

²⁶ P Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* 351 at 356 – 357.

²⁷ P Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* 351 at 357.

²⁸ P Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* 351 at 357.

²⁹ *Attorney General v Dow* 1992 BLR 119 (CA).

³⁰ *Matsipane Mosetlhanyane and Another v the Attorney General* CACLB 074 – 10 (unreported) 22.

rights. This is a transformative approach to constitutionalism which views the constitution not as a formalistic document that must be followed regardless of the legal outcome, but as a living document that must in the end be interpreted in a manner that reflects the values and aspirations of the society it seeks to regulate.

The Constitution of Botswana is relevant to sentencing law. The Constitution guarantees the right to protection of the law regardless of race, place of origin, political opinion, colour creed or sex, as well as the right to protection from cruel and inhuman punishment.³¹ In this thesis, the validity of sentencing laws will be tested against the Botswana Constitution.

3 LITERATURE REVIEW

Research on the question of sentencing in Botswana is limited. Nevertheless, there are several text books and journals articles dealing with various topics in the area of sentencing. Three text books traverse the question of sentencing in Botswana. Their treatment of the subject is in general part of a larger discussion on criminal procedure in the country. Nsereko's text book is a compilation of cases and materials in the area of criminal procedure in Botswana.³² It contains a chapter on sentencing. However, his comments on sentencing are short and do not delve into any detailed discussion on sentencing options.

Lebotse has also written on the question of sentencing in Botswana.³³ His text book contains a short commentary on the aims and purposes of sentencing and the role of appellate courts in considering the sentences of lower courts. The text book does not contain an in-depth discussion of sentencing options.

³¹ Section 3 and section 7 Constitution of Botswana.

³² DDN Nsereko *Criminal procedure in Botswana: Cases and Materials* (2002).

³³ KK Lebotse *A guide on criminal procedure in Botswana* (2001).

Modise's text in the field covers the topic of sentencing satisfactorily referring to recent cases. It is a statement of the law of sentencing as it stands and has no detailed discussion on sentencing options and their continued efficacy in Botswana.³⁴

Journal articles on the law of sentencing in Botswana include Nsereko's studies on various aspects of sentencing, which are compensation of victims of crime in Botswana,³⁵ minimum mandatory sentences and judicial discretion in Botswana,³⁶ and extenuating circumstances in sentencing in Botswana³⁷. These articles are useful in the specific areas that they treat. Nsereko's comment on the minimum mandatory sentencing regime will be instructive as it was written at the introduction of the regime and gives a cogent historical analysis of political motivations for the regime at the time and the initial reaction of judges to its introduction. It should be noted that research into minimum mandatory sentencing by Nsereko was conducted before 2000 and does not reflect the current position of the law. The researcher's article on minimum mandatory sentencing published in 2011, discusses developments in minimum mandatory sentencing in Botswana in the intermittent years.³⁸

There are no doctoral studies on the law of sentencing in Botswana. Given the small volume of writing on sentencing in Botswana, the researcher has latitude to explore the chosen topic without replicating a similar study.

³⁴ K Modise *A practical approach to criminal procedure in Botswana* (2009).

³⁵ DDN Nsereko 'Compensating victims of crime in Botswana' (1989) 33 *Journal of African Law* 157.

³⁶ DDN Nsereko 'Minimum mandatory sentences and their effect on judicial discretion' (1999) 31 *Crime Law and Social Change* 363.

³⁷ DDN Nsereko 'Extenuating circumstances in capital offences in Botswana' (1991) 2 *Criminal Law Forum* 235.

³⁸ E Macharia-Mokobi 'Exceptional extenuating circumstances: Statutory omission or judicial opportunity?' (2011) 2 *South African Journal of Criminal Justice* 113.

4 RESEARCH PROBLEM

The current use of capital punishment and corporal punishment is antiquated and anachronistic. The use of mandatory minimum sentences has resulted in lack of fairness in sentencing by fettering judicial discretion. These sentencing options have no continued legal usefulness in Botswana. Botswana should adopt sentences that promote human rights, in particular the right to life and the right to human dignity.

5 RESEARCH OBJECTIVES

In order to tackle the research problem, the thesis proposes to investigate the following specific questions:

1. Capital punishment

- 1.1 What is the position of Statutory Law on capital punishment in Botswana? What arguments have been made for and against the use of capital punishment in case law and by jurists and civil society?
- 1.2 What conclusions can be drawn from these arguments to justify or critique the continued use of capital punishment in Botswana?
- 1.3 Using the comparative method, what arguments can be made for the reform capital punishment in Botswana?

2. Judicial corporal punishment

- 2.1 What is the position of Statutory Law on judicial corporal punishment in Botswana? What arguments have been made for and against the use of judicial corporal punishment in Botswana by jurists and civil society?
- 2.2 What are the implications of the practice of judicial corporal punishment on juvenile offenders in Botswana?

2.3 What conclusions can be drawn from the arguments in 2.1 above to justify or critique the continued use of judicial corporal punishment in Botswana?

2.4 Using the comparative method, what arguments can be made for the reform of judicial corporal punishment in Botswana with respect to adult and juvenile offenders?

3. Mandatory minimum sentencing

3.1 What is the position of Statutory Law on mandatory minimum sentencing in Botswana? What arguments have been made for and against the use of mandatory minimum sentencing in Botswana by jurists and civil society?

3.2 What are the possibilities of imposition of mandatory minima on juvenile offenders?

3.3 What conclusions can be drawn from the arguments in 3.1 above to justify or critique the continued use of mandatory minimum sentences in Botswana?

3.4 Using the comparative method, what arguments can be made for the reform of mandatory minimum sentencing in Botswana with respect to adult and juvenile offenders?

6 RESEARCH METHODS, DESIGN, METHODOLOGY, AND ETHICS

6.1 Research methods

There are two broad categories of social science research methods, quantitative and qualitative.³⁹ This study will utilize the qualitative method. Qualitative research is non-numerical whilst quantitative research numerical.⁴⁰ Patton states that qualitative research

³⁹ WH Chui 'Quantitative legal research' in M McConville & WH Chui (eds) *Research methods for law* (2007) 47.

⁴⁰ I Dobson & F Johns 'Qualitative legal research' in M McConville & WH Chui (eds) *Research methods for law* (2007) 17.

methods facilitate the study of issues in depth and detail. He notes that qualitative research is unconstrained by predetermined categories of analysis, which contributes to its depth, openness and detail. In contrast, quantitative analysis as requires ‘the use of standardised measures so that the varying perspectives and experiences of people can be fit into a limited number of predetermined response categories to which numbers are assigned.’⁴¹

The advantage of qualitative research is the production of detailed data from a small number of cases or respondents. This data is rich but less generalisable due to the small pool of respondents. On the other hand, the advantage of quantitative research is the ability to acquire numerous responses to a limited set of questions, producing broad generalisable findings, that is findings that can apply to a large segment of the population.⁴²

Under each broad category, there exist many different types of research methods, each suited to different types of studies. According to Patton, one cannot judge the appropriateness of the methods in any study or the quality of the resulting findings without knowing the study’s purpose, agreed-on uses, and intended audiences.⁴³

The purpose of this study is set out above in the research aims. The aims are in essence an examination of the continued legal efficacy selected sentencing options in Botswana with a view to identifying possible areas for law reform. There are several possible uses for this study: First, personal scholarship and the attainment of a doctoral degree and secondly, some contribution to the body of scholarship in the area of sentencing law and practice in Botswana and thirdly, the identification of areas for possible law reform.

⁴¹ MQ Patton *Qualitative research and evaluation methods* (2002) 14.

⁴² MQ Patton *Qualitative research and evaluation methods* (2002) 14.

⁴³ MQ Patton *Qualitative research and evaluation methods* (2002) 10.

In order to achieve the aims set out above, the study will apply the following qualitative methods: First, in order to describe the current state of the Law of Sentencing in Botswana and to identify emerging themes, the researcher uses the doctrinal method. Further, in order to identify possible solutions to problems identified in Botswana's Sentencing Law, the research relies on the comparative method to explore how similar problems are approached in selected comparative jurisdictions. The next section contains a description of each method and an explanation of how each methodology will enable the study to achieve the stated research aims.

6.2 Research design and methodology

A research design is a plan or blueprint mapping out the conduct of a research project. Research designs are tailored to answer different types of research questions. The point of departure is the research question. The design indicates what type of evidence is required to address the research question adequately.⁴⁴

6.2.1 The doctrinal method

The first research aim is an inquiry into the position of Statutory Law and Common Law regarding the selected sentencing options. The object of this research aim is not only to document the current law but also to identify gaps and problems in the law and draw inferences from the research which will serve as themes for legal reform proposals. The research methodology proposed to achieve this first aim is the doctrinal method.⁴⁵

⁴⁴ The source of all the comments in this paragraph is J Mouton *How to succeed in your master's & doctoral studies: A South African guide and resource book* (2001) 55 – 57.

⁴⁵ There is a debate whether the doctrinal or theoretical research method is a true qualitative research method. This debate is secondary to the current discussion. A brief comment is necessary. In L Epstein and G King, 'Empirical legal research and the goals of legal scholarship: The rules of inference' (2002) 69 *University of Chicago Law Review* 1 at 9 the authors argue that purely theoretical research is not empirical and consequently doctrinal research cannot qualify as a qualitative research method. On the other hand, Dobinson & John in I Dobson & F Johns 'Qualitative legal research' in M McConville & WH Chui (eds) *Research methods for law* (2007) 21 - 22 argue that doctrinal research is qualitative and therefore empirical because 'it is simply not a case

Doctrinal or theoretical legal research is defined as research that asks what the law is in a particular area. As Dobson and Johns state:

The researcher seeks to collect and body of case law together with any relevant legislation (so called primary sources). This is often done from a historical perspective and may include secondary sources such as journal articles or other written commentaries on the case law and legislation. The researcher's principal or even sole aim is to describe a body of law and how it applies. In so doing, the researcher may even provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment. In this regard, the research can be seen as normative or purely theoretical.⁴⁶

The research methodology of doctrinal legal research involves seeking to provide a detailed and highly technical commentary upon and a systematic exposition of the content of legal doctrine by gathering organising and describing legal rules as well as discussing the significance of case law on the legal rules that are the subject of analysis.⁴⁷

The research methodology to be adopted with respect to the first research aim is therefore to identify and review all primary sources of the Law of Sentencing in Botswana being Case Law and relevant legislation, with a view to identifying gaps, problems and drawing inferences or themes for further analysis in the study. The study will also conduct a review of secondary sources being journal articles, textbooks and periodicals in the area of the selected sentencing options in Botswana. Secondary sources will be of assistance in the interpretation and analysis of the primary sources.

6.2.2 The comparative method

Tonry states, 'we can learn things about crime and punishment by looking across national

of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable. It is a process of collecting and weighing materials taking into account hierarchy and authority and as well as understanding social context and interpretation. For this reason it can be argued that doctrinal research is qualitative.' This latter argument is to my mind convincing.

⁴⁶ I Dobson & F Johns 'Qualitative legal research' in M McConville & WH Chui (eds) *Research methods for law* (2007) 19.

⁴⁷ M Slater & J Mason *Writing law dissertations: an introduction and guide to the conduct of legal research* (2007) <http://lib.myilibrary.com/open.aspx?id=134734&loc=&srch=undefined&src=0> (accessed 20 January 2016).

boundaries... countries can learn from each other's experiments.'⁴⁸ Frase sounds a note of caution saying:

Unfortunately, increasing similarity between sentencing systems makes it easier for bad practices to migrate across national boundaries, however, comparative research is valuable for what it tells us *not to do* about crime and sentencing.⁴⁹

The researcher hopes to explore both the good and the bad in each sentencing option as experienced by comparative jurisdictions with a view to identifying possible areas for law reform proposals with regard to these specific areas of sentencing in Botswana.

Comparative law is the comparison of different legal systems of the world.⁵⁰ The primary aim of comparative law is knowledge, which offers the scholar the opportunity to find a better solution for his time and place.⁵¹ The comparative method enables the researcher to see how similar legal objectives can be achieved in a different jurisdiction, which may have different legal rules and different institutions.⁵² This inquiry leads the researcher to measure the effectiveness of legal solutions for similar problems from one jurisdiction as compared to the other. Thus, the comparative methodology is a useful tool when one considers introducing law reform.⁵³

Slater and Mason cite several advantages of the comparative method some of which are listed below. Firstly, the comparative method offers the researcher the opportunity to challenge attitudes towards the law in his jurisdiction. By juxtaposing legal rules in his jurisdiction with

⁴⁸ M Tonry 'Punishment policies and patterns in western countries' in M Tonry & RS Frase (eds) *Sentencing and sanctions in western countries* (2001) 3.

⁴⁹ RS Frase 'Comparative perspectives on sentencing policy and research' in M Tonry & RS Frase (eds) *Sentencing and sanctions in western countries* (2001) 259.

⁵⁰ K Zweigert & H Kotz trans T Weir *Introduction to comparative law* 3rd Edition (1998) 2.

⁵¹ K Zweigert & H Kotz trans T Weir *Introduction to comparative law* 3rd Edition (1998) 15.

⁵² J Bell 'Legal research and comparative law' in M van Hoecke (ed) *Methodologies of legal research* (2011) 158; K Zweigert & H Kotz trans T Weir *Introduction to comparative law* 3rd Edition (1998) 16.

⁵³ M Slater & J Mason *Writing law dissertations: an introduction and guide to the conduct of legal research* (2007) 184-185 <http://lib.myilibrary.com/open.aspx?id=134734&loc=&srch=undefined&src=0> (accessed 20 January 2016).

legal rules in another, the researcher is able to question the existence and manner of application of generally accepted legal rules. Secondly, the comparative method enables the researcher to assess the effectiveness of the operation of reforms in other jurisdictions and thirdly, it is a good source of persuasive authority for countries with a Common Law tradition.⁵⁴ The disadvantages of this method are that it is time-consuming, it may prove difficult to locate primary and secondary sources of foreign law and that the researcher risks the narrative not moving from uncritical description to the analytical.⁵⁵

The basic methodological principle of all comparative law is functionality.⁵⁶ This entails the comparison of comparable things. In law, the only things that are comparable are those that fulfil the same function. The rationale for this principle is that every society faces similar legal systems but often tackles them differently, with different rules and institutions from the next, achieving similar or even better results.

6.3 Outcomes

Having completed the process of describing sentencing law, identifying pressing problems, and analysing how similar problems are treated in selected jurisdictions, the researcher shall then make recommendations for law reform in Botswana's Sentencing Law and informed by the research findings.

6.4 Ethics

The researcher intends to conduct a desk study. There will be no human subjects interviewed.

⁵⁴ M Slater & J Mason *Writing law dissertations: an introduction and guide to the conduct of legal research* (2007) 189 <http://lib.mylibrary.com/open.aspx?id=134734&loc=&srch=undefined&src=0> (accessed 20 January 2016).

⁵⁵ M Slater & J Mason *Writing law dissertations: an introduction and guide to the conduct of legal research* (2007) 189-190 <http://lib.mylibrary.com/open.aspx?id=134734&loc=&srch=undefined&src=0> (accessed 20 January 2016).

⁵⁶ K Zweigert & H Kotz trans T Weir *Introduction to comparative law* 3rd Edition (1998) 34.

Therefore, ethical clearance normally required for studies that seek information directly from the public will not be required.

6.5 Citation style

The citation style chosen for this study is the *Pretoria University Law Press (PULP) Publication and Style Guidelines*. In some areas, the citation style has been amended. Of particular interest is the inclusion of full details for every footnote, the addition of a citation style for Botswana legislation and case law, and an amendment to heading levels. The adapted style does not link footnotes. The chosen style guide and amendments have been availed to the researcher's supervisor.

7 STRUCTURE OF THE STUDY

Following on the introduction in chapter 1, the research in chapter 2 focuses on capital punishment. The chapter commences with a discussion of the application of capital punishment in Botswana's Statutory Law. This is followed by an in-depth consideration of discourses arising from the continued use of capital punishment in Botswana. A discussion of the current use of capital punishment worldwide is followed by a survey of the abolition of capital punishment in South Africa and the United Kingdom. The efforts to limit the use of capital punishment in Caribbean states are also discussed. Of particular interest to the researcher is the similarity of constitutional arrangements in Caribbean states and Botswana. Recommendations for law reform follow which include a proposal to abolish the death penalty and replace it with life imprisonment.

In chapter 3, the researcher considers judicial corporal punishment. The use of corporal punishment in Common Law and Customary Courts in Botswana today is discussed. The impact of judicial corporal punishment on juvenile offenders is also investigated. The

particular challenges presented by the use of corporal punishment in Customary Courts are highlighted. A discussion of the rational for and against judicial corporal punishment is followed by a comparative consideration of the use and abolition of judicial corporal punishment in South Africa, England and Wales, Namibia, Zimbabwe and the United States. The chapter ends with recommendations for law reform including possible alternative sentencing arrangements including correctional supervision and restorative justice approaches to sentencing follow.

In chapter 4, the thesis considers the introduction of mandatory minimum sentencing in Botswana in the early 1990's. The chapter traces the difficulties experienced by judges and legal practitioner in applying this new sentencing option and the steps taken by the courts and the legislature to resolve the difficulties. The continuing challenges with mandatory minima in Botswana are identified. A comparative survey of various jurisdictions that have adopted mandatory minima and their experience with the sentencing option follows. The rationale for the increasing use of this penalty from the 1970's to the 1990s and the disenchantment of some states with its continued use is examined. South Africa, England and Wales and Australia provide useful points of comparison for whether Botswana should consider abolishing or improving her mandatory minimum sentencing regime. A foray into possible alternative sanctions concludes the discussion.

In chapter 5, the recommendations arising from the thesis are outlined. The thesis proposes a roadmap to the successful abolition of the death penalty in Botswana. The researcher proposes the promulgation of a commission of inquiry into the continued usefulness of the death penalty. A moratorium on executions followed by an abolition of capital punishment is also proposed. The need for public education is also highlighted. Lastly, the researcher

proposes that life imprisonment be extended to persons convicted of capital offences as an alternative to the death penalty. A more nuanced parole scheme is proposed which will enable judges to set the term of imprisonment of life prisoners and to indicate when, if at all, they may be considered for parole. The thesis also proposes the prohibition of judicial corporal punishment. To fill the gap, it is proposed that the extra mural labour provisions in the Prisons Act be extended and developed into a proper correctional supervision scheme. The introduction of restorative justice measures like family group conferences is proposed for young offenders. Lastly, the thesis proposes further research into the impact of mandatory minima in Botswana and a moratorium on new mandatory minimum sentences. The researcher also proposes that the Botswana Government consider the use of guideline judgements to restore of greater judicial discretion to judges. Interpretive guidelines as to the scope of application of section 27(4) of the Penal Code are also proposed along the lines of the Malgas test. The proposed interpretive guidelines would limit arbitrariness and restore some uniformity to the mandatory minimum sentencing regime.

CHAPTER TWO

CAPITAL PUNISHMENT IN BOTSWANA: THE CASE FOR ABOLITION

1 INTRODUCTION

This chapter is divided into three sections. In the first section, the historical development of the death penalty in Botswana, and the Statutory Law underpinning it, is discussed. This is followed by a discussion of the application of the death penalty through the cases. A critical assessment of decisions on the constitutionality of the death penalty in Botswana takes centre stage. Finally, a discussion on the continued usefulness of the death penalty in Botswana concludes the first section.

The second section is a comparative exercise. The researcher examines the application and later abandonment of the death penalty in South Africa and the United Kingdom. These two jurisdictions are selected because Botswana's legal history is inextricably intertwined with theirs. This is followed by a discussion on efforts to limit the use of the death penalty in retentionist commonwealth Caribbean states with a view to establishing what Botswana can learn from the successes in this region.

The third section concludes the chapter with recommendations for law reform drawn from the comparative survey and tailored to fit Botswana's legal terrain.

2 DEFINING THE DEATH PENALTY AND MANNER OF EXECUTION

The death penalty is defined by Amnesty International in their seminal publication entitled '*When the state kills*' as the premeditated cold blooded killing of a human being by the

state.⁵⁷ The death penalty is a deliberate assault on the prisoner.⁵⁸ The seven most common methods of execution are discussed below.

Hanging is one of the most widely used methods of execution of the death penalty. Death by hanging occurs by damage to the spinal cord or asphyxiation due to narrowing of the airways.⁵⁹ Suffering of the prisoner may be prolonged if the measurements of the length of rope and the drop are incorrect as this may cause decapitation.⁶⁰ Failure of the execution has been known to occur through improperly rigged gallows.

Shooting is another common method of execution. This may be effected by firing squad or by a single executioner. Death occurs through damage caused to vital organs by the projectiles. Shooting sometimes does not result in immediate death.⁶¹ Death may follow by bleeding out.

Electrocution is a method that was first used in the United States in 1888. When utilising this method, the prisoner is strapped into a special chair and has copper electrodes attached to his head and leg.⁶² Massive surges of electricity are then applied to the prisoner. Death is by cardiac arrest and respiratory paralysis. The prisoner may suffer involuntary defecation, urination or the vomiting of blood. The execution is accompanied by the smell of burnt flesh.⁶³ Unconsciousness may not follow the first burst of electrical charge and death is not always immediate resulting in the need for further bursts of electricity and a non-instantaneous or lingering death.⁶⁴ Electrocution has been criticised as being particularly

⁵⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 1.

⁵⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 54.

⁵⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 54.

⁶⁰ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 143.

⁶¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 57.

⁶² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 57.

⁶³ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 57.

⁶⁴ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 151; Amnesty International *When the state kills: The death penalty v. human rights* (1989) 58.

painful as it results in burns and bleeding in the prisoner.⁶⁵

Lethal injection induces death by the continuous flow of lethal quantities of chemicals through the prisoner's body. The drugs used for this process cause unconsciousness, relax the prisoner's muscles to prevent breathing, and finally cause death by cardiac arrest.⁶⁶ While lethal injection is regarded by some as being a humane process, problems have been noted in the method, which makes the punishment cruel and inhuman. Lethal injection is objectionable for causing a lingering death in some cases.⁶⁷ In some cases, improper insertion of needles has caused clogging in the intravenous tubes resulting in syringes 'popping out' of the prisoners arms.⁶⁸ Veins have also been reported to collapse requiring re-insertion of needles.⁶⁹ Other difficulties experienced in carrying out the death penalty by lethal injection include problems locating veins, difficulties subduing the struggling prisoner which causes the drugs to enter a muscle and not a vein, failure of the anaesthetising barbiturate which causes the prisoner to be awake and aware of the suffocating effects of the drugs.⁷⁰ Lethal injection has been criticised for masking the pain of the prisoner through restraints and immobilising medications administered to him when he is on the gurney.⁷¹

Execution can also be achieved by gassing. The prisoner is exposed to cyanide gas while secured in an airtight chamber. Death follows by asphyxiation as the cyanide gas inhibits the transfer of oxygen from the blood to the cells. Falling into a state of unconsciousness is slow if the prisoner holds his breath or attempts to breathe slowly. Vital organs may continue to

⁶⁵ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 153.

⁶⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 59.

⁶⁷ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 153.

⁶⁸ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 153.

⁶⁹ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 153.

⁷⁰ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 60

⁷¹ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 153.

function throughout the process of the execution.⁷² Prisoners have been observed gasping for breath in the gas chamber bringing into question the humane nature of the process.⁷³

Beheading is used in Saudi Arabia, Yemen and the United Arab Emirates as a method of execution. It involves a cut inflicted on the back of the head with a sword. The object is to sever the spinal cord and cause death by spinal shock. Unconsciousness should follow the first blow. The effectiveness of the execution depends on the strength and accuracy of the executioner.⁷⁴

Death by stoning requires that the prisoner be restrained and stoned. Death is caused by injury to the brain. However, the prisoner may experience numerous injuries to other parts of the body before death occurs.⁷⁵

3 THE DEATH PENALTY IN BOTSWANA

3.1 Introduction and historical overview

There were 39 executions for capital crimes in Botswana since its independence⁷⁶ until 2006.⁷⁷ A further seven executions occurred from 2007 – 2011, bringing the total number of persons executed to 46 at the end of 2011.⁷⁸ The sole method of execution prescribed in Botswana is hanging.⁷⁹

⁷² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 60.

⁷³ MJ Borg & ML Radelet 'On botched executions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 153.

⁷⁴ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 60.

⁷⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 60 at 61.

⁷⁶ Botswana attained independence in 1966.

⁷⁷ <http://www.ditshawanelo.org.bw> and <http://www.handsoffcain.info> (accessed 20 January 2016).

⁷⁸ <http://www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world> (accessed 20 January 2016).

⁷⁹ Section 26 Penal Code. However, section 128(a) of the Botswana Defence Force Act allows the president to determine the manner of execution. Other methods of execution that have been used in other countries include electrocution, the administration of a lethal injection, death by firing squad and the gas chamber see Death Penalty Information Centre 'Methods of execution' available at <http://www.deathpenaltyinfo.org/methods-execution> (accessed 20 January 2016).

The death sentence has been a part of Botswana's legal culture since time immemorial. Prior to the colonial era, Customary Law, *ngwao ya Setswana* or *mekgwa le melao ya Setswana*, meaning customs and usages of Setswana,⁸⁰ applied to the Tswana tribes living in the territory. The Chief administered the Customary Law and in him resided all legislative, judicial and executive powers. The Chief delegated these powers to male elders who were designated heads of families and wards.⁸¹ The Chief had the power to try all types of offences. Punishments available to the chiefs were the death penalty, corporal punishment and banishment.⁸² The Chief could impose the death penalty as punishment for murder, sorcery, incest, bestiality and conspiracy.⁸³

Botswana became a British protectorate in 1885⁸⁴ primarily as a strategy by the British to curb Boer expansion northwards as well as to prevent the Germans having a coast-to-coast presence in the sub- region.⁸⁵ The offer of protection by the British government and the acceptance of it were not as a result of conquest of the territory but arose out of a desire by all concerned for peace, order and good governance in the territory.⁸⁶

With the creation of a protectorate came the reception of Roman-Dutch Common Law in 1891 which was the law in force in the Cape Colony of Good Hope.⁸⁷ The Queen, through an

⁸⁰ A Molokomme 'Customary Law in Botswana: past present and Future' in S Brothers, J Hermans & D Nteta (eds) *Botswana in the 21st Century: proceedings of a symposium* (1994) 347 at 348.

⁸¹ A Molokomme 'Customary Law in Botswana: past present and Future' in S Brothers, J Hermans & D Nteta (eds) *Botswana in the 21st Century: proceedings of a symposium* (1994) 347 at 351; CM Fombad & EK Quansah *The Botswana legal system* (2006) 54.

⁸² K Frimpong 'The death penalty in Botswana' http://www.biicl.org/files/2193_country_report_botswana_frimpong.pdf (accessed 20 January 2016). 1.

⁸³ I Schapera *A handbook of Tswana law and custom* 2nd Edition (1994) 49.

⁸⁴ Proclamation no 1 of 1885 dated 30 September 1885.

⁸⁵ CM Fombad & EK Quansah *The Botswana legal system* (2006) 54.

⁸⁶ A Aguda 'Legal developments in Botswana from 1885 to 1966' (1973) 5 *Botswana Notes and Records* 52 at 54.

⁸⁷ Section 19 of the Proclamation of 10 June 1891.

Order-In-Council dated 9 May 1891, gave the British High Commissioner the power to exercise on behalf of the Queen all powers and jurisdictions which she may have in the South African territories. These territories included British Bechuanaland.⁸⁸ The High Commissioner was vested with authority to legislate for the said territories by Proclamation and by so doing to provide for the administration of justice, peace, order and good government.⁸⁹ Through a *proviso*, the High Commissioner was required, in issuing any Proclamations, to respect native laws or customs by which the civil relations of any native chiefs, tribes or populations were regulated except so far as this may be incompatible with the exercise of the Queens power and jurisdiction.

In pursuance of this authority, the High Commissioner for South Africa issued the Proclamation of 10 June 1891 legislating for the Bechuanaland Protectorate. The laws were promulgated in cognisance of the influx of a European population into the said territory.⁹⁰ The Preamble of the 1891 Proclamation reiterates that the High Commissioner was required to respect native laws and customs. Thus, through this Proclamation, the protectorate received its first colonial laws. The reception clause read as follows:

Subject to the foregoing provisions of this Proclamation, in all suits actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit be the same as the law for the time being in force in the Colony of the Cape of Good Hope; Provided that no act after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.⁹¹

This Proclamation effectively endowed the territory with a complete system of administration, established courts of law and amongst other things provided for the appointment of officials.⁹² It was usual practice for such reception clauses to contain a date to govern the application of the received law. However, the reception clause for Botswana

⁸⁸ Section 2 Orders in Council of 9 May 1891.

⁸⁹ Section 4 Orders in Council of 9 May 1891.

⁹⁰ Preamble to the Proclamation of 10 June 1891.

⁹¹ Section 19 Proclamation of 10 June 1891.

⁹² I G Brewer 'Sources of the Criminal Law of Botswana' 1974 18(1) *Journal of African Law* 24.

merely stated that the law that would apply in the Protectorate was that for the time being in force in the Cape Colony. This clause admitted two interpretations. First, that the law in force was that applicable in the Cape Colony as at 10 June 1891 and second, the law applicable was that in force in the Colony at any relevant time, which would have been a ‘living law’ developing in the same manner as the law applicable in the Cape.⁹³ Realising the confusion created by the 1891 Proclamation, the British authorities clarified the law by issuing a new proclamation in 1909 repealing section 19 of the 1891 Proclamation.

Proclamation 36 of 1909 dated 22 December 1909, promulgated for the purpose of removing doubts, restated the position as follows:

...the laws in force in the Colony of the Cape of Good Hope on the 10th day of June 1891 shall *mutatis mutandis* and in so far as is not inapplicable be the laws in force and to be observed in the said protectorate, but no statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June 1891 shall be deemed to apply or to have applied to the said Protectorate unless specially applied thereto by Proclamation.⁹⁴

The Common Law and statutes applicable in the Bechuanaland Protectorate became that in force in the Cape Colony of Good Hope as at 10 June 1891. There was no written criminal code in the Cape Colony of Good Hope at the material time.⁹⁵ The general criminal law received into the Bechuanaland Protectorate was in the form of unwritten Roman-Dutch Common Law rules, also referred to as Cape Colonial Law.⁹⁶ The criminal law offences recognised were those recognised at the Cape prior to 10 June 1891 and these remained in force until a Penal Code was promulgated for Botswana in 1964.⁹⁷

Roman-Dutch Common Law existed side by side with the Customary Law. Initially, this was

⁹³ I G Brewer ‘Sources of the Criminal Law of Botswana’ 1974 18(1) *Journal of African Law* 24 at 25.

⁹⁴ Section 2 of the General Law Proclamation of 1909.

⁹⁵ D D N Nsereko ‘Extenuating circumstances in capital offences in Botswana’ 1991 2(2) *Criminal Law Forum* 235 at 236 – 237.

⁹⁶ B Forster ‘Introduction to the History of the Administration of Justice in Botswana’ 1981(13) Botswana Notes and Records 89 at 91.

⁹⁷ B Othogile *A history of the higher courts of Botswana* (1995) 4.

not problematic as the received law was intended to apply to the European population since the High Commissioner had been enjoined to respect native law and custom.⁹⁸ As time went on native matters increasingly came under the jurisdiction of the new courts of the territory and aspects of the Roman-Dutch Common Law begun to apply to the indigenous population.⁹⁹ By the turn of the century, the British Administration was beginning to make inroads into the chief's jurisdiction in criminal matters.¹⁰⁰

In 1919, almost 30 years after the reception of Roman-Dutch Law into the Protectorate, the High Commissioner issued a Proclamation providing that any party to a dispute before a native chief could appeal at the first instance to an Assistant Commissioner or Magistrate. A final appeal would lie with the Resident Commissioner.¹⁰¹ Up until this point Native Courts had run independently of Common-Law Courts.

In 1934, the High Commissioner issued proclamation wherein he curtailed the chief's powers to try treason, sedition, murder or attempted murder, culpable homicide, rape or attempted rape, currency offences, perjury, subversion of the chief or sub-chief and any offences created by statute in the territory in native tribunals.¹⁰² The offences of murder and the offence of challenging the chief's authority¹⁰³ had always attracted the death penalty. With this proclamation, the chiefs were stripped of their power to impose the death penalty and the punishment was imposed solely by Common-Law Courts. *Kgosi* Tshekedi and *Kgosi* Bathoen II challenged Proclamation 75 of 1934, as well as Proclamation no 74 of 1934 which also

⁹⁸ B Otlhogile *A history of the higher courts of Botswana* (1995) 3 – 4.

⁹⁹ A Molokomme 'The reception and development of Roman-Dutch Law in Botswana' 1985 1(1) *Lesotho Law Journal* 124.

¹⁰⁰ A Molokomme & B Otlhogile 'Legal Developments in Botswana since independence 1989 (6) *Pula - Botswana Journal of African Studies* 17 at 18.

¹⁰¹ Section 1 of Proclamation no. 1 of 1919.

¹⁰² Section 8(1) Bechuanaland Protectorate Proclamation no. 75 of 1934.

¹⁰³ This offence is characterised by serious insubordination, rebelliousness or disobedience or defiance to the chief.

severely limited the powers of Chiefs at the Privy Council without success.¹⁰⁴

The death penalty was received into the Protectorate as part its general criminal law. The 1891 Proclamation created Courts of the Resident Commissioner, and the Assistant Commissioner or Magistrate. These Courts had power to hand down a death sentence. However, no sentence of death passed by such Courts could be carried out without a special warrant from the High Commissioner. In order to obtain a warrant, the Resident Commissioner presiding at the trial was required to forward to the High Commissioner the record of proceedings and a report on the case.¹⁰⁵ The High Commissioner also had power to commute any sentence or grant a free or conditional pardon to any offender.¹⁰⁶ Otlhogile cites several examples of cases in which the natives were convicted of murder and sentenced to death and had their cases reviewed by the High Commissioner for purposes of possible commutation of sentence.¹⁰⁷

The death penalty was retained as a feature of Botswana's criminal law throughout the colonial period. In 1964, the Penal Code was promulgated. Section 2 of the Penal Code states that '*...after the commencement of this law, the unwritten substantive criminal law in force in the Cape Colony of Good Hope of 10 June 1891 shall no longer be of force in the territory.*' This provision effectively abolished the Common Law crimes in Botswana.¹⁰⁸ However, the death penalty survived this abolition and was retained as a method of punishment under the

¹⁰⁴ *Tshekedi Khama and Ano v The High Commissioner* (1926-1953) HCTLR 9. For a full discussion of the decision see B Otlhogile 'Tshekedi Khama and Ano vs. The High Commissioner: The making of the court' (1993) 25 *Botswana Notes and Records* 29.

¹⁰⁵ *Tshekedi Khama and Ano v The High Commissioner* (1926-1953) HCTLR 9; For a full discussion of the decision see B Otlhogile 'Tshekedi Khama and Ano vs. The High Commissioner: The making of the court' (1993) 25 *Botswana Notes and Records* 29

¹⁰⁶ Proclamation dated 18 November 1891.

¹⁰⁷ B Otlhogile 'A history of Botswana through Case Law' (1997) 11(1) *Pula - Botswana Journal of African Studies* 82 at 85 – 88.

¹⁰⁸ Section 4 of the Penal Code abolishes the reign of Roman-Dutch Common Law by specifically providing that the Penal Code be interpreted in accordance with English legal principles.

Penal Code.

Public attitudes towards the death penalty in Botswana remain largely sympathetic and supportive.¹⁰⁹ This may be because the views of many are formed by traditional or customary attitudes towards crime and punishment and many see nothing objectionable with the imposition of the death penalty.¹¹⁰ The death penalty has after all been part of Botswana's legal history for over a 100 years. Public attitudes in support of the death penalty have strengthened in the wake of the perception that Botswana's neighbour, South Africa, suffers a high rate of serious crimes like murder and armed robbery partly because criminal elements do not face the possibility of capital punishment.¹¹¹

For instance, at the Kanye *Kgotla* on 21 March 1996, the majority supported capital punishment as a deterrent with only one individual speaking against it. At the Tlokweng *Kgotla* on 28 March 1996, the death penalty received support. It was proposed that capital trials be speeded up and at the death penalty be extended to rapists. At the Moshupa *Kgotla* meeting on 11 April 1996, one person spoke against the death penalty urging that it be replaced with life imprisonment. At the Jwaneng Customary Court on 16 April 1996, support for the death penalty was indicated with a request that it be extended to persons committing abortions. At the *Kgotla* meeting in the Lobatse Customary Court on 16 April 1997, the public indicated their support for the death penalty and urged government to minimise delays in execution since government was wasting public funds feeding condemned prisoners.

¹⁰⁹ K Frimpong 'The death penalty in Botswana' http://www.biicl.org/files/2193_country_report_botswana_frimpong.pdf (accessed 20 January 2016) 3; Ditshwanelo 'The death penalty' http://www.ditshwanelo.org/bw/death_penalty.html (accessed 20 January 2016) 2.

¹¹⁰ O Tshosa 'The death penalty in Botswana in the light of international law: The case for abolition' http://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf (accessed 20 January 2016) 6.

¹¹¹ Botswana National Assembly Law Reform Committee 'Minutes of the Law Reform Committee on Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II' 1997

Members of the public also lamented the South African experience with the abolition of the death penalty which they felt had exacerbated crime. In the Gaborone Babusi Ward *Kgotla* meeting held on 21 May 1997, the death penalty received support with one person calling for a referendum on the matter.¹¹²

Government often relies on the reports of the Parliamentary Law Reform Committee to explain its retentionist stance. The President of the Republic of Botswana has publicly expressed that the views of Botswana are largely in support of the death penalty.¹¹³ This significant issue fuels the retentionist stance of the Government of Botswana.

The next section examines Botswana's post-independence Statutory Laws with respect to the death penalty.

3.2 The death penalty under the Botswana Constitution and Statutory Law

The Botswana Constitution was promulgated on 30 September 1966. The Constitution has never been subjected to a major overhaul since its promulgation. Section 4 of the Constitution recognises the right to life providing as follows:

No person shall be deprived of his life intentionally save in the execution of a sentence of the court in respect of an offence under the law in force in Botswana of which he has been convicted.

Section 7(1) of the Constitution outlaws torture, cruel and inhuman punishment, however, section 7(2) of the Constitution makes an exception with regard to punishments that were lawful in the country prior to promulgation of the Constitution. Section 7(2) of the

¹¹² Botswana National Assembly Law Reform Committee 'Minutes of the Law Reform Committee on Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II' 1997

¹¹³ 'Death penalty Still Stands in Botswana, says Khama' available at <http://palapye.wordpress.com/2008/11/04/death-penalty-still-stands-in-Botswana-says-khama/> (accessed 20 January 2016). In this news piece, the President Lt General Seretse Khama Ian Khama is reported to have informed a *Kgotla* meeting he addressed in Palapye that the Government does not intend to change its current stance on the death penalty. He cited its deterrent effect and mentioned that murders had increased when one of Botswana's neighbours (a reference to South Africa) eliminated the death penalty. The President's comments were reportedly greeted with ululations from the gathered crowd.

Constitution provides:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.

It is safe to say that the death penalty is constitutionally enshrined and protected in Botswana. The framers of the Constitution anticipated that its legality may be challenged on the basis of section 7(1) and had the foresight to include a savings clause to preserve the death penalty.

The death penalty in Botswana is the punishment prescribed for murder without extenuating circumstances, treason and piracy, grave breaches of the Geneva Conventions and certain military offences.

With respect to the offence of murder, the Penal Code provides that any person who with ‘malice aforethought’¹¹⁴ causes the death of another person by an unlawful act or omission is guilty of murder.¹¹⁵ The penalty prescribed for murder is the death sentence.¹¹⁶ There is therefore a mandatory death sentence for the offence of murder with no extenuation.

Where the court is of the opinion that there are extenuating circumstances, it may impose any sentence other than death.¹¹⁷ The Penal Code also provides that in deciding whether or not there are any extenuating circumstances, the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.¹¹⁸

¹¹⁴ This is the mental element of the offence of murder which is the intention to kill.

¹¹⁵ Section 202 Penal Code.

¹¹⁶ Section 203(1) Penal Code.

¹¹⁷ Section 203(2) Penal Code.

¹¹⁸ Section 203(3) Penal Code.

Extenuating circumstances are factors bearing on the commission of an offence that reduce the moral blameworthiness of the accused and in so doing, make him deserving of a lesser sentence.¹¹⁹ A non-exhaustive list of ordinary, well-known extenuating circumstances can be found in *S v Mokwena*,¹²⁰ wherein Gyeke-Dako J states as follows:

What factors constitute extenuating circumstances are however not defined under the Penal Code. But, in *Baoteleng v The State* 1972 (2) B.L.R. 82 (CA) the Court of Appeal approved the following passage from the judgment of Holmes J.A. in the South African case of *S v. Letsolo* 1970 (3) S.A. 476, which dealt with what is meant by extenuating circumstances:

“Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard, a trial court has to consider-

- (a) Whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
- (b) Whether such facts, in their cumulative effect, probably had a bearing on the accused’s state of mind in doing what he did;
- (c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.”

Mokwena identifies three ordinary extenuating circumstances. These are immaturity,¹²¹ intoxication,¹²² and provocation.¹²³ Other extenuating factors, recognised by the criminal courts in Botswana, include belief in witchcraft,¹²⁴ the totality of circumstances surrounding the offence,¹²⁵ being a first offender,¹²⁶ honest but mistaken belief of infidelity,¹²⁷ and the

¹¹⁹ *Koitsiwe v The State* 2001 (2) BLR 317 (CA) 321 - 322, see also [2001] BWCA 20 (Criminal Appeal No 1 of 201) (20 July 2001) available at <http://www.saflii.org/bw/cases/BWCA/2001/20.html>, accessed on 15 December 2010; *State v Bogosi* 2006 (2) BLR 123 (HC) 126.

¹²⁰ 1990 BLR 1 (HC) 29 – 30.

¹²¹ On immaturity see also *State v Rapulana* 1975 (1) BLR 37 (CA); *State v Sebolai* 2007 (3) BLR 435 (HC).

¹²² On intoxication see also *Ntesang v The State* 1990 BLR 396 (CA); *Ramothaedi v The State* 1998 BLR 9; *State v Basikere* 2007 (3) BLR 454 (HC).

¹²³ On provocation see also *Ramontsho v The State* 1987 BLR 374; *Ramothaedi v The State* 998 BLR 9 (CA); *State v Sebolai* 2007 (3) BLR 435 (HC); *State v Basikere* 2007 (3) BLR 454 (HC); *State v Bogosi* 2006 (2) BLR 123 (HC) 126

¹²⁴ *State v Molapo* 2007 (3) BLR 493 (HC).

¹²⁵ In *State v Rapulana* supra 1975 (1) BLR 37 (CA) 39, acting on the spur of the moment with no intention to kill, was deemed an extenuating circumstance; In *State v Phori* 1987 BLR 228 (HC) and *State v Sharp* 1987 BLR 14 (HC) lack of premeditation and intention to kill were respectively found to be extenuating circumstances.

¹²⁶ *State v Rapulana* supra 1975 (1) BLR 37 at 39 (CA); *State v Basikere* 2007 (3) BLR 454 (HC). In *Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016), the Court suggests that being a first offender does not amount to an extenuating circumstance but is solely a mitigating factor.

¹²⁷ *Ramontsho v The State* 1987 BLR 374 at 376–377 (CA); *Ntesang v The State* 1990 BLR 396 (CA); *Ramothaedi v The State* 1998 BLR 9 (CA).

mental condition of the accused.¹²⁸ In the *Kgosikwena Sebele* judgment, ill health and a distinguished public record were excluded as possible ordinary extenuating circumstances.¹²⁹

The search for extenuating circumstances is an important judicial safeguard against the arbitrary imposition of the death sentence. In *Ntesang v The State*,¹³⁰ the court held that it was the duty of the trial court to search for extenuating circumstances. Commenting on section 203 of the Penal Code the Court of Appeal stated:

It is quite clear from this provision that it is the responsibility of the court convicting a person of murder to consider all the facts and circumstances of the case and determine whether or not there are extenuating circumstances. The law does not in my opinion cast any onus on such a person to show that such extenuating circumstances exist; such a decision may be arrived at independently of whether or not the accused gives any evidence in that regard. In order for a fair determination of the issue, however, it becomes incumbent on the court to explain the purpose of the inquiry to the accused and to afford him the opportunity to give evidence or to point out any facts in the case upon which a finding of the existence of extenuating circumstances may be found in his favour. If such circumstances already exist clearly in the evidence, a court may so find without the necessity of calling upon the accused to tender further evidence or make further submissions in that behalf. However a court cannot hold that such circumstances do not exist without affording the accused an opportunity to show by oral evidence or otherwise that such circumstances exist.

Nsereko observes that the death penalty is used sparingly in Botswana. His research findings for the years 1976 to 1988 show that 22 people were convicted of capital offences and of those, an average of two a year received the death sentence. Nsereko states that the principle of extenuation has contributed significantly to the relatively low number of convicts sentenced to death.¹³¹

As referred to above, the death penalty is the prescribed punishment for treason. Section 34(1) of the Penal Code provides

A person is guilty of treason and shall, subject to section 40, be sentenced to death who-

- (a) prepares or endeavours to overthrow by unlawful means the Government as established by law;
- (b) prepares or endeavours to procure by force any alteration of the law or the policies of the

¹²⁸ *State v Gadiwe* 2005 (1) BLR 212 (HC); *State v Raphotsana* 2006 (2) BLR 80 (HC).

¹²⁹ *Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

¹³⁰ 1995 BLR 151 (CA).

¹³¹ DDN Nsereko 'Extenuating circumstances in capital offences in Botswana' 1991 2(2) *Criminal Law Forum* 235 at 243 to 244.

- Government;
- (c) prepares or endeavours to carry out by force any enterprise which usurps the executive power of the State in any matter of both a public and a general nature;
 - (d) in time of war and with intent to give assistance to the enemy, does any act which is likely to give such assistance; or
 - (e) gives assistance to any person who threatens the security or sovereignty of Botswana.

Section 35 of the Penal Code provides for the offence of treason through instigating invasion stating:

Any person who instigates any foreigner to invade Botswana with an armed force is guilty of treason and shall, subject to section 40, be sentenced to death.⁷

Section 40 enjoins the trial court convicting a person of treason to impose a lesser sentence of not less than 15 years and not more than 25 years if it is of the opinion that extenuating circumstances exist. The researcher found no record of convictions for treason in Botswana since independence.

The third offence for which the death penalty is available is piracy. Section 63 of the Penal Code reads as follows:

- (1) A person who commits an act of piracy shall be guilty of an offence and shall be liable to imprisonment for life or any lesser term.
- (2) A person who, with intent to commit or at the time of or immediately before or immediately after committing an act of piracy in respect of any ship, assaults, with intent to murder, any person being on board, or belonging to, the ship or injures any such person or unlawfully does any act by which the life of any such person may be endangered shall be guilty of an offence and shall be liable to suffer death.

A literal interpretation of section 63(2) of the Penal Code may bring one to the conclusion that there exists in Botswana a mandatory death penalty for the offence of piracy with intent to murder. This section raises several concerns. First, there is no mention of the possibility of a reduced sentence by way of extenuation. This is indeed unusual as extenuation is required for murder and treason. Secondly, the elements of the offence are assault with intent to murder, or infliction of injury, or any other act that may endanger the life of any person aboard or belonging to the ship, all done with the intention to commit an act of piracy, or

done before or after the actual commission of an act of piracy. There is no requirement that the offender in fact kills the victim. It would appear that if the elements of the offence were met, the court would have to impose the death sentence. Section 45 of the Interpretation Act of Botswana provides that in any enactment, the word 'shall' should be regarded as imperative and the word 'may' should be regarded as permissive.¹³² It is submitted that it may very well have been the intention of parliament to impose a mandatory death sentence for the offence of piracy given that it is a serious crime of an international character.

Nsereko makes the case that this provision is simply poorly drafted and that it could not have been the intention of parliament to impose a mandatory death penalty. He suggests that insisting on a mandatory death penalty for an offender whose conduct has not resulted in death of the victim would be unjust, absurd, inhumane and out of step with the tenor of the Penal Code.¹³³ The fact that all offences attracting the death penalty in Botswana allow for discretion to reduce the sentence and allow for extenuation therefore places the mandatory death penalty for piracy in a unique position. As this offence has not been tested, and is unlikely to be tested as Botswana is landlocked with no shipping tradition, it could be argued that the problems with section 63(2) should not be dwelt on unnecessarily. However, the need for clarity and consistency in law is sufficient motivation to call for review of this section.

The fourth offence for which the death penalty is prescribed is the commission of grave breaches of the Geneva Conventions under the Geneva Conventions Act.¹³⁴ The Geneva Conventions Act provides that where any person commits, aids, or abets or procures the commission of grave breaches of the four Geneva Conventions, which involves willful

¹³² The Laws of Botswana Chapter 01:04.

¹³³ DDN Nsereko 'Extenuating circumstances in capital offences in Botswana' 1991 2(2) *Criminal Law Forum* 235 At 243 to 245.

¹³⁴ The Laws of Botswana Chapter 39:03.

killing, such person shall be sentenced to death or imprisonment.¹³⁵ The death sentence may not be pronounced on a protected prisoner of war unless the court's attention has been drawn to the fact of the prisoner's protected status.¹³⁶ Further, the death penalty may not be executed for a period of at least six months after the prisoner's protecting power has been notified of the final judgment and sentence.¹³⁷

There is no requirement for extenuation where the death penalty is imposed for grave breaches. It is submitted that the seriousness of these international crimes informs the imposition of the mandatory death penalty. Of course, these statutes are 50 years old and have never been tested by the Botswana courts. International Criminal Law has developed over time and the death penalty is not available in any international criminal tribunal trying grave breaches of the Geneva Conventions today.¹³⁸ The fact that the court has discretion to consider imprisonment as opposed to the death penalty is laudable.

The last category of offences for which the death penalty is prescribed is military offences. The Botswana Defence Force Act¹³⁹ provides for the death penalty for the offences of aiding the enemy,¹⁴⁰ communication with the enemy¹⁴¹ and cowardly behavior.¹⁴² The prescribed death sentences are not mandatory. The Court-Martial, or the High Court, has discretion to hand down a lesser sentence for each military offence. Where the death penalty is imposed by any court, the President must approve the sentence before it is carried out.¹⁴³ The researcher found no cases where the death penalty had been imposed for military offences.

¹³⁵ Section 3(1) Geneva Conventions Act.

¹³⁶ Section 6(2) Geneva Conventions Act.

¹³⁷ Section 7 Geneva Conventions Act.

¹³⁸ The death penalty is however retained in some countries, which have similar jurisdiction to prosecute grave breaches of the Geneva Conventions for example Uganda.

¹³⁹ The Laws of Botswana Chapter 21:05.

¹⁴⁰ Section 27 Botswana Defence Force Act.

¹⁴¹ Section 28 Botswana Defence Force Act.

¹⁴² Section 29 Botswana Defence Force Act.

¹⁴³ Section 99 Botswana Defence Force Act.

The next section considers statutory limitations on the imposition of the death penalty.

3.3 Limitations on the imposition of the death penalty

There are two legislative limitations on the imposition of the death penalty. First, the death penalty may not be pronounced against a person who was under the age of 18 when he committed the offence.¹⁴⁴ Instead, such a child or juvenile offender¹⁴⁵ is detained at the President's pleasure at such a place or under such conditions as the President may direct.

The second limitation applies to pregnant women.¹⁴⁶ Where a woman convicted of an offence punishable by death is found to be pregnant, such a woman shall be liable to imprisonment for life and not to a sentence of death. The procedure for making such a finding is set out in section 298 of the Criminal Procedure and Evidence Act (CP&E) which requires proof of the alleged pregnancy by evidence that must be brought before the trial judge when he considers the sentence.¹⁴⁷

3.4 The Presidential warrant and the prerogative of mercy

The death sentence in Botswana is carried out under a special warrant from the President. The President executes the warrant after he receives a record of the proceedings and a report from the officer presiding over the trial.¹⁴⁸ The death sentence shall not be carried out if the President gives written notice that he has decided to pardon or reprieve to the individual

¹⁴⁴ Section 26 (2) Penal Code.

¹⁴⁵ The Children's Act Chapter 28:04 defines a child as a person under the age of 14 years and a juvenile as a person who has attained the age of 14 years but is under the age of 18 years. In terms of section 22 (2) of the Children's Act, Juvenile Courts have the power to hear and determine any charge against a person aged between 7 and 18 years. Capital crimes are specifically legislated for in section 89(1) of the Children's Act, which provides that children convicted of murder shall not be sentenced to the death penalty.

¹⁴⁶ Section 26(3) Penal Code.

¹⁴⁷ Laws of Botswana Chapter 08:02.

¹⁴⁸ Section 299(1) CP&E.

sentenced to death or to exercise the prerogative of mercy in any other way.¹⁴⁹

The prerogative of mercy is an executive function of the President. In terms of section 53 of the Constitution of Botswana,¹⁵⁰ the President may grant any person convicted of any offence a pardon, which may be free or conditional. The President may grant respite, substitute the sentence imposed on any person, or remit the whole or part of the punishment imposed. The Constitution of Botswana also creates an Advisory Committee on the Prerogative of Mercy consisting of the Vice President or a minister appointed by the President, the Attorney General and a medical practitioner.¹⁵¹ The Committee may only be summoned to act by the authority of the President who should as far as is possible attend and preside at all meetings.¹⁵² The Committee is entitled to regulate its own procedure.¹⁵³

Where any person is sentenced to death, the President is obliged by law to summon the Advisory Committee.¹⁵⁴ The Committee shall be provided with the report of the proceedings from the trial judge and other relevant information from the record or elsewhere. The Committee is required to advise the President who may then decide whether to exercise his powers under section 53 of the Constitution.

The manner in which the prerogative of mercy is exercised in Botswana has been the subject of much debate and will be discussed later in this chapter.

¹⁴⁹ Proviso to section 299 (2) CP&E.

¹⁵⁰ Laws of Botswana.

¹⁵¹ Section 54(1) The Constitution of Botswana.

¹⁵² Section 54(3) The Constitution of Botswana.

¹⁵³ Section 54(5) The Constitution of Botswana.

¹⁵⁴ Section 55(1) The Constitution of Botswana.

3.5 The constitutionality of the death penalty in Botswana

The legality of the death penalty has been challenged in several decisions in Botswana. The challenges are always on constitutional grounds. The cases are considered in chronological order.

*Molale v The State*¹⁵⁵ was the first case challenging the constitutionality of the death penalty. The accused had murdered his partner for no apparent reason by striking her with an axe. The accused submitted in extenuation that he and the deceased had had an argument and that in the fracas the deceased had assaulted the accused. The accused was convicted. The trial judge had found against the accused on the question of extenuation finding that there was nothing before him that could reduce the moral blameworthiness of the accused. On appeal, the Court of Appeal considered whether the trial judge was correct in finding that there were no extenuating circumstances. The Court of Appeal was also asked to consider two points with regard to the death penalty. First, whether hanging was anachronistic, antediluvian and barbaric and second, whether the death penalty was inhuman, degrading and unconstitutional. On the question of extenuation, the Court of Appeal ruled that the trial court had erred in failing to find that a fracas had indeed taken place between the accused and the deceased. The Court of Appeal ruled that taking all the other evidence into account the trial court should have found that extenuating circumstances existed in the case and reduced the death sentence to 15 years imprisonment. On the issue of the death penalty, the Court of Appeal ruled as follows per Aguda JA:

Needless to say that following upon the conclusion to which I have arrived as regards the sentence of death, it is no longer necessary for me to consider either of the two grounds filed by Mr. Morotsi as regards capital punishment.

¹⁵⁵ 1995 BLR 146 (CA).

In the same sitting of the Court of Appeal in 1995, the same justices of appeal¹⁵⁶ that heard the *Molale* case sat to hear *Ntesang v the State*.¹⁵⁷ *Ntesang* is the watershed case on the death penalty in Botswana. In 1991, the deceased took his motor vehicle for repairs to the appellant. Whilst the vehicle was with the appellant, some parts went missing. It was the appellant's belief that the deceased had stolen them and he confronted the deceased with the allegation. A dispute arose between the two men. The appellant reported the deceased to the police but was unable to get any assistance from them. The deceased, incensed by the appellant brought a civil suit against him for restoration of the motor vehicle. The appellant was unable to defend the suit, a judgment was issued against him, and his house attached. This caused him a great deal of worry. The appellant with the assistance of an accomplice procured a gun and live bullets, a home-made spear, balaclavas, and a vehicle with false licence plates. The two men lay in wait for the deceased at his home. They confronted the deceased and a scuffle broke out. The deceased tried to escape shouting "Patrick is killing me". The appellant, whose was named Patrick, then shot and killed the deceased. The High Court convicted the appellant of murder and, finding no extenuating circumstances, sentenced him to death. On appeal, the Court of Appeal had to decide two issues. First, whether the facts of the case disclosed extenuating circumstances that would have warranted a lesser sentence than the death penalty. Second, whether the imposition of the death sentence was *ultra vires* the Constitution.

On the first question, the Court of Appeal held that the emotional distress felt by the appellant could not have justified the intentional murder so carefully planned and executed. Regarding the second question on the constitutionality of the death penalty, the appellant raised three issues for decision. First, that the death penalty is anachronistic, antediluvian and barbaric.

¹⁵⁶ Aguda JA, Lord Wylie JA, Steyn JA, Tebbutt JA and Lord Cowie JA.

¹⁵⁷ 1995 BLR 151 (CA).

Second, that hanging as a form of carrying out the death penalty constitutes torture, inhuman and degrading treatment and third, that provisions of the Penal Code permitting the death penalty were unconstitutional and therefore null and void.

With respect to the first issue, the Court of Appeal accepted that many countries, including some African states regarded the death penalty as anachronistic, antediluvian and barbaric. However, the Court of Appeal pointed out that there were many other nations, like Botswana, that had yet to abolish the death penalty. The Court of Appeal took the view that the first point was not decisive of the issue before the Court. The Court considered that the question of amending Botswana's laws to be in step with the international community was not a matter for it but for the legislature stating:

Of course this Court, as well as other institutions of government of this country cannot and should not close its ears and eyes to happenings in other parts of the world and among the international community to which we belong. But this Court must keep within the role assigned to us as a purely adjudicatory and not legislative body under the Constitution which is the basic law of this country; and it is the interpretation of that basic law that we are called upon to decide in these proceedings.

On the issue whether the death penalty amounts to cruel and inhuman punishment contrary to section 7(1) of the Constitution, the Court of Appeal held:

I must now proceed to the second arm of the argument, namely, that since section 7(1) of the Constitution says that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment" and capital punishment falls within the ambit of this provision, the death penalty must be held to be ultra vires that provision. This argument however overlooks the provisions of subsection (2) of the same section which as I have earlier on quoted apparently saves any law which "authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation" of the Constitution. The death penalty by hanging was such a punishment. As I have pointed out the Penal Code came into effect on 10 June 1964 whilst the Constitution came into effect on 30 September 1966.

The appellant has submitted that because the death penalty is torture, inhuman or degrading punishment or treatment, this Court should hold it to be ultra vires the Constitution. This will mean in effect rendering nugatory the provisions of subsection (2) of the same section. No authority has been cited to us as to how we can do that. All the authorities point clearly to the duty of this Court to so interpret the Constitution as to give meaning as far as possible to each of its provisions which had been expressed in clear terms. In the absence of very compelling reasons we cannot hold that one provision of the Constitution is contradictory and opposed to another, and hence refuse to give effect to the one in favour of the other.

The result, of course, is that despite that the death penalty may be considered, as it apparently has been elsewhere, to be torture, inhuman or degrading punishment or treatment, that form of punishment is preserved by subsection (2) of section 7 of the Constitution. I have no doubt in my mind that the Court has no power to re-write the Constitution in order to give effect to what the appellant has described as

progressive movements taking place all over the world and to give effect to the resolutions of the United Nations as to the abolition of the death penalty. I, however, express the hope that before long the matter will engage the attention of that arm of the government which has responsibility of effecting changes to the statutes for its consideration and changes which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world.’

The second point revolved around constitutional interpretation. The Court was firm that it could not interpret one clause of the constitution to the exclusion of another. Further, the Court could not ‘re-write’ the constitution in order to conform to abolitionist trends. This, the Court held, was a matter for the legislature.

On the third issue, that is whether the provisions of the Penal Code prescribing the death penalty were *ultra vires* the Constitution, the Court of Appeal took issue with the appellant’s position that the provisions of the Penal Code prescribing the death sentence were *ultra vires* section 3 and 4 of the Constitution that guarantee the right to life. The Courts concern was that the appellant’s argument would require the Court to ignore the exception to section 4(1) of the Constitution that clearly sanctioned the death penalty. The Court was not prepared to do. The Court noted:

In this regard counsel has urged us to perform a surgical operation on section 4(1) of the Constitution by sustaining the first nine words of that section and deleting all the other words. The subsection provides that: "No person shall be deprived of his life intentionally save in execution of the sentence of a Court on respect of an offence under the law in force in Botswana of which he has been convicted."

It is in his submission that all the words beginning with "save" to the end of the provision should not be given effect. He has not been able to direct our attention to any principle of the interpretation of the Constitution which we can apply to come to that rather odd conclusion, nor has he cited to us any judicial decision in which any Court has adopted that strange form of constitutional construction. On the other hand, this Court in at least two previous decisions has held that it would be improper to interpret one provision of the Constitution in isolation from others. Here I refer to *Petrus and Another v. The State* [1984] B.L.R. 14 and the case of the *Attorney-General v. Dow* [1992] B.L.R. 119. In the latter case I had the occasion to quote at p. 165B-C with approval what Justice White of the Supreme Court of the United States said in *South Dakota v. North Carolina* (1904) 192 U.S. 286; 48 L. Ed. 448 at 465 thus: "I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view to be so interpreted as to effectuate the great purposes of the instrument."

In this case the appellant is not only asking us to segregate one provision and interpret it in isolation, but indeed to segregate it and cut it into two, and thereafter refuse to give effect to one of the two parts into which we should have cut the provision. In my view we cannot do this; and all the words of section 4(1) of the Constitution must be given full effect.’

The Court of Appeal in *Ntesang* was mindful not to overstep its adjudicatory powers insisting that its duty was not to re-write the Constitution. The Court was steadfast in its conviction that its role was to interpret the Constitution. The Court applied tried and tested rules of interpretation and would not be swayed into taking a decision outside the bounds of the Constitution. This was a pragmatic and sound approach to the questions before it.

Indeed, the greatest hurdle to the abolition of the death penalty in Botswana may be that the death sentence is constitutionally entrenched and the courts have no power to declare provisions of the constitution unconstitutional. Such a finding would be specious and an attack on the constitutional supremacy underpinning Botswana's legal system. The Court of Appeal was correct to reassert its role as an adjudicatory body whose function is to interpret the Constitution. The Court of Appeal correctly turned to the legislature to consider the question of the death penalty in order to cement Botswana's claim as one of the greatest liberal democracies of the world.

The question of legality of the death penalty was raised again in *Ditshwanelo and Others v The Attorney-General and Another*,¹⁵⁸ a case filed by Ditshwanelo - the Botswana Centre for Human Rights on behalf of two death row inmates Tlabologang Maauwe and Gwara Brown Motswetla. The case was filed against the Attorney General the seeking a stay in execution.

The two men had been tried and convicted of murder, and sentenced to death. They were due to be executed on the morning of 16 January 1999. The night before the executions, Ditshwanelo approached the courts through an urgent application seeking a stay in execution on the grounds that the trials of the condemned men had been unfair, that the subsequent

¹⁵⁸ 1999 (2) BLR 56 (HC).

appeal was also unfair and that the imposition of the death sentence following the trial was arbitrary and discriminatory. Ditshwanelo also sought a declaratory order that the imposition of the death penalty and the method of execution, that is hanging, was unconstitutional. In its preliminary ruling on the application for a stay of execution, the High Court held that the matter of constitutionality of the death penalty had already been dealt with by the Court of Appeal in *Ntesang* but left the door open for Ditshwanelo to approach the Court on the question should new constitutional matters arise. Reynolds J stated:

It is clear from the judgment of the Court of Appeal in the case of *Ntesang v. The State* [1995] B.L.R. 151, C.A. (Full Bench) at p. 161B, that it has been determined by this, the highest court in the land, that the sentence of death carried out by hanging is not unconstitutional in Botswana, and that "that form of punishment is preserved by subsection (2) of section 7 of the Constitution." The question then arises as to whether this definitive pronouncement precludes the applicants from approaching this Court on the constitutional issues as it has done. I believe that there can be no objection to such a course if new, pertinent and previously unconsidered matter is placed before this Court.¹⁵⁹

The matter proceeded to the merits stage. The condemned men were granted a retrial on the basis that a letter written by them to the Court of Appeal raising concerns about inadequate legal representation had never been placed before the judges of appeal. The Court took the view that this on its own amounted to a failure of justice. The Court set aside the convictions and sentences and ordered a new trial. The question of constitutionality of the death penalty was not revisited at the merits stage.¹⁶⁰

Constitutionality of the death penalty was challenged once again in *Kobedi v the State (2)*.¹⁶¹ Citing the *Ntesang* decision with approval, the Court of Appeal stated it had, in a full bench decision, pronounced on the constitutionality of the death penalty and held that it is not unconstitutional and that the method of execution, hanging, was not *ultra vires* the Constitution. This challenge also failed.

¹⁵⁹ *Ditshwanelo and Others v The Attorney-General and Another* 1999 (2) BLR 56 (HC) 62.

¹⁶⁰ *Ditshwanelo and Others v The Attorney-General and Another (No.2)* 1999 (2) BLR 222 (HC).

¹⁶¹ 2005 (2) BLR 76 (CA).

The *Ntesang* decision continues to be the high-water mark on the constitutionality of the death penalty. The decision is a seemingly insurmountable hurdle. Since the *Kobedi* decision in 2005, there have been no further reported legal challenges on the constitutionality of the death penalty. Perhaps activists and litigants alike have accepted the view that the most fruitful way to challenge the death penalty would be through a constitutional review as the Botswana Court of Appeal has stoically defended the constitutionality of the death penalty.

However in 2004, almost ten after *Ntesang*, the High Court was presented with a constitutional question when it was asked in *State v Rodney Masoko*¹⁶² to rule on the constitutionality of the mandatory death penalty.

Rodney Masoko faced a murder charge before the Francistown High Court. The accused pleaded not guilty to the murder of Gloria Zwemisi, a plea he later changed as the trial proceeded. Following the change of plea, the agreed facts were that the accused and the deceased were lovers. The accused admitted stabbing the deceased with a knife and conceded that he had no legal justification for causing the deceased's death. He was consequently found guilty of murder on his own plea of guilty.¹⁶³

The High Court then considered if there were any extenuating circumstances that would reduce the Masoko's moral blameworthiness enable him to escape the sole punishment on a conviction of murder without extenuating circumstances which is a mandatory death sentence. The High Court noted that jealousy and emotional strain could not be relied on as extenuating circumstances because the deceased's love affair with Masoko had already ended

¹⁶² CTHFT 000008 – 07 (unreported).

¹⁶³ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 1 - 43 of the cyclostyled judgement for an exposition of the full facts.

at the time of the killing. The Court also rejected intoxication as an extenuating circumstance noting that though the accused had been drinking on the night of the murder, he was not intoxicated.¹⁶⁴

The judge also considered aggravating circumstances, he noted that the killing had been planned. Masoko had lain in wait for his victim on the night of the killing. Since he had already vacated the yard and was living elsewhere, the Court noted that Masoko had no business being in the deceased's yard. On the fateful night, the accused made two visits to the deceased's yard. Finally, the nature of injuries on the victim also revealed that she had been stabbed in the back and was not in a position to fight her assailant. The Court then found that there were no extenuating circumstances which the accused could rely on in order to reduce his moral blameworthiness.¹⁶⁵

By operation of law, the only sentence available on a conviction of murder without extenuating circumstances was a mandatory death sentence in terms of section 203(1) of the Penal Code. The Court noted that its judicial discretion was entirely circumscribed and restricted by section 203(1) of the Penal Code.¹⁶⁶

The Court found this sentencing scheme for murder without extenuating circumstances to be arbitrary.¹⁶⁷ Motswagole J held that section 203 of the Penal Code was unconstitutional stating that:

The treatment meted out to persons guilty of murder without extenuating circumstances is to my mind unequal treatment proscribed by section 3(a) of the Constitution and is unfair as proscribed by section 10(1) of the Constitution and is discriminatory as proscribed by section 15(1) of the Constitution.¹⁶⁸

¹⁶⁴ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 44 - 64 of the cyclostyled judgement.

¹⁶⁵ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 65 – 73 of the cyclostyled judgement.

¹⁶⁶ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 74 – 75 of the cyclostyled judgement.

¹⁶⁷ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 123 of the cyclostyled judgement.

¹⁶⁸ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 172 – 173 of the cyclostyled judgement.

The Court also noted that section 203 of the Penal Code flew in the face of the protection against self-incrimination enshrined in section 10(7) of the Constitution by requiring the accused convicted of murder with extenuating circumstances to show cause why he should not face the most severe punishment of death by presenting extenuating circumstances to the Court. Motswagole J considered whether the limitation of the convicted prisoner's right to present evidence in mitigation of his sentence was an acceptable limitation of constitutional rights under section 15(4) of the Constitution. He cautioned as follows

One should bear in mind that all persons convicted on any crime are permitted to present all mitigating factors before sentencing including the fact that one is a first offender, remorseful and had had pre-trial or pre-conviction incarceration. Yet once convicted on murder without extenuation (sic) circumstances is singularly singled out for an unfair, inequitable, unequal and discriminatory treatment by the exclusion of relevant factors. I cannot find any legitimate state interest in this unfair, discriminatory and unequal treatment. In the circumstances I find that the limitation of the right to equal treatment and/or equal opportunity or equal benefit and protection of the law and fair trial as well as the right to non-discrimination by exclusion of relevant information for a certain class of murder convicts neither promotes the enjoyment of rights and freedoms nor seeks to protect the rights of other people or the public interest, and the limitation is illegitimate and not reasonably justifiable in a democratic society as provided for under section 15(4) of the Constitution.¹⁶⁹

The Court then held that the process leading to the imposition of the death penalty in Botswana was flawed stating:

In my mind, the treatment extended to the accused who is found guilty of murder without extenuating circumstances amounts to inhuman and degrading treatment proscribed by section 7(1) of the Constitution and I accordingly declare section 203(2) of Cap 08:01 [the Penal Code] unconstitutional. I am unable to see how ones mouth can be shackled and at the same time expect the person to show that he or she is not death worthy but this is exactly what is being done pursuant to section 203(2) of the Penal Code of Cap 08:01. The right to be heard and the opportunity to make representations of a penal nature before a penal sanction is imposed forms a well of life in any civilised system of justice from which all nations that respect human rights drink. I believe that the framers of our constitution could not have intended that the right to life can be so terminated without following humanly acceptable procedures and basic notions of civilisation.¹⁷⁰

The Court then considered if the procedure of arriving at the sentence of death in cases of murder without extenuating circumstances could find protection under the constitutional savings clause in section 7(2) which preserved the legality of any punishment permissible by law before the coming into effect of the constitution. The Court held:

I am persuaded that section 203(2) of Cap 08:01 cannot even find refuge under section 7(2) of the

¹⁶⁹ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 174 – 175 of the cyclostyled judgement.

¹⁷⁰ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 196 – 197 of the cyclostyled judgement.

constitution... We are here dealing not with the punishment of death per se but with the process leading to the imposition of the punishment of death. See *Watson v The Queen* [2004] 3 W.L.R.841 (PC).¹⁷¹

Section 203 of the Penal Code was then declared unconstitutional in its entirety.¹⁷² As stated by Motswagole J, the effect of the judgement was not to declare the death penalty unconstitutional. Indeed, the judge did not have the power to do this on account of the constitutional savings clause. The effect of *Masoko* was to outlaw the mandatory death sentence in Botswana where an accused is convicted of murder without extenuating circumstances.

The *Masoko* High Court decision is in keeping with emerging consensus in human rights law that the mandatory death penalty for murder is a cruel, inhuman and degrading punishment.¹⁷³ In *Thompson v St Vincent*,¹⁷⁴ The Human Rights Committee found the mandatory death penalty to be a violation of the right to life because it did not allow for sentences that were individually tailored to fit the crime. As such, mandatory death sentences could be disproportionately harsh. There have been several similar decisions in international human rights tribunals.¹⁷⁵ The decision by Motswagole J at the High Court is progressive.

The *Masoko* matter was taken on appeal by the State. The Court of Appeal overturned the decision on the constitutionality of the mandatory death penalty in Botswana in section 203 of the Constitution thus holding the line that has stood the test of time since 1966, that

¹⁷¹ *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 198 of the cyclostyled judgement.

¹⁷² *State v Rodney Masoko* CTHFT 000008-07 (unreported) at 200 of the cyclostyled judgement.

¹⁷³ A Novak 'Capital Sentencing and Discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14 *African Human Rights Law Journal* 28.

¹⁷⁴ Communication 806/1998.

¹⁷⁵ Similar decisions were reached by the UN Human Rights Commission in *Carpo v Philippines* Communication 1077/ 2002 and at the Inter-American Court of Human Rights in *Hilaire, Constantine and Benjamin v Trinidad and Tobago* Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002) and *Edwards v Bahamas* Case 12.067, Report N° 24/00.

the death penalty is constitutional in Botswana.¹⁷⁶

3.6 The death penalty in Botswana: Decisions of the African Commission

The African Commission has had occasion to make recommendations regarding the death penalty in Botswana following the conviction of Mariette Bosh for murder on 30 January 2001. Mariette Sonjaleen Bosch, a South African citizen, was convicted by the Court of Appeal of the murder of Maria Wolmarans whom she shot dead in what she alleged was a crime of passion. The trial court and the Court of Appeal took the view that she had carefully planned and executed the murder and that she shot Maria Wolmarans in cold blood in order to marry Maria's husband. The Court of Appeal, finding no extenuating circumstances, sentenced Mrs. Bosch to death. The question of constitutionality of the death penalty was not raised at the Court of Appeal.

Upon the death sentence being handed down, Interights – the international legal centre for the protection of human rights, acting on behalf of Mariette Bosch, filed a complaint with the African Commission on Human and Peoples Rights alleging violations of articles 4, 5 and 7.1 of the African Charter.¹⁷⁷

The relevant charter provisions read as follows:

ARTICLE 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

ARTICLE 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

ARTICLE 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c. The right to defence, including the right to be defended by counsel of his choice;

¹⁷⁶ *State v Masoko* CLCGB 058-14 (unreported).

¹⁷⁷ *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihlda.org/doc/240.01/view/> (accessed 20 January 2016).

- d. The right to be tried within a reasonable time by an impartial court or tribunal.¹⁷⁸

The communication was filed at the African Commission on 7 March 2001. The condemned prisoner was executed on 31 March 2001 before the hearing of the communication.¹⁷⁹ Nevertheless, the communication was held to be admissible and a decision on the merits handed down in November 2003 at the 34th ordinary session of the African Commission.

On the question of violation of article 4, which protects the right to life and prohibits arbitrary deprivation of this right, and article 7(1) guaranteeing the right to a fair trial, the Applicant argued that trial court had misdirected itself with regard to the onus of proof of extenuating circumstances. The Applicant argued that this misdirection vitiated the verdict of guilt and consequently the death sentence had been arbitrarily imposed. The African Commission ruled against the Applicant stating that not every misdirection by a trial court would have the effect of vitiating a trial, and that only a misdirection that resulted in a failure of justice could vitiate the entire trial. The Commission was satisfied with the Botswana Court of Appeal's evaluation of evidence and its conclusion that there was a massive body of evidence against the Applicant, which could lead to no other conclusion than that she was responsible for the murder of Maria Wolmarans. The Commission ruled that the conviction of the Applicant did not arise from misdirection. The Commission held that the Court's evaluation of the facts was not arbitrary nor did it amount to a denial of justice. Therefore, the Commission found that

¹⁷⁸ African Charter on Human and Peoples Rights (Banjul Charter) UNTS I-26363. Botswana acceded to this treaty on 22 July 1986.

¹⁷⁹ The Chairman of the African Commission wrote to the President of Botswana appealing for a stay of execution pending consideration of the communication. The applicant claimed that Botswana had violated article 1, 4 and 7.1 of the Charter by failing to abide by the indication of provisional measures. Botswana argued that it had never received the fax. The African Commission was not in possession of any proof that the President of Botswana received the fax. The Commission ruled that there was no violation of Article 1 of the Charter, which requires states recognise the rights duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to them.

there was no violation of article 4 or article 7(1).¹⁸⁰

The Applicant also alleged that the clemency process was unfair. The Applicant argued that Mariette Bosch's right to life had been violated by the arbitrary manner in which the President of Botswana exercised clemency. The Commission ruled that due process had been afforded to Mariette Bosch and that the President of Botswana was entitled by law to exercise his discretion over written submissions for clemency. The Commission found no violation of Article 4.¹⁸¹ The African Commission did note however that a person must be given reasonable time to assemble relevant information and to prepare and put forward his representations.¹⁸²

The African Commission was also requested to rule on the question whether Botswana was in violation of Article 5 of the African Charter by imposing the death sentence, which the Applicant submitted was disproportionate to the circumstances of the case.¹⁸³ Article 5 of the African Charter requires that all states recognise the inherent dignity of the human person and prohibits cruel and inhuman treatment or punishment. The decision of the African Commission does not at any stage consider whether the death penalty is cruel and inhuman punishment. The African Commission noted that the death penalty should be imposed after full consideration of the circumstances of the offence and those of the offender. The African Commission ruled that the sentence imposed on Mariette Bosch could not be faulted given the serious nature of the crime she committed.

¹⁸⁰ *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihlda.org/doc/240.01/> (accessed 20 January 2016) at [22] – [29].

¹⁸¹ *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihlda.org/doc/240.01/> (accessed 20 January 2016) at [42] – [47].

¹⁸² *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihlda.org/doc/240.01/> (accessed 20 January 2016) at [48].

¹⁸³ *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihlda.org/doc/240.01/> (accessed 20 January 2016) at [30] – [37].

The African Commission was also invited to make a finding on the question whether failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman and degrading punishment in violation of Article 5. The Commission declined to deal with this issue on the basis that it was raised at a late stage in proceedings and the Respondent did not have the opportunity to make meaningful submissions.¹⁸⁴ Citing *Guerra v Baptiste*¹⁸⁵ the Commission did state however that

...a justice system must have a human face in matters of execution of a death sentence by affording a condemned person and opportunity “to arrange his affairs, to be visited by member of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal.”¹⁸⁶

The final holding of the African Commission was that Botswana was not in violation of the African Charter. The Commission strongly urged the Republic of Botswana to take all measures to comply with the African Union Resolution Urging States to Envisage a Moratorium on the Death Penalty¹⁸⁷ and to report to the Commission on measures taken to comply with its recommendation.

The African Commission did not rule on the legality or otherwise of the death penalty. There would have been no legal basis upon which to make such a ruling, as there is no prohibition on the death penalty at international law. The Commission restricted itself to making statements on the manner in which the execution is carried out emphasising the requirement for judicial guarantees in the trial process and a ‘human face’ in matters of the execution of a condemned prisoner.

¹⁸⁴ *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihrda.org/doc/240.01/> (accessed 20 January 2016) at [38] – [40].

¹⁸⁵ [1996] AC 397 at 418

¹⁸⁶ *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihrda.org/doc/240.01/> (accessed 20 January 2016) at [41].

¹⁸⁷ Available at <http://www.achpr.org/sessions/26th/resolutions/42/> (accessed 20 January 2016).

3.7 Botswana's international obligations and the death penalty

This section first examines the place of international law in Botswana's national law, and examines treaties that Botswana is signatory to regarding the death penalty. The purpose of this section is to determine if Botswana breaches international law by retaining, imposing and executing capital punishment.

3.7.1 The place of international law in Botswana's national law

Botswana is a dualist state. Dualism treats international law and national law as separate spheres of law.¹⁸⁸ In order for international obligations undertaken by states by way of treaty to form part of national laws, dualism propounds that the international law rules would have to be transformed into national law rules through the use of enabling legislation.¹⁸⁹ Enabling legislation simply gives effect to the international rules on a national level creating enforceable rights and duties. In order for international treaties that Botswana has ratified to form part of Botswana's national laws, there is a requirement of domestication.¹⁹⁰ Tshosa characterises the ratification of a treaty in a dualist country as a 'purely executive act'.¹⁹¹ The domestication of treaties gives the legislature the opportunity to endorse the treaty rules that will, from the point of domestication onwards, grant the rights and create obligations for individuals in the jurisdiction.¹⁹²

The status of undomesticated treaties in Botswana is that they have no force of law. In

¹⁸⁸ OB Tshosa 'The Status and Role of International Law in the National Law of Botswana' in *Essays on the Law of Botswana*, 229 at 230.

¹⁸⁹ OB Tshosa 'The Status and Role of International Law in the National Law of Botswana' in *Essays on the Law of Botswana*, 229 at 234 – 235.

¹⁹⁰ OB Tshosa 'The Status and Role of International Law in the National Law of Botswana' in *Essays on the Law of Botswana*, 229 at 237.

¹⁹¹ OB Tshosa 'The Status and Role of International Law in the National Law of Botswana' in *Essays on the Law of Botswana*, 229 at 234.

¹⁹² OB Tshosa 'The Status and Role of International Law in the National Law of Botswana' in *Essays on the Law of Botswana*, 229 at 235.

*Kenneth Good v The Attorney General*¹⁹³ Tebbutt JP stated:

Botswana...is a signatory to a number of international treaties. It is trite and recognised that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by parliament. Those treaties do not confer enforceable rights on individuals within a state.

In terms of section 24 of the Interpretations Act undomesticated treaties are a guide to interpretation.

3.7.2 Treaties guaranteeing the right to life

A survey of international law instruments reveals that there is no express prohibition of the death penalty in international law. In fact, for many years the death penalty was recognised as a legitimate limitation to the right to life. Amnesty International reports that as at December 2010, 96 countries had abolished the death penalty in law or practice leaving 58 retentionist countries.¹⁹⁴ The abolition of the death penalty is a progressive movement that commenced in the second half of the 20th Century. Abolition of the death penalty is therefore not universal. A considerable number of states retain, impose and execute the death penalty.

Botswana is party to several international instruments that recognise the right to life. First, Botswana is party to the United Nations Charter (UN Charter), which encourages respect for human rights and fundamental freedoms for all, without distinction. The UN Charter does not outlaw the death penalty.¹⁹⁵ Second, Botswana is a state party to the International Covenant on Civil and Political Rights (ICCPR) which contains an extensive provision on the right to life and the imposition of the death penalty. The ICCPR recognises the existence of the death penalty in some states but anticipating its eventual abolition by all states. Article 6 provides as follows:

¹⁹³ Botswana Court of Appeal 2005 (2) BLR 337 (CA) 345 – 346.

¹⁹⁴ Available at <http://www.amnesty.org/en/death-penalty/numbers> (accessed 20 January 2016).

¹⁹⁵ Article 1(3) United Nations Charter.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. ...
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Botswana is not a state party to the 2nd Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, which prohibits the death penalty in all circumstances.¹⁹⁶

Botswana is acceded to the United Nations Convention on the Rights of the Child (UNCRC) on 14 March 1995. The UNCRC was domesticated in the Children's Act of 2009.¹⁹⁷ The UNCRC outlaws the imposition of the death penalty for offences committed by persons below the age of 18.¹⁹⁸ Botswana is party to the African Charter on Human and Peoples Rights (ACHPR). In terms of the African Charter, the right to life should be respected and no one arbitrarily denied this right.¹⁹⁹

In the Second Round of the Universal Periodic Review of the United Nations Human Rights Committee, Botswana faced renewed criticism from the international community over the retention of the death penalty.²⁰⁰ In March 2013 in its response to the recommendations to consider abolition of the death penalty, Botswana declined to give its support to any

¹⁹⁶ International Covenant on Civil and Political Rights UNTS I-14668 which Botswana acceded to on 16 December 1996. The Second Optional Protocol was adopted by General Assembly Resolution 44/128 of 15 December 1989.

¹⁹⁷ UNTS I-27531 and domesticated in the Children's Act No.8 of 2009.

¹⁹⁸ Article 37(a) Convention on the Rights of the Child.

¹⁹⁹ Article 4 African Charter UNTS I-26363.

²⁰⁰ Report of the Working Group on the Universal Periodic Review A/HRC/23/7 at 6 – 13 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/125/04/PDF/G1312504.pdf?OpenElement> accessed 20 March 2015).

recommendations to abolish the death penalty, consider a moratorium in the implementation of the death penalty, or sign and ratify the Second Optional Protocol to the ICCPR on Abolition of the Death Penalty.²⁰¹

In its First Periodic Report to the African Commission on the Implementation of the African Charter on Human and Peoples Rights, Botswana reiterated its retentionist stance as follows:

Currently there are no initiatives or plans by the Government to totally abolish capital punishment. In 1997, the Parliamentary Law Reform Committee produced a report on public opinion on the death penalty, which was tabled before Parliament. The findings of the report show that the public was in favour of retaining the death penalty.²⁰²

In response to this report, the African Commission noted with concern deep-rooted beliefs in the death penalty.²⁰³ It also noted that Botswana is one of few African states that continue to impose the death penalty and regularly execute condemned prisoners²⁰⁴ and recommended that Botswana take steps to institute a moratorium on the death penalty.²⁰⁵

As has been indicated, the African Commission found no violation of Article 5 in the *Mariette Bosch* Case and stated outright that there is no prohibition against the death penalty in international law. It is submitted that Botswana's Constitution, penal laws and sentencing laws are compliant with her international obligations to protect the right to life. The right to

²⁰¹ Report of the Working Group on the Universal Periodic Review A/HRC/23/7 at 6 – 13 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/125/04/PDF/G1312504.pdf?OpenElement> accessed 20 March 2015) at 22.

²⁰² Republic of Botswana First Periodic Report to the African Commission on the Implementation of the African Charter on Human and Peoples Rights 1986 – 2007 available at http://www.achpr.org/files/sessions/46th/state-reports/1st-1966-2007/staterep1_botswana_2008_eng.pdf (accessed 20 January 2016) at [115].

²⁰³ Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana available at http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 20 January 2016) at [26].

²⁰⁴ Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana available at http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 20 January 2016) at [36].

²⁰⁵ Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana available at http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 20 January 2016) at [57].

life in Botswana is protected in section 4 of the Constitution and the deprivation of life must be pursuant to a sentence of death passed by a competent court. The Botswana Constitution also makes provision for a presidential pardon for individuals sentenced to death, though the exercise of the prerogative of mercy has been criticised as opaque and lacking in transparency.²⁰⁶ As mentioned above, capital punishment is prohibited in the Criminal Procedure and Evidence Act for persons who are under eighteen and for pregnant women in keeping with international law. The continued use of the death penalty in Botswana is not in breach of Botswana's international obligations to protect the right to life.

3.7.3 Treaties prohibiting the torture, cruel, inhuman and degrading punishment

Botswana is a state party to the Convention against Torture that requires states party to the Convention to take administrative, judicial, legislative and other measures to prevent acts of torture within territory under its jurisdiction.²⁰⁷ Botswana is also party to the African Charter also provides that every person should be free from torture, cruel inhuman or degrading punishment.²⁰⁸

Botswana is also party to the ICCPR which also provides that no one shall be subjected to cruel inhuman or degrading treatment punishment.²⁰⁹ Botswana has entered a reservation to this provision to the following effect:

The Government of the Republic of Botswana considers itself bound by:

- a) Article 7 of the Covenant to the extent that "torture, cruel, inhuman or degrading treatment" means torture, inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana;

This reservation would have been entered in recognition of the fact that the death penalty is

²⁰⁶ FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 26.

²⁰⁷ Article 2(1) Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment UNTS I-24841.

²⁰⁸ Article 5 African Charter UNTS I-26363.

²⁰⁹ Article 7 ICCPR UNTS I-24841. Botswana acceded the Convention on 8 September 2000.

recognised and enshrined in Botswana's Constitution as a legitimate limitation on the right to life.

To date, Botswana has no penal provisions that directly criminalize torture. In the event of the creation of such an offence, it is unlikely that the definition of torture in Botswana would include the death penalty given that section 7(2) of the Constitution of Botswana preserves the death penalty from falling foul of the prohibition against cruel and inhuman treatment.

As Botswana law now stands, there is no obligation to abolish the death penalty arising out of being a signatory to the Convention against Torture or the ICCPR. The *Ntesang* decision illustrates the point that in Botswana the interpretation of 'cruel, inhuman and degrading treatment' does not extend to or in any way encompass the death penalty in Botswana. It is concluded therefore that the imposition and execution of the death penalty in Botswana does not run contrary to Botswana's international obligations not to impose cruel, inhuman or degrading punishment.

3.8 Discourses on the death penalty in Botswana

The death penalty in Botswana continues to be a subject of debate. Current discourses centre on issues involving the constitutional savings clause; public opinion in support of the death penalty; the adequacy of legal representation of accused persons in capital cases; the clemency process; and secret executions. Each of these issues is amplified below.

3.8.1 The constitutional savings clause

In order to challenge the constitutional provisions preserving the death penalty in Botswana,

it is clear that recourse cannot be had to the courts. The courts of Botswana have clearly indicated that they are not empowered to re-write the constitution and declare the death penalty unconstitutional. There may have been some headway made in finding the mandatory death penalty unconstitutional at the High Court in the *Mosoko* High Court decision, however, this decision has been overturned on appeal thus retaining the mandatory death penalty for murder without extenuating circumstances.

3.8.2 Public opinion

Public perceptions in Botswana are in favour of retention of the death penalty.²¹⁰ Botswana's system of governance relies greatly on public consultation in the *Kgotla* before any major decisions affecting the public are made. These consultations serve as a platform to inform the populace of Government initiatives but also an important forum to secure the views of the public on any matter. *Therisanyo*, or public consultation, is a critical facet of Botswana's governance.

Therisanyo is very important in Botswana as a means of communication between the communities and the government. The government of Botswana usually consults people through *Kgotla* meetings organized by the chief. The chief is the ex-officio on government issues... Since independence, BDP [the ruling party] has been in power until now; the party leaders have adopted this way of discussing government policies and initiatives, developments etc. with the tribal peoples at the *Kgotla*. The president and the cabinet ministers usually go around each village addressing people at the *Kgotla* on any issue the public needs to know or to get the public opinion.²¹¹

Public consultation with regard to the death penalty was conducted between January 1996 and September 1997 by the Parliamentary Law Reform Committee.²¹² The Minutes of the results of the consultation from *Kgotla* Meetings country wide indicated overwhelming

²¹⁰ Botswana unmoved on death penalty Wednesday 30 January 2013 – 09:45 available at Gabzfm available at www.gabzfm.co/botswana-unmoved-death-penalty (accessed 7 May 2013).

²¹¹ PC Mounakwa 'The Botswana *Kgotla* system: a mechanism for traditional conflict resolution in modern Botswana case study of the Kanye *Kgotla*' unpublished master's thesis, University of Tromsø 2010 77. Available at <http://munin.uit.no/bitstream/handle/10037/3211/thesis.pdf> (accessed 20 January 2016).

²¹² Botswana National Assembly Law Reform Committee 'Minutes of the Law Reform Committee of Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II' 1997.

support for the death penalty.²¹³ It is unlikely that law reform that does away with the death penalty could be achieved without considerable public disquiet.

3.8.3 Adequacy of representations

The right to legal representation in Botswana is not absolute.²¹⁴ An accused person has a right to legal representation of his choice at his own cost. The sole exception in criminal matters is capital cases. Where the accused faces the death penalty, he is entitled to legal representation. If he cannot afford a lawyer, the Registrar of the High Court appoints a *pro deo* attorney for the accused. The adequacy of *pro deo* counsel was raised as an issue in the *Kobedi (2)*²¹⁵ Case and the *Maauwe and Motswetla* Cases.²¹⁶

In the *Kobedi (2)* case, it was argued that an attorney who was inexperienced in trying death penalty cases represented the accused.²¹⁷ In the *Maauwe and Motswetla* Cases, Ditshwanelo took issue with the adequacy of legal representation. Seeking a declaration of mistrial, Ditshwanelo argued that *pro deo* counsel given the accused was incompetent and that they did not represent the accused persons properly or adequately. The Court did not rule definitively on this issue but ordered a retrial on other grounds.²¹⁸ The issue of adequacy of legal representation is one of concern in capital cases in Botswana. A weak or faulty defence

²¹³ For instance, at the *Kgotla* meeting in the Lobatse Customary Court the public indicated their support for the death penalty and urged government to minimise delays in execution and wasting public funds feeding condemned prisoners. Members of the public also lamented the South African experience with the abolition of the death penalty. At the Kanye *Kgotla*, The majority supported capital punishment as a deterrent with only one individual speaking against it. At the Tlokweng *Kgotla*, the death penalty received support. It was proposed that capital trials be speeded up and at the death penalty be extended to rapists. At the Moshupa *Kgotla* meeting, one person spoke against the death penalty urging that it be replaced with life imprisonment. At the Jwaneng Customary Court, support for the death penalty was indicated with a request that it be extended to persons committing abortions. In Gaborone Babusi Ward *Kgotla* meeting, the death penalty received support with one person calling for a referendum on the matter.

²¹⁴ *Mathiba v The State* 2010 1 BLR 711 (HC); *Makhura and Another v The State* [1991] B.L.R. 104 (HC) 110 D-H.

²¹⁵ 2005 (2) BLR 76 (CA).

²¹⁶ *Ditshwanelo and others v The Attorney – General and Another (No 2)* 1999 (2) BLR 222 (HC)

²¹⁷ FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 21.

²¹⁸ *Ditshwanelo and others v The Attorney – General and Another (No 2)* 1999 (2) BLR 222 (HC).

could mean the wrongful imposition of the death sentence on the accused. In the report,²¹⁹ filed by the International Federation for Human Rights in conjunction with Ditshwanelo, it was that inexperienced attorneys who lacked the necessary skills to defend persons facing the death penalty argued capital cases in Botswana. Another matter raising concern is that the fees paid to attorneys in *pro deo* cases were inordinately low considering the time-consuming preparations giving little incentive to them to zealously represent their clients. Attorneys in *pro deo* cases lacked the necessary resources to prepare for capital cases. The matter of adequacy of legal representation remains unresolved.

3.8.4 The prerogative of mercy

The clemency process in Botswana has been criticised as opaque and lacking in transparency.²²⁰ Ditshwanelo have taken issue with the process, as did the South African High Court in the Emmanuel Tsebe Case. Issues raised with the clemency process include the fact that the Attorney-General is a member of the clemency committee raising problems of conflict of interest. Further, campaigners against the death penalty are dissatisfied with the provision of the law that allows the clemency committee to sit even with one of its members absent. The committee regulates its procedure, which contributes to the opaqueness of the process. Another area of concern is that there is no possibility of making oral submissions to the clemency committee. There is also no mechanism for challenging the death penalty at the clemency committee. The clemency committee does not provide a written ‘decision’ but merely makes a pronouncement that the application has been denied. The system has been criticised as broadly inadequate and in need of more transparency and independence.

²¹⁹ FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 21.

²²⁰ FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 26.

3.8.5 Secret executions

Executions in Botswana are often carried out without notice to the condemned prisoners family, friends or attorneys. With respect to the condemned prisoner Mr. Ping, Ditshwanelo reports that Mr. Ping's family was not informed of his execution although there was opportunity to do so. Ditshwanelo maintain that failure to inform the family of the date of the execution and the refusal to give the family access to the prisoner may result in inhuman and degrading treatment and punishment for both the prisoner and his family.²²¹ In the *Interights* application on behalf of Mariette Bosch, the African Commission stated that the justice system must have a human face and allow the condemned prisoner to arrange his affairs and receive family and visits prior to his execution.²²²

Of concern as well is the fact that the execution of Mariette Bosch occurred whilst an application was pending before the African Commission. In the *Mariette Bosch* matter, the African Commission had requested a stay in the execution pending its decision on the merits of the application. The Botswana Government did not receive the communication requesting the stay. The African Commission did not form a view on the question of the violation of provisional measures, as it was not certain that the Botswana Government had in fact received the communication requesting a stay.

4 INTERNATIONAL AND REGIONAL PERSPECTIVES

The discussion above describes the history of the death penalty in Botswana. By illustrating the acceptance of the death penalty by native communities and the development of the death

²²¹ FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 27.

²²² *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* available at <http://caselaw.ihlda.org/doc/240.01/> (accessed 20 January 2016).

penalty as a Common Law punishment for serious offences in Botswana, the chapter sought to show how deeply the punishment is entrenched in the rubric of crime and punishment in Botswana. Popular support for the death penalty remains strong in Botswana.

The historical discussion is followed by an exposition of the death penalty in Statutory Law and case law. Despite numerous attempts to have the death penalty declared unconstitutional, it appears that campaigners are unable to sway the courts. The greatest obstacle is that the death penalty is entrenched in the very document from which campaigners against the death penalty seek recourse. Barring a constitutional amendment, it appears that the Court of Appeal in *Ntesang* has closed the door to any further challenges to the constitutionality of the death penalty.

A survey of Botswana's international obligations with respect to the death penalty followed next. There is no prohibition against the death penalty at international law. Botswana position is not in breach of any international obligations. Where there could have been a risk of such a breach, as with Botswana's accession to the ICCPR, reservations were made that ensured the continued legality of the death penalty in Botswana. Though the tide is turning internationally, as many countries abandon the death penalty, Botswana retains the force of the argument that the imposition of the death penalty is not illegal at international law and it is the sovereign right of any state that wishes to retain it.

Current debates surrounding the death penalty in Botswana marked the end of this section. The constitutional savings clause, the concerns of pressure groups regarding the adequacy of legal representation and consequently the fairness of trials in capital cases; concerns surrounding the clemency process and, the secrecy of some executions in Botswana were

traversed. Whilst these concerns are legitimate, they have to date failed to make any impression on the Government to change its retentionist stance or adopt a different approach in the management of capital cases from start to finish. It could be argued that much more work in advocacy needs to be done if there are to be any lasting changes in current law and practice.

The aim of this discussion was to introduce the reader to the history, development and current issues surrounding the death penalty in Botswana. The discussion now turns to considering the death penalty in comparative perspective. The objective of the next section is to propose a way forward for Botswana through a comparative study of the death penalty in other jurisdictions.

The death penalty is an ancient punishment but there is a definite trend towards its abolition, particularly evident in the 20th Century.²²³ However, the assertion that the death penalty is prohibited at international law is a bridge too far.²²⁴ While many states now maintain that the state has no legal right to deprive any person of his life, other nations steadfastly retain the use of the death penalty.²²⁵

The abolitionist trend has been growing for hundreds of years. Abolitionists argue that the right to life is inherent to the human being and is not a privilege granted to the person by the state for good conduct and withdrawn for bad conduct.²²⁶ Cesare Beccaria in his 1764 treatise '*On Crimes and Punishments*' advocated the abandonment of capital punishment in favour of

²²³ P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 1; K Bojosi 'The death row phenomenon and the prohibition against torture and cruel inhuman or degrading treatment' (2004) 4 *African Human Rights Law Journal* 303 – 304.

²²⁴ K Bojosi 'The death row phenomenon and the prohibition against torture and cruel inhuman or degrading treatment' (2004) 4 *African Human Rights Law Journal* 304.

²²⁵ See section 3.5 below on the current status of the death penalty.

²²⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 1.

new styles of punishments that were proportional to the crimes committed. Beccaria maintained that capital punishment is inhuman and ineffective. In his view, capital punishment amounted to killing by that state which legitimised the use of force.²²⁷

The next section evaluates the development of the abolitionist trend in the United Nations and in regional blocs world-wide.

4.1 The United Nations

The death penalty was imposed by the International Military Tribunals at Nuremberg and Tokyo following the end of the Second World War.²²⁸ But by the 1990's when the International Criminal Tribunals for Rwanda and Yugoslavia were constituted by the United Nations (UN), there had been a sea change in international criminal law. The death penalty was not included in the statute of either tribunal.²²⁹ The international community had departed from support of the death penalty to eschewing it as unacceptable. This stance was to be followed in 1998 by the adoption of by the statute of the International Criminal Court which contained no penalty of death which sealed the future direction of international criminal tribunals.

The first foray into consideration of the legality of the death penalty at international law by the United Nations was the preparatory work on the Universal Declaration of Human Rights (UDHR) some 60 years ago.²³⁰ In those discussions, a proposal by the Soviet Union to abolish the death penalty in peacetime was put to a vote and defeated by 21 votes to 9 with 9

²²⁷ R Hood *The death penalty – a worldwide perspective* (2002) 9.

²²⁸ WA Schabas 'The United Nations and the Abolition of the Death Penalty' in J York (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 9 at 9.

²²⁹ WA Schabas 'The United Nations and the Abolition of the Death Penalty' in J York (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 9 at 9.

²³⁰ GA Resolution 217 A (111) 10 December 1948; WA Schabas 'The United Nations and the Abolition of the Death Penalty' in J York (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 9 at 10.

abstentions.²³¹ The UDHR remained silent on the death penalty.

The International Covenant on Civil and Political Rights (ICCPR)²³² was the next document of the United Nations dealing with the death penalty. The ICCPR provides as follows in article 6(1) and 6(2)

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Schabas notes that article 6(2) had the singular success of recognising capital punishment as an exception or limitation to the right to life and that the ‘principles are now approaching near universal acceptance’.²³³ The ICCPR now counts 168 nations as states party to the treaty.

The next notable document of the United Nations dealing with the death penalty is the Safeguards Guaranteeing the Protection of The Rights of Those Facing the Death Penalty, a document adopted by the Economic and Social Council of the United Nations in 1984.²³⁴ These safeguards contain guarantees to be provided to persons facing the death penalty. The safeguards are an attempt to narrow the scope of application of the death penalty for those countries that were still retentionist.

The Safeguards were further supplemented and buttressed by another resolution of the Economic and Social Council adopted in 1989 entitled ‘Implementation of Safeguards

²³¹ WA Schabas ‘The United Nations and the Abolition of the Death Penalty’ in J York (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 9 at 10 – 11.

²³² UNTS I-14668.

²³³ WA Schabas ‘The United Nations and the Abolition of the Death Penalty’ in J York (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 9 at 12 – 13.

²³⁴ ESC Res 1984/50.

Guaranteeing Protection of the Rights of those Facing the Death Penalty'²³⁵ Of note in this document are the following recommended protections: allowing time and facilities to mount a defence in capital cases and in particular counsel; providing for mandatory appeals; clemency and pardon; setting of a maximum age beyond which capital punishment will not be permissible and, eliminating the death penalty for persons suffering from mental incapacity.²³⁶

In the 1970's, there had emerged the idea that the compromise that was article 6 of the ICCPR could be corrected by a protocol outlawing the death penalty.²³⁷ In 1989, the fruits of this idea were harvested with the conclusion of the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.²³⁸ The Second Optional Protocol provides for total abolition of the death penalty while providing for states to retain the death penalty in times of war by way of reservation.²³⁹ This Protocol currently has 81 states party.

In 1989, the UN General Assembly adopted the United Nations Convention on the Rights of the Child (UNCRC). This convention prohibits the imposition of the death penalty on any person who committed an offence whilst under the age of 18.²⁴⁰

On 18 December 2007, the United Nations General Assembly passed its annual resolution called the Moratorium on the Use of the Death Penalty.²⁴¹ Despite some opposition, this resolution cemented the United Nation's abolitionist stance towards the death penalty. In 18 December 2014, the vote was held once again with 177 nations in favour and 37 against. The number of states in favour of a moratorium has been rising every year. According to Schabas,

²³⁵ ESC Res 1989/64.

²³⁶ ESC Res 1989/64 Articles 1 (a) – (d).

²³⁷ WA Schabas 'The United Nations and the Abolition of the Death Penalty' in J York (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 9 at 22.

²³⁸ General Assembly resolution 44/128 of 15 December 1989. This protocol was adopted with 59 votes in favour, 26 voted against and 48 abstentions.

²³⁹ Article 1 and 2, 2nd Optional Protocol on the Death Penalty.

²⁴⁰ Article 37(a) UNCRC.

²⁴¹ The 2007 moratorium was adopted with 104 votes in favour, 54 votes against and 29 abstentions.

state practice today may currently indicate a trend towards a customary international law rule prohibiting the death penalty.²⁴² As will be seen below, in Europe and Latin America, regional Customary Law prohibiting the death penalty can arguably be said to exist because executions in these regions have virtually ceased.²⁴³

4.2 The European Union

The European Convention for the Protection of Human Rights and Fundamental Freedoms was promulgated by the Council of Europe in 1965. It contains no prohibition of the death penalty. It provides for the right to life and allows execution following conviction for a crime whose penalty is prescribed by law.²⁴⁴

Protocol 6 to the European Convention on Human Rights was concluded in 1982. In terms of this protocol the death penalty is abolished in peacetime.²⁴⁵ States are permitted to retain the death penalty in wartime.²⁴⁶ The protocol is currently signed and ratified by all members of the Council of Europe except Russia which has signed but not ratified the Protocol.²⁴⁷

Protocol 13 to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances came into force in 2002. Protocol 13 provides for abolition of the death penalty in all circumstances with no exceptions. It has been signed and ratified by all member states of the Council of Europe except Armenia which has signed but not ratified it and Russia and Azerbaijan which have not signed the Protocol.²⁴⁸

²⁴² WA Schabas 'International Law and the death penalty: Reflecting or promoting change' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 43.

²⁴³ WA Schabas 'International Law and the death penalty: Reflecting or promoting change' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 43 at 44.

²⁴⁴ Article 1.

²⁴⁵ Article 1.

²⁴⁶ Article 2.

²⁴⁷ Available at

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=06/03/2015&CL=ENG> (accessed 20 January 2016).

²⁴⁸ Available at

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=187&CM=8&DF=06/03/2015&CL=ENG>

The death penalty and issues surrounding it has been the subject of several influential decisions from the European Court of Human Rights. In the famous *Soering Case*²⁴⁹, concerning risk of exposure to the death-row phenomenon, the European Court of Human Rights ruled that extradition of the defendant to the United States to stand trial for murder where he faced the death penalty amounted to cruel, inhuman and degrading treatment contrary to article 3 of the European Convention on Human Rights because the applicant if extradited to Virginia, United States, was at risk of being sentenced to death and of being subjected to the death-row phenomenon. This risk was accepted by the Court as amounting to the possibility of exposing Soering to cruel, inhuman and degrading treatment.

A similar decision on the death row phenomenon being human and degrading treatment was reached in *Einhorn v France*²⁵⁰ save for the fact that the defendant had been granted an express decree that he would not be subjected to the death penalty if he returned to the United States to face trial. In *Jabari v Turkey*,²⁵¹ the Court held that the applicant was at a real risk of being subjected to death by stoning in Iran if she were to be returned there. The Court held that the deportation of the applicant, if executed, would give rise to a violation of Article 3 of the European Convention prohibiting torture, cruel and inhuman treatment, or punishment. The European Court has also ruled that deportation to a country where an individual faces a risk of being sentenced to death would amount to a violation of the right to life guaranteed under article 2 of the Convention and the prohibition against torture, inhuman or degrading punishment in article 3 of the Convention.²⁵² The Court has also held that the imposition of

(accessed 20 January 2016).

²⁴⁹*Soering v United Kingdom* (1989) 11 EHRR 439.

²⁵⁰ 71555/01.

²⁵¹ 40035/98.

²⁵²*Bader and Kanbor v Sweden* 13284/04. In *Salem v Portugal* 26844/04, a similar application was not successful because the Indian government gave assurances that the applicant would not be exposed to the death penalty of a sentence of more than 25 years if Portugal were to extradite him to face terrorism charges in India. A similar decision was reached in *Babar Ahmad and Others v The United Kingdom* 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 regarding an extradition request by the United States accompanied by diplomatic assurances that the applicants would not be exposed to the death penalty on terrorism charges. See also *Rrapo v*

the death penalty following an unfair trial before a Court whose impartiality was open to doubt amounts to inhuman treatment in violation of Article 3 of the European Convention.²⁵³

4.3 The inter-American human rights system

The Organisation of American States has among its members some of the most enthusiastic retentionist states including Jamaica, Trinidad and Tobago and the United States of America.²⁵⁴

The first Inter-American human rights treaty was the American Declaration on the Rights and Duties of Man (The American Declaration).²⁵⁵ The American Declaration was adopted in 1948 as a non-binding declaration. In terms of article 1 of the American Declaration, every human being was guaranteed the right to life liberty and security of his person. There was no mention of the death penalty despite earlier drafts that had such a reference.²⁵⁶

In 1959, at a high level ministerial meeting, it was agreed to advance the protection of human rights in the Western Hemisphere with a human rights convention. The American Convention on Human Rights was adopted on 22 November 1969 and came into force in 1978. In terms of Article 4(1) of the American Convention on Human Rights, the right to life is guaranteed. In countries that have not abolished the death penalty, the punishment is reserved for only the most serious crimes following judgement by a competent court.²⁵⁷ The death penalty may not be applied retrospectively.²⁵⁸ It is also prohibited to impose the death penalty for political offences.²⁵⁹ There are limitations on persons upon who the death penalty may be imposed.²⁶⁰

Albania 58555/10; *Harkins and Edwards v The United Kingdom* 9146/07.

²⁵³ *Ocalan v Turkey* 46221/91.

²⁵⁴ WA Schabas *The abolition of the death penalty* (3rd ed) (2003) 311.

²⁵⁵ Adopted by the Ninth International Conference of American States, Bogota, Colombia, 1948.

²⁵⁶ WA Schabas *The abolition of the death penalty* (3rd ed) (2003) 313 – 314.

²⁵⁷ Article 4(2).

²⁵⁸ Article 4(2).

²⁵⁹ Article 4(3).

²⁶⁰ Article 4(4).

Persons over the age of 70 are not to be executed.²⁶¹ This is the only regional human right treaty with such a provision. Persons may not be executed for crimes committed when they were under the age of 18 and pregnant women shall not have the death penalty applied to them.²⁶² Lastly, in terms of Article 4(5) every person condemned to death has the right to request a pardon or a commutation of their sentence. Amnesty, pardon and commutation shall be available in all cases. Capital punishment may also not be imposed where a decision is pending in the first application for pardon from a condemned prisoner.

The interpretation of article 4 of the American Convention has given rise to several notable decisions of the Inter-American Court and Commission on Human Rights. In a ruling concerning the mandatory death penalty, the Inter-American Court that it was to be contrary to article 4 of the American Convention on Human Rights because the sentence gave no regard to the individual circumstances of each offender and the offence, amounting to an arbitrary deprivation of life contrary to article 4(1) of the Convention.²⁶³ The Inter-American Court and Commission also considered the application of the death penalty without respect for due process to be a violation of article 4 (1) and an arbitrary deprivation of life.²⁶⁴ This includes failure to inform persons charged with capital crimes of their entitlement to consular assistance as occurred in the *La Grand Case*²⁶⁵ and the requirement to provide legal aid to indigent defendants.²⁶⁶ The Court has also held that article 4(2) prohibits the extension of the death penalty to new offences after signature of the Convention.²⁶⁷ The Inter-American

²⁶¹ Article 4(5).

²⁶² Article 4(5).

²⁶³ *Lamey et al v Jamaica* Case 11.826, Report No. 49/01; *Baptiste v Granada* Case 11.743 Report No. 38/00.

²⁶⁴ *Baptiste v Grenada* Case 11.743 Report No. 38/00 at [87].

²⁶⁵ *Lamey et al v Jamaica* Case 11.826, Report No. 49/01[222]-[226].

²⁶⁶ *The Right to information on consular assistance in the context of guarantees of due process of law* Advisory Opinion OC 16/99 of 1 October 1999 at [141(7)] in relation to *La Grand (Germany The United States of America)* Judgement ICJ Reports 2001 p. 466.

²⁶⁷ *Restrictions to the death Penalty (Arts 4(2) and 4(4) American Convention on Human Rights)* Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983) at [59] in a case where Guatemala sought to extend the death penalty to political offences; See also *International Responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts 1 and 2 of the American Convention*

Commission has also held that article 4(6) of the American Convention secures for the prisoner the following protections: The right to apply for amnesty, pardon or commutation, the right to be informed by competent authorities when his application will be considered, the right to make representations in person or through counsel, the right to receive a decision within reasonable time as well as the right not to have capital punishment imposed while awaiting a decision on his petition. These rights entail on the part of the state the duty to provide a procedure through which the prisoner may make effective use of these processes. The Commission ruled that absence of this minimum protections and procedures would render article 4(6) meaningless, effectively a right without a remedy.²⁶⁸

Apart from Europe, the Inter-American Human rights system is the only other regional system which has a Protocol abolishing the death penalty. The Protocol to the American Convention on Human rights on the Abolition of the Death Penalty was adopted by the Organisation of American States in 1990. The protocol provides for the total abolition of the death penalty though making allowance for a state to retain the use of the death penalty in wartime through a reservation.²⁶⁹

In spite of being at the forefront of human rights instruments limiting and prohibiting the use of the death penalty, the Inter-American region continues to present a mixed record to the international community. Staunch retentionist states including the United States of America and states in the commonwealth Caribbean continue to impose the death penalty sometimes in violation of norms set out in Article 4 of the American Convention on Human rights. The United States continues to execute offenders who committed crimes while juveniles and the

on Human Rights) Advisory Opinion OC 14/94 of 9 December 1994 in a case where Peru sought to extend, in its new constitution, the application of the death penalty to crimes not previously subject to capital punishment.

²⁶⁸ *Lamey et al v Jamaica* Case 11.826 Report No. 49/01at [121]; *Baptiste v Granada* Case 11.743 Report No. 38/00 at [159]; *McKenzie et al v Jamaica* Case 12.023, Annual Report of the IACHR 1999at [228]; *Knights v Grenada* Case 12.028 Report No. 47/01at [110].

²⁶⁹ Per Article 1 and 2.

Inter-American Court and Commission have dealt with numerous cases concerning failures in due process from Caribbean countries. The Inter-American region has certainly fallen behind the European countries in progress towards abolition of the death penalty.

4.4 The death penalty in Africa

Many African states retain the death penalty with 17 abolitionist states²⁷⁰ and 20 other African nations observing a *de facto* moratorium. As at October 2013, only 10 African states had ratified the 2nd Optional Protocol to the ICCPR Aiming at Abolition of the Death Penalty. The African Charter on Human and Peoples Rights is silent on the question of the death penalty.²⁷¹ Article 4 of the African Charter preserves the right to life; however, Chenwi states that there is little interpretive material on the meaning of Article 4. The African Human Rights System has no protocol on the question of the death penalty in contrast to the protocols concluded in the European Union and the Inter-American Human Rights system.²⁷²

It is encouraging to note that the Protocol to the African Charter on Human and Peoples on the Rights of Women in Africa places a restriction on the imposition of the death penalty on expectant women and nursing mothers.²⁷³ Similarly, the African Charter on the Rights and Welfare of the Child provides that the death sentence shall not be pronounced for crimes committed by children.²⁷⁴

Chenwi notes, however, that African states continue to jealously guard their right to make law

²⁷⁰ Angola, Benin, Burundi, Cape Verde, Côte d'Ivoire, Djibouti, Gabon, Guinea-Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tomé and Príncipe, Senegal, Seychelles, South Africa and Togo.

²⁷¹ WA Schabas *The abolition of the death penalty* (3rd ed) (2003) 255.

²⁷² L Chenwi 'Taking the death penalty debate further: The African commission on human and peoples rights' in J Yorke (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 76.

²⁷³ Article 4(2)(j).

²⁷⁴ Article 5(3).

within their territory with international law viewed as a threat to sovereignty.²⁷⁵ Consequently, domestication of international instruments tends to be poor across the continent. Nevertheless, there is advocacy for the development of a protocol specifically addressing the death penalty in Africa as is found in Europe and the Inter-American Human rights systems.²⁷⁶ Arguably, this goal may not be met soon as many African states continue to make use of the death penalty. There are encouraging signs of progress which are discussed below.

In 1999 in Kigali, The African Union adopted a resolution urging states to envisage a moratorium on the death penalty.²⁷⁷ In terms of this resolution, states still maintaining the death penalty were to consider limiting the imposition of the death penalty to the most serious crimes, consider a moratorium on the execution of the death penalty, and reflect on the possibility of abolishing the death penalty. In 2008, a further resolution was adopted in Abuja in which African states were urged to observe a moratorium on the death penalty.²⁷⁸ These resolutions have been supported by the establishment of a Working Group on the Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa.

The African Commission on Human and Peoples Rights has considered several communications on the death penalty in Africa. In the case concerning Orton and Vera Chirwa,²⁷⁹ the African Commission defended the right of the defendants to a fair trial in terms of Article 7 of the African Charter stating that a capital trial before a Traditional Court of chiefs with no legal training and where defendants were not allowed the right to defence by

²⁷⁵ L Chenwi 'Taking the death penalty debate further: The African commission on human and peoples rights' in J Yorke (ed) *Against the Death Penalty: International Initiatives and Implications* (2008) 76.

²⁷⁶ L Chenwi 'Taking the death penalty debate further: The African commission on human and peoples rights' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 76 at 97.

²⁷⁷ Resolution Urging States to Envisage a Moratorium on Death Penalty (1999) ACHPR /Res.42(XXVI)99

²⁷⁸ Resolution calling on State Parties to observe the moratorium on the death penalty (2008) ACHPR/Res.136(XXXXIII)08.

²⁷⁹ *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, African Commission on Human and Peoples' Rights, Comm. Nos. 64/92, 68/92, and 78/92 (1995). Available at <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html> (accessed 3 March 2015).

counsel of their own choice was objectionable.²⁸⁰ The African Commission found that the trial did not meet the standards of fairness required by Article 7 of the African Charter.²⁸¹ In *Constitutional Rights Project (in respect of Lekwot and Others) v. Nigeria*²⁸² the Commission held that intimidation and harassment of counsel of the accused persons resulting in them withdrawing and the subsequent conviction of the accused without counsel was a violation of article 7(1) c of the African Charter. Further, the African Commission held that the composition of the court as members of armed forces and police compromised the defendant's right to be tried by an impartial tribunal contrary to article 7(1) d of the African Charter.

In *Constitutional Right Project (in respect of Akumu and Others) v Nigeria*²⁸³ and *Forum of Conscience v Sierra Leone*²⁸⁴ the African Commission criticised the absence of the right to an appeal in capital cases which it held to be contrary to Article 7(1) (a) of the African Charter . In four cases filed against Sudan, the African Commission also noted violation of the right to life contrary to article 4 on account of the failure of the government of Sudan to prevent extra-judicial and arbitrary killings and, a violation of the right to a fair trial contrary to Article 7 of The African Charter on account of the absence of a right to appeal in capital cases and the fact that the accused persons had no legal representation.²⁸⁵

In the Ken Saro-Wiwa case²⁸⁶ the tribunal found violation of Article 7(1)(a) by failure to

²⁸⁰ *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, African Commission on Human and Peoples' Rights, Comm. Nos. 64/92, 68/92, and 78/92 (1995). Available at <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html> (accessed 3 March 2015) [10].

²⁸¹ *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, African Commission on Human and Peoples' Rights, Comm. Nos. 64/92, 68/92, and 78/92 (1995). Available at <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html> (accessed 3 March 2015) [12].

²⁸² Communication 87/93 (1995) available at <http://www1.umn.edu/humanrts/africa/comcases/87-93.html> (accessed 5 March 2015).

²⁸³ Communication 60/91 (1995).

²⁸⁴ Communication 223/1998 (2001).

²⁸⁵ *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights and Association of members of the Episcopal conference of East Africa v Sudan Communications* 48/90, 50/91, 52/91, 89/93

²⁸⁶ *International Pen and Others v Nigeria* African Commission on Human and Peoples' Rights Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998).

provide a trial for the defendants before an impartial tribunal and instead trying them before a body that was an extension of the executive. The tribunal also found a violation of article 7(1)(b) which guaranteed the defendants the presumption of innocence. The Commission also established a violation of the right to legal representation guaranteed by Article 7 (1) (c) finding that accused attorneys had been harassed by the executive.²⁸⁷ The African Commission also held that there had been a violation of Article 4 of the African Charter which guarantees the right to life citing the fact that the defendants were executed while their communications to the African Commission were pending determination.²⁸⁸

The Working Group on the Death Penalty prepared a study on the death penalty in Africa which was adopted in 2012. This study identified the following challenges for the African region in relation to the death penalty: Continued public support for the death penalty; the deep influence of tradition and religion in support of the death penalty regional human rights instruments that are silent on the death penalty; and general ignorance on the death penalty.²⁸⁹ The Study identified the following strategies for abolition in the region including: Engagement with states parties on the issue of the death penalty; increasing public awareness on the death penalty such as human rights education; the importance of a multi-sectoral approach that involves all stakeholders in communities; encouraging states to sign and ratify human rights treaties; collaboration with the United Nations and national human rights bodies; the drafting of an African protocol abolishing the death penalty and encouraging African states to adopt a moratorium on executions.²⁹⁰

²⁸⁷ *International Pen and Others v Nigeria* African Commission on Human and Peoples' Rights Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998) at [86] – [101].

²⁸⁸ *International Pen and Others v Nigeria* African Commission on Human and Peoples' Rights Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998) at [102] – [104].

²⁸⁹ African Commission on Human and Peoples Rights, *Study on the Question of the death penalty in Africa* (2012) 51.

²⁹⁰ African Commission on Human and Peoples Rights, *Study on the Question of the death penalty in Africa* (2012) 51 at 52 – 53.

4.5 Death penalty: International trends

The international trend continues to eschew the death penalty.²⁹¹ As at 31 December 2014, Amnesty International reports that 140 countries were abolitionist in law or practice. Of these 98 were abolitionist for all crimes, 7 were abolitionists for ordinary crimes reserving the death penalty for exceptional crimes under military law or committed under exceptional circumstances and 35 were abolitionist in practice. Amnesty International further reports that 58 countries retained the use of the death penalty worldwide. This means that two-thirds of the world's nations are abolitionist in law or practice.²⁹²

Current statistics on the death penalty indicate that 22 countries carried out the death penalty in 2013 executing a total of 778 persons. 80% of executions were recorded in Iran, Iraq and Saudi Arabia. This figure excludes the thousands thought to have been executed in the Supreme People's Republic of China.²⁹³

Despite the positive trend towards abolition, there are some notable setbacks. In December 2014, following a terrorist attack on an Army School in Peshawar Pakistan, in which 141 people, most of them children, were killed, Pakistan lifted a moratorium on the use of the death penalty.²⁹⁴ In 2013, capital punishment also resumed in Indonesia, Kuwait, Nigeria and Vietnam.²⁹⁵ In 2013, the United States of America was the only country in North and South America to carry out the death penalty whilst there were no executions recorded in Europe or Central Asia in 2014.²⁹⁶ Hood argues that if the United States were to abandon the death penalty, many countries would follow suit, in what he calls the 'pack of cards theory'.²⁹⁷

²⁹¹ Amnesty International 'Death sentences and executions 2013' 5.

²⁹² Amnesty International 'Death sentences and executions 2013' 52.

²⁹³ Amnesty International 'Death sentences and executions 2013' 4.

²⁹⁴ 'Pakistan reinstates death penalty after attacks'. Available at <http://news.sky.com/story/1393201/pakistan-reinstates-death-penalty-after-attack> accessed (17 March 2015).

²⁹⁵ Amnesty International 'Death sentences and executions 2013' 3.

²⁹⁶ Amnesty International 'Death sentences and executions 2013' 4.

²⁹⁷ P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital*

Retentionist countries continued to justify their use of the death penalty on deterrence. Unfair trials and executions of persons who committed crimes whilst under the age of 18 were recorded in Saudi Arabia, Iran and Yemen. In Indonesia, India, Japan, Malaysia, South Sudan and Iran, failure to inform the family and legal representatives of planned executions in advance was noted.²⁹⁸ In Africa, 5 member states of the African Union carried out executions in 2013 being Botswana, Nigeria, Somalia, South Sudan and Sudan. The remains of those executed were not returned to their families for burial in Botswana, India, Nigeria, Iran and Saudi Arabia.²⁹⁹ 37 AU member states were recorded to be abolitionist in law or in practice.³⁰⁰ Amnesty international recorded a total of 32 commutations of death sentences worldwide in 2013.

Methods of execution reported to have been used in 2013 are beheading, electrocution, hanging, lethal injection, and shooting. Public executions were conducted in North Korea, Saudi Arabia and Somalia.³⁰¹ Mandatory death penalties were handed down in Iran, Kenya, Malaysia, Nigeria Pakistan and Singapore despite being considered to be contrary to human rights law because they do not take into account the defendants personal circumstances and the circumstances surrounding the offence.³⁰²

In some countries, crimes that cannot be considered to be ‘most serious crimes’ in terms of article 6 of the ICCPR, continued to attract the death penalty. These crimes include: Drug offences, adultery, blasphemy, economic crimes, rape, aggravated robbery, treason, acts

punishment: Strategies for abolition (2004) 29. Death penalty statutes were struck down as unconstitutional in the United States by the US Supreme Court in *Furman v Georgia* 408 US 238, when the Supreme Court ruled that the death penalty was applied in an arbitrary and capricious manner. The death penalty was restored in the United States by the same Court in *Gregg v Georgia* 428 US 153.

²⁹⁸ Amnesty International ‘Death sentences and executions 2013’ 7.

²⁹⁹ Amnesty International ‘Death sentences and executions 2013’ 7.

³⁰⁰ Amnesty International ‘Death sentences and executions 2013’ 3.

³⁰¹ Amnesty International ‘Death sentences and executions 2013’ 8.

³⁰² Amnesty International ‘Death sentences and executions 2013’ 8 – 9.

against national security, and crimes against the state.³⁰³ Amnesty International also reports that the death penalty continued to be imposed in military courts and special courts even against civilians in the Democratic Republic of Congo, Egypt and Somalia.³⁰⁴

5 COMMON ARGUMENTS IN FAVOUR OF THE DEATH PENALTY

It has been argued that the death penalty meets a particular need of society. The various justifications generally recognised by jurists are, deterrence, retribution in response to the victims loss or suffering, public support for the death penalty, efficient punishment.³⁰⁵

5.1 Individual and general deterrence

Individual deterrence adopts the position that by being subjected to the death penalty, the condemned man is permanently removed from society ridding it of future murders by him.³⁰⁶

Some also argue that the death penalty is necessary as a general deterrent to prevent or punish crime.³⁰⁷ It is argued that this need to rid the community of the offender and set an example for other potential offenders justifies the cruelty of the punishment.³⁰⁸

5.2 Retribution

It is argued that the death penalty is necessary as retribution for offensive crimes against society.³⁰⁹ Retribution is in essence an attempt to respond to the loss or suffering of the victim, whose rights have been interfered with by the defendant, by exacting punishment. The human desire for vengeance is triggered by the extreme grief and anger coupled with the need

³⁰³ Amnesty International 'Death sentences and executions 2013' 9.

³⁰⁴ Amnesty International 'Death sentences and executions 2013' 9.

³⁰⁵ P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 3.

³⁰⁶ V Streib *Death penalty in a nutshell* (2008) 10.

³⁰⁷ R Hood *The death penalty – a worldwide perspective* (2002) 209.

³⁰⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 4 – 5.

³⁰⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 6.

to see the offender receive the punishment that he deserves.³¹⁰ Capital punishment is then seen as exacting a payment for such crimes. Thus, the ancient *Lex talionis* plays out in the death penalty – an eye for an eye, a tooth for a tooth. Indeed, ‘those who show no mercy should find none.’³¹¹

Retribution makes the criminal justice system the instrument through which the public avenge crimes.³¹² Retribution makes impossible demands of the criminal justice system, requiring fairness and infallibility at every stage of the process.³¹³ Retribution ignores factors like the fallibility of human judgement, the social circumstances of the offender and adequacy of the offenders defence.³¹⁴

5.3 Public opinion

Another reason advanced for retaining the death penalty is that public opinion, at a particular moment of a nation’s history, may not support abolition.³¹⁵ The fact remains that many citizens in countries that have abolished the death penalty remain in favour of its use.³¹⁶ This is certainly the reality in South Africa for example.³¹⁷

5.4 Efficient punishment

States that apply the death penalty harbour the belief that it is the most efficient punishment for capital offences. There does exist a perceived absence of viable alternatives to the death penalty. The death penalty is sometimes advocated as a cheaper option to incarceration of

³¹⁰ V Streib *Death penalty in a nutshell* (2008) 10.

³¹¹ ‘The death penalty will discourage crime’ in P Winters (ed) *The death penalty: opposing viewpoints* 3rd ed (1997) 13.

³¹² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 9.

³¹³ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 17 – 18.

³¹⁴ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 17 – 18.

³¹⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 22.

³¹⁶ RJ Simon & DA Blaskovich *A comparative analysis of capital punishment: statutes, policies, frequencies and public attitudes the world over* (2002) 33.

³¹⁷ J Midgley ‘Public opinion and the death penalty in South Africa’ (1974) *British Journal of Criminology* 345 348.

persons convicted of capital offences.³¹⁸

5.5 Other arguments

Some argue that the death penalty gives a convicted individual a unique opportunity for introspection and rehabilitation. Prisoners on death row are known to repent and express remorse for their crimes and to experience profound spiritual rehabilitation. Some favour the death penalty because it permanently incapacitates the prisoner making it impossible for the prisoner to commit another crime. The death penalty is also supported as it gives closure and vindication to the families of the victim. Lastly, some argue that capital punishment gives individuals incentives to cooperate with police investigations in a bid to avoid the gallows or to assist to capture a criminal who may later be executed.³¹⁹

6 ARGUMENTS AGAINST THE DEATH PENALTY

6.1 The death penalty is not a deterrent

The death penalty is not an individual deterrent. Since the death penalty permanently incapacitates the prisoner, it cannot be proven that such a prisoner would have repeated the offence for which he was convicted had he not been executed.³²⁰ In fact, evidence seems to support the view that the deterrent effect of the death penalty is not more effective than the deterrent effect of life imprisonment.³²¹ This is because imprisonment also incapacitates the offender making it impossible for him to repeat the crime for so long as he remains in

³¹⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24.

³¹⁹ BBC Ethics Guide 'Arguments in favour of capital punishment' available at http://www.bbc.co.uk/ethics/capitalpunishment/for_1.shtml (Accessed 6 January 2016)

³²⁰ RJ Simon & DA Blaskovich *A comparative analysis of capital punishment: statutes, policies, frequencies and public attitudes the word over* (2002) 41; Amnesty International *When the state kills: The death penalty v. human rights* (1989) 5.

³²¹ R Hood *The death penalty – a worldwide perspective* (2002) 209; V Streib *Death penalty in a nutshell* (2008) 17.

custody.³²² The death penalty therefore runs the risk of being ‘nothing more than a purposeless and needless imposition of pain and suffering’.³²³

Capital punishment incorrectly assumes that all persons committing capital offences do so rationally and with premeditation.³²⁴ Cesare Beccaria, writing in 1764, states that the death penalty has never prevented people from committing crimes.³²⁵ Beccaria captures a fact of human nature - the reality is that many capital crimes are crimes of passion fuelled by alcohol or drugs, triggered by panic or mental instability.³²⁶ Consequently, the death penalty does not act as a deterrent in these cases.

With regard to general deterrence, Marc Ancel notes that the abolition of the death penalty is never followed by a notable increase in the incidence of the crime punishable by death.³²⁷ In fact, crime rates are not lower in countries that have the death penalty.³²⁸ This position is reiterated by Amnesty International which has stated that the death penalty has never been empirically proved to be a deterrent to crime.³²⁹ Roy Hattersley speaking in the House of Commons stated as follows:

If the deterrence case is to be accepted, if we are to vote for capital punishment as a deterrent we at least ought to be sure that it deters. If we are to hang men and women by the necks until they are dead we ought to do it on more than a hunch, a superstition, a vague impression...³³⁰

A study conducted in Nigeria between 1967 and 1985 established that murders and armed robberies had increased during the period under study even though it was widely known that

³²² V Streib *Death penalty in a nutshell* (2008) 15.

³²³ *Coker v Georgia* 433 U.S. (1977).

³²⁴ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 10.

³²⁵ C Beccaria ‘The death penalty will not discourage crime (1764)’ in P Winters (ed) *The death penalty: opposing viewpoints* 3rd ed (1997) 22.

³²⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 10.

³²⁷ WA Schabas ‘The United Nations and the abolition of the death penalty’ in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 9 at 14.

³²⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 10.

³²⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 5.

³³⁰ Roy Hattersley Debate on the death penalty House of Commons, 13 July 1983 House of Commons Official Report Parliamentary Debated (Hansard) Vol. 45 No. 20 13 July 1983 Column 905 cited in Amnesty International *When the state kills: The death penalty v. human rights* (1989) 9.

these were capital offences. The study concluded that the death penalty had no efficacy in preventing murders and armed robberies in Nigeria.³³¹ Cesare Beccaria, writing 200 years prior and arguing that the death penalty was no deterrent, stated that human beings are creatures of habit more likely to be moulded or impacted by the continued example of a man imprisoned and deprived of his liberty than they are to be affected by the momentary explosive act of executing a convict.³³² The general deterrent argument makes the false assumption that the average member of the general public knows of capital punishment for capital crimes and that he believes that he will be caught, convicted and executed and that he makes this cost-benefit analysis before committing a capital offence. Most people who commit capital crimes simply do not make that analysis.³³³

In an interesting angle of research, Streib argues that murder rates have been observed to go up following executions. He refers to this as the ‘brutalisation effect’, the general diminishing of the value for life in the community.³³⁴ This is not an unusual proposition. Amnesty International has noted that with regard to politically motivated crimes and terrorist offences, the possibility of ‘political martyrdom’ through execution by the state can actually have the undesired effect of encouraging such crimes.³³⁵ Indeed, the ideologically motivated offender is often prepared to die for his beliefs, making the state an unwitting pawn in furthering the offender’s ideology.³³⁶ This may result in radicalisation of those who share the offender’s beliefs and the drawing of unwanted attention to the agenda of the ‘political martyr’.³³⁷

Robert Badinter is quoted as saying:

³³¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 13.

³³² C Beccaria ‘The death penalty will not discourage crime (1764)’ in P Winters (ed) *The death penalty: opposing viewpoints* 3rd ed (1997) 23.

³³³ V Streib *Death penalty in a nutshell* (2008) 16.

³³⁴ V Streib *Death penalty in a nutshell* (2008) 17.

³³⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 6.

³³⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 19.

³³⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 19.

History and contemporary world events refute the simplistic notion that the death penalty can deter terrorists. Never in history has the threat of execution halted terrorism or political crime. Indeed, if there is one kind of man or woman who is not deterred by the threat of the death penalty, it is the terrorist, who frequently risks his life in action. Death has an ambiguous fascination for the terrorist. Be it death of others by one's own hand or the risk of death for oneself. Regardless of his proclaimed ideology, his rallying cry is the fascist 'viva la muerte' [long live death].³³⁸

6.2 The death penalty brutalises all those involved in the process

6.2.1 The prisoner

Amnesty international reports that the cruelty of the death penalty is suffered by the prisoner from the moment of conviction with some prisoners abandoning the appeals process resigning themselves to execution 'as if it were some form of suicide'.³³⁹ This is because the prisoner convicted to death is often treated differently from other prisoners. They may be segregated, be placed in isolation for long periods with no activities to occupy their time and mind. The prisoner suffers anxiousness of the impending execution and the effect of his execution on his family.³⁴⁰ Relationships sometimes deteriorate between the prisoner and family members as the prisoner may view ties of family and friendship as useless.³⁴¹ The threat of execution is one of the most terrifying forms of torture.³⁴² Schabas describes the threat of executing as 'the inhumane treatment'.³⁴³

Some scholars have taken the view that prolonged detention in death row can of itself render the carrying out of the death penalty unjust or unlawful.³⁴⁴ In the *Catholic Commission*³⁴⁵ case, the Zimbabwe Supreme Court stated that the state had nothing to gain by delaying the execution of condemned persons.

³³⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 20.

³³⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 61.

³⁴⁰ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 61.

³⁴¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 62.

³⁴² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 64.

³⁴³ WA Schabas *The abolition of the death penalty at international law* (1993) 127.

³⁴⁴ K Bojosi 'The death row phenomenon and the prohibition against torture and cruel inhuman or degrading treatment' (2004) 4 *African Human Rights Law Journal* 304; *Pratt and Morgan v the Attorney General for Jamaica* [1994] 2 AC 1.

³⁴⁵ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and others* 1993 4 SA 239.

The ritual of execution itself is described as being dehumanising to the prisoner. Preceding the death penalty, the prisoner may be placed in solitary confinement, the death warrant may be read out aloud, the prisoner may be placed under constant observation, and his property may be removed. The prisoner may be measured for clothing to be worn during the execution, the death certificate may be prepared with his knowledge and the prisoner offered a last meal.³⁴⁶

In *Soering v The UK and Germany*,³⁴⁷ the European Court held that death row phenomenon was contrary to the European Convention on Human Rights. In *Pratt & Morgan v The Attorney General for Jamaica*³⁴⁸ the Privy Council considered long post-trial detention and held that no one should be subjected to execution after waiting more than 5 years on death row. The Court considered this to be cruel and inhuman treatment contrary to the Jamaican Constitution.

Public rituals are equally dehumanising of the prisoner. This may include parading before crowds, display the offences for which the prisoner must be executed on placards, and dragging of prisoners who cannot walk to the stakes for execution.³⁴⁹

6.2.2 The executioners

Advocates against the death penalty state that capital punishment causes the state to be viewed as the perpetrator of violence against its citizens.³⁵⁰ The guards, chaplains, jurors, lawyers, judges, prosecutors, doctors and police officers often find the execution of the death penalty a traumatic and disturbing experience.³⁵¹ Indeed, repaying death with death may not always be a fair punishment as society, in executing a prisoner, descends to the same moral

³⁴⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 65.

³⁴⁷ 11 EHR 439.

³⁴⁸ [1993] 4 All ER 769.

³⁴⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 65.

³⁵⁰ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 67.

³⁵¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 67.

depravity as the offender.³⁵²

6.2.3 The families and friends of the victim and the prisoner

Hodgkinson states that victim's families are often ignored.³⁵³ The death penalty perpetuates the pain and anger of the victim's family.³⁵⁴ Victim's families suffer the extended process of the trial, conviction and execution of the offender for a capital offence. In capital cases, the victims' families report that they experience a shift of attention from the victim of the crime to the prisoner who perpetrated the offence often resulting in frustration and a feeling of disillusionment with the law.³⁵⁵ It has been stated that the desire for retribution on the part of the victims is not a valid justification for the sentence of death because the victims should not be the determinants of the suitable punishment.³⁵⁶

On the flip side of the coin are the family and friends of the prisoner who often suffer when a loved one is convicted sentenced and executed. Often they are not afforded a chance to say goodbye. They are sometimes denied advance notice of the execution. They suffer grief at the death of the prisoner. They suffer humiliation at the manner of death of their loved one. They are also dejected as they have no way of preventing the execution.³⁵⁷

6.3 The death penalty and poor and marginalised communities

Bias in the imposition of the death penalty based on race, sex, economic level, judicial office, jury and defence council has been noted as an important flaw in capital cases.³⁵⁸ Certain groups are observed to be more vulnerable to discrimination than others. Ethnic and social

³⁵² V Streib *Death penalty in a nutshell* (2008) 12 – 13.

³⁵³ P Hodgkinson 'Capital punishment: Meeting the needs of the families of the homicide victim and the condemned' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 332.

³⁵⁴ P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 1.

³⁵⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 68.

³⁵⁶ V Streib *Death penalty in a nutshell* (2008) 11.

³⁵⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 68.

³⁵⁸ V Streib *Death penalty in a nutshell* (2008) 18.

backgrounds are also factors that influence the imposition of the death penalty making poor and marginalised communities disproportionately subject to the death penalty.³⁵⁹ The poor are less able to engage effectively with the criminal justice system since knowledge confidence and funds are often not at their disposal.³⁶⁰ Amnesty international also observes that the death penalty is less likely to be imposed on persons from more favoured sections of society.³⁶¹

6.4 The death penalty is imposed arbitrarily

Most would agree that ‘...it is not fit that men in criminal causes...should be condemned, unless the evidence be clearer than the midday sun’.³⁶² However, the reality is that absolute perfection in the criminal justice process is unachievable. There are inherent challenges that plague any legal system that must determine the innocence or guilt of any offender.

The death penalty has been criticised as being too arbitrary and subject to error.³⁶³ Amnesty International notes that it is not possible to achieve fairness, consistency and infallibility in any criminal justice process that determines who should live and who should die. The possibility of error is ever present due to human frailty of judges, prosecutors and defence attorneys. Public opinion on particular cases may influence the decisions-makers from arrest to clemency. Expediency and discretion also affect the mind of the decision-maker.³⁶⁴

Wrongful convictions are often difficult to reverse as appellate courts do not consider new evidence but are confined to points of law.³⁶⁵ This means that capital punishment should not be imposed without a trial, and that procedural safeguards must be respected in capital

³⁵⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 7.

³⁶⁰ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 28.

³⁶¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 28.

³⁶² _ ‘The death penalty will discourage crime’ in P Winters (ed) *The death penalty: opposing viewpoints* 3rd ed (1997) 13.

³⁶³ RJ Simon & DA Blaskovich *A comparative analysis of capital punishment: statutes, policies, frequencies and public attitudes the word over* (2002) 47.

³⁶⁴ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 7, 9 – 10.

³⁶⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 31.

trials.³⁶⁶ A trial implies the presence of an attorney, the presumption of innocence for the benefit of the defendant, a trial without delay, an impartial tribunal, the right to an appeal and an opportunity for clemency before execution.³⁶⁷

6.5 The death penalty may result in execution of the innocent

The death penalty should be abolished due to the risk of errors that could have affected the process of investigation, trial, conviction and clemency, which could then result in the execution of the innocent. Innocent persons have been convicted to death and subjected to the death penalty.³⁶⁸ Abolition of the death penalty is the most effective way to avoid wrongful executions.³⁶⁹

The death penalty is used as a tool to quash political dissent.³⁷⁰ Because of its irrevocable nature, capital punishment has been used in some states as a tool to repress persons who hold views that are deemed to be contrary to those of a particular government. The culpability of such views is often simply a matter of perception as other governments may hold such views as harmless.

Unfair trials have been known to be held for political expediency.³⁷¹ Such trials ignore the essential requirements of a fair trial. Evidence of unfairness includes secret courts, absence of legal representation, incompetent judges, judges lacking independence, lack of time to prepare and mount a defence, being denied the right to appeal or clemency and executions being carried out within hours of conviction and sentencing.³⁷²

³⁶⁶WA Schabas 'International Law and the death penalty: Reflecting or promoting change' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 53 – 54.

³⁶⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 54 – 55.

³⁶⁸ V Streib *Death penalty in a nutshell* (2008) 19.

³⁶⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 31.

³⁷⁰ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 8.

³⁷¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 46.

³⁷² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 42.

6.6 The death penalty is a violation of the fundamental human rights of prisoners

As noted in the discussion above, there is an increase in the number of international agreements, both binding and non-binding in nature that have seen the international community move steadily towards abolition.³⁷³ Hodgkinson notes that political pressure and the desire to reject injustices propagated in some nations by totalitarian regimes has driven the steady march towards abolition.³⁷⁴ The question of the death penalty cannot be separated from the question of human rights.³⁷⁵ The death penalty is a violation of a person's right to life. Cesare Beccaria states that no man has the right to take another's life.³⁷⁶ The death penalty is an extreme physical and mental assault on the prisoner. The pain caused by the act of killing the prisoner cannot be quantified.³⁷⁷ The death penalty violates a person's right to be free from torture, cruel, inhuman or degrading punishments.³⁷⁸

In response to the argument that capital punishment is justifiable as retribution for crime, Amnesty International argues that human rights are inalienable and should not be taken away despite the heinousness of a crime.³⁷⁹ Whilst the desire for vengeance is understandable, the law serves to restrict personal vengeance in favour of public policy and legal codes to mete out justice.³⁸⁰ The Mosaic Law that demands an eye for an eye and a tooth for a tooth must be replaced by a restrained legal code. Thus, the rapist should not be raped, the arsonist should not have his home burned, the killer should not be killed.³⁸¹ Human rights should apply to everyone, from the toughest of criminals to the most law abiding citizen.

³⁷³P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 3.

³⁷⁴P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 3.

³⁷⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 1.

³⁷⁶ C Beccaria 'The death penalty will not discourage crime (1764)' in P Winters (ed) *The death penalty: opposing viewpoints* 3rd ed (1997) 22.

³⁷⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 2.

³⁷⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 2.

³⁷⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 6.

³⁸⁰ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 7.

³⁸¹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 7.

The argument that the public would not support the abolition of the death penalty can also be refuted on the basis of human rights. The mere fact that the public would support some form of punishment does not give credence to the punishment. Public support for the death penalty is often based in incomplete understanding of the facts surrounding the death penalty from arrest to execution.³⁸² Persons who are informed about the cruelty of the death penalty and the risks of error inherent in the process of condemning a person to death would be unlikely to continue to offer their support to the punishment. Attitudes often change when the public is well-informed about what states do in their names.³⁸³

The cost of incarceration of a prisoner is not a convincing argument in support of capital punishment. It was held in *Emmanuel Tsebe* that the question of cost should not deter any criminal justice system from protecting the human rights.³⁸⁴ Amnesty International states that an inordinate amount of resources is concentrated on capital cases, which resources could be useful in other areas of law enforcement were the death penalty to be abolished.³⁸⁵

6.7 Ineffective clemency process

Clemency is an administrative decision to commute the death penalty after all appeals have been exhausted in the court process.³⁸⁶ It is also referred to as mercy, pardon or reprieve. Previously exercised by the monarch, it is now usually exercised by the head of the executive arm of government.³⁸⁷

In terms of article 6 of the ICCPR, the right of the prisoner sentenced to death to seek clemency is preserved. The right to clemency exists in many countries, but Amnesty

³⁸² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 22.

³⁸³ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 22.

³⁸⁴ *Minister of Home affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16.

³⁸⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24.

³⁸⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 33.

³⁸⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 33.

International notes that it is often exercised arbitrarily or entirely overlooked.³⁸⁸ In some countries the decision is made in a few short hours or days by an executive fully engaged with other government matters creating a real risk of error where decisions must be made under pressure.³⁸⁹

6.8 Death penalty is sometimes imposed for less serious offences

The application of any penalty ought to be proportional to the crime.³⁹⁰ Thus, even the death penalty, where it is applied, ought to apply to the most serious offences. This is the principle of proportionality encompassed in article 6 of the ICCPR. The Human Rights Committee in General Comment 6(16) required that the term ‘the most serious crimes’ be read restrictively because death is an exceptional measure encouraging states to eliminate the death penalty save for the most serious crimes.³⁹¹ The principle of proportionality is also found in Article 49(3) of the Charter of Fundamental Rights and Freedoms of the European Union.³⁹²

Similar provisions are found in article 4 (2) of the American Convention. The African Charter on Human and Peoples Rights is silent on the death penalty, but the African Union in its Resolution urging States to envisage a moratorium on the death penalty has called upon African states to limit imposition of the death penalty to only the most serious of crimes.³⁹³ The 1984 ECOSOC Safeguards also provide that the death penalty should be imposed save for international crimes with lethal or extremely grave consequences.³⁹⁴ Article 68 of the 4th Geneva Convention of 1949 also limits application of the death penalty to the most serious crimes.

³⁸⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 34.

³⁸⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 34.

³⁹⁰ WA Schabas ‘International Law and the death penalty: Reflecting or promoting change’ in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 45.

³⁹¹ Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003) at [6].

³⁹² 2000/C 364/01.

³⁹³ Resolution Urging States to Envisage a Moratorium on Death Penalty (1999) ACHPR /Res.42 (XXVI)99.

³⁹⁴ ESC Res 1984/50 GA Res 39/1/8 at Article 1.

Sadly, the principle of proportionality is not applied in some jurisdictions which sentence person's to death regularly and for less serious offences. Restricting the death penalty to the most serious offences is one of the first steps towards abolition.³⁹⁵

6.9 Retroactive use of the death penalty

In some instances the death penalty is used retroactively in breach of the principle *nulla poena sine lege*.³⁹⁶ The recent reintroduction of the death penalty in Pakistan following a terrorist attack at the military school in Peshawar is an example of retroactive application of the death penalty, should the perpetrators be convicted and sentenced to death.

6.10 Death penalty against juveniles, the elderly, pregnant women and the mentally incapacitated

Because juveniles are considered not yet to have matured as adults, it is presumed, in their favour that they are capable of reform.³⁹⁷ Article 6 of the ICCPR prohibits the imposition of the death penalty on persons under the age of 18. This principle is reiterated in several international instruments.³⁹⁸ Notwithstanding execution of juveniles continues in several countries including Bangladesh, Barbados, Pakistan and the United States of America.

International instruments do not present a unified front concerning the execution of elderly persons, that is, persons over the age of 70. Amnesty International reports that there have been execution of persons over the age of 70 in Sudan and the USSR. The 1984 ECOSOC safeguards have no provisions regarding the execution of the elderly. However, the 1989 ECOSOC document on implementation did propose that states consider a maximum age

³⁹⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 35.

³⁹⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 37.

³⁹⁷ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 38.

³⁹⁸ Article 4(5) American Convention on Human Rights, article 76(3) Additional protocol 1 UNTS I-17512 and Article 6(4) Additional Protocol 11 UNTS I-17513.

beyond which executions should be excluded. A maximum age beyond which executions are prohibited is now reflected in the American Convention which contains a maximum age limit of 70 years.³⁹⁹ International instruments prohibit execution of expectant women and mothers of young children.⁴⁰⁰

A further ECOSOC safeguard is the protection of those suffering from mental incapacity from execution.⁴⁰¹ The rationale for this argument is that the mentally unsound cannot be held criminally responsible for their actions. However there are difficulties in applying this protection based on adequacy of the facilities and skills to diagnose mental incapacity and lack of agreement on the severity of illness that should amount to mental incapacity.⁴⁰² Amnesty International documents that in the United States persons who are mentally unstable have been subjected to the death penalty.⁴⁰³

6.11 The death penalty and public opinion

The argument that public support for the death penalty is insurmountable is a fallacy. Many people erroneously believe that the death penalty is an effective general deterrent.⁴⁰⁴ Hood states that there is no connection between public support for the death penalty and the incidence of homicide.⁴⁰⁵ It has been argued that once the public are properly educated about what it takes to execute a human being, public support for the death penalty would wane. Hodgkinson states that strong public support for the death penalty is better challenged

³⁹⁹ Article 4(5).

⁴⁰⁰ Article 6(5) ICCPR; Article 4(2)j of the African Women's Charter; Article 4(5) American Convention

⁴⁰¹ Article 1 1989 ECOSOC Guidelines; UN Human Rights Commission *Annual Report on the Question of the Death Penalty* 2002 also urges states to exclude from the death penalty persons who are suffering from mental disorders.

⁴⁰² Amnesty International *When the state kills: The death penalty v. human rights* (1989) 42.

⁴⁰³ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 42.

⁴⁰⁴ WA Schabas 'Public Opinion and the death penalty' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 312.

⁴⁰⁵ R Hood *The death penalty – a worldwide perspective* (2002) 243.

through raising public awareness and understanding of the death penalty.⁴⁰⁶ In the Royal Commission Report on Capital Punishment (1949 – 1953), the UK Attorney General cautioned against reliance on public opinion stating that in his view any reliance placed on public opinion had to be founded on the confidence that the public was ‘well informed and instructed.’⁴⁰⁷ In fact, legislative abolition of the death penalty in the United Kingdom occurred in the face of public opinion polls in favour of the death penalty.⁴⁰⁸

In Tanzania, Mwalusanya J stated as follows when commenting on the death penalty and public opinion in *Republic v Mbushuu et al.*⁴⁰⁹

The government must assume the responsibility of ensuring that their citizen are placed in position whereunder they are able to base their views about the death penalty on a rational and properly informed assessment. It is clear that many people base their support for the death penalty on an erroneous belief that capital punishment is the most effective deterrent punishment, and so the government has a duty to put the true facts before them instead of holding out to the public that the death penalty is an instant solution to violent crime.⁴¹⁰

Similar views were expressed by the US Supreme Court in *Gregg v Georgia*⁴¹¹ where Justice Thurgood Marshall stated that ‘the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable’.⁴¹²

In another decision of the US Supreme Court IN *Furman v Georgia*⁴¹³ the Court noted that public opinion ‘lies at the periphery not the core of the judicial process in constitutional cases’⁴¹⁴ According to the US Supreme Court, the assessment of public opinion was a matter for the legislature and not a judicial function.⁴¹⁵ Similarly, in South Africa, the death penalty

⁴⁰⁶P Hodgkinson ‘Capital punishment: Improve it or remove it’ in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 18.

⁴⁰⁷ P Hodgkinson ‘Capital punishment: Improve it or remove it’ in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 19.

⁴⁰⁸ WA Schabas ‘Public Opinion and the death penalty’ in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 309.

⁴⁰⁹ 1994 2 LRC 335.

⁴¹⁰*Republic v Mbushuu et al* 1994 2 LRC 335 at 351.

⁴¹¹ 428 US 153.

⁴¹²*Gregg v Georgia* 428 US 153 at 233.

⁴¹³ 408 US 238.

⁴¹⁴*Furman v Georgia* 408 US 238.

⁴¹⁵*Furman v Georgia* 408 US 238 at 443.

was abolished by the Constitutional Court in *State v Makwanyane*⁴¹⁶ in the face of strong public support for the death penalty.⁴¹⁷

7 ACHIEVING ABOLITION: A COMPARATIVE STUDY

7.1 South Africa

7.1.1 Introduction

The death penalty was introduced in South Africa by colonists who settled in the Cape. It was widely used under Roman-Dutch law, available for a raft of offences and exercised on a discretionary basis.⁴¹⁸ Scholars have noted that between 1910, the year of formation of the Union of South Africa and 1966, a total of 2107 persons were executed in South Africa.⁴¹⁹ By 1970 – 1971 there was an execution every 4 ½ days, which made the death penalty virtually a routine occurrence.⁴²⁰ 4220 people were executed in South Africa between 1910 and 1990 with 90% of all executions being for murder.⁴²¹ The death penalty was mandatory for murder in South Africa until 1935. Act no 46 of 1935 authorised a lesser sentence where extenuating circumstances could be established.⁴²²

⁴¹⁶ 1995 ZACC 3.

⁴¹⁷ WA Schabas 'Public Opinion and the death penalty' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 311.

⁴¹⁸ G Devenish 'The Historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform' (1992) 5 *South African Journal of Criminal Justice* 1 2 – 3.

⁴¹⁹ J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 346; BD van Niekerk 'Hanged by the neck until you are dead: some thoughts on the application of the death penalty in South Africa' (1969) 86 *SALJ* 457 458. For an excellent historical overview of the death penalty in South Africa see E Kahn, 'How did we get our lopsided law on the imposition of the death penalty for common law crimes? And what should we do about it?' (1989) 2 *South African Journal of Criminal Justice* 137.

⁴²⁰ J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 347.

⁴²¹ A Novak 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14 *African Human Rights Law Journal* 30.

⁴²² SS Terblanche 'Sentencing murder and the ideal of equality' (2011) 44 *Comparative and International Law Journal of Southern Africa* 97 99.

By 1974, the death penalty was available for the following offences: Murder, treason, rape, robbery, aggravated house-breaking, attempted robbery, kidnapping and child stealing. After the Sharpeville Massacre the death penalty was then available for terrorism and guerrilla training abroad.⁴²³ Novak states that apartheid South Africa had one of the most active death penalty regimes in the 20th Century.⁴²⁴

7.1.2 Historical overview

In 1945, the Lansdown Commission was charged by the government of the day to report on the prison and penal reform in South Africa. The Commission had no specific mandate to consider the death penalty but when reporting stated that it was in favour of the retention of the death penalty. The reason proffered was that public opinion in South Africa at the time could not accept a change and that a strong abolitionist movement would be necessary to ensure a shift in public opinion through public education.⁴²⁵ The Lansdown Commission also took the view that that the death penalty remained a suitable punishment for the undeveloped native population.⁴²⁶

Problems noted in the application of the death penalty in South Africa included the disproportionate number of non-whites executed in comparison to whites, the fact that black defendants were unable to secure proper legal representation in a split bar, the *pro deo* system that forced young inexperienced advocates to take on capital cases, and socio-economic conditions that produced hardened criminal in marginalised communities.⁴²⁷ Language

⁴²³J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 348.

⁴²⁴ A Novak 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14 *African Human Rights Law Journal* 26.

⁴²⁵ J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 348.

⁴²⁶ J H van Rooyen 'Towards a new South Africa without the death sentence: struggles, strategies and hopes' (1993) 20 *Florida State University Law Review* 737 744.

⁴²⁷ J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345

difficulties and the burden of proving extenuation also meant that blacks had a greater chance of being sentenced to death.⁴²⁸

These potent arguments against the death penalty were disputed by retentionists in South Africa who argued that blacks had a propensity to violent crime.⁴²⁹ Some also argued for retention of the death penalty on the basis that it was a general and individual deterrent citing leniency towards crime as being a direct cause of high crime rates.⁴³⁰ Others cited the Bible for support arguing that the death penalty was sanctioned by scripture which stated that murder should be punished with death.⁴³¹ While some judges were mindful of the non-deterrent effect of the death penalty, others thought that an abolition would not serve any useful purpose.⁴³²

Voices were emerging supporting abolition of capital punishment. However, in the face of a difficult political environment characterised by institutionalised apartheid, such voices were lonely and quickly muzzled. Helen Suzman introduced a Private Members Bill in Parliament in 1969 calling for a commission of inquiry on the death penalty. The Minister of Justice's response was that the commission was not needed because there was public support for the death penalty.⁴³³ Prof Van Niekerk's article, 'Hanged by the neck until you are dead' led to a

347.

⁴²⁸J H van Rooyen 'Towards a new South Africa without the death sentence: struggles, strategies and hopes' (1993) 20 *Florida State University Law Review* 737 744 – 745.

⁴²⁹J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 347.

⁴³⁰J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 350.

⁴³¹Romans 13: 1 – 4; Genesis 9:6.

⁴³²J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 346 350.

⁴³³G Devenish 'The Historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform' (1992) 5 *South African Journal of Criminal Justice* 1 10.

contempt of court hearing against the scholar which put off many from discussing racial disparity in the administration of the death penalty in South Africa.⁴³⁴

Most members of Parliament supported the retention of the death penalty in a debate held in 1970.⁴³⁵ In 1971, the Society for the Abolition of Capital Punishment in South Africa was created, however, the government continued to reject calls to revamp the criminal justice system. With Prof Van Niekerk's death in 1981, the Society for the Abolition of the Death Penalty in SA became moribund for almost ten years. In the 1980's the death penalty regime in South Africa was in crisis with large numbers of accused persons being sentenced to death under the common purpose doctrine in political cases despite their having trivial roles in the crimes committed.⁴³⁶

A new wind of change began to blow at the end of the decade. With the release of Nelson Mandela from prison in 1990, negotiations commenced for a new constitutional order. The ANC required that a moratorium on executions be instituted by the government as a pre-condition for negotiations.⁴³⁷ The exercise of the death penalty was suspended through a moratorium announced by the President, FW de Klerk. The last time capital punishment was used in South Africa was on 2 February 1989.⁴³⁸

The legislative arm of government also did its part to whittle away at the bastion of capital punishment in South Africa and usher in a new era. In July 1990, the Criminal Law

⁴³⁴ J H van Rooyen 'Towards a new South Africa without the death sentence: struggles, strategies and hopes' (1993) 20 Florida State University Law Review 737 746.

⁴³⁵ J Midgley 'Public opinion and the death penalty in South Africa' (1974) *British Journal of Criminology* 345 352.

⁴³⁶ A Novak 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14 *African Human Rights Law Journal* 3.

⁴³⁷ A Novak 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14 *African Human Rights Law Journal* 331.

⁴³⁸ R Hood *The death penalty – a worldwide perspective* (2002) 39.

Amendment Act abolished the death penalty for house-breaking with intent to commit a crime or house-breaking with aggravating circumstances.⁴³⁹ The mandatory death penalty was also outlawed making the death penalty for any capital crime discretionary. A tribunal was set up to review the death sentences imposed before July 1990. In the same year the concept of extenuating circumstances was abolished. Under new guidelines, when the death penalty was not considered an appropriate sentence a term of imprisonment could be imposed.⁴⁴⁰

In 1992, the Ministry of Justice announced that all executions were suspended pending the introduction of the new South African Bill of Rights.⁴⁴¹ Interestingly, the Interim Constitution adopted in 1993 was silent on the question of the death penalty. However, the death penalty was abolished in South Africa in 1995 following a Constitutional Court decision in *State v Makwanyane*,⁴⁴² a case which presented a valuable opportunity for the Court to rule on the constitutionality of the death penalty.

In *Makwanyane*, counsel for the accused contended that the death penalty was cruel inhuman and degrading punishment. They averred that it was an affront to human dignity and the unqualified right to life enshrined in the constitution. They maintained that the death penalty was arbitrary in its enforcement. The Director of Public Prosecutions for his part presented the argument that the death penalty was a deterrent for violent crime. He also indicated that popular opinion in South Africa supported the punishment and that it was not cruel, inhuman or degrading.⁴⁴³

⁴³⁹ R Hood *The death penalty – a worldwide perspective* (2002) 39.

⁴⁴⁰ SS Terblanche ‘Sentencing murder and the ideal of equality’ (2011) (44) *Comparative and International Law Journal of Southern Africa* 97 100.

⁴⁴¹ R Hood *The death penalty – a worldwide perspective* (2002) 39.

⁴⁴² 1995 ZACC 3.

⁴⁴³ *State v Makwanyane* 1995 ZACC 3 Per Chaskalson P at [27].

In determining whether the death penalty was a cruel inhuman and degrading punishment contrary to section 11(2) of the Interim Constitution, the Constitutional Court took the view that the death penalty was applied in an arbitrary manner holding that:

It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and the final decision as to who should live and who should die.⁴⁴⁴

The Constitutional Court noted that there were inherent inconsistencies in the judicial system which had to be accepted. The Court noted however, that unjust imprisonment could be identified and remedied, the killing of an innocent person was irremediable.⁴⁴⁵

On the question of the importance of public opinion, the Constitutional Court opined as follows:

Public opinion may have some relevance to the inquiry but, in itself, it is not substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour, if public opinion were to be decisive, there would be no need for constitutional adjudication.⁴⁴⁶

With respect to the right to life and the right to dignity the Constitutional Court held that the right to life and dignity were the most important of all human rights and that the state had to demonstrate its commitment to these human rights even in its manner of treatment of criminals. This, the Constitutional Court held, could not be achieved by capital punishment which objectifies the prisoner by putting him to death in the hope of deterring others from committing capital crimes.⁴⁴⁷

For these reasons, the Constitutional Court concluded that capital punishment was a cruel inhuman and degrading treatment.⁴⁴⁸ The *Makwanyane* decision is notable because it brought to an end an era that saw extensive use of the death penalty prior to the adoption of a

⁴⁴⁴*State v Makwanyane* 1995 ZACC 3 at [51].

⁴⁴⁵*State v Makwanyane* ZACC 3 Per Chaskalson P at [54].

⁴⁴⁶ 1995 ZACC 3 at [88].

⁴⁴⁷*State v Makwanyane* 1995 ZACC 3 per Chaskalson P at [144].

⁴⁴⁸*State v Makwanyane* 1995 ZACC 3 per Chaskalson P at [95].

new constitutional order in South Africa.⁴⁴⁹ In 1997, the Criminal Law Amendment Act⁴⁵⁰ was promulgated to remove all references to capital punishment from South African laws.⁴⁵¹

South Africa has also adopted a non-extradition stance with respect to defendants wanted for capital offences elsewhere. In *Mohamed v the President of the Republic of South Africa*⁴⁵² the South African Constitutional Court lamented the deportation of an illegal immigrant suspected of bombing the United States embassy in Dar-es-Salaam, without prior securing of an assurance of non-execution. The defendant was later tried in the United States of America by jury which did not impose the death penalty.⁴⁵³

The death penalty in Botswana was the subject of two decisions of the South African High Court and the South African Constitutional Court respectively. These decisions are discussed below. The purpose of this discussion is to explore the effects of a retentionist stance on the administration of justice in Botswana in a world where states increasingly eschew the death penalty. These repercussions were not anticipated, however their impact cannot be ignored.

The decisions in *Emmanuel Tsebe and Another v The Minister of Home Affairs and Others and Jerry Ofense Pitsoe (Phale) v the Minister of Home Affairs and Others*⁴⁵⁴ (the High Court decisions) and *Minister of Home Affairs and Ors v Emmanuel Tsebe and Others and*

⁴⁴⁹ R Hood *The death penalty – a worldwide perspective* (2002) 39.

⁴⁵⁰ Act No 105 of 1997.

⁴⁵¹ R Hood *The death penalty – a worldwide perspective* (2002) 41.

⁴⁵² [2001] ZACC 18.

⁴⁵³ R Hood *The death penalty – a worldwide perspective* (2002) 22. A similar decision was reached the *Emmanuel Tsebe Case* (27682/10, 51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA 83 (GSJ).

⁴⁵⁴ *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* (27682/10, 51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA 83 (GSJ) at para 13. Emmanuel Tsebe died on 28 November 2010. He was deceased by the time the application was heard and concluded at the High Court but given the nature of the issues at stake it was agreed by the parties and the Court that the case be heard and determined.

*Amnesty International*⁴⁵⁵ (the Constitutional Court Decision), brought to the fore serious problems raised by the retentionist stance in Botswana.

The Applicants at the Johannesburg High Court were Botswana citizens Emmanuel Tsebe and Jerry Ofense Pitsoe (Phale). Their applications were consolidated by the High Court because they sought similar relief. Each man was wanted for murder in Botswana. They were at risk of being subjected to the death penalty. They both contended that their removal to Botswana would be in breach of the South African Constitution.

On 21 July 2008, Emmanuel Tsebe allegedly murdered his girlfriend. He allegedly assaulted her with a machete and a stick and she succumbed to wounds to her head.⁴⁵⁶ If convicted he faced possible execution. Tsebe fled to South Africa as a fugitive from justice. The South African police arrested him on 30 July 2008 and arraigned and detained him on the strength of an arrest warrant issued by the Government of Botswana. The Director of Public Prosecutions in Botswana then applied for Mr. Tsebe's extradition to face a charge of murder in Botswana through diplomatic channels. The South African Minister of Justice responded to the application stating that he could not order the extradition of Tsebe to Botswana in the absence of an undertaking from the Directorate of Public Prosecutions in Botswana that the prosecution would not seek the death penalty, and if the death penalty was imposed that it would not be executed. This was subject to Tsebe being found to be extraditable by a magistrate dealing with the application for extradition. The basis for the Republic of South Africa's position was article 6 of the Extradition Treaty between South Africa and Botswana that provided as follows:

'Extradition may be refused if under the law of the requesting Party the offence for which extradition is

⁴⁵⁵ 2012 ZACC 16.

⁴⁵⁶ *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* (27682/10, 51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA 83 (GSJ) at [14].

requested is punishable by death and if the death penalty is not provided for such an offence by the law of the requested Party’

The magistrate in the Mokopane Magistrates Court concluded the extradition inquiry and found Tsebe liable to be surrendered to Botswana. On the diplomatic front the Minister for Defence, Justice and Security in Botswana Mr. D N Seretse replied to his South African counterpart reiterating Botswana’s position that no undertaking would be made not to impose or execute the death penalty in Tsebe’s case. The Minister Seretse stated that there was no provision in Botswana’s laws or in the extradition treaty between Botswana and South Africa to support such an undertaking. Diplomatic engagement on the issue continued and the Republic of South Africa maintained that it could not extradite Tsebe without the required undertaking. It proposed to prosecute Tsebe in its own courts though it did not have the legal mechanism to exercise extraterritorial jurisdiction over foreign nationals who could not be extradited. The South African Government anticipated that Tsebe would be released from detention, as there were no further grounds for holding him. They anticipated that Tsebe would then be deported as an illegal immigrant. The South African Ministry of Justice expressed concerns that an application for deportation was bound to raise legal issues given the Constitutional Court judgement on prohibiting deportation of persons wanted for criminal prosecution in countries where they could be sentenced to death – a reference to the decision in *Mohamed and Another v The President of the RSA and Others*.⁴⁵⁷ The South African Government later abandoned the development of legislation for the extraterritorial prosecution in instances where individuals concerned were at risk of the death penalty in the countries where the alleged offences were committed. The reason for abandoning this initiative was financial constraints. The two governments decided to pursue a possible review of the extradition treaty.

⁴⁵⁷ 2001 (3) SA 893 (CC).

In the interim, Tsebe appeared before the Mokopane Magistrates Court and was transferred to the Lindela Holding Facility. He was informed that he would be deported to Botswana as an illegal foreigner and detained as such. The Minister for Home Affairs agreed to the proposed deportation. Tsebe then obtained legal assistance from Lawyers for Human Rights who wrote to the Minister of Home Affairs and the authorities at the Lindela Holding Facility questioning Tsebe's 'indefinite detention without any legal basis' and asserting his constitutional rights to due process and judicial review of his detention. From the response from the Ministry of Home Affairs, it became apparent that Tsebe's deportation was to proceed. The imminent deportation by the Ministry of Home affairs prompted an urgent application to the High Court for an order interdicting the proposed deportation of Tsebe and a declaratory order that his removal would be unlawful and unconstitutional. Mr. Tsebe's application was heard along with that of Mr. Phale, a fugitive from justice facing a capital offence in Botswana.

In October 2009, Mr Phale was accused of killing his former lover. Her decomposed body was found in Marula lands, 35 kilometres from Francistown. Inside her car, her clothing was found alongside Phale's passport. Phale fled to South Africa when the Botswana police attempted to arrest him. In November 2009, he was handed over to the authorities by his co-church members. He was arrested and detained by the South African Police and arraigned at the Mankweng Magistrates Court where he appeared four times until he was informed that the criminal case against him had been withdrawn. Despite the withdrawal of the case, he remained in custody and was transferred to Lindela Holding Facility where he was held in custody as an illegal immigrant.⁴⁵⁸ In December 2009, an application for Phale's extradition was placed before the Magistrates Court. The extradition inquiry did not proceed as the

⁴⁵⁸ Mr. Phale's citizenship was in dispute as he held a South African Identity Document as well as a Botswana passport. The Court, for purposes of the application, treated Phale as a Botswana Citizen.

Directorate of Public Prosecutions in Botswana had once again intimated that no assurance that the death penalty would not be imposed would be made. Mr. Phale then brought an application similar to that of Mr. Tsebe alleging that the attempt to deport him to Botswana was in fact a disguised extradition and was unlawful.

The South African Government filed a counter application and prayed for a declaratory order from the High Court. The declaration sought was that the Minister of Justice was required by the Constitution of the Republic of South Africa, as read with section 11 of the Extradition Act 67 of 1962, to surrender any individual accused of committing an offence included in an extradition agreement within the jurisdiction of a foreign state for trial in that state. The Respondent stated that such surrender was justified provided that where the offence carried a death penalty, the Republic of South Africa had sought an assurance that the death penalty would not be imposed and if imposed would not be carried out. The Respondents argued that it was immaterial whether the foreign state concerned had refused to provide such an assurance by virtue of provisions contained in its domestic laws. In essence, the Respondents argument was that provided an assurance had been sought, the surrender should be effected whether the assurance was forthcoming or not, and that this was neither unlawful nor unconstitutional.

In support of the relief sought, the Respondent argued, first that because the imposition of the death penalty was a function of the judiciary in Botswana. Any request by South Africa for an assurance that the death penalty would not be imposed or executed amounted to interference in the judicial processes of Botswana's courts and a fetter on the independence of Botswana's courts. Second, that in terms of the Constitution of Botswana, the office of the Director of Public Prosecutions was independent from the control of any person or authority. Any

assurance requested from the executive of the Republic of Botswana would compromise the independence of the Directorate of Public Prosecutions. Third, that the purpose of the declaratory order sought was to permit the executive of the Republic of South Africa to exercise other foreign policy options over persons who found themselves in the position of Mr. Tsebe and Mr. Phale.

The question of distinguishing Tsebe and Phale's case from the Mohamed case were inescapable. The Respondent argued that the *Mohamed* case was distinguishable on the grounds that the provisions of the Extradition Act had to be applied in good faith and with reference to the facts and the Constitution. The Respondent also argued that there was no provision in the Extradition Act or Extradition Treaty expressly prohibiting the extradition of a fugitive for trial in a foreign state where a capital offence has been committed. Further, the Respondent posited that the Botswana Government had the sovereign right to try Botswana citizens for offences committed on its territory against one of its own citizens and the right to make and execute laws for the conduct of such a trial. The Respondent also argued that capital punishment was not prohibited at international law. The Respondent noted that the South African Bill of Rights was not applicable extraterritorially and in particular, South Africa should not infringe on the sovereignty of Botswana. The Respondents also pointed out that the government of South Africa had a duty to cooperate with Botswana in the combating of crime and that South Africa did not wish its territory to be perceived as a haven for criminals. The Minister of Justice argued that the Applicants, if extradited, would be afforded all normal human rights protections including the process of clemency and commutation of sentence by the President of Botswana which were within normal bounds of an open and democratic society. The Respondent also argued that financial constraints hindered the promulgation of laws to enable trying of the Applicants in South Africa.

The High Court noted that Botswana's track record with the death penalty was not good lamenting the execution of 36 individuals between Botswana's independence in 1966 and 1 April 2006. The Court was particularly mindful of the execution of South African citizen Mariette Bosch who was 'secretly executed' by Botswana even as her application was pending hearing at the African Commission of Human and Peoples Rights. The Court noted that the African Commission encouraged states to recognise the evolution of international law and the trend towards the abolition of the death penalty and urged that retentionist states observe a moratorium on the death penalty.

The High Court also noted that only one person in Botswana had been granted clemency after being sentenced to death since independence. The Court was concerned that the right to a fair trial of persons accused of murder was detrimentally affected by the appointment of *pro deo* counsel who lacked skills resources and commitment to deal with such serious matters. The Court was mindful of the fact that there was an active and consistent lobby against the death penalty in Botswana and several legal and constitutional challenges levelled against the death penalty, which had come to naught. The clemency procedure in Botswana was described as opaque and a serious threat to the administration of justice. The Court also regretted the fact that Botswana retained the death penalty and at the same time was a signatory to the Convention against Torture that it acceded to on 8 September 2000. The Court finally ruled as follows:

We would opine that the extradition of the Applicants to Botswana would be impermissible purely based upon its aforesaid track history in regard to the manner in which it has proven itself to be a flouter of human rights as far as the implementation of the death penalty is concerned. This past conduct by Botswana makes it a pariah state not synchronised with the majority of African countries that have either abandoned or are refusing to implement the death penalty. In our view, justice and fairness demands that Botswana should not be the preferred choice to obtain extradition orders from the Republic in circumstances where its past conduct of secretive hangings has led to shock and outrage. In addition, a requested state incurs responsibility if it has reasonable grounds to foresee that violation of human rights will occur in the requesting state and nonetheless extradites the criminal fugitives. On this

basis alone, it would be permissible to grant the applications and dismiss the counter applications.⁴⁵⁹

The Court reiterated that the death penalty was ruled unconstitutional and outlawed in South Africa by the Constitutional Court in *S v Makwanyane*.⁴⁶⁰ The Court ruled that *Makwanyane* was absolute in its declaration that the death penalty was unconstitutional with no exceptions. The Court noted that argument that there would be some exception in cases of extradition was disposed with in the *Mohamed and Another v The President of the RSA and Others*⁴⁶¹ where the Court ruled that the prohibition against the death penalty also affects the extradition of foreigners to countries where the death penalty is still applied. It was the Court's considered opinion that the South African Government was obliged to obtain an assurance from Botswana that the death penalty would not be imposed or executed before removals of the Applicants could be justified. In the absence of such assurances, South African authorities were bound to refuse extradition.

The *Tsebe* decision went on appeal to the Constitutional Court. The issue for determination was couched as follows:

The issue for determination is whether the Government has the power to extradite or deport or in any way surrender a person, including an illegal foreigner, to another country to stand trial on capital charges if the death penalty is a competent sentence in that country and that country is not prepared to give the requisite assurance. Within the context of an appeal, the question is whether the High Court's decision that the Government had no power to extradite, deport or surrender Mr Tsebe or Mr Phale to Botswana in the absence of the requisite assurance, and interdicting the Government from extraditing or deporting them and the decision dismissing the Justice Minister's and Government's counter application were correct.⁴⁶²

The Constitutional Court upheld the decision of the High Court finding that the refusal to extradite Tsebe and Phale was lawful. Citing the *Mohamed* decision as authority, the Constitutional Court stated that the Government of the Republic of South Africa had no

⁴⁵⁹ *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* (27682/10, 51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA 83 (GSJ) at para 67.

⁴⁶⁰ 1995 ZACC 3; 1995 (3) SA 391 (CC).

⁴⁶¹ 2001 (3) SA 839 (CC).

⁴⁶² *Minister of Home Affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16 at [24].

power to extradite, deport, or in any way remove from South Africa to a retentionist state any person who to its knowledge would face a real risk of the imposition and execution of the death penalty.⁴⁶³ The Court noted that section 7(2) the South African Constitution that enjoined the State to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ applied to citizens and foreigners within the borders of South Africa alike whether they were in the Republic legally or illegally.⁴⁶⁴ According to the Constitutional Court, there was a real risk that if extradited, Mr Phale would be subjected to the death penalty. In arriving at this conclusion, the Court considered first that the alleged killing was brutal. Second, that the punishment for murder without extenuating circumstances in Botswana was a mandatory death penalty. Third, that none of the parties had put forward any extenuating circumstances before the Court. The Constitutional Court was convinced that once the death penalty was imposed there would be nothing to prevent the Botswana Government from executing it.⁴⁶⁵ The Constitutional Court dismissed the appeal.

The Constitutional Court was alive to the fact that workable solutions needed to be found for the prosecution of individuals finding themselves in the circumstances of Mr Tsebe and Mr Phale. The Constitutional Court supported the initiative that had been taken, though later abandoned, of enacting legislation to try individuals in similar positions to those of Mr Tsebe and Mr Phale in South Africa. The Constitutional Court did not see cost as an insurmountable constraint stating that similar statutes with extraterritorial jurisdiction already existed in South Africa and that Botswana would be willing to avail state witnesses to give evidence in South Africa should the need arise.

⁴⁶³ *Minister of Home affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16 at [43].

⁴⁶⁴ *Minister of Home affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16 at [65]- [66].

⁴⁶⁵ *Minister of Home affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16 at [72][and [73].

The Tsebe judgement was critical of Botswana's retentionist stance. The Attorney General of Botswana, commenting on the South African High Court judgement, defended the integrity and independence of Botswana's judicial system and in particular, the Court of Appeal, which she stated was composed of international jurists who had taken an oath to defend Botswana's Constitution. She noted that Botswana had a right to retain the death penalty and was not bound to abolish it in spite of the fact that South Africa had chosen to do so.⁴⁶⁶

It is submitted that Botswana was legally obliged to follow the provisions of its Constitution, which protects the right to life subject to the imposition of the death penalty, by a competent Court. The High Court and Constitutional Court in the *Emmanuel Tsebe* decision emphasised the supremacy of the Constitution and the fact that the South African Constitution and in particular the bill of rights had to be respected and promoted in everything the State does.⁴⁶⁷ A similar argument could be made with respect to Botswana's continued application of the death penalty. The sentence of death is constitutionally enshrined as a legitimate limitation to the right to life. It has therefore proved impossible over the years for a Botswana court, and even courts outside the jurisdiction considering the same issue, to declare the death sentence in Botswana unconstitutional or in any way unlawful.

It appears that in order to move towards abolition of the death penalty in Botswana, the executive and the legislature would be the arms of government that must take requisite action in the form of a moratorium on the execution of the death penalty, and a constitutional amendment revoking the death penalty respectively. In imposing the death penalty, the

⁴⁶⁶ Attorney General lashes at SA judges available at Sunday Standard online edition <http://www.sundaystandard.info/attorney-general-lashes-sa-judges> (accessed 20 January 2016).

⁴⁶⁷ *Minister of Home affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16 at [45] and [46].

judiciary has done no more than enforce the law as it stands.

Since 1998, the South African Legislature has prescribed sentences for murder. Life imprisonment is reserved for aggravated form of murder which include premeditated murdered, murder following rape and armed robbery. All other forms of murder carry minimum sentences.⁴⁶⁸ Courts have the discretion to depart from statutory minimums where the circumstances justify longer terms. By establishing the presence of substantial and compelling circumstances, the defendants can make a case for a shorter term of imprisonment.

7.2 The United Kingdom

Before 1957, there was a mandatory death penalty imposed upon being convicted of murder in the United Kingdom with no possibility of mitigation of sentence.⁴⁶⁹ The United Kingdom, through the Royal Commission on Capital Punishment (1949 – 1953), examined available statistics on jurisdictions which abolished the death penalty for murder and found as follows:

There is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate or that its reintroduction has led to a fall.⁴⁷⁰

The Royal Commission heard recommendations for removal of the mandatory death penalty and the introduction of discretion in sentencing by allowing juries to determine the appropriate sentence in each case.⁴⁷¹ In its report, the Royal Commission recommended the retention of hanging as the mode of execution. The Commission also rejected the establishment of ‘degrees’ of murder. It recommended raising the minimum age for capital

⁴⁶⁸ Criminal Law Amendment Act 105 of 1997 per section 51(1) and 51(2).

⁴⁶⁹ D Pannick *Judicial review of the death penalty* (1982) 108.

⁴⁷⁰ United Kingdom Royal Commission of Capital Punishment (1949 – 1953) A report presented to parliament by command of Her Majesty, Her Majesty’s Stationary Office London (1953) 23, 358 – 359 cited in Amnesty International *When the state kills: The death penalty v. human rights* (1989) 11.

⁴⁷¹ D Pannick *Judicial review of the death penalty* (1982) 108.

punishment from 18 to 21 years, abolishing capital punishment for women and abandoning the principle of diminished responsibility. These recommendations were not implemented on account of a change of government from Labour to Conservative at the polls.⁴⁷²

The Homicide Act of 1957 was the first step towards narrowing the scope of the death penalty in the United Kingdom. In this statute, the death penalty was limited to ‘capital murders’. These were essentially murders committed to further theft or robbery; murder using firearms and explosives as well as murders of police or prison officers as well as multiple murders.⁴⁷³ By so doing, the Homicide Act of 1957 created anomalies while trying to distinguish between murders that would attract capital punishment and those that would not. While executions were notably fewer, there was increasing public sympathy as people were executed for crimes that seemingly did not warrant the death penalty.⁴⁷⁴ The last execution in the United Kingdom was carried out in 1964.⁴⁷⁵

The difficulties created by the Homicide Act of 1957 lead to a provisional abolition of the death penalty in 1965 for all crimes except treason. This abolition was to last an initial 5 year period and was ushered in by a parliamentary vote carried 343 to 185.⁴⁷⁶ A permanent abolition was achieved in on 18 December 1969 through a free vote.⁴⁷⁷

Attempts to reintroduce the death penalty were debated and defeated in parliament in 1983 by 368 votes to 223 votes and again in 1987 and 1989.⁴⁷⁸ The attempts to reintroduce the death

⁴⁷²P Hodgkinson ‘The United Kingdom and the European Union’ in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global issues and prospects* (1996) 194.

⁴⁷³R Hood *The death penalty – a worldwide perspective* (2002) 25.

⁴⁷⁴D Pannick *Judicial review of the death penalty* (1982) 109; R Hood *The death penalty – a worldwide perspective* (2002) 25.

⁴⁷⁵P Hodgkinson ‘The United Kingdom and the European Union’ in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global issues and prospects* (1996) 195.

⁴⁷⁶The abolition was achieved through the Murder (Abolition of death penalty) Act 1965.

⁴⁷⁷P Hodgkinson ‘The United Kingdom and the European Union’ in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global issues and prospects* (1996) 193; R Hood *The death penalty – a worldwide perspective* (2002) 26.

⁴⁷⁸Amnesty International *When the state kills: The death penalty v. human rights* (1989) 89.

penalty were unsuccessful largely because they would create an anomalous situation as was created by the 1957 Homicide Act fomenting a sense of injustice.⁴⁷⁹ Complete abolition of the death penalty in the United Kingdom was achieved in 1998 with the Criminal Justice Bill which removed high treason and piracy with violence as capital crimes. The following year, Britain acceded to the 6nd Optional Protocol to the European Convention on Human Rights.

7.3 The Commonwealth Caribbean

The death penalty notably remains a lawful punishment in all commonwealth Caribbean countries. The most common argument for the retention of the death penalty in the commonwealth Caribbean is deterrence and public support for the penalty.⁴⁸⁰ The death penalty is one of the lasting legacies of British Colonial rule in the Commonwealth Caribbean.⁴⁸¹ It is therefore possible to generalise about the death penalty in the commonwealth Caribbean. This region inherited the mandatory death penalty for murder along with many other features of the death penalty for example death by hanging, appeals to the Privy Council, clemency form the executive and constitutional savings clauses from Britain.⁴⁸²

Two important commissions of inquiry have considered the death penalty in Jamaica. In 1975, the Barnett Commission of Inquiry chaired by Lloyd Barnett QC questioned the deterrent effect of the death penalty stating that most persons who committed murder could be rehabilitated. Although the committee recommended the abolition of the death penalty, the legislature voted to retain it by a narrow majority.⁴⁸³ The Fraser Committee, which reported

⁴⁷⁹ R Hood *The death penalty – a worldwide perspective* (2002) 26.

⁴⁸⁰ E Fitzgerald 'Commonwealth Caribbean' in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global issues and prospects* (1996) 143.

⁴⁸¹ Q Whitaker 'Challenging the death penalty in the Caribbean: Litigation at the Privy Council' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 104.

⁴⁸² E Fitzgerald 'Commonwealth Caribbean' in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global issues and prospects* (1996) 143.

⁴⁸³ E Fitzgerald 'Commonwealth Caribbean' in P Hodgkinson and A Rutherford (eds) *Capital Punishment:*

its findings in 1981, was set up to consider the possibility of abolishing the death penalty in Jamaica. The committee noted that the death penalty was used disproportionately on poor defendants who had inadequate legal representation. The Fraser Committee also recommended the abolishing of the death penalty but noted enduring public support for the punishment as a hindrance to abolition. The Fraser Report recommended a compromise. It proposed that murders be categorised into capital and non-capital murders and that the death penalty be reserved for first degree murder or capital murder. Capital murder was reserved for the perpetrator of the actual killing and for murders committed with a fire arm.⁴⁸⁴

Commonwealth Caribbean countries, save for Belize, all carry a peculiar similarity to Botswana. These nations' constitutions all contain a constitutional savings clause, a device that entrenches the death penalty in the constitution making it impossible to assail in court. These savings clauses have the effect of preserving as legal select laws that pre-dated the independence constitutions of these nations.⁴⁸⁵

Commenting on constitutional savings clauses, Edward Fitzgerald QC stated:

Either they [constitutional savings clauses] rule out altogether any constitutional attack on the laws in existence at the time of independence, or, at the least, they prohibit any attack on the specific colonial penalties or punishments in existence at the time of independence based on the alleged cruelty, or inhumanity of those punishments...such savings clauses inhibit the sort of dynamic or evolutionally approach to the development of human rights protections that other constitutions, and international human rights conventions have adopted throughout the world.⁴⁸⁶

In other words, what the constitutions of these Commonwealth Caribbean jurisdictions achieve in the savings clause is to prevent any legal challenges to the application of capital

Global issues and prospects (1996) 147.

⁴⁸⁴E Fitzgerald 'Commonwealth Caribbean' in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global issues and prospects* (1996) 147 – 148.

⁴⁸⁵ Q Whitaker 'Challenging the death penalty in the Caribbean: Litigation at the Privy Council' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 105.

⁴⁸⁶ Per Edward Fitzgerald, 'Savings Clauses and the colonial death penalty regime' in *Penal reform international*, Simon Muirhed and Burton, Foreign and Commonwealth Office, Attorney General's Ministry (Belize), Commonwealth Caribbean Human Rights Seminar 12 – 14 September 2000 (2001) at 113 as cited in R Hood *The death penalty – a worldwide perspective* (2002) 61.

punishment as such.⁴⁸⁷ Even the Privy Council, as the highest court on the region could not, on account of the savings clauses abolish the death penalty in Caribbean countries.⁴⁸⁸

What Commonwealth Caribbean states have succeeded in doing is to whittle away, through litigation, the broad and far-reaching effects of the death penalty ring-fenced by constitutional savings clauses and by so doing limit the scope of application of such saving clauses. This is no mean feat, as defeating the savings clause through a constitutional affront would fail dismally. Decisions of the courts in the region and the Privy Council that have limited the application of the savings clauses by attacking the constitutionality of the manner of application of the death penalty and not the constitutionality of the death penalty itself.⁴⁸⁹ These decisions are lauded as victories for human rights by abolitionists, and unacceptable intrusions into the realm of parliament by retentionist. Nevertheless, they serve as interesting comparative jurisprudence that could inform the journey towards abolition in similarly circumstanced states. These landmark cases are discussed below.

With regard to the constitutionality of the mandatory death penalty, the Eastern Caribbean Court of Appeal in *Spence and Hughes v The Queen*⁴⁹⁰ held that the mandatory death penalty applicable in the Caribbean state of St. Vincent and consequently other island states within the Court's jurisdiction⁴⁹¹ was an arbitrary deprivation of the right to life which was not protected by the constitutional savings clause in the St. Vincent Constitution.⁴⁹² The Court held as follows:

The mandatory death penalty robs those upon whom the sentence is passed of any opportunity whatsoever to have the Court consider mitigating circumstances even as an irrevocable punishment is meted out to them. The dignity of human life is reduced by a law that compels the Court to impose death

⁴⁸⁷ R Hood *The death penalty – a worldwide perspective* (2002) 174.

⁴⁸⁸ R Hood *The death penalty – a worldwide perspective* (2002) 62.

⁴⁸⁹ R Hood *The death penalty – a worldwide perspective* (2002) 62.

⁴⁹⁰ (unreported) Criminal Appeal 20 of 1998.

⁴⁹¹ Jurisdictions affected by this decision are Anguilla, Antigua and Barbuda, The British Virgin Islands, Dominica, Grenada, Montserrat, St Lucia, St Kitts and Nevis and St Vincent and the Grenadines.

⁴⁹² R Hood *The death penalty – a worldwide perspective* (2002) 174.

by hanging upon all convicted of murder granting none the opportunity to have the individual circumstances of his case considered by the Court to pronounce the sentence.⁴⁹³

This decision was upheld on appeal by the Judicial Committee of the Privy Council.⁴⁹⁴ In a similar case *Patrick Reyes v. The Queen*⁴⁹⁵ the Privy Council held

To deny the offender the opportunity before the sentence is passed to seek to persuade the Court that in all the circumstances, to condemn him to death would be disproportionate, is to treat him as no human being should be treated and thus to deny him his basic humanity, the core of the right that [the constitutional provision barring inhuman or degrading punishment] exists to protect.⁴⁹⁶

Similar inroads against the death penalty were made with regard to the pre-trial and post-trial delays. In *Pratt and Morgan v the Attorney General for Jamaica*⁴⁹⁷ the Privy Council held that no one should be subjected to capital punishment after remaining more than 5 years on death row.

In *Guerra v Baptiste*⁴⁹⁸ the Privy Council extended the 5 year window set out in the *Pratt* decision to a defendant who had suffered a post-trial delay of 4 years and 10 months. The Privy Council ruled in the *Henfield* decision that the 5 year period was not ‘a fixed limit in all cases but rather a norm that could be departed from if the circumstances of the case so required.’⁴⁹⁹

The impact of these decisions on post-trial delays was to significantly increase the number of commutations of death penalties in the Caribbean region. In the area of pre-trial delays, the Privy Council adopted a similar approach. In *Neville Lewis v The Attorney General of Jamaica*,⁵⁰⁰ the Privy Council accepted that pre-trial delays should be considered in

⁴⁹³Criminal Appeal 20 of 1998 at [215].

⁴⁹⁴The *Queen v Peter Hughes* [2002] UKPC 12 at [50] – [51]. A similar decision was reached in *Benthill Fox v The Queen* [2002] UKPC 13.

⁴⁹⁵[2002] UKPC 11 at [43].

⁴⁹⁶[2002] UKPC 11 at [43].

⁴⁹⁷[1994] 2 AC 1. This overturned a previous decision in *Riley v The Attorney General of Jamaica* [1983] 1 AC 719 where the Privy Council had declined to intervene on behalf of 4 defendants who argued that the long delay between their conviction and the issuance of their death warrants amounted to cruel inhuman and degrading treatment.

⁴⁹⁸[1996] AC 397 (PC).

⁴⁹⁹*Henfield v. Attorney-General of Bahamas* [1997] App. Cas. 413 (PC).

⁵⁰⁰[2001] 2 AC 50.

determining if the defendant had been treated in an inhuman or degrading manner.⁵⁰¹

The Privy Council has also made valuable rulings on the justiciability of the prerogative of mercy. In the first decision on the question, *Reckley v The Minister for Public Safety No 2*⁵⁰² the Privy Council was asked to consider whether natural justice should apply in capital cases. Lord Goff took the view that because the merits of the decision of mercy could not be challenged in court, then the defendants could not claim any procedural rights since the prerogative of mercy was therefore not amendable to judicial review. This decision was much criticised.⁵⁰³

According to Hood, the decision in *Reckley (No.2)* placed blind faith in those involved in the mercy process suggesting that they were immune from errors and inaccuracies whereas the reality was that in some instances, these persons could be inaccurate and unfair.⁵⁰⁴ The Privy Council departed from this decision in *Neville Lewis*⁵⁰⁵ where it held that fairness required that the condemned man be able to make informed representations, that he had a right to see all the material which would be placed before the mercy committee and, that he could be availed an oral hearing depending on the circumstances.

Lastly, the commonwealth Caribbean has also given valuable insights into the status of non-binding decisions of Human Rights Bodies in capital cases. In *Thomas v Baptiste*,⁵⁰⁶ the Privy Council considered if the executions of the appellants should await the decisions of the

⁵⁰¹ A similar decision was reached on the question of law in *Fisher v The Minister of Public Safety* [1998] AC 673 [PC] where the majority took the view that on principle, in exceptional cases, pre-trial delays could justify commutation of the death sentence. The Privy Council was not satisfied on the facts that the defendant in this particular case had proven any exceptional circumstances entitling him to a commutation on the basis of pre-trial delays.

⁵⁰² [1996] AC 527 (PC).

⁵⁰³ D Pannick 'Tempering Justice with mercy' (1996) *Public Law Capital punishment in the Commonwealth Caribbean* 301; C Gelber, 'Reckley (No.2) and the Prerogative of Mercy: Act of Grace or constitutional Safeguard?' 1997 60 *MLR* 572; L Blom-Coppinger 'Justice and Mercy in the Caribbean' 1997 *Criminal Law Review* 116.

⁵⁰⁴ R Hood *The death penalty – a worldwide perspective* (2002) 174.

⁵⁰⁵ *Lewis v Attorney General of Jamaica* 2000 (3) *WLR* 1785.

⁵⁰⁶ [2000] 2 AC 1 (PC).

American Commission for Human Rights. The death warrants had already been signed by the President of Trinidad. The Committee held that Trinidad was obliged to wait notwithstanding the fact that the decisions of the American Commission for Human Rights was non-binding. In the *Neville Lewis* Case, the Committee held that Jamaica was obliged to wait for reports and recommendations from international human rights bodies which it was state party to before proceeding with an execution and further, that any recommendations from human rights bodies should be considered by the Mercy Board which should give reasons for not agreeing with the recommendations of the human rights body.⁵⁰⁷

Having considered the experience of three abolitionist jurisdictions, the next section considers the use of life imprisonment as an alternative to the death penalty.

8 LIFE IMPRISONMENT AS AN ALTERNATIVE TO THE DEATH PENALTY

No discussion on abolition can safely exclude a conversation on viable alternative sentencing options and how they operate within the existing criminal justice system. Coyle states that newly abolitionist states need to create a system of punishment that is humane, secure and appropriate.⁵⁰⁸ Public concerns about escape, increased criminality and parole of offenders must be assuaged otherwise public pressure could see the death penalty reinstated.⁵⁰⁹

Following abolition of the death penalty, life imprisonment is applied to the most serious of crimes.⁵¹⁰ There are variations that exist in the meaning of life imprisonment from jurisdiction to jurisdiction. In the United States life would typically mean a whole life

⁵⁰⁷ *Lewis v The Attorney General of Jamaica* 2000 (3) WLR 1785 at 1805 – 1806.

⁵⁰⁸ A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63 92.

⁵⁰⁹ A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63 92 – 93.

⁵¹⁰ D Van Zyl Smit *Taking life imprisonment seriously* (2002) 1.

sentence.⁵¹¹ In England and Wales, immediately upon the abolition of the death penalty convicts received life sentences which in practice meant that they served an initial punishment phase that met the need for deterrence and retribution, followed by a risk phase where the prisoner was considered for release, provided, he was not a risk to the community.⁵¹² However, following the Criminal Justice Amendment Act of 2003, it is possible to have prisoners serve whole life sentences in England and Wales.⁵¹³

In addition to the difficulties presented by defining the scope of life imprisonment, there are other challenges that follow the abandonment of the death penalty. Moratoria on death are usually followed by indefinite detentions of persons on death row without review of sentences.⁵¹⁴ Further, populations of persons serving life imprisonment are noted to grow exponentially. For example in South Africa, lifers increased from 443 to 5745 from 1995 to 2005.⁵¹⁵ This often results in prison overcrowding.

The argument whether life without parole is an appropriate sentence or a breach of human rights remains unsettled.⁵¹⁶ In Europe, courts in France, Italy and Germany have ruled that whole life sentences would be unacceptable.⁵¹⁷ However, in England and Wales, the courts have ruled that a whole life sentence would be acceptable in principle for the most extreme of

⁵¹¹ R Stokes 'A fate worse than death: The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 282-283; A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63 94 – 96.

⁵¹² P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 268.

⁵¹³ P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 268.

⁵¹⁴ R Stokes 'A fate worse than death: The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 284.

⁵¹⁵ R Stokes 'A fate worse than death: The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 285.

⁵¹⁶ For a full discussion see D van Zyl Smit 'Life imprisonment as the ultimate penalty in international law: A human rights perspective' (1999) 9 *Criminal Law Forum* 5.

⁵¹⁷ D van Zyl Smit 'Life imprisonment: recent issue in national and international law' (2006) 29 *International Journal of Law and Psychiatry* 405 409.

offenders. In *R v Home Secretary, Ex Parte Hindley*⁵¹⁸ the House of Lords stated that ‘there are crimes which are so wicked that even if the prisoner is detained until he or she dies, it will not exhaust the requirements of retribution or deterrence.’⁵¹⁹

The humane and effective management of persons serving life sentences presents a new set of challenges. Experiences of persons in life imprisonment indicate harsh treatment which includes handcuffing every time they leave their cells, spending of long hours alone in their cells, restricted communication with other prisoners, severely restricted contact with family and friends in the outside world as well as health problems.⁵²⁰

Any state considering a moratorium on the death penalty or the abolition of the death penalty must be willing to adopt a holistic view of the problem. Abolition is not enough. It is the responsibility of states imposing life sentences to ensure that the rights of inmates, their humanity and dignity are recognised and protected.⁵²¹ Penal Reform International,⁵²² laments that many states abolishing the death penalty replace it with life without the possibility of parole which presents its own unique set of human rights challenges. Often, life without parole imposes different and worse conditions of imprisonment than other types of imprisonment.⁵²³

International standards on life imprisonment are present in several international treaties and soft law documents. The International Covenant on Civil and Political Rights (ICCPR)

⁵¹⁸ [2001] 1 AC 410 (HL (E)).

⁵¹⁹ At 417H.

⁵²⁰ R Stokes ‘A fate worse than death: The problems with life imprisonment as an alternative to the death penalty’ in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 287 – 288.

⁵²¹ R Stokes ‘A fate worse than death: The problems with life imprisonment as an alternative to the death penalty’ in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 295.

⁵²² <http://www.penalreform.org/>.

⁵²³ Penal Reform International ‘Life imprisonment: Key facts’ available at <http://www.penalreform.org/priorities/life-imprisonment/key-facts/> (accessed 25 May 2015).

provides that the essential aim of a penitentiary system should be reformation of offenders and their social rehabilitation.⁵²⁴ The Convention on the Rights of the Child (UNCRC) provides that there should be no incarceration without parole for persons committing crimes when under the age of 18.⁵²⁵ Article 10(3) of the Rome Statute of the International Criminal Court limits prison terms for persons committing the gravest of international crimes, genocide, crimes against humanity, and war crimes to 25 years.⁵²⁶ The ICCPR provides that states should maintain the essential aim of their penitentiary systems as reformation and social rehabilitation.⁵²⁷

It can be argued that these treaties indicate that states exclude the idea that incarceration should be for the offender's whole or natural life in all cases, but admits of the fact that even long term sentences should be geared towards release at some point in the future.

The United Nations Standard Minimum Rules for the Treatment of Prisoners provide in article 61 that the main aim of incarceration is the rehabilitation of offenders.⁵²⁸ The Council of Europe Recommendations on Management by Prison Administration of Life Sentence and Other Long Term Prisoners⁵²⁹ provides that inmates should be governed by the principles of individualisation, normalisation of the prison environment to reflect the realities of life, responsibility, security and safety for the prisoners and those who work with them, non-segregation and progression through the prison system.⁵³⁰ This brings to an end the practice of automatically treating all life and long term prisoners as dangerous persons without

⁵²⁴ Article 10 (3) ICCPR.

⁵²⁵ Article 37 UNCRC.

⁵²⁶ Article 77(1) Rome Statute UNTS I-38544 acceded to by Botswana on 1 July 2002.

⁵²⁷ ICCPR Art 10(3).

⁵²⁸ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁵²⁹ Recommendation REC (2003) 23.

⁵³⁰ Article 3 – 8 Recommendation REC (2003) 23.

individual assessments.

The Council of Europe Resolution on Treatment of Long Term Prisoners⁵³¹ anticipates that governments should pursue criminal justice policies that impose long term sentences only where it is necessary to protect society and stringent security only for dangerous prisoners.⁵³²

The United Nations Crime Prevention and Criminal Justice Branch Report on Life Imprisonment encourages states to adopt policies which see life imprisonment imposed only where necessary to protect society and to ensure justice and only for the most serious crimes.

The report recommends that persons serving life imprisonment should, wherever possible, be afforded the possibility of release. It also provides that life without parole should not be imposed on juvenile offenders.⁵³³ These standards should form the basis of life imprisonment in any penitentiary system.

8.1 Advantages of life imprisonment

Long term imprisonment is considered preferable to the death penalty primarily because it achieves the same objectives as capital punishment without the killing of the condemned person.⁵³⁴ First, incapacitation of the condemned person protects the public from the offender who may be deemed to be a danger to society.⁵³⁵ The removal of the offender from the community has the effect of assuring the community of its continued well-being. The offender is individually deterred and other would-be offenders in the community are suitably warned.⁵³⁶ Secondly, long term imprisonment means that governments are also able to

⁵³¹ Council of Europe Resolution 76(2) adopted by Committee of Ministers on 17 February 1976.

⁵³² Article 1.

⁵³³ United Nations Crime Prevention and Criminal Justice Branch Report 'Life imprisonment' (1994) UN Document ST/CSDHA/24.

⁵³⁴ D Van Zyl Smit *Taking life imprisonment seriously* (2002) 1.

⁵³⁵ P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 269.

⁵³⁶ D Van Zyl Smit *Taking life imprisonment seriously* (2002) 174.

continue to claim toughness on crime, thus meeting the retributionist agenda.⁵³⁷ Third, and perhaps most importantly for abolitionists, the government no longer participates in the killing of condemned persons and the risk of killing innocent persons.⁵³⁸

8.2 Disadvantages of life imprisonment

From the perspective of the inmate, some recognised disadvantages of long term imprisonment include psychological and social problems suffered by the inmates leading to desocialisation and dependence.⁵³⁹ Inmates may display a loss of hope of ever attaining a life outside of prison where their sentences are indeterminate or whole life tariffs.⁵⁴⁰ It has been stated that long term imprisonment is sometimes harsher, and an even greater deterrent, than instant death and that some inmates may even prefer death to a life in prison.⁵⁴¹ There is the display of lack of personal responsibility coupled with stress of powerlessness to determine their future.⁵⁴² The fact that there is no possibility of release negates the aims of reformation and social rehabilitation of inmates.⁵⁴³

The prisons service must also adjust to changes required by an increased number of long-term prisoners. There is increased pressure on prison facilities and increased costs as numbers of inmates rise.⁵⁴⁴ An increased aging population has also been noted with the attendant

⁵³⁷ D Van Zyl Smit *Taking life imprisonment seriously* (2002) 174; P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 269.

⁵³⁸ P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 269.

⁵³⁹ R Stokes 'A fate worse than death: The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 288.

⁵⁴⁰ A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63 104.

⁵⁴¹ P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 270.

⁵⁴² R Stokes 'A fate worse than death: The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 288.

⁵⁴³ P Hodgkinson S Kandelia & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 270.

⁵⁴⁴ A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA

requirement of specialist facilities to care for elderly inmates.⁵⁴⁵ Further, prisons become increasingly dangerous places as inmates who have nothing to gain and nothing to lose are generally uncooperative and non-compliant with prison officials.⁵⁴⁶ Perhaps the most damning criticism is that life imprisonment is contrary to human rights and in some instances wholly unjust.⁵⁴⁷

The operation of life imprisonment as a sanction in South Africa and England and Wales is discussed below. This comparative perspective may shed light for Botswana in the event she abandons the death penalty and seeks an alternative sanction.

8.3 Life imprisonment in South Africa

After the abolition of the death penalty, life imprisonment is the most severe punishment available to the South African courts for aggravated instances of murder and rape.⁵⁴⁸ The sentence is imposed where it is proportionate to the crime and it is imperative that the convicted person be removed from society. In *S v Bull and Another*⁵⁴⁹ the Court held:

Since the abolition of the death penalty this Court has consistently recognised that life imprisonment is the most severe and onerous sentence which can be imposed and that it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society. This approach appears clearly from the passages quoted in the succeeding paragraphs.⁵⁵⁰

Life imprisonment in South Africa is indeterminate. This means that upon imposition it is never certain how long the prisoner will be incarcerated. Possibilities for release from life imprisonment are found in the Correctional Services Act⁵⁵¹ which provides that a prisoner

Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63 104.

⁵⁴⁵ R Stokes 'A fate worse than death: The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 290.

⁵⁴⁶ P Hodgkinson S Kandelina & L Gyllensten 'Capital Punishment: A review and critique of abolitionist strategies' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 270.

⁵⁴⁷ D Van Zyl Smit *Taking life imprisonment seriously* (2002) 173.

⁵⁴⁸ See section 51 (1) Act No. 105 of 1997

⁵⁴⁹ 2001 (2) SACR 682 (SCA).

⁵⁵⁰ 2001 (2) SACR 682 (SCA) at [21].

⁵⁵¹ 111 of 1998.

may be released on parole upon the recommendation of the National Council of Correctional Services.⁵⁵² A minimum requirement is however that the prisoner should have served at least 25 years, or at least 50% of the sentence whichever is the shorter, or when reaching the age of 65, the prisoner should have served at least 15 years in prison.⁵⁵³ If a prisoner was convicted to life before 1 October 2004, then they can be considered for parole after serving 20 years in prison.⁵⁵⁴

Terblanche states that the sentence of life imprisonment in South Africa is saved from unconstitutionality simply by the possibility of parole.⁵⁵⁵ The right to human dignity also demands that the prisoner should have the hope of release.⁵⁵⁶ A notable problem with life sentences, however, is the increase in the overcrowding of prisons.⁵⁵⁷

8.4 Life imprisonment in England and Wales

In England and Wales, the offence of murder attracts a penalty of life imprisonment. This penalty is mandatory.⁵⁵⁸ In imposing the life sentence, the judge is required to identify a minimum term that must be served by the offender before he can be considered for parole, which minimum term can be life.⁵⁵⁹ In considering the minimum term the judge must have regard to the principles set out in Schedule 21 of the Criminal Justice Act, 2003.⁵⁶⁰ These

⁵⁵² Section 111.

⁵⁵³ Section 73(6).

⁵⁵⁴ Section 136(3).

⁵⁵⁵ SS Terblanche, 'Sentencing' in Joubert (ed) *Criminal procedure handbook* 11th Edition (2013) 328.

⁵⁵⁶ A van der Merwe 'Justice "beyond" the law in *The secret in their eyes: Rights of victims and offenders in the post sentencing phase*' in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 235 248.

⁵⁵⁷ JD Mujuzi 'The prospect of rehabilitation as a 'substantial and compelling' circumstance to avoid imposing life imprisonment in South Africa: A comment on S v Nkomo' (2008) *South African Journal of Criminal Justice* 1 3.

⁵⁵⁸ B Mitchell & J Roberts 'Bringing principles of fairness to sentencing of murder' (2013) 24 *Criminal Law Forum* 501

⁵⁵⁹ D van Zyl Smit 'Life imprisonment: recent issue in national and international law' (2006) 29 *International Journal of Law and Psychiatry* 405 415.

⁵⁶⁰ Schedule 21 Determination of minimum terms in relation to mandatory death sentence available at <http://www.legislation.gov.uk/ukpga/2003/44/schedule/21> (accessed 26 August 2015). See also section 269(5)

principles include considerations that the judge must take into account when determining the minimum mandatory term of life imprisonment. These include starting points, or the minimum term to be served, are determined by the nature of the crime as well as mitigating and aggravating factors.⁵⁶¹ The judge is required to provide reasons for any departure from the provisions of Schedule 21.⁵⁶² Effectively, the judge is free to impose upon the offender one of two sentences being either, life without the possibility of parole, which is also known as a whole life or natural life penalty, or life with the possibility of parole after serving a minimum period.⁵⁶³

This scheme has been criticised for not having been put to sufficient debate in Parliament before adoption. Critics take the view that it can be the cause of disproportionate sentences. Criticisms centre on the fact that murder need not be met with a mandatory life sentence since some crimes which fall under the category of manslaughter can sometimes be more gruesome and should perhaps attract tougher sentences than those classified as murders. Lastly, judges and academics alike lament the absence of guidance on the meaning and use of some terms found in Schedule 21. It has been proposed that sentencing guidelines should be issued by the Sentencing Council of England and Wales to assist courts in interpreting Schedule 21, since there is only some limited guidance available from Court of Appeal decisions on various points in the application of Schedule 21.⁵⁶⁴

Criminal Justice Act 2003.

⁵⁶¹ Schedule 21 sets out the basic starting points. a) For adults aged 21 years old and over there are 4 starting points: a whole life order; 30 years; 25 years (effective from 2 March 2010); and 15 years. b) For 18 - 20 year olds there are three starting points: 30 years; 25 years (effective from 2 March 2010); and 15 years. c) For youths there is one 12-year starting point. Available at http://www.cps.gov.uk/legal/s_to_u/sentencing_-_mandatory_life_sentences_in_murder_cases/ (accessed 7 January 2016)

⁵⁶² Section 270(2) Criminal Justice Act 2003.

⁵⁶³ B Mitchell & J Roberts 'Bringing principles of fairness to sentencing of murder' (2013) 24 *Criminal Law Forum* 501 502.

⁵⁶⁴ B Mitchell & J Roberts 'Bringing principles of fairness to sentencing of murder' (2013) 24 *Criminal Law Forum* 501 503.

Mitchell and Roberts advocate for the abolition of mandatory life sentences which they argue violate principles of proportionality, restraint in the use of custody and individualisation of sentences.⁵⁶⁵ They argue that the public has been empirically proven to be more open to fixed term sentences than to mandatory life sentences and that the absence of truth in sentencing actually erodes public confidence in sentencing.⁵⁶⁶ They also make the case that not all offenders who are convicted of murder present a danger to the community requiring their long term incapacitation.⁵⁶⁷

Mitchell and Roberts propose replacing the mandatory life sentence with discretionary life sentences in 3 general categories which are life without parole in appropriate cases, life with parole with a minimum terms indicated where the offender can be released conditionally and lastly, fixed term sentences with unconditional release.

9 ATTAINING A PROHIBITION OF THE DEATH PENALTY IN BOTSWANA: A PROPOSED ROADMAP

Having considered the manner in which the death penalty has been abolished in South Africa and the United Kingdom, and the inroads made into the death penalty in the Commonwealth Caribbean, the next section considers what lessons can be learnt by Botswana from the experience of the three comparative nations in mapping a possible path towards abolition.

⁵⁶⁵ B Mitchell & J Roberts 'Bringing principles of fairness to sentencing of murder' (2013) 24 *Criminal Law Forum* 501 504.

⁵⁶⁶ B Mitchell & J Roberts 'Bringing principles of fairness to sentencing of murder' (2013) 24 *Criminal Law Forum* 501 505.

⁵⁶⁷ B Mitchell & J Roberts 'Bringing principles of fairness to sentencing of murder' (2013) 24 *Criminal Law Forum* 501 505.

9.1 Overcoming the constitutional saving clause

Overcoming the constitutional savings clause preserving the legality of the death penalty in the Botswana Constitution would be a gargantuan task. The Court of Appeal in Botswana has pronounced several times on the fact that the courts cannot find a constitutional clause unconstitutional by stating as follows in *Attorney General v Unity Dow*:⁵⁶⁸

We cannot declare a provision of the constitution unconstitutional. It would otherwise be a contradiction in terms. The constitution has always had the power to place limitations on its own grants.⁵⁶⁹

The Botswana Court of Appeal ruled on a similar point in *Kamanakao I and Others v The Attorney General and Another*⁵⁷⁰ where it was invited to declare sections 77, 78 and 79 of the Constitution unconstitutional. The High Court held that it had no powers to second guess the founders and makers of the Constitution by re-writing the Constitution. The Court took the view that it was the function of parliament to review the Constitution and legislate, adopting any new values that may be necessary in the circumstances. The Court held that the legislature derived this power from the electorate and that it was not for the Court to ‘engineer new social values into the law of the country’.⁵⁷¹ This was reiterated in *The Petrus and Another v. the State*,⁵⁷² a case concerning the constitutionality of judicial corporal punishment. In *Petrus*, the Court of Appeal declined to find the punishment unconstitutional because the penalty of corporal punishment was preserved in the Constitution. The courts of Botswana is clear, that the task of amending the constitution falls to Parliament and not to the judiciary.

The task of amending the Botswana Constitution to abolish the death penalty should be informed by legal considerations of the position in international law, the practice of states today and the possibility for alternative sentences. All the countries examined in this chapter

⁵⁶⁸ 1992 BLR 119 (CA).

⁵⁶⁹ 1992 BLR 119 (CA) 150H.

⁵⁷⁰ 2001 (2) BLR 654 (HC).

⁵⁷¹ 2001 (2) BLR 654 (HC).

⁵⁷² 1984 BLR 14 CA at 39 – 40.

have set up commissions of inquiry which have examined these issues and made recommendations with regard to the continued utility of the death penalty. Botswana may consider instituting a commission of inquiry to look into penal reform in the country with a particular focus on the continued legal utility of the death penalty. Official commissions of inquiry are useful in obtaining facts on the death penalty in a particular country. They serve to inform legislators and the public of the attitudes of the citizenry towards crime and capital punishment in their communities.

Abolishment of the death penalty has also been achieved through the courts. In South Africa, the landmark case of *State v Makwanyane* saw the demise of the death penalty in favour of the more important considerations of the right to life, human dignity and promoting a culture of human rights. While it is accepted that an outright abolition by the courts may not be possible, there is certainly room to narrow the scope of application of the death penalty by adopting the approach of the judiciary in the commonwealth Caribbean. The approach in the Commonwealth Caribbean has been an incremental approach, seeking to curb the most extreme excesses of the constitutional savings clauses by attacking the manner of application of the death penalty rather than the constitutionality of the death penalty itself.

We have seen an attempt at a similar approach in *S v Masoko*⁵⁷³ where the High Court was asked to rule on the constitutionality of the mandatory death penalty. The High Court found that the manner of application of the death penalty where the burden of proof is shifted to the accused and the accused is required to prove the existence of extenuating circumstances in order to avoid the mandatory death penalty, amounts to cruel, inhuman and degrading treatment and therefore unconstitutional. The Court Of Appeal decision rebuffed the progressive approach to limiting the application of the death penalty.⁵⁷⁴

⁵⁷³CTHFT 000008 – 07 (unreported).

⁵⁷⁴Criminal Appeal No. CLCGB 058-14.

There is room also to assail the constitutionality of the manner of application of the death penalty on other grounds as has been done in the commonwealth Caribbean for instance, the constitutionality of lengthy pre-trial and post-trial delays, conditions of detention and procedural aspects of the prerogative of mercy.

Abolishment of the death penalty through the legislature was achieved in the United Kingdom through a moratorium in 1965 followed by a total ban in 1969. A similar strategy could be adopted in Botswana. The Legislature in Botswana would be urged to take developments in the international arena and the need to promote a culture that respects human rights to heart when reviewing the Botswana Constitution.

Moratoriums against the continued use of the death penalty has been proven to be an effective strategy towards abolition of the death penalty in the United Kingdom and in South Africa. Over time moratoriums in a particular jurisdiction show the death penalty to be unnecessary.⁵⁷⁵ It is a useful tool that appeals to retentionist nations who wish to abandon capital punishment in a measured manner by helping to swing alter public opinion and force the government to seriously engage with the question of alternatives to capital punishment.

Commutation of death sentences has been used in numerous cases in the commonwealth Caribbean. These commutations have largely been triggered by decisions of the higher courts and the Privy Council on what amounts to cruel and inhuman punishment of the capital offender. Commutations immediately decrease the number of executions. Commutations on constitutional grounds strengthen the rule of law and respect for the right to life. Commutations are an important first rung towards abolition of the death penalty.

According to Amnesty International, each commutation of a sentence of death affirms the

⁵⁷⁵P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 5 – 6.

value of life.⁵⁷⁶ Commutation of all sentences of death makes a state abolitionist in practice. Often abolition of the death penalty is achieved through the concretisation of a long practice of abstention into law prohibiting capital punishment. As at 2013, there were 35 nations that were abolitionist in practice. Whilst the risk always remains that such nations may reinstate the use of the death penalty, there is also hope that an abolitionist practice could develop into a legal abolition of death penalty. As Hodgkinson surmises, a moratorium should not be a goal but a step towards abolition.⁵⁷⁷

9.1.1 Recommendations addressing constitutionality of the death penalty

The following recommendations are made:

[1] The Government of Botswana should consider setting up a commission of inquiry to study the continued utility of the death penalty in Botswana along the lines of the Lansdown inquiry in South Africa, the Royal Commission of Inquiry in The United Kingdom and, Barnett and Fraser Commissions in Jamaica. The commission must be charged with considering whether or not the death penalty should be abolished and if so to make recommendations for alternative sentencing arrangements.

[2] Given the patent difficulties in having the death penalty declared unconstitutional, legal practitioners should attack the manner in which the death penalty is applied in Botswana as has recently been done in *S v Masoko*. Possible areas of interest might be pre-trial and post-trial delays, the clemency process and the adequacy of legal representation. Challenges of this nature may force the courts and subsequently the legislature may view murder convicts more humanely.

⁵⁷⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 73.

⁵⁷⁷ P Hodgkinson 'Capital punishment: Improve it or remove it' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 8.

[3] Apart from the current challenge on the mandatory death penalty legal practitioners handling death penalty cases may seek to challenge other aspects of the administration of capital cases from arrest to execution. An incremental approach in assailing all aspects of the death penalty, as has been adopted in the Commonwealth Caribbean, from detention to the exercise of the prerogative of mercy may begin to yield small but influential gains against the broad mantle that is the death penalty in Botswana today. This approach may trigger discussion into viable alternatives to the death penalty and set Botswana on a course towards abolition. With respect to the current procedure that exists in the clemency process in Botswana legal practitioners may wish to focus on the constitutionality of the secrecy of the Committee on the Prerogative of Mercy, the lack of an opportunity to make verbal representations individually or through counsel, the right to see the papers presented to the Committee on the prerogative of mercy by the state and the presiding judge and the right to respond to these representations. There is room for improvement of the current clemency procedures in Botswana in order to make them more meaningful.

[4] The Government of Botswana should consider a review of the constitution with a view to securing greater protection of the right to life and human dignity by abolishing the death penalty. A two stage process which would involve a moratorium on the exercise of the death penalty and commutation of all death sentences followed by a total ban in the future is recommended.

9.2 Addressing public support for the death penalty

Public support for the death penalty is based on the false perception that the government is being tough on crime. *Kgotla* meetings throughout the nation in 1997 addressing the public

revealed overwhelming support for the death penalty in Botswana.⁵⁷⁸

However, as Amnesty International points out, the death penalty does not eliminate crime. It simply detracts attention from the development of effective methods of protecting society from crime.⁵⁷⁹ Midgley notes that in many countries abolition of the death penalty is not preceded by changes in public opinion.⁵⁸⁰ On the weight to be given to the question of public opinion when considering the legality of the death penalty, the US Supreme Court in *Furman v Georgia*,⁵⁸¹ noted the peripheral nature of public opinion in taking steps towards abolition. In *Gregg v. Georgia*,⁵⁸² the Court was keen to point out the public opinion is often poorly formed by misinformation and misconceptions of the realities surrounding the death penalty. In *State v Makwanyane*⁵⁸³ the South African Constitutional Court noted that public opinion could never be the decisive factor in determining the legality of the death penalty.

Governments must address the real causes of crime and re-educate the public that the death penalty is not a deterrent. Government need to invest in crime prevention strategies which include addressing poverty, inequality and unemployment which cause socio-economic problems in communities that have high crime rates.⁵⁸⁴ Governments also need to change social attitudes towards crime by education of the public on crime prevention. Governments should also consider engaging in research into crime patterns, improving crime detection and investigation, the arrest of offenders, and rehabilitation of offenders as a more positive and targeted way to deal with criminality. This would be more effective than the ‘pseudo-solution’

⁵⁷⁸ Botswana National Assembly Law Reform Committee ‘Minutes of the Law Reform Committee of Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II’ 1997.

⁵⁷⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24.

⁵⁸⁰ J Midgley ‘Public opinion and the death penalty in South Africa’ (1974) *British Journal of Criminology* 345 348.

⁵⁸¹ 408 US 238.

⁵⁸² 428 US 153.

⁵⁸³ 1995 ZACC 3.

⁵⁸⁴ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24.

that is the death penalty.⁵⁸⁵ Victim assistance programs including compensation also assist families to recover from the effects of crime.⁵⁸⁶

9.2.2 Recommendations regarding public opinion

[1] Public opinion with regard to the death penalty in Botswana remains supportive. The Government of Botswana should engage in public education campaign to change social attitudes and educate the public on the paramount nature of human life and dignity. Education on these constitutional principles will serve to strengthen the culture of human rights which is necessary for a lasting abolition of the death penalty.

[2] The public will have to be convinced that any alternative sentencing strategies proposed will serve to adequately punish the perpetrators of capital crimes. The Botswana Government may approach this problem by adopting a moratorium on the death penalty and commuting existing sentences of death followed by the implementation of an alternative sentencing program. In the absence of such a program, public disquiet may prompt a return to executions.

[3] The Botswana Government may also counter the belief that the death penalty is an individual and general deterrent to crime by conducting studies to debunk this theory in Botswana. As indicated above, it is generally accepted and empirically proven worldwide that the death penalty is not a deterrent to crime.

9.3 Activism of medical professionals

Medical professionals are often involved in the execution of condemned prisoners. The roles they play include: Certifying a person as fit for execution; the procurement of drugs for

⁵⁸⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24

⁵⁸⁶ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24

execution; the sedation of prisoners prior to execution; advising in or participating in the execution; the pronouncement of death; the certification of death, and the autopsy.⁵⁸⁷ Health professionals have also been reported to be involved in organ removal and transplantation from bodies of executed prisoners in China and Taiwan.⁵⁸⁸

Medical ethics does not support the participation of medical professionals in carrying out the death penalty. In particular, campaigners maintain that requiring a medical professional to certify a person's fitness to undergo the death penalty violates medical ethics.⁵⁸⁹ While the state does not actually require the presence of medical practitioner in order to carry out executions, in practice it has a desire for their presence.⁵⁹⁰

The American Medical Association prohibits health professionals from the administration of drugs that are part of execution procedures, the monitoring of vital signs during an execution, attending or observing executions, the selection of injection sites, starting intravenous lines to administer chemicals, the prescription of chemicals, supervision of lethal injection devices, and the pronouncement of death following executions.⁵⁹¹ The British Medical Association opposes the death penalty.⁵⁹² The International Council of Nurses opposes nurse's participation in the death penalty.⁵⁹³ The South African Medical Association has adapted the

⁵⁸⁷ R Ferris & J Welsh 'Doctors and the death penalty: ethics and cruel punishment' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63 – 64.

⁵⁸⁸ R Ferris & J Welsh 'Doctors and the death penalty: ethics and cruel punishment' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63.

⁵⁸⁹ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 78.

⁵⁹⁰ R Ferris & J Welsh 'Doctors and the death penalty: ethics and cruel punishment' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 63.

⁵⁹¹ American Medical Association Code of Medical Ethics available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?> (Accessed 19 March 2015).

⁵⁹² Per policy decisions adopted at BMA Annual Representative Meetings in 1992, 1998 and 2001 available at <http://web2.bma.org.uk/bmapolicies.nsf/searchresults?OpenForm&Q=death+penalty+AND+FIELD+Subject+contains+death+penalty~8~50~Y> (accessed 19 March 2015).

⁵⁹³ Available at <http://www1.umn.edu/humanrts/instree/executions.html> (accessed 19 March 2015).

statement of the World Medical Association that the participation of physicians in capital punishment is unethical.⁵⁹⁴

9.3.1 Recommendation on activism of medical professionals

The Prisons Act⁵⁹⁵ provides that a medical officer must attend all executions in Botswana.⁵⁹⁶

The duties of the medical officer at an execution include: Examining the body of the executed prisoner; the certification of death; and the signing of the certificate of death.⁵⁹⁷

[1] The Botswana Health Professionals Council Code of Ethical Professional Conduct is silent on the question of capital punishment. It is recommended that the Council consider formulating a policy regarding the participation of medical professionals in capital punishment in Botswana along the lines of the Codes of the American, British and South African and World Medical Associations prohibiting doctors from assisting in any duties surrounding the execution of prisoners.

9.4 Signing international treaties to abolish the death penalty

As observed above, The United Nations and regional organisations have concluded international agreements that seek to limit the use of the death penalty to the most serious crimes and exclude them for ordinary crimes. The international community has concluded several protocols which ban the use of the death penalty in all circumstances.

Many states have chosen to abandon the use of the death penalty immediately or incrementally by acceding to international treaties that place obligations upon them to limit or eliminate the use of the death penalty. This is an important strategy as it enables a state to join

⁵⁹⁴ Available at <https://www.samedical.org/assets/files/Governance%20and%20Legal/new/wma-stm-moratorium-on-use-death-penalty.pdf> (accessed 19 March 2015).

⁵⁹⁵ The Laws of Botswana Cap 21:03

⁵⁹⁶ Section 21(2) Prisons Act Cap 21:03

⁵⁹⁷ Section 21(3) Prisons Act Cap 21:03

the many nations that are abolitionist in law.

9.4.1 Recommendation on signing of international treaties regarding the death penalty

[1] It is recommended that the Government of Botswana withdraw its reservation to article 7 of the ICCPR regarding the meaning of torture, inhuman and degrading punishment in light of the Botswana Constitution. This reservation is a tool to ensure that punishments now regarded as amounting to torture, inhuman or degrading treatment are unassailable in national courts and at international law tribunals. This reservation would have to be abandoned if Botswana were to progress upon the path towards abolition.

[2] It is recommended that the Government of Botswana sign and ratify the Second Optional Protocol to the ICCPR Aimed at Abolition of the Death Penalty to indicate a lasting commitment to ending executions.

9.5 Non-extradition to retentionist countries

Abolitionist states have made it a practice to refuse to extradite persons to countries where they are sought for crimes that place them at risk of capital punishment.⁵⁹⁸ In South Africa, in *Mohamed*⁵⁹⁹ the South African Constitutional Court decried the extradition of a defendant to the United States where he would be tried for capital offences. A similar decision was made in the *Emmanuel Tsebe*⁶⁰⁰ matter, where the South African government refused to extradite two men wanted for murder in Botswana on the basis that they would be subject to the death penalty. The *Soering*⁶⁰¹ decision of the European Court of Human Rights was made on similar principles. Section 7(1)(c) of the Botswana Extradition Act No 18 of 1990 precludes the extradition from Botswana of a fugitive to face trial for an offence for which he could be

⁵⁹⁸ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 85.

⁵⁹⁹ [2001] ZACC 18.

⁶⁰⁰ *Minister of Home affairs and Ors v Emmanuel Tsebe and Ors and Amnesty International* 2012 ZACC 16.

⁶⁰¹ 1989 11 EHRR 439.

sentenced to death if that offence is not a capital offence in Botswana. It is disingenuous that Botswana would seek to protect individuals from capital punishment whilst she continues to impose it.

9.5.1 Recommendation on extradition to retentionist countries

[1] In considering the abolition of the death penalty, The Government of Botswana should also adopt the position that it will not extradite individuals to countries where they would be at risk of execution for capital offences without first securing an undertaking that the death penalty would not be pursued in such cases.

9.6 Enhancing alternative sentencing options

Abolition of the death penalty is only the first step towards reform.⁶⁰² Newly abolitionist states must create a system of punishment that is humane, secure and appropriate to address public concerns about what happens to serious offenders in the states care.⁶⁰³ Where the issue of alternatives to capital punishment is not adequately addressed, the death penalty may be reinstated. Successful abolition of the death penalty therefore includes the development of suitable alternative punishments.⁶⁰⁴ Alternatives to capital punishment should not be cruel, inhuman or degrading punishments nor should they contravene international standards.⁶⁰⁵ Alternatives to the death penalty should accompany any abolition, moratorium or commutation of death sentences.

⁶⁰² A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 92.

⁶⁰³ A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 92.

⁶⁰⁴ A Coyle 'Replacing the death penalty: The vexed issue of alternative sanctions' in P Hodgkinson and WA Schabas (eds) *Capital punishment: Strategies for abolition* (2004) 94.

⁶⁰⁵ Amnesty International *When the state kills: The death penalty v. human rights* (1989) 24.

9.6.1 Recommendation on life imprisonment as an alternative to the death penalty

Abolishing the death penalty will leave an inevitable gap in the criminal justice system in Botswana which must be filled by a viable and publicly acceptable option. As noted above, the most common replacement for the death penalty in countries that abolish it is the mandatory life sentence. There are challenges in the administration of life sentences which cannot be ignored. This include whether life sentences should always include the possibility of parole as well as concerns surrounding the increase in prison populations. It is recommended that The Government of Botswana consider extending life imprisonment to all persons convicted of capital crimes.

Botswana already has a parole system under its Prisons Act which provides that a prisoner serving a life term may be released by the parole board after serving at least 7 years of his sentence.⁶⁰⁶ As matters stand, section 85 (c) does not apply to persons convicted of capital crimes. If were to be initiated for capital offenders who are serving life sentences, the minimum term of seven years may be deemed too short given the gravity of the crimes committed.

[1] Should the Government of Botswana abolish the death penalty, it is recommended that a separate set of parole rules for persons convicted former capital offences be promulgated.

⁶⁰⁶ Section 85 Prisons Act Cap 21:03. Eligibility of prisoners for release on parole - Subject to the other provisions of this Part, a prisoner shall be eligible for release from prison on parole if he is serving- (a) a determinate term of imprisonment of not less than four years (whether that term consists of a single punishment or punishments running concurrently or consecutively), neither the whole nor part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or three years' imprisonment, whichever is the longer; (b) a determinate term of imprisonment of more than five years (whether that term consists of a single punishment or punishments running concurrently or consecutively), the whole or part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or five years' imprisonment, whichever is the longer; or (c) a term of imprisonment for life or is confined during the President's pleasure and has served seven years imprisonment.

[2] It is also recommended that the Botswana Government adopt the classification and parole system for life prisoners used in England and Wales. This would create two types of life inmates. First, those who would be detained for their natural life where they are deemed a danger to society. This would be a whole life sentence for the most dangerous prisoners who would never be released. Secondly, those who would serve life with the possibility of parole after fulfilling a discretionary minimum term set by a judge along with being released conditionally. Such a system would be more flexible than a blanket seven years for long-term prisoners. Having a judge set the minimum sentence to be served, or starting point as it is termed in England and Wales, would also ensure that the court which heard the evidence during the trial would have the opportunity to determine the appropriate sentence instead diverting that task to a Parole Board.

CHAPTER 3

JUDICIAL CORPORAL PUNISHMENT IN BOTSWANA: A ROAD MAP TO LAW

REFORM

1 INTRODUCTION

The second sentencing option under consideration in this study is judicial corporal punishment. Judicial corporal punishment is distinguished from corporal punishment of children in the setting of homes and schools, which is extraneous to this study. The focus of this discussion shall be judicial corporal punishment of adults and juveniles.

Judicial corporal punishment is defined as flogging, birching, caning or whipping of adults or juveniles, ordered by a court of law for criminal offences.⁶⁰⁷ Judicial corporal punishment has been abolished in most western countries. However, it remains lawful in some African nations as a consequence of traditional legal systems. As at March 2014, 33 nations worldwide retained judicial corporal punishment. In 159 states, judicial corporal punishment of children has been prohibited as a sentence for crime.⁶⁰⁸ The shift away from judicial corporal punishment in some nations has been a gradual process that mirrored the changing social landscape, thought and perceptions on human dignity in society.

This chapter seeks to achieve the following objectives. First the chapter will set out the rationale for judicial corporal punishment. The chapter will then outline the statutory arrangements for the use of judicial corporal punishment in Botswana in the case of adult and juvenile offenders. This will be followed by an exposition of three cases challenging the constitutionality of judicial corporal punishment in Botswana which are *The Clover Petrus*

⁶⁰⁷ CORPUN ‘What is world corporal punishment research’ available at <http://www.corpun.com/expl.htm#terminology> (accessed 20 January 2016).

⁶⁰⁸ Global Initiative to End All Corporal Punishment of Children ‘Prohibiting corporal punishment of children in central Asia and the Pacific: progress report 2014’ 10.

decision, the *Desai* case and the *Kgafela* Case. The chapter will then consider alternative sentencing options currently available in Botswana which could be utilised to minimise or completely eschew the cane. This will be followed by a look at Botswana's international obligations with respect to judicial corporal punishment and a summary of the major discourses on judicial corporal punishment in Botswana today. A comparative examination of five jurisdictions namely: South Africa, Zimbabwe, Namibia, The United Kingdom and the United States then follows. The purpose of the comparative discussion is to find lessons that may be learned to enable Botswana to abolish judicial corporal punishment. Possible alternative sentencing options that could be adopted by Botswana to replace judicial corporal punishment are considered. The chapter then ends by mapping a roadmap to achieving a prohibition of judicial corporal punishment in Botswana.

2. THE RATIONALE FOR JUDICIAL CORPORAL PUNISHMENT

2.1 The divine right to punish

The end of the nineteenth century brought with it numerous changes in European society. The capitalist middle-class rose in status and strengths. The old societal make-up where power resided in the King and the upper-classes was eroded giving way to new egalitarian ideas. In the arena of punishment, a new philosophy arose which favoured imprisonment over punishments which wielded and demonstrated the sovereign's power over the body like whipping, branding, the stocks and public hangings.⁶⁰⁹ Ignatieff notes that these punishments were accompanied by public ritual 'which carried the message of the law right into the market square'.⁶¹⁰

In those days, punishment was there for all to see. It was publicly intimate and largely physical. Ears were cut off, the whip was applied, and so was the death penalty. These were clear and concrete

⁶⁰⁹ A Crocker & S Pete 'Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa: part 1' (2007) *Obiter* 271 272.

⁶¹⁰ M Ignatieff *A just measure of pain – The penitentiary and the industrial revolution 1750 – 1850* (1978) 213.

punishments; there could be no doubt that they were painful.⁶¹¹

The power to punish has always been attendant to the power to rule. Kings ruled by divine right conferred upon them by God himself.⁶¹² As a consequence of this divine right to rule, the king had the power to punish his subjects.⁶¹³ One of the ways in which punishment was done was by inflicting pain on the body of the offender.⁶¹⁴ This power to punish devolved to other authority figures in the community including heads of households who could punish their children, wives, servants and slaves, as well as teachers who derived the right to punish their pupils from that of the parent, so that corporal punishment was used as a tool for the maintenance of social order.⁶¹⁵

2.2 Punishment by social contract

The birth of the nation state saw the decline of the right to punish vesting upon the sovereign by divine right. New theories of punishment emerged which hinged upon the so-called social contract which essentially stated that the right of the ruler to punishment arose from the consent of those he governed.⁶¹⁶

The infliction of pain on the body was replaced by the need to rehabilitate and transform the offender. Prisons were built to discipline the offender.⁶¹⁷ The questions of whether a

⁶¹¹ G Newman *Just and painful: a case for the corporal punishment of criminals* (1983) 12.

⁶¹² M Foucault *Discipline and punish – the birth of the prison* (1979) cited in A Crocker & S Pete ‘Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa: part 1’ (2007) *Obiter* 271 274.

⁶¹³ S Pete ‘To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?’ (1998) 14 *South African Journal of Human Rights* 430 431.

⁶¹⁴ S Pete ‘To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?’ (1998) 14 *South African Journal of Human Rights* 430 431.

⁶¹⁵ S Pete ‘To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?’ (1998) 14 *South African Journal of Human Rights* 430 432.

⁶¹⁶ S Pete ‘Punishment and race – the emergence of racially defined punishment in colonial Natal’ (1986) 2 *Natal University Law and Society Review* 99 – 101; S Pete ‘To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?’ (1998) 14 *South African Journal of Human Rights* 430 432.

⁶¹⁷ M Foucault *Discipline and punish – the birth of the prison* (1979) cited in A Crocker & S Pete ‘Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its

particular period of imprisonment was effective as a deterrent or whether the retribution inflicted by the state satisfied the offender's debt to society became paramount considerations.⁶¹⁸ During this time, there was an attempt to sanitise corporal punishment by regulating the place in which it was inflicted, no longer in public, but behind prison walls. Attempts were also made to regulate the manner in which it was inflicted by prescribing the size and type of implement to be used and the number of strokes to be administered.⁶¹⁹ For example, Jeremy Bentham, suggested the use of a rotating flail made of canvas and whale bone which would ensure that each stroke was delivered with equal severity.⁶²⁰ Pete argues that these suggestions were bound to fail as corporal punishment was a pre-modern form of punishment that was essentially 'cold dispassionate sadism'.⁶²¹

2.3 Corporal punishment, racial oppression and sovereignty in colonial Africa

Judicial corporal punishment has also been demonstrated to be linked with colonialism, racial oppression and sovereignty in colonial Africa.⁶²² Pete notes that the slaver or colonial master used the lash or the cat-o-nine tails to wield power over the black slave or colonised native.⁶²³ Ocobock notes that the European settler in Kenya use the *kiboko*⁶²⁴ against his workers to reinforce the racial hierarchy in Kenya.⁶²⁵ In Namibia, Chief Justice Berker noted the use of

former colonies in Africa: part 1' (2007) *Obiter* 271 274.

⁶¹⁸ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 433.

⁶¹⁹ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 433.

⁶²⁰ M Ignatieff *A just measure of pain – The penitentiary and the industrial revolution 1750 – 1850* (1978) A Crocker & S Pete 'Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa: part 1' (2007) *Obiter* 271 273.

⁶²¹ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 431.

⁶²² A Crocker & S Pete 'Cutting the cane: A comparative analysis of the struggle to banish corporal punishment from schools in Britain and South Africa (Part 1)' (2009) *Obiter* 44 58.

⁶²³ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 434.

⁶²⁴ This word means Hippopotamus in Swahili and is also the name of a whip made from hippopotamus hide. However the term has become synonymous with any instrument of corporal punishment like a cane or switch.

⁶²⁵ P Ocobock 'Spare the rod, spoil the colony: Corporal punishment, colonial violence, and generational authority in Kenya 1897 – 1952' (2012) Vol. 45 (1) *International Journal of African Historical Studies* 29.

corporal punishment by South African colonial masters in judicial, quasi-judicial organs, as well as extra-judicially by administrative authorities, which was often excessive.⁶²⁶ Pete also notes the extensive use of corporal punishment against black offenders in colonial Natal. So wide spread was judicial corporal punishment that the Natal Prison Reform Commission referred to the practice as '*the cult of the cat*'.⁶²⁷

Corporal punishment constituted a powerful weapon of domination and repression in the hands of the colonists. It was used to exert sovereignty and authority, not to rehabilitate the offender. It was used to subdue those who resisted colonial rule.⁶²⁸

Corporal punishment was widely used by the colonist against the African for two reasons. First, the native was regarded to be childlike and unable to reason. He was therefore to be shown the way through corporal punishment.⁶²⁹ Second, the African was considered by some to be a brutish savage. Since one could not reason with a savage, he could only be disciplined by means of corporal punishment.⁶³⁰

The use of corporal punishment against the black population to the exclusion of the white population was standard practice in colonial Africa. The opposite was unthinkable. This is because it would tip the balance of power, a direct challenge to the sovereignty of the white settler over the indigenous people. Two incidents illustrate this argument. The first involved the flogging of a white man named Phinehas McIntosh in the Bechuanaland Protectorate in 1933 in a Native Court presided over by the Chief *Kgosi* Tshekedi. The British Resident Commissioner Lieutenant Colonel Charles Ray said this of the incident:

⁶²⁶ Ex parte Attorney- General Namibia: In re corporal punishment by organs of state 1991 (3) SA 76 (Nms) 96E.

⁶²⁷ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 434 – 435; S Pete & A Devenish 'Flogging fear and food: punishment and race in colonial Natal' (2005) 31 (1) *Journal of Southern African Studies* 3 4.

⁶²⁸ A Crocker & S Pete 'Cutting the cane: A comparative analysis of the struggle to banish corporal punishment from schools in Britain and South Africa (Part 1)' (2009) *Obiter* 44 58-59.

⁶²⁹ S Pete 'Punishment and race – the emergence of racially defined punishment in colonial Natal' (1986) 2 *Natal University Law and Society Review* 102 – 106.

⁶³⁰ S Pete 'Spare the rod and spoil the nation? Trends in corporal punishment' (1994) 3 *South African Journal of Criminal Justice* 295 301.

It is impossible to exaggerate the effect in the Protectorate and in South Africa generally of the public flogging of a European by natives in a Native Court. The effect on the native mind in the Territory, and on the Chiefs in particular, must be such as to render insecure the position of the Europeans in the territory, to cause the government at large to be regarded with contempt, and to make it impossible any longer to carry on the administration of the territory, unless immediate and drastic action is taken.⁶³¹

Indeed, a group of soldiers was sent to restore order and reassert British sovereignty in the region. The Chief was banished from Serowe for a time by the British Resident Commissioner and only allowed to return after making undertakings that no white man could be subjected to the jurisdiction of the Native Court.⁶³²

A similar incident occurred in 1870 in Saulspoort. Bakgatla Chief, *Kgosi* Kgamanyane was whipped by President Paul Kruger. The effect of this incident on the psyche of the Bakgatla of Mochudi and the Pilanesberg was profound and enduring. Mbenga notes that the whipping of *Kgosi* Kgamanyane ‘was more bitterly resented in the persecuted people than was any other of their various ills.’⁶³³

In Namibia, Chief Justice Hans Berker noted that the use of corporal punishment in colonial times was ‘extreme in nature’ leaving an ‘indelible impression on the people of Namibia’ and ‘a deep revulsion’ in respect of corporal punishment.⁶³⁴ The interplay of corporal punishment with colonial sovereignty and racial domination has in some jurisdictions caused states to abandon the punishment at the very first opportunity in order not to further perpetuate injustices of the past.

⁶³¹ M Crowder *The flogging of Phinehas McIntosh - a tale of colonial folly and injustice, Bechuanaland* 1933 (1988) 49.

⁶³² ‘The flogging of Phinehas McIntosh’ Mmegi 3 February 2006 available at <http://www.mmegi.bw/2006/February/Friday3/4558509661582.html> (accessed 20 January 2016).

⁶³³ B K Mbenga ‘Forced labour in the Pilanesberg: the flogging of Chief Kgamanyane by Commandant Paul Kruger, Saulspoort April 1870’ 23(1) March 1997 *Journal of Southern African Studies* 127 – 140.

⁶³⁴ *In re corporal punishment by organs of state* 1991 3 SA 76 (NmS) at 94 G-H.

2.4 Corporal punishment as a response to ‘folk devils’ and ‘moral panics’

Corporal punishment is also used by governments in response to crime waves and public calls for action against crime that often cost governments votes. Cohen described the public disquiet that usually follows a spate of crime as a ‘moral panic’.⁶³⁵ He also stated that concern over such crimes leads to the creation of evil criminal characters in the public psyche who, he characterised as ‘folk devils’ who threaten public order.⁶³⁶

Pete notes that calls for the reintroduction of corporal punishment are usually linked to such moral panics and the emergence of folk devils in a community. He gives several examples. A law maker in the Delaware, Texas suggested that drug dealers should have a finger amputated for each conviction.⁶³⁷ The conviction to six lashes of the rattan cane of the American teenager Michael Fay for vandalism in Singapore also saw much public debate. A Newsweek article stated that 38 percent of Americans were in favour of the whipping.⁶³⁸ In England, Wales and Scotland, corporal punishment was reintroduced to combat public fear of garrotting⁶³⁹ in 1863.⁶⁴⁰ Moral panics in later years induced similar calls for the reintroduction of corporal punishment.⁶⁴¹ Understanding that there is a correlation between moral panics and folk devils and calls for the reinstatement of judicial corporal punishment can assist the law maker or policy maker to respond appropriately to increased public concern about crime.

⁶³⁵ S Cohen *Folk Devils and moral panics – the creation of the mods and the rockers* (2002) i – xxi.

⁶³⁶ S Cohen *Folk Devils and moral panics – the creation of the mods and the rockers* (2002) i – xxi.

⁶³⁷ S Pete ‘To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?’ (1998) 14 *South African Journal of Human Rights* 430 434 – 435.

⁶³⁸ ‘Six lashes in Singapore’ Newsweek, Vol. 123, Issue 11 14 March 1994.

⁶³⁹ The definition of this word is kill (someone) by strangulation, especially with a length of wire or cord

⁶⁴⁰ L R Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 27 – 28.

⁶⁴¹ S Cohen *Folk Devils and moral panics – the creation of the mods and the rockers* (2002) i – xxi; S Pete ‘Spare the rod and spoil the nation? Trends in corporal punishment’ (1004) 3 *South African Journal of Criminal Justice* 295 298.

2.5 The link between corporal punishment and sex

Pete refers to the work of Gibson who wrote on the sexual character of certain forms of corporal punishment.⁶⁴² Gibson cites Morris who argues that rump presentation is an appeasement gesture of certain primates and argues that this practice has vanished in human beings save for the punishment for school boys 'with rhythmic whipping replacing the rhythmic pelvic thrusts of the dominant male'.⁶⁴³

Gibson goes on to state that school boys and school masters engaged in corporal punishment are bound to become sexually excited, even unintentionally.⁶⁴⁴ Whilst this may be an uncomfortable thought to some, it cannot be ignored that whipping could evoke such sentiments in the punisher. The objective of punishment is lost where the punished suffers a painful and humiliating physical punishment, but must also suffer the indignity of becoming the helpless and unwitting victim of sexual gratification of the punisher.

2.6 Corporal punishment and religion

Corporal punishment is also linked to religion, and in particular, the belief that children should be chastised by their parents. The scriptural basis for this belief is can be found in numerous biblical verses.⁶⁴⁵ Pete cites an American study conducted in 1990 which

⁶⁴² I Gibson *The English vice- beating, sex and shame in Victorian England and after (1978)* as cited in S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 439.

⁶⁴³ D Morris *The naked ape (1969)* 146 as cited in S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 434 – 435.

⁶⁴⁴ I Gibson *The English vice- beating, sex and shame in Victorian England and after (1978)* 296 as cited in S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 434 – 435.

⁶⁴⁵ Prov 13:24: "He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes (diligently)." Prov 19:18: "Chasten thy son while there is hope, and let not thy soul spare for his crying." Prov 22:15: "Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him." Prov 23:13: "Withhold not correction from the child: for if thou beatest him with the rod, he shall not die." Prov 23:14: "Thou shalt beat him with the rod, and shalt deliver his soul from hell (Shoel)." Prov 29:15: 'The rod and reproof give wisdom: but a child left to himself bringeth his mother to shame." Hebrews 12:6-7: "...the Lord

established that a literal belief in the bible fuelled the view that corporal punishment was an acceptable form of punishment.⁶⁴⁶ Pete also notes that some parenting experts also laud the benefits of raising children in an environment where corporal punishment is used for discipline. Authors like Dr James Dobson, Bruce Ray and Frank and Ida Mae Hammond have published books strongly supporting the use of corporal punishment.⁶⁴⁷

In *Christian Education South Africa v The Minister of Education*,⁶⁴⁸ an application was brought to the Constitutional Court by Christian Education South Africa, an organisation representing 200 private Christian schools in South Africa, arguing for the retention of corporal punishment in South African schools is an illustration of how deeply held is the belief in the chastisement of children using corporal punishment. In the end, the application was not successful. The Court held that the prohibition of corporal punishment in schools was aimed at promoting the dignity, physical and emotional integrity of children. The parental right to reasonably chastise their child in the loving environment of the home was not interfered with. The Court recognised that the parent has a Common Law defence available to him. He may inflict moderate and reasonable chastisement on a child for misconduct provided it is not done in a manner that is offensive to good morals or for other objects other than correction and admonition.⁶⁴⁹

Where the chastisement is excessive or based on improper motives or a sadistic propensity, such a parent is liable in criminal and civil law.⁶⁵⁰ The Constitutional Court in the *Christian Education* case prevented parents from authorising teachers, acting in their name and on a

disciplines those he loves, and he punishes everyone he accepts as a son. Endure hardship as discipline; God is treating you as sons. For what son is not disciplined by his father?'

⁶⁴⁶ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 441.

⁶⁴⁷ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 441.

⁶⁴⁸ 2000 (4) SA 757 (CC)

⁶⁴⁹ *S v Janke & Janke* 1913 TPD 382.

⁶⁵⁰ *S v Lekgathe* 1982 (3) SA 104 (B).

school premises to use corporal punishment on their children.⁶⁵¹

2.7 Corporal punishment, paternalism, power and discipline

The relationship between corporal punishment and power is apparent where one considers the relationship between the punisher and the punished. Commenting on this dynamic, Ocobock notes that corporal punishment is also a tool used by African parents and elders to define ‘age and generational station’.⁶⁵² Corporal punishment is always perceived by the recipient in a very personal way.

Corporal punishment is a very personal form of punishment, and the way in which it is perceived depends on the relationship that exists between the punisher and the punished. It may demonstrate paternal anger and authority, but at the same time express affection and concern. If one were to differentiate between corporal punishment and imprisonment as distinctive forms of punishment, the former might be described using words such as ‘paternalistic’, ‘personal’, ‘passionate’ and ‘authoritarian’ whereas the latter may be categorised as ‘impersonal’, ‘dispassionate’ and ‘rational’.⁶⁵³

Glenn notes that corporal punishment is always imposed in a hierarchical relationship with the powerful paternal figure being: God, a king, a father, a husband, a master, a teacher, or the state punishing the vulnerable sinner, subject, child, wife, slave, student or citizen.⁶⁵⁴ In the end, corporal punishment has been used as a marker of power, sovereign authority, parental authority and dominance of the punisher over the punished. And yet, it can strangely be justified as an expression of love and affection.

Having examined the rationale for judicial corporal punishment, the next section considers the application of judicial corporal punishment in Botswana.

⁶⁵¹ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) [50 – 51].

⁶⁵² P Ocobock ‘Spare the rod, spoil the colony: Corporal punishment, colonial violence, and generational authority in Kenya 1897 – 1952’ (2012) Vol. 45 (1) *International Journal of African Historical Studies* 29 30.

⁶⁵³ S Pete ‘To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?’ (1998) 14 *South African Journal of Human Rights* 430 442.

⁶⁵⁴ M Glenn *Campaigns against corporal punishment: prisoners, sailors, women and children in antebellum America* (1984) 55.

3 JUDICIAL CORPORAL PUNISHMENT IN BOTSWANA

Judicial corporal punishment is recognised as a punishment available to Botswana Courts under section 25 of the Penal Code. It is used in Botswana's judicial system in the Common Law and Customary Law Courts.

Thrashing was a punishment for criminal and civil wrongs among Tswana tribes. Referred to as '*go kgwathisa*', thrashing was a common punishment which Schapera describes as follows:⁶⁵⁵

Thrashing is not restricted to any specific class of offence. Fining is generally preferred; but where the wrongdoer cannot pay the fine imposed, thrashing is commonly resorted to as the only form of punishment. *Ya modiidi ke e nkgwe*, says the proverb: 'The punishment of a poor person is a white-backed ox' (referring to the discolouration produced by the bruises). Any offender may be so punished, regardless of sex, age or position. But it is unusual to thrash the very old or the very young; and where the sentence is carried out on a woman, she is not required to strip. Immediately after the sentence is pronounced, the offender (if male) is ordered to strip, and to lie face downwards). He is not tied up in any way, but, if he struggles, he will be held down. Some man present is then ordered to stand at his head, and lay the strokes across his bare back. The instrument most commonly employed for the purpose is a switch of the moretlwa bush (*Grewia Cana*), something like a cane of pliant wood tapering to a very fine end. In recent years the sjambok has been introduced, and is often used instead. The number of lashes is determined according to the gravity of the offence and the demeanour of the offender while under trial. They generally amount to no more than two to four, and seldom exceed ten. But cases are known where a much larger number was administered.

Thrashing, or flogging, as it is known in common parlance, is an accepted form of punishment under Customary Law and in Customary Courts and is still in use today. Statute has now regulated the cane to be used, and the number of lashes to be administered in the Common Law and Customary Law Courts. Judicial corporal punishment in the Constitution and the Statutory Law is discussed below.

3.1 Judicial corporal punishment in the Constitution

There is no mention of corporal punishment in the Constitution of Botswana. Judicial corporal punishment is impliedly protected by the Constitution through section 7(1) as read with section 7(2) of the Constitution. As previously discussed above, section 7(1) proscribes

⁶⁵⁵ I Schapera *A handbook of Tswana law and custom* 2nd Edition (1994) 49.

cruel, inhuman and degrading punishment in Botswana. Section 7(2) is a savings clause exempting from the definition of 'cruel and inhuman' any punishments that existed in Botswana before the promulgation of the Constitution. Section 7(2) of the Constitution provides as follows:

The effect of section 7(2) is to preserve judicial corporal punishment from falling foul of the constitutional prohibition on cruel, inhuman and degrading punishment. This is because judicial corporal punishment existed in the Penal Code as a punishment in Botswana before the promulgation of the constitution. It is therefore safe to say that judicial corporal punishment is not, on the face of it, *ultra vires* Botswana's constitution because of the savings clause.

3.2 Offences attracting corporal punishment

Offences attracting corporal punishment are found in several pieces of legislation in Botswana. The offences for which judicial corporal punishment is prescribed are rape,⁶⁵⁶ statutory rape,⁶⁵⁷ defilement of idiots and imbeciles,⁶⁵⁸ procuration⁶⁵⁹ attempt to murder by a convict,⁶⁶⁰ intentionally endangering the safety of persons travelling by railway,⁶⁶¹ robbery,⁶⁶² attempted robbery,⁶⁶³ housebreaking and burglary,⁶⁶⁴ entering a dwelling house with the intent to commit serious offences,⁶⁶⁵ breaking into buildings and committing certain serious offences and the attempt thereof,⁶⁶⁶ and the commission of major prison offences under the

⁶⁵⁶ Section 147(2) and 147(3) Penal Code.

⁶⁵⁷ Section 147(4) Penal Code.

⁶⁵⁸ Section 148 Penal Code.

⁶⁵⁹ Section 149 and 150 Penal Code.

⁶⁶⁰ Section 291 Penal Code.

⁶⁶¹ Section 229 Penal Code.

⁶⁶² Section 292(1) Penal Code.

⁶⁶³ Section 293(1) Penal Code.

⁶⁶⁴ Section 300 Penal Code.

⁶⁶⁵ Section 301 Penal Code. 'Serious offences' means any offence punishable under the Penal Code with death or imprisonment for three years or more.

⁶⁶⁶ Section 302 and 303 Penal Code.

Prisons Act where corporal punishment is used as a disciplinary measure.⁶⁶⁷

3.3 The manner of application of corporal punishment

Statutory Law in Botswana prescribes the manner of application of judicial corporal punishment. Corporal punishment may not be administered where an appeal against conviction and sentence is pending.⁶⁶⁸

In terms of section 28 of the Penal Code, a sentence of corporal punishment shall be inflicted only once. The sentence must specify the number of strokes. The number of strokes administered may not exceed 12 for a person over the age of 18.⁶⁶⁹ Young offenders may also undergo corporal punishment; however, they only receive a maximum of six strokes.⁶⁷⁰

The manner of imposition of corporal punishment is governed by section 305(1) of the CP&E which provides that the caning must be carried out in a manner and with a type of cane approved by the minister.⁶⁷¹ The sentence may not be administered unless a medical officer certifies that the convicted person is fit to undergo the caning. Caning may only be carried out in the presence of a medical officer and if one is not available, in the presence of a magistrate. Caning may not be carried out in instalments. Further, if more than one sentence of caning is handed down in the same proceedings on different counts, the sentence shall be deemed one sentence. Section 305(2) of the CP&E provides that corporal punishment should be administered privately in a prison. Lastly, with respect to the manner of carrying out the sentence, section 3 of the Criminal Procedure (Corporal Punishment) Regulations⁶⁷²

⁶⁶⁷ Section 105 as read with section 109(1) and 109(3) Prisons Act.

⁶⁶⁸ Section 322(a) CP&E.

⁶⁶⁹ Section 28(2) Penal Code.

⁶⁷⁰ Section 28(2) Penal Code.

⁶⁷¹ The size of cane to administer corporal punishment is prescribed under section 2 of the Criminal Procedure (Corporal Punishment) Regulations Statutory Instrument 95 of 1969.

⁶⁷² Statutory Instrument 95 of 1969.

prescribes that corporal punishment shall, be administered on the buttocks only and on no other part of the body.

3.4 Statutory limitations on the imposition of corporal punishment

There are three limitations on the application of the sentence of corporal punishment. The limitations are based on the gender and age and lastly, the nature of the sentence imposed.

The gender limitation proscribes the flogging of women.⁶⁷³ Males whom the Court considers to be over the age of forty may not be sentenced to corporal punishment.⁶⁷⁴ Males sentenced to death may not be sentenced to undergo corporal punishment.⁶⁷⁵ The Court is also given wide discretion to order corporal punishment in lieu of, or in addition to any sentence of imprisonment for any offender sentenced to a term of imprisonment.⁶⁷⁶ This provision does not apply to persons convicted of ‘scheduled offences’.⁶⁷⁷ The scheduled offences are murder, rape and robbery, any offence in respect a minimum sentence is by law imposed, and any conspiracy, incitement or attempt to murder, rape or robbery.

3.5 Corporal punishment in the Customary Courts

Customary Courts in Botswana have jurisdiction to try criminal offences created by the Penal Code.⁶⁷⁸ This power excludes the jurisdiction to try treason, riot, or any offence involving the security of the state, murder, bigamy, offences against the lawful administration of authority, bribery, currency offences, extortion, insolvency and company law offences, rape, robbery where the accused is over 21 years and offences relating to precious stones, gold and other

⁶⁷³ Section 28(3) Penal Code.

⁶⁷⁴ Section 28(3) Penal Code.

⁶⁷⁵ Section 28(3) Penal Code.

⁶⁷⁶ Section 28(4) Penal Code.

⁶⁷⁷ The scheduled offences are listed in the second schedule to the CP&E.

⁶⁷⁸ Section 12(6) Customary Courts Act. The jurisdiction of each court as to matters it can handle and sentences it may hand down is limited by a warrant which specifies limits applicable to each Court.

precious metals.⁶⁷⁹

Corporal punishment is one of the punishments that the Customary Court may impose.⁶⁸⁰ There are limitations to the application of corporal punishment in the Customary Courts. For instance, no female person or male person over the age of forty years may be flogged.⁶⁸¹ The Minister has designated that corporal punishment may be administered in a traditional manner at any prison and any Customary Court.⁶⁸² There is no explanation of what is meant by the phrase ‘in the traditional manner’. Under Customary Law, flogging was administered on the convict’s back with a *morethwa* cane.

However, Statutory Law guidance now provides in the Customary Courts (Corporal Punishment Rules) that only a cane or *thupa* may be used to administer the punishment, in no instance may a sjambok or any type of whip be used.⁶⁸³ Further, they provide that corporal punishment shall be administered on the buttocks only and on no other part of the body and where a cane is used, protection shall be placed over the kidneys before such punishment is inflicted.⁶⁸⁴

3.6 Judicial corporal punishment of juveniles in Botswana

The Children’s Act provides that children in conflict with the law may be sentenced to corporal punishment,⁶⁸⁵ which shall not exceed six strokes of the cane.⁶⁸⁶ Section 305 (2) of

⁶⁷⁹ Section 13(a) Customary Courts Act

⁶⁸⁰ Article 18(1) Customary Courts Act.

⁶⁸¹ Section 18(2) Customary Courts Act.

⁶⁸² A Customary Court is one recognised or established under section 6(2) of the Customary Courts Act⁶⁸² as a Customary Court. The order declaring Customary Courts as places where corporal punishment may be carried out is found in section 2 of the Corporal Punishment (Designation of Places for Administering) Order, Statutory Instrument 146 of 1983.

⁶⁸³ Section 2 Customary Courts (Corporal Punishment Rules).

⁶⁸⁴ Section 3 Customary Courts (Corporal Punishment Rules).

⁶⁸⁵ Section 85(d) Children’s Act.

⁶⁸⁶ Section 90(1) Children’s Act and section 28(1) Penal Code.

the CP &E reserves the right of the parent or guardian of the child undergoing corporal punishment to be present.

Interestingly, section 61 of the Children's Act contains a prohibition outlawing the torture, cruel or inhuman punishment of a child. However, this provision does not have the effect of outlawing the judicial corporal punishment of children. This is because the Children's Act contains a savings clause under section 61(3) which preserves legality of judicial corporal punishment.

Public opinion in Botswana is firmly in favour of the retention of judicial corporal punishment of juveniles.⁶⁸⁷ There is no cultural taboo against corporal punishment, in fact, the perception of the majority appears to be that that corporal punishment is essential to the upbringing of children – a case of spare the rod, spoil the child. Consequently, corporal punishment is used widely in homes, in schools and in Common Law and Customary Law Court to chastise children. A study by Ditshwanelo reflected a similar trend where 90% of respondents indicated that they had used corporal punishment on children in the home.⁶⁸⁸ A baseline study in June 2007 found that 92% of students had been beaten at school and that such beatings were supported by 67 percent of parents.⁶⁸⁹

It is important to point out that the corporal punishment of children preserved in the Children's Act is in fact contrary to the provisions of the UNCRC, which under article 19 provides that 'all children should be protected from all forms of physical and mental

⁶⁸⁷ See Comments of Hon. Dr. Nasha in Parliament during the debate on the Children's Bill No. 1 of 2009 in which she expressed the views garnered from Botswana in public consultations on the Bill. The overwhelming majority wished that corporal punishment be retained in all settings. Botswana National Assembly Weekly Parliamentary Debates Official Report Hansard Number 159 (Part 6) 9 – 13 March 2009 at 213- 214

⁶⁸⁸ <http://www.endcorporalpunishment.org/pages/progress/reports/botswana.html> (Accessed 6 January 2016) citing a Ditshwanelo report in correspondence with Global Initiative of February 2006.

⁶⁸⁹ <http://www.endcorporalpunishment.org/pages/progress/reports/botswana.html> citing a June 2007 baseline study in the Ngami region. . [Accessed 6 January 2016)

violence.’ The Committee on the Rights of the Child has elaborated on the meaning of ‘all forms of physical or mental violence’ stating:

... There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and the State must take all appropriate legislative, administrative, social and educational measures to eliminate them.⁶⁹⁰

There is a groundswell of opinion internationally that corporal punishment amounts to cruel and inhuman punishment.⁶⁹¹ Recommendations of human rights treaty bodies regarding the continued existence of judicial corporal punishment in Botswana are consistent in their call for abolishment.

The Committee on the Rights of the Child in its report on Botswana recommended that Botswana take ‘legislative measures to prohibit corporal punishment in the family, in schools and other institutions’.⁶⁹² The Human Rights Committee has noted its concern at the continued existence of penal corporal punishment in Botswana, which it regards to be in violation of Article 7 of the Covenant on Civil and Political Rights.⁶⁹³

In the first cycle of the Universal Periodic Review in 2009 recommended that Botswana consider changing legislation to prohibit all forms of corporal punishment in all settings. The Government of Botswana rejected these recommendations. It is quoted as stating as follows:

The government ... has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code and the Education Act.⁶⁹⁴

⁶⁹⁰ Committee on the Rights of the Child, General Comment No. 8 2006.

⁶⁹¹ This will be considered later in this chapter.

⁶⁹² CRC/C/15/Add.242, Concluding observations on initial report, [36] and [37], 3 November 2004. Similar observations were made by the Committee on the Elimination of Discrimination against Women, CEDAW/C/BOT/CO/3, Concluding observations to third report, [31] and [32], 26 March 2010.

⁶⁹³ CCPR/C/BWA/CO/1, Concluding observations on initial report, [19], 24 April 2008.

⁶⁹⁴ Report of the Working Group on the Universal Periodic Review Botswana A/HRC/10/69/Add.1 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/102/67/PDF/G0910267.pdf?OpenElement> (accessed 20 January 2016).

Discussions of the Children's Bill, 2009⁶⁹⁵ in Parliament reveal the difficulties legislators faced in abolishing judicial corporal punishment of Children. In her statement presenting the Children's Bill to Parliament for its second reading, Honourable Dr. Margaret Nasha, the Minister for Local Government stated that the object of the Bill was to give effect to Botswana's obligations under the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child.⁶⁹⁶ Honourable Magama raised the question of judicial corporal punishment being contrary to the UNCRC stating:

Mr Speaker,...I want to comment on issues which in my view are not consistent with the United Nations Convention on the Rights of the Child which Botswana has ratified....As far as corporal punishment is concerned Mr Speaker, I am opposed to that. Corporal Punishment causes psychological damage to the self-image of the individual. Corporal punishment is barbaric. It is an inhuman form of punishment, It contributes to the cycle of violence in society....It is some form of state sanctioned torture, state sanctioned violence against children. I think this aspect of the law really should be discarded.⁶⁹⁷

In her response, Dr. Nasha emphasised that in public Consultations, Botswana were adamant about the retention of corporal punishment of juveniles. She stated that the citizenry would not support a Bill that excluded corporal punishment and that it was the duty of the Government of Botswana to defend the retention of judicial corporal punishment at the United Nations just as it defends capital punishment. To quote Dr. Nasha, in abolishing corporal punishment 'we would be swimming against the current, and we are not salmon, we are Botswana, in Botswana.'⁶⁹⁸ Thus corporal punishment in all settings was retained in the Bill. Indeed, in the Second Cycle of the Universal Periodic Review in 2013, Botswana maintained its position rejecting calls to abolish all forms of

⁶⁹⁵ Bill no. 1 of 2009.

⁶⁹⁶ Botswana National Assembly Weekly Parliamentary Debates Official Report Hansard Number 159 (Part 6) Meeting 9 – 13 March 2009 at 213

⁶⁹⁷ Botswana National Assembly Weekly Parliamentary Debates Official Report Hansard Number 159 (Part 7) Meeting 16 – 20 March 2009 at 127 – 128. He was supported in this view by Honourable Raletobana who argued that corporal punishment was contrary to international law at page 187.

⁶⁹⁸ Botswana National Assembly Weekly Parliamentary Debates Official Report Hansard Number 159 (Part 6) 9 – 13 March 2009 at 213- 214

corporal punishment.⁶⁹⁹ There has been no challenge to the legality of judicial corporal punishment of juveniles in Common Law Courts.

3.7 Corporal Punishment of juveniles in Customary Courts

The Children's Act confers jurisdiction over all matters concerning children in conflict with the law on all Magistrates' Courts by creating them as Children's Courts.⁷⁰⁰ This provision does not affect the High Court's status as the upper guardian of all minor children.⁷⁰¹ Where there is no Magistrate's Court, the Children's Act provides that the District Commissioner or the District Officer in charge of the administrative district shall deal with all matters concerning children.⁷⁰²

In practice however, Customary Courts have always heard and determined cases involving children in spite of the fact that Customary Courts are not defined under the Children's Act as Children's Courts. This begs the question under what normative rules do customary Courts exercise jurisdiction over juvenile offenders. Aguda states that upon attaining independence, Botswana took the deliberate decision to move towards convergence or unification of Customary Criminal Law and Statutory Criminal Law.⁷⁰³ So, whilst operating a dual system of courts with Customary Courts and Common Law Courts coexisting and applying Customary Law and Roman-Dutch Common Law in civil matters, the criminal law was not to enjoy such duality. Thus Customary Law Crimes were suppressed and customary courts were required to apply the substantive, written criminal law along with rules of procedure and

⁶⁹⁹ Timor-Leste, Costa Rica, Djibouti and Slovenia made recommendations regarding the abolition of corporal punishment, which were not accepted by Botswana. Report of the Working Group on the Universal Periodic Review Botswana A/HRC/23/7 Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/125/04/PDF/G1312504.pdf?OpenElement> (accessed 20 January 2016).

⁷⁰⁰ Section 36(1) as read with section 37(1) Children's Act.

⁷⁰¹ Section 36(3) Children's Act.

⁷⁰² Section 37(2) Children's Act.

⁷⁰³ A Aguda 'Legal developments in Botswana 1885 – 1966' (1973) 5 *Botswana Notes and Records* 52 – 63.

evidence.⁷⁰⁴ In terms of section 12(6) of the Customary Courts Act⁷⁰⁵ (6) No person shall be charged with a criminal offence unless such offence is created by the Penal Code or some other written law. This provision was affirmed in *Bimbo v The State*⁷⁰⁶ where the High Court set aside a conviction for adultery, an offence known under Customary Criminal Law but not recognised under the written Penal Code of Botswana.

Despite the formalization of dispute resolution in the Customary Courts, informal dispute under Customary Law resolution continues to subsist alongside formal mechanisms. One of these informal methods includes the chastisement of errant minors by their parents at the Chiefs Kgotla. Other examples are family courts, women's courts, ward courts and regimental courts. The line between the formal dispute resolution mechanisms of the Customary Court and the informal methods retained and used by communities is blurred and raises difficulties from time to time as there is no separation between these two levels of dispute settlement.⁷⁰⁷ With respect to the chastisement of children, the case of *Kgalaeng v the Attorney General*⁷⁰⁸ illustrates these tensions. The complainant sued the Botswana Government for damages occasioned by being whipped 9 lashes at the Chiefs *Kgotla* without first being tried for any offence. The court found that at the material time, there was no Court sitting though the incident that provoked the beating had occurred at the Kgotla. The complainant had insulted someone who complained to the Chief. The Chief then asked the complainants father what ought to be done and the complainants father recommended that the boy be thrashed for his disrespectful conduct.⁷⁰⁹ The court then considered of the caning had

⁷⁰⁴ IS Malila, Codified Law and the changing normative context of disputes in traditional settings in Botswana' *Canadian Journal of African Studies* (2015) 49(2) 267 268.

⁷⁰⁵ Chapter 04:005 Laws of Botswana.

⁷⁰⁶ Criminal Appeal number 36 of 1980 (unreported).

⁷⁰⁷ IS Malila, Codified Law and the changing normative context of disputes in traditional settings in Botswana' *Canadian Journal of African Studies* (2015) 49(2) 267 271.

⁷⁰⁸ 1988 BLR 21 (HC).

⁷⁰⁹ *Kgalaeng v the Attorney General* 1988 BLR 21 (HC) 24.

been unlawful and found that according to *Bakwena* custom, it was boys, irrespective of their age could from time to time be punished at the *Kgotla* by their parents for misbehaviour. Girls were punished at home. The Chiefs presence at the *Kgotla* did not convert the process into a judicial hearing. The High Court affirmed the father's absolute right to chastise his son for misbehavior at the *Kgotla* in accordance with Customary Law.⁷¹⁰ Further the High Court found that the thrashing was not excessive because it was moderate and reasonable.⁷¹¹

Why then does the Government of Botswana allow these formal and informal systems to coexist in the sphere of adjudication under Customary Law and what can be done about it? First, the system as it stands today is beneficial and expedient for Government allowing it to deliver justice to all corners of the country by harnessing Customary Court, both of a formal and informal nature. Magistrate's Courts and District Commissioners offices are not present in every locality in Botswana. In contrast, a *Kgosi* or *Kgosana* would be present in every village and ward in the country. Customary Courts are therefore more accessible to the general population and capable of adjudicate all manner of cases including those involving children.

Customary Courts also deal with the bulk of criminal matters processed through the criminal justice system and the Government is heavily dependent on this throughput to alleviate the pressure on Common Law Courts.⁷¹² Current figures indicate that Customary Courts deal with up to 80% of all criminal matters in the country.⁷¹³ Justice at the Customary Court is swift and summary and free of the procedural details that bog down matters in Common Law Courts. This 'endears' the Courts to the government which can dispose of criminal cases at a

⁷¹⁰ *Kgalaeng v the Attorney General* 1988 BLR 21 (HC) 24.

⁷¹¹ The High Court cited *Tshabalala v Jacobs* 1942 TPD 310, *R v Janke & Janke* 1913 TPD 382 at 385 and *R v Hopley* (1860) 2F&F 202; *Hiltonian Society v Crofton* 1953 (3) SA 130 to buttress this point.

⁷¹² DG Boko 'Fair trial and the Customary Courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 445 458.

⁷¹³ B Osei-Hwedi 'Botswana: Indigenous institutions civil society and government in peace building in Southern Africa' (2010) 16(2) *Journal of International Development and Cooperation* 115.

much faster rate than would be possible under Common Law Courts alone.⁷¹⁴

Thirdly, tribal communities have great faith and reliance in the role of Customary Courts in maintain social order. Naturally, there is a concern that juvenile offenders in Customary Courts are deprived of due process and judicial safeguards found in Common Law Courts like rules of evidence and the possibility of legal representation. Furthermore, the courts are presided over by laymen who have little or no legal education and may be barely literate.⁷¹⁵ It has been proposed that Customary Courts be prohibited from dealing with matters concerning juveniles.⁷¹⁶ However, such a prohibition would not be practical since the informal and formal adjudications systems under Customary Law have found place, flourished and have been weaved into the fabric in Tswana society.

The argument may be made that it would be prudent to recognise Customary Court's jurisdiction to hear and determine matters affecting children in conflict with the law. This would be a further formalisation of a traditional dispute resolution mechanism that is already very effective in maintaining social order. A proposal to abolish corporal punishment in the Kgotla would be difficult if not impossible to enforce. Corporal punishment of children in the Kgotla is merely an extension of the parental right to chastise the child in the private sphere. Under Tswana Customary Law, being caned in the presence of the Chief at the Kgotla is the gravest punishment a parent can summon for an errant boy who has failed to heed warnings from his parents and senior relatives in the extended family. The humiliation and publicity of a beating at the Kgotla is intended to jolt the errant boy into compliance. Any attempt to tinker with this informal system of discipline children may prove unsuccessful because of the value that tribal communities place in it. The 'the scheme of Tswana dispute processes may

⁷¹⁴ DG Boko 'Fair trial and the Customary Courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 445 458-460.

⁷¹⁵ DG Boko 'Fair trial and the Customary Courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 445 458-460.

⁷¹⁶ 'Supporting the development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana' Draft Policy Paper, May 2013 102.

not fit neatly into a Western conceptual scheme⁷¹⁷ but as a whole, it works. Therefore, no recommendations for change ought to be made.

3.8 Important Considerations in the sentencing of juvenile offenders

There are some important considerations that Botswana courts are required to abide by when dealing with children in conflict with the law. First, the courts must consider the best interests of the child. Second, the courts must also be properly constituted as Children's Courts. And lastly, the ages of criminal responsibility and minority must be respected and abided by in trying and sentencing juveniles. These considerations are expanded on below.

3.8.1 The best interest of the child principle

The Children's Act, 2009 governs the sentencing of children in conflict with the law in Botswana. The overarching consideration in dealing with children in terms of the Children's Act is the 'best interests of the child'.⁷¹⁸ The factors to be considered in determining what is in the best interests of the child are: The need to protect the child; the capacity of the child's parents or guardians to protect the child, the child's spiritual, emotional, physical and educational needs; the child's cultural, ethnic or religious identity; the effect on the child of any change in his circumstances; the importance of continuity and stability in the child's living arrangements, and the child's wishes.⁷¹⁹

3.8.2 Defining a child for purposes of the sentencing of children in Botswana

The Children's Act defines a child as '*any person who is below the age of 18 years*'.⁷²⁰ This definition is in consonance with that in the UNCRC, which provides that a child is every

⁷¹⁷ IS Malila, Codified Law and the changing normative context of disputes in traditional settings in Botswana' *Canadian Journal of African Studies* (2015) 49(2) 267-274.

⁷¹⁸ Section 5 Children's Act.

⁷¹⁹ Section 6 Children's Act.

⁷²⁰ Section 2 Children's Act.

human being under the age of 18 years unless, under the law applicable to the child, majority is attained earlier.⁷²¹ In this regard, Botswana is compliant with her international obligations under the UNCRC.

The Penal Code pegs the age of criminal responsibility in Botswana is 8 years.⁷²² Children under the age of 8 years are incapable of committing a crime or *doli incapax*.⁷²³ Children between the ages of 8 and under the age of 14 may be held criminally responsible for their conduct if it is proved that the child committing the offence had capacity to know that they ought not to do so.⁷²⁴ This is a rebuttable presumption and the onus to prove criminal responsibility lies on the state.

The Children's Court has power to 'hear and determine cases against children aged between 14 and 18 years old'.⁷²⁵ Section 83(1) provides that the Children's Court can hear charges against any person aged between 4 and 18 year old. This is subject to proof of criminal responsibility for persons under the age of 14. There is an apparent confusion as to whether section 83(1) lowers the age of *doli incapax* from 8 years in terms of section 13(1) of the Penal Code to 4 years. This is probably an error; however, there is a need to clarify the question of *doli incapax* as the law, as it now stands is contradictory.

In determining whether a person should be charged as a child or not, the Children's Act provides that the law should have regard to the age of the offender at the time they committed the offence.⁷²⁶

The age of criminal responsibility is not fixed at international law. The UNCRC does not set an age of criminal responsibility for children but merely provides states parties to the

⁷²¹ Article 1 UNCRC.

⁷²² Section 13(1) Penal Code.

⁷²³ Section 13(1) Penal Code.

⁷²⁴ Section 13(2) Penal Code and 82(1) Children's Act.

⁷²⁵ Section 36(2)(e) Children's Act.

⁷²⁶ Section 82(2) Children's Act.

Convention should establish a minimum age below which children are presumed not to have the capacity to infringe criminal law.⁷²⁷ The Beijing Rules⁷²⁸ provide that the age of criminal responsibility should not be fixed at too low a level bearing in mind the facts of emotional, mental and intellectual maturity. The commentary regarding this rule states as follows⁷²⁹

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility for delinquent or criminal behavior would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent for criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc. Efforts should thereof be made to agree on a reasonable lower age limit that is applicable internationally.

The age of criminal responsibility set for Botswana has not presented any challenges to date. Despite the dearth of statistics in this area, criminal behaviour among young persons is limited. Anecdotal evidence may be drawn from the fact that there were only 9 boys admitted at Ikago school of Industries as at June 2013.⁷³⁰ This facility admits juvenile offenders. The low number of juvenile offenders may also be explained by the fact that wayward behaviour in juveniles is often dealt with through traditional methods of family dispute resolution, which may be presided over by a local traditional leader or Kgosi and will rarely involve state authorities.

The Draft Policy Paper on Sentencing, 2013⁷³¹ has proposed the raising of the minimum age of criminal responsibility as a possible area for law reform with respect to children in conflict with the law. However, there does not appear to be much need for such proposed reforms

⁷²⁷ Article 40(3) UNCRC.

⁷²⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") General Assembly resolution 40/33 of 29 November 1985.

⁷²⁹ See Article 4 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") General Assembly resolution 40/33 of 29 November 1985 and Commentary thereto.

⁷³⁰ This information was provided by the Principal of Ikago School of Industries at the Workshop on the Draft Policy Paper titled 'Supporting the development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana', 3 June 2013, Attorney Generals Chambers Committee Room.

⁷³¹ 'Supporting the development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana' Draft Policy Paper, May 2013.

given the apparently low rate of criminal behaviour in juveniles.

Prior to the promulgation of the Children's Act 2009, there was some debate as to who could avail themselves of the protections of the Children's Act, 1981 in sentencing. The repealed Children's Act of 1981 was silent on whether a person charged with an offence was to be treated as a juvenile if he committed the offence whilst under the age of 18 but was tried whilst over the age of 18. There arose the practice in prosecutions of waiting until a suspect attained majority before charging him as an adult for the alleged crime. This practice has been the subject of some interesting decisions.

In *Oodira v The State*,⁷³² the Court of Appeal held as follows when considering when a suspect would be entitled to a trial and sentence before a Juvenile Court:

[T]he crucial determination in the age of a young person is the date of his sentence rather than the date of the commission of the crime.

It is difficult to accept that a juvenile offender could be deprived of a trial and a sentence under the Children's Act and the attendant privileges of being tried before a children's Court simply because of administrative processes that are inadvertently, but sometimes deliberately, slow. Nevertheless, this is the effect of the *Oodira* decision

In *State v Mfazi*,⁷³³ the Court took a different view and held that that it was not proper to delay the prosecution of a juvenile in order to have him tried as an adult. In this case, the accused was 16 when he raped a young girl aged 10. The accused was arraigned when he was 18 years old and tried as an adult. The Court noted that the accused ought to have been tried as a juvenile. However, the Court declined to interfere with his minimum mandatory sentence of 10 years because the accused received a competent sentence from a competent Court.

⁷³² 2006 (1) BLR 225 (CA).

⁷³³ 2009 1 BLR 168 (HC).

The Court also noted in *Mfazi*⁷³⁴ that a juvenile did not enjoy a right under the repealed Children's Act of 1981 to be tried in a Children's Court and that the DPP was at liberty to have the accused tried in a Children's Court or a Court of competent jurisdiction. This is a worrisome decision given Botswana's obligations under the UNCRC to provide an efficient juvenile justice system that treats juveniles differently because of their age and greater possibility of rehabilitation.

In *Mogodu v The State*⁷³⁵ Chinengo J held that a person who committed an offence as a juvenile but who was not a juvenile at the time of his trial could not benefit from the protections of the repealed Children's Act of 1981 and that the trial court need not be constrained in sentencing by the Children's Act. He also added that it was therefore important the juvenile cases be dealt with expeditiously.

In *Letsididi v The State*⁷³⁶ an offender, who was 16 at the time he committed the offence of manslaughter, was treated as an adult for purposes of sentencing in spite of the provisions of section 82(2) of the Children's Act, 2009. The decision in *Oodira* was cited with approval in *Letsididi*. Perhaps the Court was unaware of the protections of section 82(2) of the Children's Act 2009. Either way, it is submitted that the decision of the Court of Appeal in *Oodira* may be in need of reconsideration in light of Botswana's international obligations.

Dingake J adopted a different view in *Outwile & Ano v The State*⁷³⁷ where he states:

It is crucial to point out that the case of *Oodira* (supra) held that crucial determination in the age of a young person is the date of his sentence rather than the date of the commission of the crime (see also *Monnapudi v The State* (Crim App 39/08), unreported. Whilst I hold the view that it is just and proper that the culpability and/or moral blameworthiness of a wrongdoer should be assessed at the time of the commission of the offence, my view counts for nothing if it conflicts with that of the Court of Appeal. In fact this Court is bound by the decision of the Court of Appeal if the facts of the case under consideration are similar to that of the case of *Oodira* (supra).

⁷³⁴ 2009 1 BLR 168 (HC).

⁷³⁵ 2005 (1) BLR 384 (HC).

⁷³⁶ 2010 1 BLR 18 (CA).

⁷³⁷ 2010 2 BLR 389 (HC).

The *Outwile* case was decided under the old Children's Act. The view expressed by Dingake J in *Outwile* that the age of the offender at the time of commission of the offence should inform the Court in sentencing now forms the content of section 82(2). It is hoped that juveniles will be treated as such for purposes of trial and sentencing, the crucial determining factor being their age at the time of commission of the offence.

4 CONSTITUTIONAL CHALLENGES TO JUDICIAL CORPORAL PUNISHMENT

4.1 The *Clover Petrus* decision

The *Clover Petrus*⁷³⁸ decision was the first challenge to the constitutionality of corporal punishment in Botswana. Petrus and his co-accused were convicted by the Magistrates Court of housebreaking and theft contrary to section 305(1)(a) of the Penal Code as amended by the Penal Code (Amendment) Act of 1982. They were sentenced to three years imprisonment and corporal punishment. The case was reviewed at the High Court. The High Court Judge reduced the sentence by suspending two years of the imprisonment. The High Court Judge also reserved a question of law for determination before the Court of Appeal.

The question reserved for the Court of Appeal was as follows: "1. Does section 305(1) of the Penal Code make it mandatory for the Court to sentence the two accused to corporal punishment as prescribed by section 301(3) of the Criminal Procedure and Evidence Act if the Court were to sentence each to a term of three years imprisonment of which two years is suspended."

⁷³⁸ *Petrus and Another v The State* 1984 BLR 14 (CA).

This question was later augmented by two further questions. The first of these supplementary questions was whether corporal punishment as prescribed by section 301(3) of the CP&E was *ultra vires* as being in conflict with section 7 of the Constitution. This question was triggered by amendments to the Penal Code in 1982, which introduced a new and more severe kind of corporal punishment in which the strokes of the cane were to be administered periodically throughout the offender's sentence. The offending provision of the 1982 amendments read as follows:

...where a person is sentenced to undergo corporal punishment (...) such a person shall be given four strokes each quarter in the first and last year of his term of imprisonment⁷³⁹

The second supplementary question was whether the provisions of section 305(1) of the Penal Code with respect to imposing corporal punishment were mandatory or permissive.

With respect to the question whether corporal punishment should be imposed where the Court suspends part of the offender's sentence, the Courts answer was affirmative. With respect to the question on constitutionality of the 1982 amendments that ushered in periodic administration of corporal punishment, the Court of Appeal ruled that this provision could not stand and that it was null and void founding that "repeated and delayed infliction of corporal punishment was unconstitutional".⁷⁴⁰ The Court declined to rule on the broader question of the constitutionality of corporal punishment. The final question as to whether corporal punishment was mandatory in the scheme of the Penal Code the Court answered in the affirmative. The reasoning for this decision is found in Aguda JA's separate judgement where he states:

... [T]he argument of Mr. Hodes was to the effect that any punishment which makes it mandatory for an order of corporal punishment to be tacked upon a terms of imprisonment whenever the latter is imposed must be held to be inhuman or degrading or both. There is no doubt that the Courts should frown on legislation which tends to take away from them (or from other independent body specially created for that purpose) the power to calculate punishment to fit the circumstances of the offender as well as the circumstances in which the offence was committed. But in this case, if the National Assembly decides to

⁷³⁹ *Petrus and Another v The State* 1984 BLR 14 (CA) 19C.

⁷⁴⁰ 19D-F.

lay down what in some sense amounts to minimum punishment, then I am not prepared to hold that such punishment ipso facto amounts to inhuman or degrading punishment. In the result therefore, it is quite clear to me that the provision of the Penal Code which makes it mandatory for a Court to make an order for corporal punishment along with a term of imprisonment cannot be held to be inhuman or degrading especially when one considers the gravity of the offences in respect of which this terms of punishment is prescribed.⁷⁴¹

By so holding, the Court of Appeal defended mandatory orders of corporal punishment attached to a custodial sentence by statute as constitutional.

The *Clover Petrus* judgement is significant. *Clover Petrus* was a missed opportunity for the Court of Appeal to pronounce on the constitutionality of corporal punishment in Botswana. Perhaps the challenge to constitutionality was ahead of its time. One can only speculate whether the Court of Appeal would arrive at a similar decision if the same question were posed today.

In the separate judgement of Aguda JA, one of the Judges of Appeal in the *Clover Petrus* case indicated that the Court had been addressed by counsel on developments on the international plane towards the abolition of corporal punishment. Nevertheless, the Court of Appeal was not swayed. Aguda JA states,

I have no doubt in my mind that judicial flogging of an adult is a degrading form of punishment, but so long as the world community has not reached that stage when it can be abolished throughout the world, just as slavery has been abolished, then it must continue to exist in some countries.⁷⁴²

Aguda JA concluded that section 7(2) of the constitution was effectively a savings clause preserving judicial corporal punishment as a lawful sanction in Botswana in the face of section 7(1) which outlawed cruel and inhuman punishment.

30 years have elapsed since *Clover Petrus* and there have been no further constitutional challenges to corporal punishments in the Botswana Courts. Recently however, a new

⁷⁴¹ 41 E-H.

⁷⁴² 39H–40A.

phenomenon of extrajudicial floggings has appeared which has catapulted judicial corporal punishment into the spotlight once again. Extrajudicial floggings shall be discussed below.

4.2 The *Desai* decision

In *Desai and Others v The State*⁷⁴³ the Court of Appeal considered the legality of a long term sentences handed down to the three appellants who had been convicted of drugs offences and sentenced to prison terms coupled with mandatory corporal punishment and mandatory fines. The appellants challenged the sentences on the basis that they were cruel, inhuman and degrading contrary to section 7 of the Botswana Constitution. Maisels P. came to the conclusion that judicial corporal punishment was not unconstitutional relying on the previous decision in *Clover Petrus*. He stated:

Much as I may personally dislike a sentence of corporal punishment and despite the fact that judicial flogging has been abolished in many countries of the civilised world, the stage has not yet been reached where it can be said that it has been abolished, like slavery throughout the world. Cf. *Petrus* per Aguda J.A. at p. 39. H.⁷⁴⁴

The judge did find however that the combined sentence of long term imprisonment coupled with a fine and corporal punishment was cruel, inhuman and degrading.

In a separate opinion in the same case, Aguda JA stated that corporal punishment was inhumane, degrading and dehumanising on the person inflicting it, as well as his prisoner:

I must express my dissent in regard to certain observations of the learned President which are merely *obiter*. In his judgment he expressed his personal opinion that corporal punishment of even an adult is not per se inhuman or degrading in all circumstances. After very sober consideration and having given due respect to this opinion I find I have to say that I am convinced beyond any shadow of doubt that the mere imposition of corporal punishment is under any circumstances at this time and age certainly degrading if not inhuman. Serious offences may demand aggravated punishment - and even then within the limits of human decency - but the imposition of corporal punishment - is not meant to serve any of the ends of punishment as are now regarded the world over as justified. The main purpose of the criminal process must be to reduce if not totally eliminate the incidents of crime, and that end is not served by the imposition of corporal punishment. Incarceration either in prison custody or in some places of treatment assures the society that the person under such incarceration is unable to do more harm to society during such period of incarceration. The imposition of fines does, in certain circumstances into which it is unnecessary to go here, serve some acceptable ends of justice. It appears to me however that corporal punishment may deter adult persons who are mindful of committing minor offences by the very reason of its degrading nature. Beyond that it does

⁷⁴³ 1987 BLR 55 (CA)

⁷⁴⁴ 1987 BLR 55 (CA) 62

not appear to me to serve any purpose other than to dehumanise both the person who administers it as well as the person upon⁷⁴⁵

By majority decision, the *Desai* case reaffirmed the constitutionality of judicial corporal punishment in Botswana.

4.3 The *Kgafela Kgafela* decision⁷⁴⁶

The question of corporal punishment has come to the fore again in the *Kgosi Kgafela Kgafela* matter when *Kgosi Kgafela*, the chief of the *Bakgatla*, was accused of extrajudicial flogging and charged with assault. In May 2010, the Director of Public Prosecutions indicted *Kgosi Kgafela*, his younger brother *Mmusi Kgafela*, the *Bakgatla Motshwarelela Bogosi* (regent) *Bana Sekai Linchwe* and 11 other *Bakgatla* tribesmen on a charge of assault occasioning actual bodily harm contrary to section 247 of the Penal Code. It was alleged that they had flogged or instructed others to flog the complainants after the alleged commission of offences under Customary Law.

The *Bakgatla* tribesmen sought to have some constitutional issues, which they claimed arose from the charges, decided by the High Court before the trial before a magistrate could proceed. The *Bakgatla* tribesmen posed the following legal questions to the High Court. First, whether ‘*go kgwathisa*’ or flogging on the bare back was a lawful sanction for rule infraction under Customary Law; second, whether the *Kgosi* had the right to employ the sanction of ‘*go kgwathisa*’; third, the nature and extent of the *Kgosi*’s powers; and fourth whether *Kgosi* and a *Motshwarelela Bogosi* were protected from criminal prosecution for flogging in pursuance of their duties.

In support of their position that the *Kgosi* was empowered to administer corporal punishment

⁷⁴⁵ 1987 BLR 55 (CA) 65 – 66.

⁷⁴⁶ *Kgafela Kgafela and 13 Others v The State* CLHLB 000148 – 10 (unreported).

and protected by law in the exercise of his duties, the *Bakgatla* tribesmen argued that under Customary Law, the *Kgosi* had the power to impose corporal punishment and to designate persons to exercise that power on his behalf. They argued that Statutory Law had not limited the *Kgosi's* powers in this regard, that the acts of flogging were therefore lawful, that the *Kgosi's* powers constituted rights enshrined in the Constitution, and that the prosecution of the accused persons for exercising their Constitutional rights entitled them to seek the intervention of the Court under section 18(3) of the Constitution.⁷⁴⁷

The accused persons sought relief under section 10(12)(e) of the Constitution which gave Customary Courts the authority to convict a person of a criminal offence under any Customary Law to which such a person in subject. They argued that Statutory Law did not reduce the *Kgosi's* powers but served to enhance them.

The State in response to the application argued that the *Kgosi* and *Motshwarela Bogosi's* powers were prescribed and regulated by various acts of parliament. The state maintained that the powers that the *Bakgatla* tribesmen claimed to be exercising were inconsistent with the provisions of the Constitution. They state's position was that even if it were to concede that the *Bakgatla* tribesmen had the power to exercise corporal punishment, that power had to be exercised in a Court forum through which due process was observed. This process entailed giving the accused person a fair hearing in a *Kgotla* before any punishment was imposed. Lastly, the State argued that *Kgosi* Kgafela had in any event abdicated his functions and power as *Kgosi* and that the *Motshwarelela Bogosi* recognised by the minister in terms of section 7 of the Bogosi Act was vested with those powers. In effect, the state was arguing that as an abdicated chief, *Kgosi* Kgafela had no claim to such powers, if indeed they existed.

⁷⁴⁷ Section 18(3) of the Constitution provides 'If in any proceedings in any subordinate Court any question arises as to the contravention of any of the provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious'.

During the hearing of the appeal, the parties agreed that some matters were common cause. First, the parties agreed that corporal punishment is recognised under the law and is enforceable by both customary and Common Law Courts within accepted legal parameters. Secondly, that the *Kgosi Kgafela* and the *Motshwarelela Bogosi* was legally recognised by the Minister as required by section 7 of the Bogosi Act.

The Court considered the scope and content of the *Kgosi's* power to administer corporal punishment. On the centrality of due process in Botswana, the Court held that due process is a fundamental principle of the law recognised under both Common Law and Customary Law. The Court noted that in *Arbi v the Commissioner of Prisons*,⁷⁴⁸ the right to be heard was recognised as a cornerstone of natural justice. The Court held that due process underpins the respect that traditional communities placed in the *Kgotla* system.

On the question of source of the *Kgosi's* power to impose corporal punishment, the Court made several observations. Citing *Attorney General v Dow*⁷⁴⁹ and *Good v The Attorney General (2)*⁷⁵⁰ with approval, the Court began by stating that Botswana is a liberal democracy with a constitution that is the supreme law of the land. Further, that section 10(2)(e) of the Constitution authorised a Court to convict a person of a criminal offence. This authority, the Court emphasised, was given to the Court and not to the person of the *Kgosi* who is a mere functionary or office holder.

The Court went on to emphasise that the *Kgosi* was not above the law and that his powers were not enhanced by statutory enactments concerning Bogosi, but in fact the Chief's powers were curtailed, circumscribed and regulated by those very enactments. The Court noted

Before the advent of colonial rule, the powers of the chiefs (DiKgosi) were not regulated in the way it is today. Chiefs were absolute rulers of their tribes. They were kings. They were sovereign. They had and

⁷⁴⁸ 1992 BLR 246 (CA) 251.

⁷⁴⁹ 1992 BLR 119 (CA) 168.

⁷⁵⁰ 2005 (2) BLR 337 (CA) 343.

wielded executive, legislative and judicial powers in their hands. They had the power of life and death of their subjects in their hands. It may well have been at that stage that the Customary Law set up was, as argued by Mr. Brassy, in its pristine and primordial state. But Customary Law like civil law is dynamic. Its changes and develops with time. It is not a monolith that withstands the vicissitudes of time and change. Over time, both colonial oversight and political awareness with the coming of nationhood at a level above the tribal state, has eaten away some of those powers for the greater good of the democratic nation state... With the legislature having gone to length in putting into place statutory enactments like the Bogosi Act and the Customary Courts Act, it is in the context of the above contextual backdrop untenable to argue that these statutory enactments did not circumscribe but increased the chief's powers. It is also untenable that the Constitution could have contemplated that any institution of the state or functionary of tribe would have undefined and unregulated power. That argument is the antithesis of the spirit and character of the constitution.⁷⁵¹

Having established that the Chief is a subject of the nation state and subject to its constitution, the Court went on to note that the Chief was regulated in his powers and the conduct of his duties by the Bogosi Act (Chieftaincy Act). The Court noted that the Bogosi Act did not increase the Chief's powers or merely enact some and leave others unregulated and undefined. In fact, the Court held that the Bogosi Act set out the Chief's functions and powers and established regulatory structures for the supervision of Bogosi by the relevant Minister.

The Court noted that as a recognised chief, *Kgosi Kgafela* had placed himself squarely within the parameters of the Bogosi Act. He was entitled to enjoy the protection that goes with recognition under the Act but he was bound to exercise his powers and functions within the parameters of the Act. The Court held that the chief had no power to act outside the parameters of the Act.

Consequently, the Court held that the *Kgosi* could not act outside the parameters of the law *'to exercise unwritten law, to impose undefined and unregulated coercive power, corporal punishment included'*.⁷⁵²

With regard to *Kgosi Kgafela* and *Kgosi Linchwe Sekai*'s co-defendants, the Court ruled that

⁷⁵¹ *Kgafela Kgafela and 13 Others v The State* CLHLB 000148 – 10 (unreported) [42].

⁷⁵² *Kgafela Kgafela and 13 Others v The State* CLHLB 000148 – 10 (unreported) [48].

law enforcement was the province of the Police and other law enforcement organs of state. The Court took the view that *mephato*, who in the old days served as the *Kgosi's* law enforcement organs, no longer have any recognition in the present scheme of governance. The Court ruled that the institutions of *mephato* had no legal power of enforcement or policing.

Referring the case back to the High Court for trial on the assault charge, the Court ruled that the *Kgosi* could not act outside the Constitution and statute and thus flogging or 'go *kgwathisa*' had to be applied in accordance the enabling statute.

The *Kgafela* decision was concerned with the manner of imposition of corporal punishment under Customary Law today. The judgement was a reminder that Customary Courts now operate under the auspices of the executive and no longer under the authority of tribal chiefs. Tribal chiefs are no longer sovereigns but were subject to the Constitution and the statutes regulating their powers, functions and duties. Lastly, the imposition of corporal punishment as a coercive measure had to be in accordance with the constitution and any enabling statute.

In remitting the case back to the Magistrates Court, the High Court was effectively requiring the Lower Court to determine if the corporal punishment meted out to the complainant was done lawfully. The Magistrate's Court when receiving evidence would have to enquire into whether the offender had a fair hearing before a properly constituted Customary Court for the infraction of a written law. The Magistrates Court would also enquire into whether the penalty of corporal punishment was administered in accordance with the statutory rules promulgated in that regard. If the Magistrates Court finds that *Kgosi* Kgafela and his co-accused did not follow Statutory Law in trying, convicting and punishing the complainant, then they will be amenable to a conviction for assault. The case against the Chief has stalled

as he has since fled to South Africa.

5 BOTSWANA'S OBLIGATIONS UNDER INTERNATIONAL LAW

There is no international prohibition against judicial corporal punishment. Nevertheless, numerous states have abolished the exercise of corporal punishment in their jurisdictions on the basis that it amounts to cruel and inhuman treatment or punishment. Corporal punishment is also not available as a penalty in international criminal tribunals and the international criminal Court. Nevertheless, a number of states still maintain and utilise judicial corporal punishment.

Botswana is a state party to the Universal Declaration on Human Rights (UDHR), the African Charter on Human and Peoples Rights (ACHPR), the International Convention on Civil and Political rights (ICCPR) and the Convention against Torture (CAT). Each one of these treaties prohibits torture, cruel, inhuman and degrading treatment.⁷⁵³ Botswana is a dualist state. In order for these treaties to have force of law in Botswana, they must go through the process of domestication.⁷⁵⁴ This would require the promulgation of national laws to give effect to these international obligations.⁷⁵⁵

Botswana has a constitutional prohibition against torture, cruel inhuman and degrading treatment in section 7(1) of the Constitution. However, in an interesting legal manoeuvre, the founding fathers of the Constitution included a savings clause which limits the extent of

⁷⁵³ Article 5 Universal Declaration of Human Rights; Article 5 African Charter on Human and Peoples Rights, Article 7 International Covenant on Civil and Political Rights, Article 2 Covenant against Torture.

⁷⁵⁴ OB Tshosa 'The Status and Role of International Law in the National Law of Botswana' in *Essays on the Law of Botswana* (2008) 229 at 230.

⁷⁵⁵ *Kenneth Good v The Attorney General* 2005 (2) BLR 337 (CA) 345 – 346.

application of the prohibition against cruel inhuman or degrading treatment or punishment. Section 7(2) of the Constitution, preserves as lawful as punishments imposed by law before the promulgation of the Constitution. The Constitution was promulgated in 1966. Corporal punishment was practiced lawfully in Botswana well before 1966 and was legislated for in the first Penal Code in 1964. Therefore, the savings clause effectively legitimises corporal punishment in Botswana.

Perhaps reflecting the realities at play, Botswana has also entered a reservation to the ICCPR regarding the definition of torture, cruel and inhuman treatment, which Botswana maintains must be in keeping with its Constitution.⁷⁵⁶ The effect of the reservation is that corporal punishment remains legal and enforceable, and that corporal punishment is excluded from the bounds of the definition of cruel and inhuman treatment or punishment. This may appear to be an absurd set of provisions that legitimise what many in the world frown upon as a form of institutionalised violence. That notwithstanding, Botswana has continued to resist the prohibition of corporal punishment. In the concluded second Universal Periodic Review, Botswana rejected recommendations from several countries to eliminate corporal punishment, particularly of children.⁷⁵⁷

There are several reasons why corporal punishment has such a strong foothold in Botswana and why it is difficult to dislodge. These are discussed below.

⁷⁵⁶ The reservation is set out in full above.

⁷⁵⁷ UPR INFO, 'Recommendations and Pledges Botswana Second Review Session 15', available at http://www.upr-info.org/IMG/pdf/recommendations_and_pledges_botswana_2013.pdf (accessed 20 January 2016).

6 ALTERNATIVES TO JUDICIAL CORPORAL PUNISHMENT

6.1 Alternatives for adult offenders in Botswana

Extra-mural labour is the only method available for diverting offenders sentenced to less than twelve months imprisonment or a fine not exceeding Eight Hundred Pula in Botswana.

Section 97 of the Prisons Act⁷⁵⁸ provides as follows:

Notwithstanding the provisions of this Act or any other law, an offender who has been sentenced to a term of imprisonment not exceeding twelve months (whether that term consists of a single punishment or punishments running concurrently or consecutively) or who has been committed by any court for non-payment of a fine not exceeding P800, may, by order of the court and with the consent of the offender, be employed under the immediate control and supervision of a public authority on public work or service carried on outside prison.

This method of diversion is very limited in its application as it is not available as an alternative to a sentence of judicial corporal punishment, larger fines, or to persons convicted to serve terms longer than 12 months. Extra-mural labour is widely used by customary courts. Ordering public work at the *Kgotla* is possible for Customary Courts as the Chief can easily identify what tasks require doing at the *Kgotla*. Supervision is also possible using *Kgotla* staff. Finding the offender in his village, should he abscond, is also not a challenge as family, and neighbours would be familiar with his whereabouts.

The researchers personal experience shows that it is never ordered in Common Law Courts. This is because there is no designated Public Authority to take charge of the prisoner and ensure that he has some work allocated to him and that he is properly supervised. The possibility of the convict absconding in large commercial centres is high and discourages the use of this sentencing option.

⁷⁵⁸ Chapter 04:05 Laws of Botswana.

6.2 Alternative sentencing options for juvenile offenders

Judicial corporal punishment is one of several sentencing options available for children in Botswana. Other available options are probation, the admittance to the School of Industries, community service and imprisonment.⁷⁵⁹ The extensive use of corporal punishment by Botswana courts is caused to a large extent by administrative difficulties bedevilling other alternatives to imprisonment available for juvenile offenders. The alternative sentencing options and their particular difficulties are discussed below.

6.2.1 Probation

The Children's Act provides that the Court may sentence a juvenile offender to probation for a period of 6 months to 3 years.⁷⁶⁰ The probation order works as a good-behaviour bond. The Court is required to inform the juvenile offender clearly in a language that he understands the terms of their probation and inform the juvenile offender that should he breach the terms of the probation, he will be sentenced for the first offence and any other offence for which he may subsequently be tried. Once a sentence of probation is handed down, the juvenile's probation officer should receive a copy of the order. A probation order may be varied at the instance of the offender or his probation officer.⁷⁶¹

The Minister is empowered to appoint probation officers who must be of good character and qualified to work with children, as well as Probation Committee to oversee the work of probation officers.⁷⁶² The functions of probation officers include: Risk assessment of the offender; preparing a pre-sentence report for the Court; devising and implementing measures to reduce delinquency in children; and supervising probation and resettling children released

⁷⁵⁹ Section 85(a) – (e) Children's Act.

⁷⁶⁰ Section 85(a) Children's Act.

⁷⁶¹ Section 86(1) and (2) Children's Act.

⁷⁶² Section 91(1), 91(2) and 92 Children's Act.

from prison back into the community.⁷⁶³

There is currently no probation service in Botswana and the Minister has not appointed any Probation Officers. Social Welfare Officers have yet to be trained in this role carry out the tasks envisaged for probation officers.⁷⁶⁴ This institutional gap hampers the administration of the system dealing with children in conflict with the law.

6.2.2 Ikago School of Industries

The Children's Act provides that pursuant to a conviction for an offence in a Children's Court, children may be sent to a School of Industries for a period not exceeding three years or until the age of 21.⁷⁶⁵ Botswana has one School of Industries, Ikago, at Molepolole. The School can admit up to 100 children. However, data from 2013 showed only 9 admissions at the School. At its height, admission was 48 boys in 2009. The mandate of the School of Industries was to cater for children in conflict with the law from the age of 8 – 18 years and to provide a place of safety for children in need of care aged 8 – 14 years.

The School has been criticized as being 'underutilized'⁷⁶⁶ and 'having lost its way'.⁷⁶⁷ Some of the concerns raised in the Draft Policy Paper on Sentencing are that:⁷⁶⁸

- The School is designed as a place of safety and not a prison and that security is lax;
- there is a poor relationship between the boys admitted at the School and villagers making it difficult to gain community acceptance of the boys;

⁷⁶³ Section 91(3) Children's Act.

⁷⁶⁴ Draft Policy Paper 'Supporting the Development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana', May 2013 at 101.

⁷⁶⁵ Section 85(b) Children's Act.

⁷⁶⁶ Draft Policy Paper 'Supporting the Development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana', May 2013 at 101.

⁷⁶⁷ Draft Policy Paper 'Supporting the Development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana' May 2013 at 101.

⁷⁶⁸ Draft Policy Paper 'Supporting the Development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana' May 2013 at 100 – 102.

- poor literacy skills of the boys admitted means they cannot take full advantage of the vocational courses offered at the School;
- the School functions without any regulations;
- the School has no specialist staff in the areas of child psychology, criminology or child justice;
- there is no structure of discipline at the School and there is a need for a structured rehabilitation program;
- the School's mandate as a place of safety is not utilised but is solely focused on detention of children in conflict with the law;
- the School should be moved from the remit of the Ministry of Local Government and placed under the Ministry of Justice, Defence and Security where its facilities may be utilised to better assist in the rehabilitation of juveniles and young offenders aged 18 – 21 who are currently housed at Moshupa boys prison which does not have adequate facilities.

Given these difficulties with the running of the School of Industries, it is not surprising that judicial officers lean in favour of judicial corporal punishment when sentencing juveniles.⁷⁶⁹

6.2.3 Community service

Community Service is the third sentencing option available to Children's Courts in terms of

⁷⁶⁹ In *Benjamin Skitom Nisbert v The State* H. Ct Cr. App. No. 209 of 1983 (unreported) Justice Corduff disagreed with the imprisonment of a 16 year old boy at Gaborone Central Prison by the Lower Court which had ordered that he be sent to a reformatory for 18 months. There was no reformatory in Botswana at the time. The child was simply jailed. Justice Corduff commented that a court should not in good conscience send a child to a jail. He suggested that Government set up reformatories but maintained that reformatories devoid of appropriate legislation would merely be prisons.

the Children's Act.⁷⁷⁰ This sentencing option is not being utilised in Common Law Courts because structures and regulations for its implementation have not been created. Community service is a valuable method of diverting offenders from custodial sentences. Community Service is currently not operational in Botswana. It is lamentable that the Children's Act has been in force for over 5 years without the necessary structures and regulations to implement this sentencing option. There is also a clear need for community service regulations.

Community service is already operational in the Customary Courts where adult offenders are sentenced to extra mural labour in terms of section 91 of the Prisons Act. It would be useful to see Children's Courts better utilize the possibility to sentence juveniles to extramural labour under section 91 of the Prisons Act.

6.2.4 Imprisonment of children

The Children's Act provides that a Children's Court may sentence a child to imprisonment for repeat offences.⁷⁷¹ The rationale for the introduction of imprisonment is not clear in view of the fact that article 37 of the UNCRC provides that imprisonment of children should be used only as a last resort. The only restraint reflected in the Children's Act 2009 is that imprisonment is reserved for second and subsequent convictions.⁷⁷² It is submitted that the lack of a custodial sentence option may have been viewed as limiting, as there were cases where criminal behaviour in children required stiffer penalties. This can be surmised from the fact that repeat offenders must be sent to prison under the Children's Act of 2009.⁷⁷³ It is debatable whether this new development is an improvement to be applauded or a step

⁷⁷⁰ Section 85(c) Children's Act.

⁷⁷¹ See section 85(e) as read with section 88 Children's Act. This is a radical departure from the Children's Act of 1981 that did not provide for the imprisonment of children. Sentences of imprisonment imposed on children were unsupportable and struck down in numerous cases e.g. *State V. Molaudi and Others* 1988 BLR 214 (CA); *State v Khudung* 1988 BLR 281 (HC); *Dikgang v The State* 1990 BLR 329 (HC); *Moseki v The State* 1990 BLR 171(HC).

⁷⁷² Section 88 Children's Act.

⁷⁷³ Section 88 Children's Act.

backwards in child protection terms.

7 DISCOURSES

7.1 Popular opinion

The acceptance of corporal punishment as disciplinary tool is deeply engrained in Tswana society. Corporal punishment remains legal in the home and at schools. Judicial corporal punishment was and remains part of Tswana Law and Custom and is readily applied as a sanction in Customary Courts.

The recent review of the Children's Act brought this issue to the fore. The Children's Act 2009 states that parents have a duty to respect the child's dignity and refrain from administering discipline, which violates the dignity of the child or affects the physical, emotional and psychological wellbeing of the child.⁷⁷⁴ Incredibly, this provision is followed by another that maintains the legitimacy of corporal punishment as set out in the Children's Act, the Penal Code or any other law.⁷⁷⁵

The Children's Act also provides that children are not to be subjected to torture, cruel and inhuman punishment, or correction that is unreasonable in kind or degree having regard to the child's age, physical and mental condition.⁷⁷⁶ However, corporal punishment is again excluded from the definition of torture, cruel or inhuman treatment or punishment.⁷⁷⁷ The Education Act⁷⁷⁸ and Regulations⁷⁷⁹ also provide for corporal punishment in schools, provided it is administered as a last resort and in a moderate and reasonable manner.

⁷⁷⁴ Section 27(4)(h) Children's Act 2009.

⁷⁷⁵ Section 27(5) Children's Act 2009.

⁷⁷⁶ Section 61(1) and 61(2) Children's Act 2009.

⁷⁷⁷ Section 61(3) Children's Act 2009.

⁷⁷⁸ Section 29 Education Act.

⁷⁷⁹ Education (Corporal Punishment Regulations) 1968; Education (Government and Aided Secondary Schools) Regulations 1978; Education (Primary Schools Regulations) 1980; Education (Private primary Schools Regulations) 1991.

It comes as no surprise therefore that judicial corporal punishment remains legal and unchallenged in Botswana. Since the idea that corporal punishment of children could be done away with is unacceptable to many in Botswana, it follows that the challenge of eliminating judicial corporal punishment is even greater.

7.2 Extrajudicial flogging

Extrajudicial flogging has recently taken centre stage in the discourse about corporal punishment in Botswana. A recent newspaper report stated that a breastfeeding mother had been thrashed on her bare back by customary authorities without the benefit of a trial. It was reported as follows:

A breastfeeding mother has become the latest victim of public bareback floggings meant to arrest wayward behaviour in Ramotswa. The floggings, driven by the deputy paramount chief aided and abetted by the new traditional regiment that graduated last spring, have for weeks gone abated. Sthando Rakgokong (26), the mother of a ten month old baby, claims to have been forcefully asked to strip by traditional authorities before she was whipped on her without being accorded a trial at all. She alleges that her crime was her failure to name a bunch of young men imbibing opaque traditional beer under a tree before liquor trading hours in the vicinity of her neighbourhood. Her protestation that she did not know the young men fell on deaf ears, including those of the deputy paramount chief who simply ordered that she be flogged without being tried, she said.⁷⁸⁰

Customary Courts in Botswana are empowered to try criminal offences under the Penal Code that often have corporal punishment as a penalty.⁷⁸¹ There are manifest problems with the administration of corporal punishment in Customary Courts. First, as evidenced by the *Kgafela* matter and the newspaper excerpt above, the problem of overreaching of traditional authorities through extrajudicial administration of corporal punishment is manifest ; second, the administration of corporal punishment in excess of the prescribed number of strokes and on the back in the traditional manner disregarding the prescribed manner for administration;

⁷⁸⁰ E Tsimane 'Ramotswa Regiment Whips a Breastfeeding Mother' The Telegraph 13 February 2013.

⁷⁸¹ Crimes under Customary Law were suppressed by the Botswana Government through a deliberate policy to unify criminal law and restrict crimes tried in both Common Law Courts and Customary Law Courts to those found in written law. See IS Malila, Codified Law and the changing normative context of disputes in traditional settings in Botswana' *Canadian Journal of African Studies* (2015) 49(2) 267.

third, the administration of corporal punishment by unauthorised individuals like tribal regiments (*Mephato*); fourth, the administration of corporal punishment on women.

These problems are compounded by the fact that the Customary Courts structure has what can be regarded as institutional challenges that infringe on fair trial.⁷⁸² Notably, lawyers are not permitted in Customary Courts and further, the presiding officers are often not legally trained. The absence of safeguards for due process like legal representation and legally trained arbiters adds to the risk that corporal punishment may be imposed in circumstances where it ought not to be.

7.3 Lack of a robust alternative sentencing system

In a pragmatic opinion on the possibility of abolition of corporal punishment and other forms of cruel inhuman and degrading treatment, Neff has noted that many African states do not have robust sentencing systems as are employed in the west.⁷⁸³

This is true of Botswana whose alternative sentencing options are limited to security to keep the peace and to be of good behaviour and extramural labour, which has no proper institutional structures to enable it to operate effectively. To successfully abolish judicial corporal punishment it is imperative that Botswana put into place a robust alternative sentencing regime.

7.4 Summary of challenges facing Botswana in abolishing judicial corporal punishment

The possibility of a prohibition of judicial corporal punishment in Botswana seems remote.

⁷⁸² DG Boko 'Fair trial and the Customary Courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 445 at 458-460.

⁷⁸³ SC Neff 'Human rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the light of case law from Botswana, Lesotho and Swaziland' (1984) 33(3) *The international and Comparative law Quarterly* 331 at 339.

The punishment is entrenched in Customary Law and is embraced and still practiced by a large section of Botswana's population. The symbiotic relationship between Customary Law and Statutory Law in Botswana, which enables Customary Courts to apply statutory criminal law, has also cemented the legitimacy of judicial corporal punishment in Botswana society. This is because the sanction is legal in both Customary Law and Statutory Law. Corporal punishment is also applied in Customary Courts against juvenile offenders as part of the informal Tswana dispute resolution system, the regulation of which would prove to be difficult.

Constitutional challenges to the legality of corporal punishment have so far failed. It appears that the Courts have their finger on the pulse of the nation and would be reluctant to adopt a position grossly disparate from the more commonly held views on judicial corporal punishment.

However, reported instances of overreaching by Customary Courts in the imposition of corporal punishment, sometimes without the benefit of a trial, may be the basis to assail judicial corporal punishment and advocate for reform. It is submitted that a departure from the use of judicial corporal punishment in Botswana's legal system is long overdue.

This section was a discussion of judicial corporal punishment in Common Law Courts and Customary Courts in Botswana against both adult and juvenile offenders. The section is intended to introduce the reader to the history of the administration of judicial corporal punishment in Botswana. This was followed by an exposition of the statutory rules governing corporal punishment in Botswana. The section then traversed constitutional decisions on the question of corporal punishment by discussing the *Clover Petrus* decision, which outlawed the repeated and delayed imposition of corporal punishment but side-stepped the question of constitutionality of the judicial corporal punishment and, the *Kgafela* decision on

constitutionality of extrajudicial flogging. The discussion ends with an identification of current discourses on corporal punishment in Botswana. Having set out the background, the comparative discussion into the treatment of corporal punishment in other jurisdictions follows below.

8 COMPARATIVE JURISPRUDENCE

Judicial corporal punishment remains lawful in Common Law and Customary Courts of Botswana to date. Arguments for the abolition of judicial corporal punishment in Botswana can be made from the comparative perspective. In *State v Williams*, Langa J, made the case for the relevance and instructive value of comparative jurisprudence as follows:

While our ultimate definition of these concepts [which prohibit torture, cruel, inhuman and degrading treatment] must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights, may be gained from the manner in which the concepts are dealt with in public international law as well as foreign case law.⁷⁸⁴

The aim of the next section is to provide a survey of the manner in which a prohibition of corporal punishment was achieved in several select jurisdictions in order to gain insight and a possible roadmap for how the same prohibition may be achieved in Botswana. Zweigert and Kotz have stated that the primary aim of comparative law is knowledge, which offers the scholar the opportunity to find a better solution for his time and place.⁷⁸⁵ The comparative method enables the researcher to see how similar legal objectives can be achieved using different legal rules and different institutions.⁷⁸⁶ The aim of this section is to analyse and evaluate how a similar outcome, which is the prohibition of corporal punishment in Botswana, can be achieved using the experience of several selected comparative jurisdictions.

⁷⁸⁴1995 (3) SA 632 CC [23].

⁷⁸⁵ K Zweigert & H Kotz trans T Weir *Introduction to comparative law* 3rd Edition (1998) 15.

⁷⁸⁶ J Bell 'Legal research and comparative law' in M van Hoecke (ed) *Methodologies of legal research* (2011) 158; K Zweigert & H Kotz trans T Weir *Introduction to comparative law* 3rd Edition (1998) 16.

The jurisdictions to be examined are South Africa, Zimbabwe, Namibia, the United Kingdom, and the United States. The selection of this jurisdiction is based on two criteria. The first three jurisdictions, South Africa, Zimbabwe and Namibia have been selected as Botswana's geographical neighbours who have a shared legal history as jurisdictions following the Roman-Dutch Law tradition. The United Kingdom is selected for her historical colonial influences on Botswana as Botswana was a protectorate of the United Kingdom from 1892 to her independence in 1966. The United States is selected as a developed nation following the Common Law tradition.

8.1 South Africa

Before the prohibition of judicial corporal punishment in South Africa, the punishment had been a part of the South African criminal justice system since before the British colonial era. In the 17th century when Roman-Dutch Law was the law of the Cape, judicial corporal punishment was in use, but reserved for minor offences.⁷⁸⁷

In 1806, the British took over the rule of the Cape and English law influences began to permeate into Roman-Dutch law. The Criminal Procedure Act, 1928,⁷⁸⁸ and the Evidence Act, 1930⁷⁸⁹ introduced into the Cape Colony rules of criminal law based on English Law. Judicial corporal punishment was part and parcel of these laws.⁷⁹⁰

By 1860, the Cape Colony and Transvaal allowed the imposition of up to 30 strokes in the magistrate's Court and up to 50 strokes in the Supreme Court. The Orange Free State allowed

⁷⁸⁷ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

⁷⁸⁸ No 40 of 1828.

⁷⁸⁹ No 72 of 1830.

⁷⁹⁰ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

a maximum of 24 strokes.⁷⁹¹ Limitations on the number of strokes and the manner of administration were decided by the judiciary at the time. For instance, in 1880, in *R v Nortje*,⁷⁹² a rule against the deferment of judicial corporal punishment until part of the sentence imposed on the offender had been served was criticised. The infliction of judicial corporal punishment in instalments was outlawed in the same case. In 1911, the Transvaal Supreme Court held that 10 strokes of the cane was a serious punishment which should only be imposed in exceptional circumstances.⁷⁹³

In 1944, The Magistrates Court Act⁷⁹⁴ limited the number of strokes that could be imposed by a magistrate to 10. The use of the cat-o-nine tails or the lash by order of magistrates was removed and restricted to the Supreme Court by the same statute.

In 1945, The Lansdown Commission⁷⁹⁵ was appointed to report on penal and prison reform in South Africa. In the 1947 report, the Lansdown Commission made recommendations with regard to judicial corporal punishment. The commission noted that judicial corporal punishment had been abolished in most civilised countries around the world.⁷⁹⁶ In spite of this, the recommendation of the Commission was that judicial corporal punishment should be retained in South Africa. Certain limitations were proposed including reduction of the maximum strokes that that could be imposed to 8 for adults and 5 for juveniles. The Commission also recommended that there should be a prohibition on whipping of a person on more than two occasions.

⁷⁹¹ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

⁷⁹² [1880] 1 EDC 231.

⁷⁹³ *R v Kambala* 1911 TPD 239.

⁷⁹⁴ No 32 of 1944.

⁷⁹⁵ The Report of the Commission on Penal and Prison Reform, Government Printer, Pretoria, 1947.

⁷⁹⁶ *State v Williams and Others* 1995 (3) SA 632 CC [12].

The Commission proposed that a person should not be whipped if it would be likely to cause serious physical or psychological harm to the offender. The Commission recommended the abolition of the cat-o-nine-tails, also called the lash, as it had fallen into disuse. Yet, none of these recommendations were implemented. The political climate in South Africa changed with the election of an Afrikaner Nationalist government in 1948. This government entrenched and encouraged the use of judicial corporal punishment through various legislative measures in the 1950's that made corporal punishment compulsory for certain offences.⁷⁹⁷ These laws were only relaxed in 1965.⁷⁹⁸

In 1952, the Criminal Sentences Amendment Act⁷⁹⁹ came into force. It required the Court to impose, without any discretion, ten strokes of the cane. The age limit for imposition of judicial corporal punishment was set at 50 years. In terms of this statute, judicial corporal punishment was available for a series of serious offences including rape, where the death penalty had not been imposed, robbery, housebreaking, and culpable homicide involving assault with the intention to rape or rob. The Courts also had discretion to suspend the sentence in whole or in part in 'special circumstances' which were not defined. The lack of discretion in imposing judicial corporal punishment was disliked by the judiciary.⁸⁰⁰

This law saw a dramatic increment the use of judicial corporal punishment and a corresponding rise in the crime rate. The increase in the crime rate was attributed to the creation of new offences to police racial segregation policies of the government of the day.⁸⁰¹

⁷⁹⁷ S Pete 'Spare the rod and spoil the nation? Trends in corporal punishment' (1994) 3 *South African Journal of Criminal Justice* 295 302.

⁷⁹⁸ J Sloth-Nielsen 'Corporal punishment – Acceptable state violence?' in D Hanssen & D van Zyl Smit (eds) *Towards Justice? Crime and state Control in South Africa* (1990) 201 – 202.

⁷⁹⁹ Act No 33 of 1952

⁸⁰⁰ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

⁸⁰¹ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

In 1965 however, the Criminal Procedure Amendment Act of 1965 repealed compulsory whipping and restored discretion to the Courts, consequently, the number of caning sentences fell.⁸⁰²

In 1974, a commission of inquiry into the penal system of South Africa (the Viljoen Commission) was appointed.⁸⁰³ The Viljoen Commission took the view that whipping adults amounted to a brutal assault on the person of the offender and on his dignity as a human being as well.⁸⁰⁴ The Commission recommended the abolition of judicial corporal punishment in South Africa. In the absence of an abolition, the Commission proposed a maximum limit of 5 strokes of the cane. It proposed that no one should be whipped on more than two occasions and proposed a limit of judicial corporal punishment to offences involving violence or defiance of lawful authority. The Commission recommended a maximum age limit of 30 year for the infliction of judicial corporal punishment. The Commission also recommended that juveniles be caned on their buttocks with clothing on and not on bare buttocks as previously done.⁸⁰⁵

In 1977, the government enacted the Criminal Procedure Act of 1977 in which it implemented some of the recommendations for the Viljoen Commission. The new act provided that adult offenders should not be whipped more than two times or within a period of three years from the last corporal punishment.⁸⁰⁶ Juveniles were to be whipped whilst fully dressed.⁸⁰⁷ Females and adult males over 30 could not be whipped.⁸⁰⁸ The maximum number

⁸⁰² CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

⁸⁰³ Report of the Commission of Inquiry into the Penal System of the Republic of South Africa, Government Printer, 1976.

⁸⁰⁴ *State v Williams and Others* 1995 (3) SA 632 CC [12].

⁸⁰⁵ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

⁸⁰⁶ Section 292(3) Criminal Procedure Act of 1977.

⁸⁰⁷ Section 294(2) Criminal Procedure Act 1977.

of strokes was reduced to seven.⁸⁰⁹ The cane was to be the only instrument of whipping. This statute finally brought about the elimination of the cat-o-nine-tails as an implement for judicial corporal punishment.⁸¹⁰ In 1986, the Criminal Procedure Act was amended to ensure that an adult male could not be whipped unless the whole or part of his prison sentence was suspended. This step was taken in a bid to reduce prison overcrowding and use whipping as an alternative to prison.⁸¹¹

Judges held and expressed views regarding judicial corporal punishment. Judicial corporal punishment was criticised for many years before its prohibition in South Africa. In *S v Khumalo and others*⁸¹² judicial corporal punishment was described as severe and brutal punishment not only against the person but against his dignity as well. There are numerous other decisions expressing similar sentiments.⁸¹³

The new political dispensation in South Africa commencing in 1993 ushered in the final days of judicial corporal punishment in this jurisdiction. In 1995, in the landmark case *State v Williams and Others*⁸¹⁴ the Constitutional Court considered whether juvenile whipping under section 294 of the Criminal Procedure Act⁸¹⁵ was consistent with the provisions of the Interim South African Constitution. Its pivotal ruling abolished judicial corporal punishment for juveniles by declaring it unconstitutional. A short summary of the case is outlined below.

⁸⁰⁸ Section 295(1) Criminal Procedure Act 1977.

⁸⁰⁹ Section 292(2) Criminal Procedure Act 1977.

⁸¹⁰ Section 292(2) Criminal Procedure Act 1977.

⁸¹¹ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa' <http://www.corpun.com/jcpza2.htm#histb> (accessed 20 January 2016).

⁸¹² 1965 (4) SA 565 (N) at 574F.

⁸¹³ See also *S v Myute and other and S v Baby* 1985 (2) SA 61 (Ck) 62H; *S v Zimo en Andere* 1971 (3) SA 337 (T) at 338G; *S v Ruiters et al*; *S v Beyers en Andere*; *S v Louw en 'n Ander* 1975 (3) SA 526 (C) 530B; *S v Seeland* 1982 (4) SA 472 (NC) 476H; *S v F* 1989 (1) 460 (ZHC) at 460I; *S v Ximba and 2 Others* 1972 (1) PH H66 (N); *S v Motsoesoana* 1986 (3) SA 350 (N) 355D; *S v Daniels* 1991(2) SACR 403 (C) 406B.

⁸¹⁴ 1995 (3) SA 632 (CC).

⁸¹⁵ Act No. 51 of 1977.

The *Williams* matter was referred to the Constitutional Court from the Supreme Court of the Cape of Good Hope Provincial Division. The case concerned six juvenile males all of whom had been sentenced to judicial whipping. The Court held that section 294 of the Criminal Procedure Act providing for the sentence of juvenile whipping infringed upon the rights contained in section 10 of the Interim Constitution of South Africa which preserved every person's right to human dignity, and section 11(2) of the Interim Constitution of South Africa prohibiting torture, cruel, inhuman or degrading treatment or punishment. The Constitutional Court recognised the international consensus against corporal punishment.⁸¹⁶

In determining whether the violation of section 10 and section 11 (2) was a permissible limitation of the constitutional rights concerned in terms of section 33 of the constitution, the Court considered whether it was 'reasonable, justifiable and necessary to resort to juvenile whipping, notwithstanding the fact that it constitutes a severe assault upon not only the person of the recipient, but upon his dignity as a human being.'⁸¹⁷ The state argued that juvenile whipping was a better alternative to imprisonment and that there was a shortage of resources and infrastructure necessary for implementation of other sentencing options for juveniles. The state argued that whipping of juveniles was not too harsh and that it could be administered quickly. The state also argued that juvenile whipping was a deterrent.⁸¹⁸

The Court rejected the argument of lack of resources and infrastructure saying that it was a matter that had to be approached with seriousness and not pragmatism. Any other approach would reverse advances towards being a more humane and caring society.⁸¹⁹ The Court noted a shift in the criminal justice system in its approach and attitude towards punishment. The

⁸¹⁶ 1995 (3) SA 632 (CC) [53].

⁸¹⁷ 1995 (3) SA 632 (CC) [62].

⁸¹⁸ 1995 (3) SA 632 (CC) [61].

⁸¹⁹ 1995 (3) SA 632 (CC) [63].

Court noted that the criminal justice system had moved away from retribution to rehabilitation as objectives of punishment through measures like corrective supervision.⁸²⁰

The Court also noted a move towards alternative sentencing and abandonment of judicial whipping by judges in South Africa. The Court noted a wider range of penalties available to the presiding officer in the Criminal Procedure Act such as fines, postponed sentences, suspended sentences, caution and discharge, correctional supervision, converting the trial into an inquiry under the Child Care Act⁸²¹ with four outcomes being foster care, rendering to a children's home, schools of industries or return to the parent or guardian under supervision of a social worker.⁸²² The Court noted initiatives like community service orders, victim offender mediation processes and attendance at juvenile offender school which it encouraged as new and creative methods of addressing juvenile justice.⁸²³ Lastly, the Constitutional Court noted that it had to be mindful of the constitutional imperative to preserve human dignity and protect every person from punishments that are cruel, inhuman or degrading.⁸²⁴

Regarding the state's argument that juvenile whipping was convenient as it was a sanction that was reasonable and not too harsh for offenders and that could be administered quickly, the Constitutional Court countered that juvenile justice had to promote constitutional values. The convenience of judicial whipping was overridden by the fact that it offended against constitutional values by infringing upon the dignity of the individual.⁸²⁵

On the question of deterrence, the Constitutional Court stated that juvenile whipping was not

⁸²⁰ 1995 (3) SA 632 (CC) [65-67].

⁸²¹ No. 74 of 1983.

⁸²² 1995 (3) SA 632 (CC) [69-74].

⁸²³ 1995 (3) SA 632 (CC) [75].

⁸²⁴ 1995 (3) SA 632 (CC) [76].

⁸²⁵ 1995 (3) SA 632 (CC) [78-79].

reasonable or justifiable as no evidence had been provided to show that juvenile whipping was a more effective deterrent than any other punishment. The Court cited the report of the 1960 Advisory Council on the Treatment of Offenders on the question of corporal punishment in the United Kingdom which concluded that that ‘there is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others’.⁸²⁶ The Constitutional Court noted the unanimous decision of the Advisory Council against the reintroduction of corporal punishment to the United Kingdom. The Court also cited the decision in *S v Motsoesoana* in which the Court stated that the effect of corporal punishment was ‘coarsening and degrading rather than rehabilitative’.⁸²⁷

The Court noted that of the five defendants in the *Williams* case, three had already been chastised with a judicial whipping in the past to little effect. The Constitutional Court was prepared to accept that there was some deterrent value in judicial whippings, however, such value was not ‘sufficiently significant to enable the state to override a right entrenched in the Constitution.’⁸²⁸ The Court cited *S v Khumalo and others*⁸²⁹ with authority and then put its own views as follows:

...[t]he deterrence value is so marginal that it does not justify the imposition of this special punishment, involving as it does the deliberate infliction of physical pain, one has to conclude that the sole reason for retaining it is to satisfy society’s need for retribution. While retribution is, in itself, a legitimate aim of punishment, it is not the only one; it should not be the overriding one. It cannot on its own justify the existence of the punishment.⁸³⁰

Lastly, the Constitutional Court noted that judicial corporal punishment served neither the interests of justice, nor those of society. The Court concluded that that no compelling interest had been proved which could justify the practice of judicial corporal punishment.⁸³¹ The

⁸²⁶ Cited in *S v Motsoesoana* 1986 (3) SA 350 (N) 351I.

⁸²⁷ Cited in *S v Motsoesoana* 1986 (3) SA 350 (N) 354 D-F.

⁸²⁸ 1995 (3) SA 632 (CC) [84].

⁸²⁹ 1965 (4) SA 565 (N) 574 E-H.

⁸³⁰ 1995 (3) SA 632 (CC) [86].

⁸³¹ 1995 (3) SA 632 (CC) [88 and 91].

Court then found that judicial whipping of juveniles was unconstitutional.

The final nail in the coffin of judicial corporal punishment in South Africa was the Abolition of Corporal Punishment Act⁸³² which abolished judicial corporal punishment in all spheres of the South African criminal justice system including Traditional Courts.

The abolition of judicial corporal punishment has not been without problems. The response to the abolition of corporal punishment from the public and traditional leaders has not always been positive. Crocker and Pete note that Traditional Courts do not always adhere to the change in law.⁸³³ Vigilantism has also occurred where the public take it upon themselves to administer 'instant justice' and punish offenders. For instance, a vigilante organisation called *Mapogo-a- mathamaga* was formed in 1996 in the Northern Province. The leader of *Mapogo*, John Monthle Magolego, has been reported to say:

If the suspect hides information and there is strong evidence against him, a bit of sjambokking (whipping) will be done to dig out the truth. When they don't come out with the truth, they get a walloping. We don't encourage members to overdo the beating. But let me tell you, the criminal arrested by *Mapogo* - the one who is sjambokked - will never repeat the deed, he'll be 'born again'.⁸³⁴

One must accept that a prohibition on judicial corporal punishment would not be celebrated as a victory by every sector of the community. The fact that corporal punishment in the home remains lawful in South Africa, provided it is reasonable and moderate,⁸³⁵ is testament to the beliefs of a great number of people that chastisement has a place in the rearing of children. The existence of vigilante groups that administer judicial corporal punishment, albeit following proceedings in kangaroo Courts, points to the fact that mindsets have yet to change.

⁸³² No 33 of 1997.

⁸³³ A Crocker & S Pete 'Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa: part 2' (2007) *Obiter* 465 489.

⁸³⁴ CORPUN World Corporal Punishment Research 'Judicial corporal punishment in South Africa: illegal punishments, kangaroo courts, native/customary courts' available at <http://www.corpun.com/jcpza10.htm> (accessed 20 January 2016).

⁸³⁵ *Tshabalala v Jacobs* 1942 TPD 310, *R v Janke & Janke* 1913 TPD 382 at 385 and *R v Hopley* (1860) 2F&F 202; *Hiltonian Society v Crofton* 1953 (3) SA 130.

The experience of nations such as Sweden which was the first to eliminate judicial corporal punishment in all settings, is that with time, the thinking of the community regarding what is acceptable as punishment changes towards rejecting corporal punishment in favour of alternative disciplinary measures. Perhaps what remains to be done in South Africa is constant public education of the ills of judicial corporal punishment and the benefits of respecting the dignity of man coupled with research which demonstrates that the absence of judicial corporal punishment has not resulted in increased recidivism.

8.2 Zimbabwe

Corporal punishment had been a feature of the sentencing system in Zimbabwe since the 19th century.⁸³⁶ The sentence could be imposed for various Common Law offences including culpable homicide attempted murder, rape, arson, robbery assault, bestiality and theft.⁸³⁷ It could also be imposed under six statutes being: the Law and Order (Maintenance) Act;⁸³⁸ The Witchcraft Act;⁸³⁹ the Forest Act;⁸⁴⁰ the Dangerous Drugs Act;⁸⁴¹ the Road Traffic Act;⁸⁴² and the Prisons Act.⁸⁴³

Various inroads were made over the years which limited the imposition of judicial corporal punishment.⁸⁴⁴ For example, inflicting corporal punishment upon first offenders was excluded save in serious cases.⁸⁴⁵ Moderation in the number of strokes to be imposed was required, with 8 being viewed as a practical maximum which avoided senseless brutality.⁸⁴⁶

⁸³⁶ 1988(2) SA 702 (ZSC) 704.

⁸³⁷ 1988(2) SA 702 (ZSC) 704.

⁸³⁸ Chapter 65 (Z).

⁸³⁹ Chapter 73 (Z).

⁸⁴⁰ Chapter 125 (Z).

⁸⁴¹ Chapter 319 (Z).

⁸⁴² Chapter 48 of 1976 (Z).

⁸⁴³ Chapter 21 (Z).

⁸⁴⁴ 1988(2) SA 702 (ZSC) 705-706.

⁸⁴⁵ *R v Baidoni* 1955 SR 2; *R v Mhika* 1956 R & N 46 (SR).

⁸⁴⁶ *R v Tanyani* 1951 SR 14; *S v Du Chatelier* 1973 (2) RLR 339 at 341B-C; *S v Mathe* 1983 (2) ZLR 178 (HC) 179 E – F.

The Courts also discouraged imposing judicial corporal punishment where previous whippings had failed to obtain reformation of the offender.⁸⁴⁷ Judicial corporal punishment was excluded where the offender was convicted to serve a lengthy term.⁸⁴⁸

Whipping was also disallowed for adults over the age of 30 save in exceptional circumstances.⁸⁴⁹ Whipping was to be imposed immediately after the sentence was handed down as indefinite delays could justify setting aside of the sentence on appeal or review.⁸⁵⁰ Suspending a whipping sentence was also not desirable.⁸⁵¹ Further, Courts were required to consider the physical fitness of the offender to receive the corporal punishment. Where there was doubt regarding the offender's fitness, the punishment was not to be imposed.⁸⁵²

In *R v Tanbiga*, the Court described judicial corporal punishment as a 'severe and degrading punishment for an adult'.⁸⁵³ Similar sentiments were expressed by Gubbay JA in *S v Ndhlovu and Another* where he described judicial corporal punishment as 'judicial barbarism'.⁸⁵⁴ In *R v Dematema*, the Court noted that western countries had abandoned judicial corporal punishment and recommended a scientific study into prevention of crime and punishment in Zimbabwe.⁸⁵⁵

A constitutional challenge against judicial corporal punishment of adult males in Zimbabwe was considered by the Zimbabwe Supreme Court in *S v Ncube; S v Tshuma and S v*

⁸⁴⁷ *R v Sameli and Zipi* 1943 SR 150 at 152; *R v Tanyani* 1951 SR 14 146; *R v Johanisi* 1956 R & N 45 (SR) 45H.

⁸⁴⁸ *R v Katonda* 1960 R&N 651 at 653B-D.

⁸⁴⁹ *S v Muvungani* 1977 (4) SA (RA) at 408E – F; *S v Dickson* 1978 RLR 19 (RA) dissenting opinion of Davies JA.

⁸⁵⁰ *S v Sparimi and Another* 1965 (2) SA 413 (SRA) at 414A-B; *S v Ndhlovu and another* 1981 ZLR 600 at 602H – 603A.

⁸⁵¹ *S v Ndhlovu and another* 1981 ZLR 600 603B.

⁸⁵² *R v Mpande* 1967 (1) SA 81 (RA) at 82D.

⁸⁵³ 1965 (1) SA 257 (SR) 258E.

⁸⁵⁴ 1981 ZLR 600.

⁸⁵⁵ 1967 RLR 311 313.

Ndhlovu.⁸⁵⁶ The Court was asked to consider whether the sentence of whipping imposed on an adult male constituted inhuman and degrading treatment in contravention of section 15 (10) of the Constitution of Zimbabwe.

Prior to 18 April 1985, judicial corporal punishment was preserved in the constitution and protected from being held in contravention of section 15 of the constitutional declaration of rights through a constitutional dispensation or derogation under section 26(2)b and section 26 3(b). After 18 April 1985 when the constitutional derogation expired, judicial corporal punishment was no longer constitutional.⁸⁵⁷ Because the three appellants had been sentenced to a whipping after this watershed date, they challenged the constitutionality of the sentences against them at the Zimbabwe Supreme Court.

The Supreme Court restated the basis for the constitutional protections from cruel, inhuman and degrading treatment or punishment under section 15(1) of the Constitution of Zimbabwe as follows:

The *raison d'être* underlying s 15(1) is nothing less than the dignity of man. It is a provision that has embodied broad and idealistic notions of dignity, humanity and decency against which penal measures should be evaluated. It guarantees that the power of the state to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.⁸⁵⁸

The Supreme Court took the view that whether a particular type of punishment authorised by law could be deemed as inhuman or degrading involved the exercise of a value judgement by the Court.⁸⁵⁹ The Supreme Court found that it could not be guided by retribution as a

⁸⁵⁶ 1988(2) SA 702 (ZSC).

⁸⁵⁷ 1988(2) SA 702 (ZSC) 704.

⁸⁵⁸ 1988(2) SA 702 (ZSC) 717.

⁸⁵⁹ 1988(2) SA 702 (ZSC) 717.

justification to ignore the pleas of the appellants.⁸⁶⁰ The Court ruled that the punishment of whipping was in its very nature both inhuman and degrading.⁸⁶¹ The Court was guided in its decisions by the voices of leading jurists against corporal punishment, the fact of prohibition of judicial corporal punishment in many civilised nations worldwide, the limitation of the use of judicial corporal punishment, when it was enshrined in the Constitution, to the most serious of offences, and the decreasing resort to judicial corporal punishment in Zimbabwe.⁸⁶²

The Court held that the manner of infliction of judicial corporal punishment was barbaric, brutal and cruel, that it dehumanised the offender and the punisher, and that it was capable of abuse by overzealous prison officers administering it.⁸⁶³ The appeal against the sentence of whipping upon adult males on constitutional grounds was upheld.⁸⁶⁴

The whipping of juveniles in Zimbabwe was considered in *S v F*.⁸⁶⁵ The facts of the case are that a ten year old boy was accused of indecent assault against an eight year old girl. He was subjected to a trial and convicted. He was sentenced to a whipping of four cuts. Greenland J cited the decision in *S v Ncube; S v Tshuma and S v Ndhlovu*⁸⁶⁶ with approval and held that the whipping in this case was ‘barbaric, inherently brutal, cruel and inhuman’.⁸⁶⁷ It should be noted that the constitutionality of judicial corporal punishment of juveniles was not at issue in *S v F*.

In *S v A Juvenile*⁸⁶⁸ the Zimbabwe Supreme Court considered the constitutionality of judicial

⁸⁶⁰ 1988(2) SA 702 (ZSC) 721.

⁸⁶¹ 1988(2) SA 702 (ZSC) 721.

⁸⁶² 1988(2) SA 702 (ZSC) 722.

⁸⁶³ 1988(2) SA 702 (ZSC) 722.

⁸⁶⁴ 1988(2) SA 702 (ZSC) 722.

⁸⁶⁵ 1989 (1) SA 460 (ZHC).

⁸⁶⁶ 1988(2) SA 702 (ZSC).

⁸⁶⁷ 1989 (1) SA 460 (ZHC) 465A.

⁸⁶⁸ 1990 (4) SA 151 (ZSC).

corporal punishment of juveniles. In a majority decision, the Zimbabwe Supreme Court found the juvenile whipping was unconstitutional.⁸⁶⁹ The juvenile concerned was charged and convicted with three adults with the offence of assault with the intent to do grievous bodily harm. The juvenile was sentenced to moderate correction of four cuts with a light cane to be administered in private by a prison officer at Bulawayo prison. In an appeal against the conviction and sentence the juvenile challenged the constitutionality of judicial corporal punishment imposed on a juvenile. The Supreme Court considered this question in its judgment.

The Court made the following observations of judicial corporal punishment:

It is a type of institutionalised violence inflicted on one human being by another. The only difference between it and street violence is that the inflicter assaults another human being under the protection of the law. He might, during the execution of the punishment vent his anger in a similar manner on his victims as the street fighter does. But, as I have pointed out above, the degree of force he elects to use is of his own choosing. Because this institutionalised violence is meted out to him, the victim's personal dignity and his own physical integrity are assailed. In the result, the victim is degraded and dehumanised. In a street fight he can run away from his assailant or he can defend himself. The juvenile offender cannot because he is tied down to the bench.⁸⁷⁰

The Court ruled that the whipping of juveniles was an inhuman or degrading punishment or treatment in contravention of section 15(1) of the Constitution of Zimbabwe. The Court declared the punishment unconstitutional.⁸⁷¹

Following this ruling, a constitutional amendment was tabled and passed in 1990 as section 15(3) of the Constitution which reinstated as lawful punishment moderate judicial corporal punishment of males under the age of 18 years. This was a complete departure from the sentiments of the Court in *S v A Juvenile*. The rationale for this sea change as expressed by the Minister of Justice was the concern that the prohibition of corporal punishment on juveniles would have far-reaching effects to the administration of justice in Zimbabwe as

⁸⁶⁹ Dumbutshena CJ, Gubbay JA and Korsah JA agreeing. McNally JA and Manyaraya JA dissenting.

⁸⁷⁰ 1990 (4) SA 151 (ZSC) 156.

⁸⁷¹ 1990 (4) SA 151 (ZSC) 162.

Courts had little option but to send juveniles to jail. The reintroduction of judicial corporal punishment was geared at ameliorating the problem whilst other alternatives were considered. Hatchard refers to this move as a penological and constitutional disaster because the amendment to the Constitution was not properly debated and the amendment patently undermined the authority of the Zimbabwe Supreme Court.⁸⁷²

In conclusion, it is clear that the reintroduction of judicial corporal punishment for juveniles, in order to save them from jail, was a move to assuage pressure on the executive to develop alternative forms of punishment to fill the vacuum created by the removal of judicial corporal punishment as a sentencing option.⁸⁷³ If the executive is unable or unwilling to put measures in place to improve the sentencing regime in Zimbabwe then reversals of this nature are sadly bound to occur. Unfortunately, this reversal was rooted in pragmatism and a realisation that state resources could not be marshalled to put in place a workable system of alternative punishment. Sadly, this was done at the cost of universal dignity for all persons.

8.3 Namibia

The decision *Ex Parte Attorney General of Namibia: In re Corporal Punishment by Organs of State*⁸⁷⁴ considered the constitutionality of the imposition of corporal punishment as a sentence by any judicial or quasi-judicial authority in Namibia.⁸⁷⁵

The case came to Court as a petition brought by the Attorney General under section 15(2) of the Supreme Court Act. The Supreme Court was asked to consider the constitutional question

⁸⁷² J Hatchard 'The rise and fall of the cane in Zimbabwe' (1991) 35(1) and (2) *Journal of African Law* 198 202-204.

⁸⁷³ J Hatchard 'The rise and fall of the cane in Zimbabwe' (1991) 35(1) and (2) *Journal of African Law* 198 202-204.

⁸⁷⁴ 1991 (3) SA 76 (NmS).

⁸⁷⁵ The question also extended into the constitutionality of corporal punishment in schools, which aspect is outside the confines of the present study.

whether imposition of corporal punishment ran afoul of article 8 of the Namibian Constitution which preserves every person's right to human dignity. The relevant section provides as follows:

Respect for human dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings before any organ of state, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

The Supreme Court noted that Namibia had a myriad of laws that allowed for corporal punishment by organs of state. The Court defined the word 'inhuman' as 'destitute of natural kindness or pity; brutal, unfeeling, cruel, savage, barbarous'. The Court defined the word 'degrading' as "to lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase. The Court cited several well-known decisions to buttress these definitions.⁸⁷⁶

Adopting the value judgement approach, enunciated in *S v Ncube*, the Court took the view that the value judgement had to be

articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is part) which Namibians share.⁸⁷⁷

The Court noted that making a value judgement was not a static exercise but one that is continually evolving and dynamic.⁸⁷⁸ It was evident that provisions prohibiting cruel and inhuman punishment had been interpreted in the United Kingdom, Germany, the United States Zimbabwe, Canada, and South Africa to encompass and outlaw judicial corporal

⁸⁷⁶ *S v Ncube* 1988(2) SA 702 (ZSC); *S v Petrus and another* 1984 BLR 14 (CA).

⁸⁷⁷ 1991 (3) SA 76 (NmS) at 86.

⁸⁷⁸ 1991 (3) SA 76 (NmS) at 86.

punishment.⁸⁷⁹ The Court noted that in Botswana the disapproval of the Court in *S v Petrus and Another*⁸⁸⁰ was manifest in spite of the fact that the Court was constrained from declaring judicial corporal punishment unconstitutional because of the constitutional derogation preserving the punishment in the Botswana.⁸⁸¹

The Court elucidated six considerations that informed the position of a growing number of nations that judicial corporal punishment is a form of cruel inhuman and degrading treatment. These are: First, the inviolable dignity of man is violated by the punishment; second, that the punishment is painful; third, that the assault is inflicted by organised society reducing the society to the level of the offender; fourth that it is a retributive irrational and insensitive punishment that makes no appeal to the offender; fifth, that it is inherently arbitrary and sixth, that it is alien and humiliating.⁸⁸²

The Court then held that it had no difficulty arriving at the conclusion that judicial corporal punishment was a form of inhuman and degrading punishment contrary to section 8(2) of the Namibian Constitution.⁸⁸³

With respect to judicial corporal punishment of children the Court held that most of the six objections to judicial corporal punishment outlined in the judgement applied equally to juveniles who also have an inherent right to dignity. The Court dispensed with the argument that juveniles should be whipped in order to avoid unsuitable alternatives like custodial sentences. Citing *Trop v Dulles*⁸⁸⁴ the Court noted that it could not allow such derogation

⁸⁷⁹ 1991 (3) SA 76 (NmS) at 87-90.

⁸⁸⁰ J Hatchard 'The rise and fall of the cane in Namibia' (1992) 36(1) *Journal of African Law* 81 82.

⁸⁸¹ 1991 (3) SA 76 (NmS) at 90.

⁸⁸² 1991 (3) SA 76 (NmS) 89.

⁸⁸³ 1991 (3) SA 76 (NmS) 89.

⁸⁸⁴ 365 US 86.

based on the absence of suitable alternatives or facilities. The constitution had to be defended and implemented to safeguard individual rights. A failure to do so would render the constitution ‘little more than good advice’.⁸⁸⁵

The Court noted that some argued that the manner of implementation of corporal punishment to juveniles and adults differed. First, it was argued that since a parent or guardian was required to be present, and because the ‘cuts’ were not administered on the bare buttocks, and further since there was a limit of 7 strokes, then judicial corporal punishment of children and adults were dissimilar.⁸⁸⁶ The Court was in no doubt that these measures were intended to ameliorate the severity and harshness of the punishment. However, the Court noted that the punishment invaded human dignity of the offender and the punisher alike, it was open to abuse, arbitrariness, was retributive and insensitive and above all contrary to Namibia’s Constitution. The argument that the judicial corporal punishment inflicted on children was somehow less onerous thus fell away.⁸⁸⁷

Another argument in support of judicial corporal punishment for children was that the whip forced the rebellious youngster to be humble. The Court disagreed with this argument as it did not remedy or justify derogation from the constitutional protection of every person’s dignity and the prohibition against cruel inhuman and degrading treatment. Judicial corporal punishment of children was ruled unconstitutional.⁸⁸⁸

Hatchard notes that in view of the considerable weight of opinion in support of the views of the Court in this decision, African countries which retain corporal punishment should

⁸⁸⁵ 365 US 86 104.

⁸⁸⁶ 1991 (3) SA 76 (NmS) 92.

⁸⁸⁷ 1991 (3) SA 76 (NmS) 92.

⁸⁸⁸ 1991 (3) SA 76 (NmS) 93.

reconsider the wisdom of doing so.⁸⁸⁹

8.4 The United Kingdom

From the early to mid-19th century, the application of judicial corporal punishment was gradually diminishing in England and Wales.⁸⁹⁰ By 1861, the Courts powers to order judicial corporal punishment against adult males had been removed save for a few specific offences.⁸⁹¹ Interestingly, in 1863, flogging was reintroduced in the Security from Violence Act as a response to a spate of robberies in the winter of 1862.⁸⁹² Corporal punishment of girls existed primarily in schools of industry until 1877 when the practice was stopped by the Home Secretary and rules authorising such punishment of girls in Industrial schools removed.⁸⁹³ Judicial corporal punishment of boys was widely used for numerous offences.⁸⁹⁴

After WW1, the first major report on the treatment of crime in England and Wales was concluded. The Juvenile Offenders Committee Report, 1920 recommended the abolition of birching in favour of correction and reform. The primary motivation for the proposed abolition was that birching had proved to be an ineffective deterrent. However, the report did not lead to an amendment in the law due to resistance in government to abandoning judicial corporal punishment.⁸⁹⁵

The question of abolition was not so easily disposed. It was revisited in a government inquiry

⁸⁸⁹ J Hatchard 'The rise and fall of the cane in Namibia' (1992) 36(1) *Journal of African Law* 81 82.

⁸⁹⁰ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 27.

⁸⁹¹ For example the Vagrancy Act 1824 and the Knackers Act 1786.

⁸⁹² RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 27-28.

⁸⁹³ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 27 (2009) 29.

⁸⁹⁴ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 27 (2009) 30 and 61.

⁸⁹⁵ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 63 – 64.

into the subject in May 1937 when Edward Cadogan was appointed to chair a Home Office committee to report on corporal punishment. The Report of the Departmental Committee on Corporal Punishment (the Cadogan Committee)⁸⁹⁶ made three important findings. First, that corporal punishment was not effective as a deterrent. Second, that corporal punishment failed to deal with the causes of offending, and third, that corporal punishment had a detrimental effect on all concerned. The Committee noted that corporal punishment had no positive reformatory influence, and that it could produce a hardening in the character of offenders.⁸⁹⁷

The recommendations of the Cadogan Committee made their way into the Criminal Justice Bill of 1938 which proposed an abolition of judicial corporal punishment for the young. The bill was successfully steered through the parliamentary committee stages. However, it did not proceed to the House of Lords. The Second World War broke out and the bill was scuppered due to wartime pressures.⁸⁹⁸

At the end of World War II, a Labour government was ushered into Parliament in England and Wales. The question of judicial corporal punishment was renewed in the government's agenda. In 1948, the Criminal Justice Bill was passed abolishing judicial corporal punishment in England and Wales.⁸⁹⁹ Detractors of the abolition remained ever present and in 1960, the government reconsidered the matter following calls for the reintroduction of judicial corporal punishment. In the Barry Report, commissioned by the Home Office in 1969,⁹⁰⁰ it was found that judicial corporal punishment had no deterrent effect and that

⁸⁹⁶ Home Office (1938).

⁸⁹⁷ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 93.

⁸⁹⁸ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 109 – 111.

⁸⁹⁹ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 122.

⁹⁰⁰ The Advisory Council on the Treatment of Offenders was chaired by Mr Justice Barry.

despite calls for the reintroduction of judicial corporal punishment, there was no reason to do so as the punishment was outdated and ineffective.⁹⁰¹

Abolition of judicial corporal punishment in England and Wales did not affect other territories forming part of the United Kingdom. One such territory is the Isle of Man, which was the setting for a landmark decision of the European Court of Human Rights on the question of judicial corporal punishment.

In *Tyrer v United Kingdom*,⁹⁰² 4 boys aged 15 years old were reported to school authorities by a school prefect for bringing beer to school. The boys were reprimanded and caned at school for this misconduct. The boys then set upon the prefect and beat him up. One of the boys, Anthony Tyrer was charged and convicted of assault occasioning actual bodily harm as a result of the incident. He was sentenced to three strokes of the birch. These were administered on his bare buttocks. Following an unsuccessful appeal to the Appellate Court, the matter was referred to the European Commission on Human Rights where several violations of the European Convention were alleged including the argument that corporal punishment is degrading punishment contrary to article 3 of the European Convention.

The Commission opined that corporal punishment was humiliating and degrading to the offender and that it qualified as degrading punishment in contravention of article 3 of the European Convention. The Commission was however unable to resolve the dispute amicably. The case was referred to the European Court of Human Rights (ECHR) which had to decide on whether judicial corporal punishment was in violation of Article 3 of the European Convention on Human Rights.

⁹⁰¹ RL Gard *The end of the rod: A history of the abolition of corporal punishment in the courts of England and Wales* (2009) 125 – 128.

⁹⁰²(1979 – 1980)2 EHRR 1.

The unique status of the Isle of Man as a British territory meant that laws abolishing judicial corporal punishment in England and Wales did not apply on the Isle of Man. As the Court stated:

The Isle of Man is not a part of the United Kingdom but a dependency of the Crown with its own Government, legislature and Court and its own administrative, fiscal and legal systems. The crown is ultimately responsible for the good governance of the Island and acts in this respect through the Privy Council on the recommendation of ministers of the United Kingdom in their capacity as Privy counsellors.⁹⁰³

The Court noted that the Isle of Man's parliament, the Court of Tynwald, legislated for the island in domestic matters and, that such laws are ratified by the Queen-in-Council. Thus, abolition of judicial corporal punishment in England, Wales and Scotland in 1948 did not apply to the Isle of Man where the punishment continued to subsist. Though the matter was debated by the Isle's Parliament in 1963 and 1965, a decision was taken to retain judicial corporal punishment 'as a deterrent to hooligans visiting the island as tourists, and more generally, as a means of preserving law and order.'⁹⁰⁴

In considering whether the caning of Tyrer constituted a breach of Article 3 of the European convention prohibiting torture, inhuman and degrading treatment or punishment, the European Court dealt with each element of article 3 on its own. First, the Court took the view that the punishment of Tyrer did not amount to torture as the level of suffering inherent in the notion of torture was not reached.⁹⁰⁵ Secondly, the Court also considered whether the punishment inflicted on Tyrer amounted to inhuman treatment. The Court held that the level of suffering must reach a certain level before it can be classified as inhuman. Again, the Court

⁹⁰³ *Tyrer v The United Kingdom* (1979 – 1980) 2 EHRR 1 at [13].

⁹⁰⁴ *Tyrer v The United Kingdom* (1979 – 1980) 2 EHRR 1 at [13-15].

⁹⁰⁵ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [29]. The Court had in a previous decision *Ireland v the United Kingdom* Series A No. 25 at 66 – 67 and 69 indicated what amounts to torture within the meaning of Article 3 of the European Charter.

was not satisfied, on the facts that Tyrer's punishment had been inhuman.⁹⁰⁶

In a majority decision on the third element concerning 'degrading punishment', the ECHR found that the judicial corporal punishment of Anthony Tyrer was degrading contrary to article 3 of the European Convention on Human Rights. The Court held that for a punishment to be degrading, the humiliation or debasement had to exceed the usual element of humiliation present in the infliction of any judicial punishment.⁹⁰⁷ The Court emphasised the point that punishment is by its very nature humiliating and that article 3 of the European Charter was not directed at the usual humiliation attaching to judicial punishment. The Court concluded that in assessing if a punishment was degrading, what was pivotal was the circumstances of each case, the nature and context of the punishment itself, and the manner and method of its execution.⁹⁰⁸ Of importance as well was the knowledge that the European Convention is a 'living instrument' that had to be interpreted in the light of present day conditions. Developments and accepted standards in penal policy of member states were therefore relevant.⁹⁰⁹

Judicial corporal punishment has been deemed to be institutionalised violence which infringes on the dignity of the prisoner.

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State (see paragraph 10 above). Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender⁹¹⁰

⁹⁰⁶ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [29].

⁹⁰⁷ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [30].

⁹⁰⁸ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [30].

⁹⁰⁹ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [31].

⁹¹⁰ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [33].

In the circumstances the Court found that the corporal punishment inflicted on Tyrer by the Manx authorities was degrading punishment contrary to article 3 of the European Charter and a thus a breach of the Convention.⁹¹¹

The abolition of judicial corporal punishment in the United Kingdom was achieved through statute amid periodic calls for the reintroduction of the punishment. The issue of human dignity was pivotal in the decision on the *Tyrer case*. The UK experience is instructive as it illustrates how abolition can be achieved in spite of public support for retention and reintroduction of the punishment in some sectors of the community.

8.5 The United States

Corporal punishment had been a feature of the American legal system until it slowly went into disuse in the late 19th century. The period between 1780 and 1820 saw states reform their criminal justice systems. In Pennsylvania, penitentiaries were established and flogging gave way to incarceration. In New York corporal punishment was prohibited in 1796 only to be reintroduced in 1819.⁹¹² Public opposition to corporal punishment in America was at its height between 1830 and 1840, declining in the 1850's.⁹¹³ The last state to abolish corporal punishment was the state of Delaware in 1972, having performed its last flogging in 1952 at the whipping post known as the 'Red Hannah'.⁹¹⁴

There are several reported incidences of corporal punishment being ordered by judges and

⁹¹¹ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [35]. Judge Sir Gerald Fitzmaurice handed down a separate opinion in which he disagreed that the judicial corporal punishment inflicted on Mr. Tyrer was in violation of Article 3 of the European Charter.

⁹¹² M Glenn *Campaigns against corporal punishment: prisoners, sailors, women and children in antebellum America* (1984) 11.

⁹¹³ M Glenn *Campaigns against corporal punishment: prisoners, sailors, women and children in antebellum America* (1984) 12.

⁹¹⁴ 'Corporal punishment book reviews page 5' Available at [http://www.corpun.com/rules3.htm#usa\(accesses](http://www.corpun.com/rules3.htm#usa(accesses) (7 July 2014).

inflicted pursuant to a decision of a Court although such punishments would not have the backing of law.⁹¹⁵ There are no United States decisions on judicial corporal punishment as a penal sanction. The constitutionality of corporal punishment as a disciplinary sanction in prisons was considered in *Jackson v Bishop*⁹¹⁶ wherein inmates in Arkansas State contested the legality of corporal punishment administered by prison officials for breach of prison discipline. The Court ruled that disciplinary flogging was cruel and unusual punishment which violated the Eighth Amendment to the American Constitution.⁹¹⁷ The Court ruled that the use of corporal punishment ‘offends contemporary concepts of decency and human dignity’⁹¹⁸ and is ‘degrading to the punisher and punished alike.’⁹¹⁹ Today, judicial corporal punishment is not a part of the American criminal justice system.

9 THE TURNING OF THE TIDE: THE REASONS FOR THE DECLINE OF JUDICIAL CORPORAL PUNISHMENT

In The Namibian decision *Ex parte Attorney General, Namibia: In re corporal punishment by organs of state*, the Court set out six factors that constitute general objections to corporal punishment. These factors form a concise matrix that encapsulates the findings of numerous Courts and the statements of scholars from the various jurisdictions discussed above.⁹²⁰ They form the subject of the discussion below.

9.1 The dignity of the human being is inviolable

The inviolability of the dignity of the human person was recognised in every jurisdiction

⁹¹⁵ ‘Country files index: United States judicial corporal punishment’ available at <http://www.corpun.com/rules3.htm#usa> (accessed 20 January 2016).

⁹¹⁶ 404 F. 2d 571 (8th Cir. 1968). See also *Nelson v Heyne* 491 F.2d 352 (7TH cir) which cites *Jackson v Bishop* with a approval.

⁹¹⁷ *Jackson v Bishop* 404 F. 2d 571 580 - 581 (8th Cir. 1968). The eighth amendment states as follows: ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’

⁹¹⁸ *Jackson v Bishop* 404 F. 2d 571 579.

⁹¹⁹ *Jackson v Bishop* 404 F. 2d 571 580.

⁹²⁰ 1991 (3) SA 76 (NmS).

examined above in *State v Williams, S v Ncube, Ex parte Attorney General, Namibia, The Tyrer* decision and in *Jackson v Bishop*. This principle is of universal acceptance.

The Universal Declaration of Human Rights, at article 5, prohibits torture, cruel, inhuman and degrading treatment or punishment. These words are reflected in numerous international conventions including the International Covenant on Civil and Political Rights,⁹²¹ the African Charter on Human and People's Rights,⁹²² the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁹²³ the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁹²⁴ the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁹²⁵ and the Convention on the Rights of the Child.⁹²⁶ It is also prohibited by the four Geneva Conventions of 12 August 1949.⁹²⁷ The prohibition against torture, cruel, inhuman and degrading treatment or punishment is also reflected in numerous national constitutions as a non-derogable right.

Judicial corporal punishment is that it infringes upon the prohibition against torture, cruel inhuman and degrading punishment thus violating the human dignity and physical integrity of the person.

Torture is defined in Article 1 of the Convention against Torture and Other Cruel Inhuman and Degrading Punishment (CAT)⁹²⁸ as:

⁹²¹ Article 7.

⁹²² Article 5.

⁹²³ Article 3.

⁹²⁴ Article 2(1).

⁹²⁵ Article 3.

⁹²⁶ Article 37 (a).

⁹²⁷ UNTS I-970 to I-973 Article 13 GC III; Article 13 & 32 GC IV; in the case on non-international armed conflicts Common article 3.

⁹²⁸ Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841->

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity⁹²⁹

The CAT excludes from the definition of torture ‘pain or suffering arising only from, inherent in, or incidental to lawful sanctions’.⁹³⁰ There is debate amongst states regarding the meaning of this exclusion. Some states maintain that the exclusion allows for criminal sanctions that involve physical harm like the death penalty and flogging, whipping or caning.⁹³¹ Other states argue that this exclusion is superseded by provisions in multilateral treaties that guarantee the right to life and security of the person and treaties that regard certain forms of corporal punishment as cruel, inhuman and degrading.⁹³²

There is no single definition of what amounts to cruel, inhuman and degrading treatment. The Human Rights Committee, commenting on article 7 of the ICCPR noted the absence of a definition stating as follows:

4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure...⁹³³

[English.pdf](#) (accessed 20 January 2016).

⁹²⁹ Convention against Torture art 1 UNTS I-24841.

⁹³⁰ Convention against Torture and Other Forms of Cruel Inhuman or Degrading Punishment art 1 UNTS I-24841.

⁹³¹ Human Rights Education Associates ‘Torture Inhuman or degrading treatment’ http://www.hrea.org/index.php?base_id=134 (accessed 20 January 2016).

⁹³² Human Rights Education Associates ‘Torture Inhuman or degrading treatment’ http://www.hrea.org/index.php?base_id=134 (accessed 20 January 2016).

⁹³³ Human Rights Committee ‘General Comment 20 Article 7’ (Forty-fourth session, 1992) U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

In *Voulanne v Finland*⁹³⁴ the Committee held that what amounts to inhuman or degrading treatment depends on the circumstances of the case such as the duration and manner of treatment, its physical or mental effects as well as the sex, age and state of health of the victim.

In *Denmark et al. v Greece*,⁹³⁵ the European Commission on Human Rights was asked to interpret article 3 of the European Convention on Human Rights which prohibits torture, inhuman or degrading treatment or punishment. The European Commission defined inhuman treatment as treatment which causes severe suffering, mental or physical, which in the particular situation is unjustifiable. The Commission defined degrading treatment as treatment which humiliates a person, driving to act against his will. Lastly, the Commission defined torture as aggravated inhuman treatment.

In *Republic of Ireland v the United Kingdom*, the European Court made a distinction between torture and inhuman and degrading treatment. The Court held that the difference between the two ‘derive[d] principally from a difference in the intensity of the suffering inflicted’ holding that ‘torture attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’.⁹³⁶ In *Tyrer v the United Kingdom*, the European Court outlined what it considered to be a degrading punishment as follows:

In the Court’s view, in order for a punishment to be degrading and in breach of art 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual level of humiliation referred to in the preceding subparagraph. The assessment is in the nature of things, relative; It depends on all the circumstances of the case and, in particular on the nature and context of the punishment itself and the manner and method of its execution.⁹³⁷

⁹³⁴Communication no 265/1987 7 April 1989 Human Rights Committee [9.2].

⁹³⁵ 12 Yearbook of the European Convention on Human Rights 186 (1969).

⁹³⁶ (1979 – 80) 2 EHRR 25 [167].

⁹³⁷ (1978) 2 EHRR 1 [30].

In the United States case *Furman v Georgia*⁹³⁸ which held that capital punishment in the state of Georgia was unconstitutional, the Court explained that a punishment would fall foul of the Eighth Amendment which prohibits cruel and unusual punishment not because it was painful but because it violated the human dignity of the human being. Brennan J stated

The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A `punishment is `cruel and unusual` therefore, if it does not comport with human dignity...When we consider why they [punishments which inflict torture] have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause [the eight amendments] that even the vilest criminal remains a human being possessed of common human dignity⁹³⁹

The underlying rationale for the prohibitions against cruel and inhuman punishment was confirmed by Stewart J in *Gregg v Georgia*⁹⁴⁰ to be the dignity of the human being. This protection from cruel, inhuman and degrading punishment extends to children as well. The Committee on the right of the Child in its General Comment No.8, 2006 stated as follows;

...eliminating violent and humiliating punishment for children through law reform and other necessary measures in an immediate and unqualified obligation for states.⁹⁴¹

The obligation to prohibit and eliminate corporal punishment is reiterated in general Comment no. 13 (2010).⁹⁴² Articles 19, 28(2) and 37 have been interpreted by the Committee on the rights of the child to require all states to protect children from all forms of corporal punishment.⁹⁴³ Children should have the same legal protection from assault that adults

⁹³⁸ 408 US 238 (1972).

⁹³⁹ *Furman v Georgia* 408 US 238 (1972) 270 – 273.

⁹⁴⁰ 478 US 153 (1976) 173.

⁹⁴¹ UN Committee on the Rights of the Child (UNCRC) ‘*UN Committee on the Rights of the Child: General comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*’ [22].

⁹⁴² UN Committee on the rights of the Child (UNCRC) ‘*UN Committee on the rights of the Child: General comment no.13 (2010) The right of the Child to freedom from all forms of violence*’ [61].

⁹⁴³ UN Committee on the Rights of the Child (UNCRC), ‘*UN Committee on the Rights of the Child: General comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*’ [18 -21].

have.⁹⁴⁴ The UN standard minimum rules for the administration of juvenile justice (Beijing Rules) require that juveniles should not be subjected to judicial corporal punishment.⁹⁴⁵

As illustrated above, the inviolability of the dignity of the human being is accepted universally appearing in international treaties, decisions of international tribunals and national Courts. Judicial corporal punishment has been found to infringe upon the right to dignity enjoyed by every person.

9.2 The manner of infliction of the punishment is objectionable

The Court in *S v Ncube*⁹⁴⁶ found the manner of infliction of judicial corporal punishment objectionable and falling below standards of human decency. This was reiterated in *S v F*⁹⁴⁷ where the Court held that the manner of infliction of judicial corporal punishment was barbaric, brutal, cruel, dehumanising to the offender. The Court also noted that the punishment was capable of abuse by those administering it.⁹⁴⁸ This finding was reiterated in *Ex parte Attorney General, Namibia* wherein the Court stated

The manner in which the corporal punishment is administered is attended by, and intended to be attended by, acute pain and physical suffering ‘which strips the recipient of all dignity and self-respect’.⁹⁴⁹

Berker CJ lamented the inability to control the actual execution of the punishment saying:

...whatever substantial restrictions and controls are placed on the method of imposition of corporal punishment or chastisement by law, the actual execution thereof can never be fully controlled so that in practice, despite such controlling provisions the application of the punishment may nevertheless result in a brutal excessive manner.⁹⁵⁰

⁹⁴⁴ Global Initiative to End All Corporal Punishment of Children ‘Prohibiting corporal punishment of children in central Asia and the Pacific: progress report 2014’ 40.

⁹⁴⁵ Rule 17.3.

⁹⁴⁶ 1988(2) SA 702 (ZSC) 722.

⁹⁴⁷ 1989 (1) SA 460 (ZHC)

⁹⁴⁸ 1989 (1) SA 460 (ZHC) 465A.

⁹⁴⁹ 1991 (3) SA 76 (NmS) 89.

⁹⁵⁰ 1991 (3) SA 76 (NmS) 89 97E.

9.3 Judicial corporal punishment demeans the punisher and organised society

In *Ex parte Attorney General, Namibia*, the Court noted that the systematic planning and execution of judicial corporal punishment by organised society makes the punishment objectionable.⁹⁵¹ It has also been argued as well that judicial corporal punishment brutalises or dehumanises the person inflicting the punishment. In *S v A Juvenile*, Gubbay JA noted that ‘...judicial whipping in any form must inevitable tend to brutalise and debase both the punished and the punisher alike’.⁹⁵² Judicial corporal punishment dehumanises the offender as well as the person administering the punishment. Gubbay JA also noted that judicial corporal punishment causes the punisher ‘and through him society to stoop to the level of the offender’⁹⁵³ In the *Tyrer decision*, the Court also characterised judicial corporal punishment as institutionalised violence.⁹⁵⁴

9.4 Judicial corporal punishment has no deterrent or rehabilitative effects

The question whether judicial corporal punishment is an individual and general deterrent is still debated. In the United Kingdom, the Cadogan Report took the view that judicial corporal punishment had little effect on recidivism in an individual.⁹⁵⁵ The statistical basis of this report had been criticised by some scholars like Prof Graeme Newman who supports the reintroduction of judicial corporal punishment.⁹⁵⁶

In South Africa the Lansdown Commission took the view that there were no reliable statistics on the deterrent effect of judicial corporal punishment.⁹⁵⁷ In later years, the Viljoen

⁹⁵¹ 1991 (3) SA 76 (NmS) 89.

⁹⁵² *S v A Juvenile* 1990 (4) SA 151 at 169.

⁹⁵³ *S v A Juvenile* 1990 (4) SA 151 at 169.

⁹⁵⁴ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR [33].

⁹⁵⁵ CORPUN World Corporal Punishment Research ‘The deterrent effect of corporal punishment’ <http://www.corpun.com/jcpza11.htm#histb> (accessed 20 January 2016).

⁹⁵⁶ G Newman *Just and painful: a case for the corporal punishment of criminals* (1983) 127 – 136.

⁹⁵⁷ CORPUN World Corporal Punishment Research ‘The deterrent effect of corporal punishment’

Commission noted that African witnesses supported judicial corporal punishment as a deterrent.⁹⁵⁸ In the end the Committee took the view that where there was no better method than judicial corporal punishment, then the administration of the punishment was better than no punishment at all. The Committee recommended that judicial corporal punishment accompanied by probationary supervision was best where feasible.⁹⁵⁹

Case law on the question of deterrence has provided to be equally inconclusive. Whilst case law against corporal punishment has been elucidated in this chapter, some judges continue to support judicial corporal punishment and view it as beneficial to the delinquent youth. For instance Judge Fitzmaurice in the *Tyrer* decision wrote a dissenting opinion in which he took the view that judicial corporal punishment was not degrading nor was it a breach of Article 3 of the European Convention.⁹⁶⁰ He is not alone in holding such a view. In *S v Khumalo*, Milne JP stated that the thought a severe whipping did deter many offenders, although he also admitted that a good many went undeterred.⁹⁶¹ In *S v A Juvenile*, McNally JA stated that moderate correction of the juvenile by cuts avoided the unpleasantness of prison, remand homes and reformatories. He described judicial corporal punishment as a ‘short, sharp, salutatory, briefly painful punishment’ which many times achieved just what was required for an errant young offender.⁹⁶²

In *Ex parte Attorney General, Namibia*, the Court noted that judicial corporal punishment made no appeal to the emotional sensitivity or rational capacity of the offender.⁹⁶³ In the

<http://www.corpun.com/jcpza11.htm#histb> (accessed 20 January 2016).

⁹⁵⁸ CORPUN World Corporal Punishment Research ‘The deterrent effect of corporal punishment’ <http://www.corpun.com/jcpza11.htm#histb> (accessed 20 January 2016).

⁹⁵⁹ CORPUN World Corporal Punishment Research ‘The deterrent effect of corporal punishment’ <http://www.corpun.com/jcpza11.htm#histb> (accessed 20 January 2016).

⁹⁶⁰ See dissenting opinion of Justice Sir Fitzmaurice in *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR [13].

⁹⁶¹ 1965 (4) SA 565 (N) 571H.

⁹⁶² 1990 (4) SA 151 ZS 171-172.

⁹⁶³ 1991 (3) SA 76 (NmS) 89.

words of Pete judicial corporal punishment is a pre-modern punishment against the body alone.⁹⁶⁴

Scarre states that judicial corporal punishment is not a sufficient deterrent.⁹⁶⁵ As the Cadogan Committee found, in its 1938 report, corporal punishment was not exceptionally effective as a deterrent which is usually claimed for it by those who advocate its use as a penalty for adult offenders. This was later reiterated by the Barry Committee.

Scarre also notes that corporal punishment does not offer greater protection to society than imprisonment does through incapacitation of the offender.⁹⁶⁶ Another criticism of corporal punishment is that it hardens criminals and further isolates them from society.⁹⁶⁷ Scarre notes that because corporal punishment is often inflicted on persons with low self-image, it does little to reform the offender but in fact harms his self-image even further.⁹⁶⁸ Scarre contends that offenders may develop a 'perverse pride' in the experience of having been flogged.⁹⁶⁹

9.5 Severity of the punishment depends on the character of the punisher

It has been argued that it is not possible to control in any uniform fashion the severity or ferocity or otherwise of the judicial corporal punishment. Whilst Bentham suggested a rotary flail that would deliver each blow with equal measure, nothing resembling such uniformity has ever been contrived.⁹⁷⁰ The intensity of the punishment is dependent on the punisher and the decision he takes as he administers the punishment. In *S v Ncube and others* the Court

⁹⁶⁴ S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African Journal of Human Rights* 430 431.

⁹⁶⁵ G Scarre 'Corporal punishment' (2003) 6 *Ethical Theory and Moral Practice* 295 at 301.

⁹⁶⁶ G Scarre 'Corporal punishment' (2003) 6 *Ethical Theory and Moral Practice* 295 at 301.

⁹⁶⁷ G Scarre 'Corporal punishment' (2003) 6 *Ethical Theory and Moral Practice* 295 at 303.

⁹⁶⁸ G Scarre 'Corporal punishment' (2003) 6 *Ethical Theory and Moral Practice* 295 at 304.

⁹⁶⁹ G Scarre 'Corporal punishment' (2003) 6 *Ethical Theory and Moral Practice* 295 at 304.

⁹⁷⁰ M Ignatieff *A just measure of pain – The penitentiary and the industrial revolution 1750 – 1850* (1978) A Crocker & S Pete 'Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa: part 1' (2007) *Obiter* 271 273.

observed that the officer administering the cuts will determine ‘their strength, timing and to some extent, their placement on the buttocks. A second stroke upon the same part as an earlier stroke undoubtedly causes greater pain that were it to be placed elsewhere’.⁹⁷¹ This is reiterated in *S v A Juvenile* where the Court noted that the person administering the punishment is free to do what he likes without any control from his superior officer or from the Court that imposed the punishment.⁹⁷² This was reiterated in *Ex parte Attorney General, Namibia*.⁹⁷³

The narratives of persons who have suffered judicial corporal punishment or witnessed judicial corporal punishment attest to this reality. Indres Naidoo narrates receiving corporal punishment as a political prisoner on Robben Island. His account illustrates the unbridled power officer inflicting the punishment:

One of the warders ordered me to remove my trousers; the doctor asked if I suffered from any serious ailments and when I said 'No' he pronounced me fit for caning. First, my hands were strapped high above my head and then, as I lay at a forty-five-degree angle on the frame, my ankles were tied. My pants lay on the ground quite near me and, under the doctor's supervision, cushions were strapped on my back and over my thighs, leaving only my backside exposed. A medical orderly dabbed iodine all over the exposed part, and I heard the burly chief warder saying, even more loudly than before, that he was going to kill me that day, that I would have the scars for the rest of my life. He kept boasting about how efficient he was, with years of experience, and the other warders egged him on, almost hysterical with excitement. In the meantime the doctor told me not to worry since it would not be too bad and would soon be over but even while he was talking I heard the whistle of the cane. Next moment it felt as though a sharp knife had cut right across my backside. There was no pain immediately but, suddenly, my whole body felt as though it had been given an electric shock. I grabbed hold of the Mary with both my hands and clung tightly to it. The chief warder commented sarcastically, 'Oh, die koelie wil nie huil nie - the coolie doesn't want to cry', and all the warders joined in the chorus. He went on to say that the next three strokes would land right on the cut; the medical orderly applied more iodine and this burned me even more than the caning. The doctor continued to speak to me, saying that it had not been too bad, and that one stroke had already gone. While he was talking I again became aware of the whistle of the cane [...] The last shot came whistling down and cut me right along the very line of the first cut. That stroke was so painful that after it I could hardly see in front of me. I was dazed, and strange shapes appeared in front of my eyes. I grabbed hold of the Mary and hung on to it as I tried to regain control of myself. In all that time I did not speak or groan and, as the chief warder marched away [...] I heard the warders commenting angrily that I was refusing to cry [...] I heard the doctor saying that I had taken it well, and somebody loosened the straps. As my feet touched the ground I felt

⁹⁷¹ 1988 (2) SA 702 (ZS) 714C.

⁹⁷² 1990 (4) SA 151 169.

⁹⁷³ 1991 (3) SA 76 (NmS) 89.

that I was going to collapse at any moment [...] I heard the warder in charge saying abruptly that I must put on my pants and return to my cell [...]⁹⁷⁴

In contrast another account indicates how prison officers attempted to be measured in the infliction of corporal punishment on juveniles.⁹⁷⁵

With a few exceptions, there were two forms of caning technique. For the older boys, usually 16 and over, this involved aiming at an imaginary spot about 6 inches below the surface of the buttocks. It resulted in the cane's remaining in contact, at maximum pressure, with the skin, for a measurable period. It stung like hell, raised very ugly weals and left deep, long-lasting bruises. It resulted in a very painful thrashing and a deeply bruised backside that stayed tender for weeks. For younger offenders, the stroke was aimed at the skin, landed there and was lifted at once. It stung like the devil, especially on the bare bottom, and left an angry 'tramline' welt, but, unless the offender had a very thin hide, he was as right as rain next day, although his behind would stay striped for about a week. This stroke was used to let them know all about it while it was happening, and as a warning for later, but so as not to really hurt them.

In each instance the challenges in removing from the punishment the character and personality of the punisher are patently clear.

9.6 Judicial corporal punishment administered by a stranger is humiliating

In *S v A Juvenile*, the Court described judicial corporal punishment as institutionalised violence which degrades and dehumanises the victim who is unable to defend himself.⁹⁷⁶ On *Tyrer*, the Court noted the adverse the psychological effects attendant on the prisoner following the infliction of judicial corporal punishment by a stranger.⁹⁷⁷ The Court in *Ex parte Attorney General, Namibia*, expressed the view that judicial corporal punishment was alien and humiliating as it was administered to the offender by a stranger with no emotional bonds to them.⁹⁷⁸ There are those who have argued that that some punishers get a perverse sexual kick from administering judicial corporal punishment.⁹⁷⁹ It is no doubt humiliating for

⁹⁷⁴ I Naidoo *Island in chains; Ten years on Robben Island* (1982) as cited in CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa: What caning of adults involved' <http://www.corpun.com/jcpza5.htm#histb> (accessed 20 January 2016).

⁹⁷⁵ CORPUN World Corporal Punishment Research 'Judicial Corporal Punishment in South Africa: What caning of juveniles involved' <http://www.corpun.com/jcpza6.htm#histb> (accessed 20 January 2016).

⁹⁷⁶ 1990 (4) SA 151 at 169.

⁹⁷⁷ *Tyrer v the United Kingdom* (1979 – 1980) 2 EHRR 1 at [35].

⁹⁷⁸ 1991 (3) SA 76 (NmS) 89.

⁹⁷⁹ D Morris *The naked ape* (1969) 146 as cited in S Pete 'To smack or not to smack? Should the law prohibit South African parents from inflicting corporal punishment upon their children?' (1998) 14 *South African*

an adult male to have to expose their back side to a complete stranger as a punishment.

10 POSSIBLE ALTERNATIVES TO CORPORAL PUNISHMENT

Abolition of corporal punishment would require the introduction of a new form of sentencing for adults in Botswana which would serve the same purpose as corporal punishment which is primarily retribution coupled with the avoidance of a custodial sentence. In many jurisdictions this is achieved by ordering sentencing within the community or what is called community-based punishment. Community-based sentencing in South Africa and Australia is examined below as a possible alternative to the abolition of judicial corporal punishment.

10.1 South Africa

In South Africa, the following non-custodial sanctions are available: Committal to an institution,⁹⁸⁰ fines,⁹⁸¹ correctional supervision,⁹⁸² suspended and postponed sentences, caution and discharge, compensatory orders and community service orders.⁹⁸³ Community-based sentences usually include correctional supervision coupled with community service orders and/or restorative justice orders. Community-based alternatives to sentencing in South Africa hold many advantages. Society is able to achieve several aims of sentencing in one form of punishment.

Community-based alternatives enable reformation of the offender, retribution by the community, deterrence of the offender and other would be offenders. Another advantage of community-based sentencing is that offenders do not suffer the same stigma in the community. Prisoner over-crowding is also reduced. The offender retains the ability to

Journal of Human Rights 430 434 – 435.

⁹⁸⁰ Section 276 (1)(e) Criminal Procedure Act.

⁹⁸¹ Section 276 (1)(f) Criminal Procedure Act.

⁹⁸² Section 276 (1)(h) Criminal Procedure Act.

⁹⁸³ Section 297 Criminal Procedure Act.

provide for his family and maintain family and community relationships. Where the offender is employed, they are enabled to retain their employment, and the escalation of deviant behaviour in the offender, which sometimes occurs as a consequence of incarceration, halted. Rehabilitation and reintegration of the offender into the society is therefore more feasible.⁹⁸⁴ Although alternative sentencing is still not widely used by magistrates and judges,⁹⁸⁵ alternative sanctions recognise the fact that custodial sentences are not suitable for all offenders.⁹⁸⁶

10.1.1 Correctional supervision of adults

Correctional supervision is defined in section 1 of the South African Criminal Procedure Act⁹⁸⁷ as a community-based form of punishment. The offender serves his punishment in the community. Correctional supervision has been described as being ‘an excellent acceptable alternative, having regard to the present day emphasis on the rehabilitation and reformation of offenders, to direct imprisonment.’⁹⁸⁸

Terblanche identifies three elements that must be present in any correctional supervision order. These are house arrest, community service and monitoring of the offender by a public official to ensure compliance with the correctional service order.⁹⁸⁹ House arrest entails the offender staying at home though exceptions may be made for work, shopping and religious services. Community service includes 16 hours a month of unpaid work in the community

⁹⁸⁴ RM Ntuli & SV Dlula, ‘Enhancement of Community based alternatives to incarceration at all stages of the criminal justice process in South Africa’ 121st International Training Course Participants Papers Resource Material Series No. 61 263 (Unpublished paper).

⁹⁸⁵ L Muntingh ‘Alternative Sentencing in South Africa: An update’ in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 118.

⁹⁸⁶ L Muntingh ‘Alternative Sentencing in South Africa: An update’ in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 106 – 108.

⁹⁸⁷ No 51 of 1997.

⁹⁸⁸ *S v Omar* 1993 (2) SACR 5 (C).

⁹⁸⁹ SS Terblanche, ‘Sentencing’ in Joubert (ed) *Criminal Procedure Handbook* 11th Edition (2013) 336.

like cleaning of public facilities, or work in a hospital or other public institution.⁹⁹⁰

In terms of section 52 of the Correctional Services Act the correctional supervision order may also include conditions on education, rehabilitation, correction of wrongdoing, compensation of the victim, supervision by a probation officer and life skills courses and also to participate in mediation between victim and offender or in family group conferencing.⁹⁹¹

Correctional supervision may be imposed alone⁹⁹² or as a condition to a suspended or postponed sentence.⁹⁹³ A person serving a prison sentence may also be released by the Commissioner of Correctional Services into correctional supervision after serving a term of imprisonment.⁹⁹⁴ The Commissioner of Correctional Services is also empowered to apply for an order reconsidering a sentence of imprisonment and imposing a correctional supervision order on an offender in lieu of the remaining term of imprisonment.⁹⁹⁵ The imposition of correction supervision is dependent on the nature of the crime, which should not be too serious to admit correctional supervision but also by the circumstances of the particular offender. In *S v Omar*⁹⁹⁶ the Court held that correctional supervision would be open to:

...the first offender with no inborn criminal tendencies who has strayed into criminal activities, to the offender with criminal leanings who may have offended on more than one occasion but by reason of his employment, domestic and other circumstances is considered likely to ... be a suitable candidate for correctional supervision.⁹⁹⁷

In *S v R*⁹⁹⁸ the Court noted that the South African legislature had drawn a distinction between offenders who required removal from society and those who could be punished from within

⁹⁹⁰ SS Terblanche, 'Sentencing' in Joubert (ed) *Criminal Procedure Handbook* 11th Edition (2013) 336.

⁹⁹¹ 52(1)(g) Correctional Services Act.

⁹⁹² Section 276 (1)(h) Criminal Procedure Act.

⁹⁹³ SS Terblanche, 'Sentencing' in Joubert (ed) *Criminal Procedure Handbook* 11th Edition (2013) 337. See also section 297(1)(a) & (b) Criminal Procedure Act.

⁹⁹⁴ Section 276(1)(i) and Section 276(2)A Criminal Procedure Act.

⁹⁹⁵ Section 276(A)(3) Criminal Procedure Act. See also A van der Merwe 'Recent cases: Sentencing' (2012) 3 *South African Journal of Criminal Justice* 441 and A van der Merwe 'Recent cases: Sentencing' (2013) 3 *South African Journal of Criminal Justice* 412

⁹⁹⁶ 1993 (2) SACR 5 (C).

⁹⁹⁷ 1993 (2) SACR 5 (C).

⁹⁹⁸ 1993 (1) SACR 209 (A) 221H.

the community. Contrary to some views, the Court also pointed out that correctional supervision is not a soft option.⁹⁹⁹ Correctional supervision is a useful tool with punitive content which can be adjusted by increasing or decreasing the strictness of conditions attaching to the supervision order.¹⁰⁰⁰

Correctional supervision is used for a range of offences in South Africa today including serious crimes such as murder,¹⁰⁰¹ sexual offences,¹⁰⁰² fraud¹⁰⁰³ and theft.¹⁰⁰⁴ To avoid outrage in the community, the judicial officer handing down a sentence of correctional supervision must be careful to balance the seriousness of the crime with the punishment ordered. It is a fine balance. There is always the risk of preposterous sentences being handed down that have little relation to the seriousness of the offence. Thus in *S v Ingram*,¹⁰⁰⁵ the Court noted that correctional supervision could only be opposed for periods not exceeding three years which would exclude very serious crimes which would by their nature demand more serious penalties.

10.1.2 Restorative Justice for adult offenders

Restorative justice can be defined as a tool addressing the hurts and needs of victims and offenders in a way that heals them and their communities.¹⁰⁰⁶ Restorative justice places the victim at the centre of the criminal justice system in a bid to empower the victim.¹⁰⁰⁷

Restorative justice is defined by the South African Law Reform Commission (SALRC) as

⁹⁹⁹ 1993 (1) SACR 209 (A) 221H.

¹⁰⁰⁰ SS Terblanche, 'Sentencing' in Joubert (ed) *Criminal Procedure Handbook* 11th Edition (2013) 337.

¹⁰⁰¹ *S v Potgeiter* 1994 (1) SACR 61(A).

¹⁰⁰² *S v R* 1993 (1) SACR 209 (A) 221H.

¹⁰⁰³ *S v M* (Centre for Child Law as *amicus curiae*) 2007 2 SACR 539 (CC), in terms of which the Court has an obligation to consider the best interests of children when a custodial sentence is considered for the sole caregiver of children.

¹⁰⁰⁴ *S v Sibuyi* 1993 (1) SACR 235 (A).

¹⁰⁰⁵ 1995 (1) SACR 1(A) at 9F.

¹⁰⁰⁶ M Batley 'Restorative justice in the South African context' in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 21.

¹⁰⁰⁷ H Hargovan 'Restorative approaches to justice: "Compulsory compassion" or victim empowerment' (2007) 20(3) *Acta Juridica* 113 114.

a way of dealing with victims and offenders by focussing on the settlement of conflicts arising from crime and resolving the underlying problems caused by it.¹⁰⁰⁸

The Truth and Reconciliation Commission (TRC) report defines restorative justice as a process which seeks to redefine crime from breaking laws to violations against human beings, a process which is aimed at reparation, healing and restoration, a process encouraging victims and offenders and the community to participate directly in resolving conflict and a process which supports the criminal justice system by aiming for accountability of offenders and the full participation of victims and offenders.¹⁰⁰⁹

Restorative justice is based on 5R's which are reality, responsibility, repentance, reconciliation and restitution.¹⁰¹⁰ Restorative justice can be used at any stage of the criminal justice process including pre-trial, diversion during the trial, diversion prior to sentencing or post sentence.¹⁰¹¹ Crucially, restorative justice requires participation of both victim and offender.¹⁰¹² Restorative justice in the African context cannot be divorced from the concept of 'ubuntu' or 'botho' where one derives humanity or personhood through respecting the humanity and personhood of the other.¹⁰¹³ In *State v Makwanyane*,¹⁰¹⁴ the Constitutional Court stated:

[Ubuntu] envelops the key values of group solidarity, compassion, respect, human dignity, conformity of basic norms and collective unity. In its fundamental sense, it denote humanity and morality.¹⁰¹⁵

Batley identifies certain principles which govern the application of restorative justice. These are the fact that crimes injure victims, offenders and communities; that victims and offenders

¹⁰⁰⁸ South African Law Reform Commission 'Sentencing: Restorative Justice' (1997) Issue Paper no. 7 4.

¹⁰⁰⁹ Truth and Reconciliation Commission of South Africa Report (1998) 1 125.

¹⁰¹⁰ M Batley 'Restorative justice in the South African context' in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 22.

¹⁰¹¹ A Skelton & M Batley *Charting progress, mapping the future: Restorative justice in South Africa* (2006) 10 – 12.

¹⁰¹² A Skelton & M Batley *Charting progress, mapping the future: Restorative justice in South Africa* (2006) 13.

¹⁰¹³ A Skelton 'Restorative Justice as a framework for juvenile justice reform: A South African perspective' (2002) 42(3) *British Journal of Criminology* 499.

¹⁰¹⁴ 1995 ZACC 3.

¹⁰¹⁵ 1995 ZACC 3 at [308]. See also *Dikoko v Mokhatla* [2006] 6 SA 235 (CC) at [68] per Mokgoro J who states 'in our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another'.

should be involved in the criminal justice process at the earliest point and as much as possible; and that government has a responsibility to promote restoration between victims, offenders and the community.¹⁰¹⁶

Like correctional supervision, restorative justice may be viewed as a soft option. However this argument is disputed.¹⁰¹⁷ Restorative justice also holds within it the possibility that the offender will learn from the consequences of his behaviour and reform.¹⁰¹⁸ Further, the victim has the opportunity to be vindicated and perhaps receive compensation or restitution, elements often missing in the criminal justice system.¹⁰¹⁹ As Bosielo J noted in *S v Shilubane*¹⁰²⁰ the retributive system of justice has done little to curb crime and that the victim in that particular case would have been pleased with compensation under the new philosophy of restorative justice.

Restorative justice is usually applied in minor cases but is also important in more serious cases where the victim could benefit from the opportunity to confront the offender with the fact of the crime and its impact on the victim.¹⁰²¹ One common criticism of restorative justice is that it tends to widen the net of affected offenders to include those that would normally be overlooked by the criminal justice system for mildly deviant behaviour.¹⁰²²

Restorative justice is an important element of correctional supervision in South Africa. In terms of section 52(1) g of the Correctional Services Act, mediation between victim and offender as well as family group conferencing may be ordered.

¹⁰¹⁶ M Batley 'Restorative justice in the South African context' in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 21.

¹⁰¹⁷ M Batley 'Restorative justice in the South African context' in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 29.

¹⁰¹⁸ A Skelton & M Batley *Charting progress, mapping the future: Restorative justice in South Africa* (2006) 13.

¹⁰¹⁹ A Skelton & M Batley *Charting progress, mapping the future: Restorative justice in South Africa* (2006) 13.

¹⁰²⁰ 2008 (1) SACR 295 (T) at [4] and [6].

¹⁰²¹ A Skelton & M Batley *Charting progress, mapping the future: Restorative justice in South Africa* (2006) 14.

¹⁰²² M Batley 'Restorative justice in the South African context' in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 29.

Victim offender mediation was pioneered in Kitchener, Ontario, Canada in the 1970's. The experiment promoted a meeting between the victim and the offender facilitated by a mediator. Attendance at the meeting by the victim is voluntary. The attendance of the offender is also voluntary although in many instances the offender is motivated by the possibility of avoiding harsher outcomes. The purpose of the meeting is to assist the victim and the offender to achieve justice in relation to the crime that has been committed by one against the other. They both have the opportunity to state their feelings and discuss their perceptions of the offence. The objective is to end the meeting having repaired the harm caused. The mediator does not impose a solution but assists the parties to reach a mutually agreed outcome that they would both perceive as fair.¹⁰²³

Family group conferencing was first utilised in 1989 in New Zealand as a method of dealing with child offenders. The Children, Young Persons and Their Families Act¹⁰²⁴ in New Zealand gave priority to the juvenile offender, his family and the victim to reach an agreed sanction for the juvenile's criminal conduct. The procedure was rooted in the *whanau* conferencing of the Maori aboriginal people. In a similar manner to victim-offender mediation, the victim will meet with the offender but in addition, the families will be included in the meeting. The purpose of the meeting is to discuss the impact of the offence, direct the offender into taking responsibility for his actions and consequences of his actions and to reintegrate the offender into society. The outcome of the meeting is an agreed reparation by the offender to the victim. Notably, family group conferencing is only utilized where the offender admits guilt. The matter can be diverted back to the criminal justice system at any point should the offender dispute his guilt. Benefits of family group conferencing include the offender showing empathy for his victim, behavioural change in the

¹⁰²³ Restorative Justice Online 'Victim offender Mediation' available at <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/vom> (accessed 30 May 2015).

¹⁰²⁴ Public Act 1989 No 24.

offender and reintegration into the community.¹⁰²⁵

The view has been expressed that restorative justice is still playing a marginal role in the South African criminal justice system.¹⁰²⁶ In *S v Maluleke*¹⁰²⁷ the Court noted that restorative justice in South Africa was still in its infancy but that it could become an important tool in reconciling the victim, the offender and the community.¹⁰²⁸ Terblanche states that restorative justice is not a panacea for the problem of crime and is not equipped to rid South Africa of dangerous individuals.¹⁰²⁹

10.1.3 Community-based sentencing and restorative justice for juveniles

The law reform process to give child justice its rightful place in the South African criminal justice system begun in the 1990's driven by advocacy by non-governmental organisations. At the time, children were being detained for committing ordinary offences after having their cases tried in the criminal justice system used for adult offenders.¹⁰³⁰

A diversion program was created by the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) in 1992 which allowed for the diversion of cases involving juveniles. This was South Africa's first victim-offender mediation project and it laid the groundwork for later diversion programs run by government and non-governmental organisations.¹⁰³¹ This program was based on victim offender reconciliation models in use in

¹⁰²⁵ Restorative Justice Online 'Conferencing' available at <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/conferencing> (accessed on 30 May 2015)

¹⁰²⁶ H Hargovan 'Restorative approaches to justice: "Compulsory compassion" or victim empowerment' (2007) 20(3) *Acta Juridica* 113 122.

¹⁰²⁷ 2008 (1) SACR 49.

¹⁰²⁸ 2008 (1) SACR 49 at [31] and [34].

¹⁰²⁹ SS Terblanche 'Sentencing' (2008) *Annual Survey of South African Law* 1191 1193.

¹⁰³⁰ A Skelton & J Galinetti 'A long and winding road: The Child Justice Bill, civil society and advocacy' (2008) 25 *SA Crime Quarterly* 3 4.

¹⁰³¹ A Skelton & M Batley *Charting progress, mapping the future: Restorative justice in South Africa* (2006) 19; A Skelton & J Galinetti 'A long and winding road: The Child Justice Bill, civil society and advocacy' (2008) 25 *SA Crime Quarterly* 3 4.

Ontario and family group conferencing practiced in New Zealand.¹⁰³²

South Africa became a signatory to the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare the Child (ACRWC), the UN Guidelines for the Prevention of Juvenile Delinquency, the UN Rules for the Protection of Juveniles Deprived of their Liberty and the UN Standard Minimum Rules for the Administration of Juvenile Justice. Of these treaties and soft law documents, perhaps the most important principles are those captured by article 37 and article 40 of the UNCRC which provide for protection of the rights of children in conflict with the law.

The ratification of the UNCRC provided the impetus for the development of a separate juvenile justice system for children.¹⁰³³ South Africa has embodied these principles in section 28 of its Constitution which, among others, recognises a child's right to be detained for the shortest period of time and only as a last resort. In *S v N*¹⁰³⁴ the Constitutional Court reaffirmed the principle that imprisonment should only be imposed on a child as a last resort.

In 1996, the South African Law Reform Commission (SALRC) was charged with investigating juvenile justice and South Africa's compliance with the UNCRC and section 28 of the Constitution.¹⁰³⁵ The SALRC published its report on juvenile justice in 2000 and made recommendations for the creation of a separate criminal justice system for juveniles. After lengthy legislative delays,¹⁰³⁶ this recommendation saw fruition in the Child Justice Act

¹⁰³² A Skelton 'Restorative Justice as a framework for juvenile justice reform: A South African perspective' (2002) 42(3) *British Journal of Criminology* 496.

¹⁰³³ F Cassim 'Formulating new juvenile justice legislation in South Africa' (1998) 31 *Comparative and International Law Journal of Southern Africa* 330 333.

¹⁰³⁴ 2008(2) SACR 135 (SCA) at [39].

¹⁰³⁵ A Skelton & J Galinetti 'A long and winding road: The Child Justice Bill, civil society and advocacy' (2008) 25 *SA Crime Quarterly* 3 4.

¹⁰³⁶ A Skelton & J Galinetti 'A long and winding road: The Child Justice Bill, civil society and advocacy' (2008) 25 *SA Crime Quarterly* 3 4.

which came into effect in 2010.¹⁰³⁷

One of the highlights of the Child Justice Act is the diversion of offenders from the criminal justice system in appropriate cases and a wider range of sentencing options for juveniles. Diversion allows child offenders to be dealt with outside the criminal justice system using community-based orders and restorative justice tools in a bid to rehabilitate juveniles and to avoid criminalising them. General principles applying to the sentencing of children include encouraging responsibility for the crime and the harm caused to the victim, balancing the interests of the child and those of society, promoting reintegration of the child into the community and using imprisonment only as a last resort.¹⁰³⁸

Recognising that lack of rehabilitation programmes, inadequate programs targeting juvenile delinquents, and the risk of further criminalisation of incarcerated juveniles, the need for community-based sentences that kept juveniles out of prison was patent.¹⁰³⁹ A community-based sentence allows the child to remain in the community whilst receiving punishment for a criminal offence.¹⁰⁴⁰ In terms of section 75 of the Child Justice Act, a child can be sentenced to correctional supervision. Correctional supervision is a species of community-based sentences for children. A probation officer must be appointed to supervise the probationer.¹⁰⁴¹

The Child Justice Act (CJA) also has a strong restorative justice orientation.¹⁰⁴² Restorative justice is a method of punishment that focuses on social justice rather than legal justice. Its aim is to repair broken relationships of persons affected by crime as offenders or victims. It

¹⁰³⁷ Act No 75 of 2008 coming into force on 1 April 2010.

¹⁰³⁸ Section 69 Child Justice Act.

¹⁰³⁹ F Cassim 'Formulating new juvenile justice legislation in South Africa' (1998) 31 *Comparative and International Law Journal of Southern Africa* 330 333.

¹⁰⁴⁰ Section 72 Child Justice Act.

¹⁰⁴¹ Section 72(2)(a) Child Justice Act.

¹⁰⁴² J Sloth Nielsen & J Galinetti 'Just say sorry? Ubuntu, africanisation and the child justice system in the Child Justice Act 75 of 2008' (2011) 14 (4) *Potchefstroom Electronic Law Journal* 64.

places the victim of the crime at the centre of the criminal justice process instead of at the periphery as is the most common experience.¹⁰⁴³ Restorative justice also gives the community the opportunity to engage directly with young offenders and is more effective than more punitive options like incarceration or corporal punishment which further alienate the offender from society and bear the risk of further criminalising the youth.¹⁰⁴⁴

Section 73 of the Child Justice Act provides for the possibility of utilisation of restorative justice measures when juveniles offenders are diverted. These include family group conferences and victim offender mediation which have been described above. Hargovan states that the Child Justice Act recognises children in conflict with the law as victims in their own right and seeks to focus on reconciliation, restitution and responsibility.¹⁰⁴⁵ The act aims to foster the child's dignity and worth, to reinforce children's respect for human rights and fundamental freedoms of others, to support reconciliation through restorative justice and to involve parents, families, victims and communities in reintegrating the offender.¹⁰⁴⁶ Where diversion is unsuccessful, the case reverts back to the criminal justice system.¹⁰⁴⁷

There are challenges with restorative justice and children. Van der Merwe raises several points for consideration. First, a level of cynicism to an apology being used to fix criminal wrongdoing exist. Second the fact that child offenders are often too immature to be genuinely empathetic towards their victims. Third, that in sexual offenders, the suitability of restorative justice approaches is doubted due to the intimate and serious nature of the offences. The adequacy of training of probation officers and Court officers dealing with restorative justice

¹⁰⁴³ MA Yeats 'Three strikes' and restorative justice: Dealing with young repeat burglars in Western Australia' (1997) 8(3) *Criminal Law Forum* 369 371.

¹⁰⁴⁴ MA Yeats 'Three strikes' and restorative justice: Dealing with young repeat burglars in Western Australia' (1997) 8(3) *Criminal Law Forum* 369 384 – 385.

¹⁰⁴⁵ H Hargovan 'Restorative approaches to justice: "Compulsory compassion" or victim empowerment' (2007) 20(3) *Acta Juridica* 113 118.

¹⁰⁴⁶ J Sloth Nielsen & J Galinetti 'Just say sorry? Ubuntu, africanisation and the child justice system in the Child justice Act 75 of 2008' (2011) 14 (4) *Potchefstroom Electronic Law Journal* 68.

¹⁰⁴⁷ A Skelton 'Restorative Justice as a framework for juvenile justice reform: A South African perspective' (2002) 42(3) *British Journal of Criminology* 504.

approaches is also an issue. Lastly, physical and financial redress is often out of the reach of the child offender and often the responsibility of the offender's parents or guardians.¹⁰⁴⁸

According to Skelton, restorative justice can be criticised for eroding the child's right to remain silent and the presumption of innocence. Children are sometimes under pressure to admit guilt in order to be considered for diversion. There is also the effect of widening the net to include matters that would previously not have reached the evidential threshold to enter the criminal justice system.¹⁰⁴⁹ Others take the view that restorative justice can be perceived as letting child offenders off the hook.¹⁰⁵⁰

The advantages of a restorative justice approach with respect to juveniles cannot be overstated. Where it is effective, society benefits from behavioural change in children, the limiting of recidivism and a balancing of victims and offenders rights.¹⁰⁵¹

10.2 Australia

In 1994, Western Australia adopted family group conferencing as a restorative justice method involving young offenders. This method was pioneered in New Zealand in 1989 and adopted in the United States and later in Australia.¹⁰⁵² As described above, in family group conferencing, the police do not lay a charge but refer the young person to a juvenile justice team who then go through the mediation process with the victim, the offender and their families with a view to reaching a resolution.

¹⁰⁴⁸ For a full discussion of restorative justice and the Child Justice Act see A Van der Merwe 'A role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act' (2013) *De Jure* 1022 1034 – 1037.

¹⁰⁴⁹ A Skelton 'Restorative Justice as a framework for juvenile justice reform: A South African perspective' (2002) 42(3) *British Journal of Criminology* 506.

¹⁰⁵⁰ J Sloth Nielsen & J Galinetti 'Just say sorry? Ubuntu, africanisation and the child justice system in the Child justice Act 75 of 2008' (2011) 14 (4) *Potchefstroom Electronic Law Journal* 64.

¹⁰⁵¹ A Skelton 'Restorative Justice as a framework for juvenile justice reform: A South African perspective' (2002) 42(3) *British Journal of Criminology* 506.

¹⁰⁵² MA Yeats 'Three strikes' and restorative justice: Dealing with young repeat burglars in Western Australia' (1997) 8(3) *Criminal Law Forum* 369 370.

It has been found that family group conferencing seems to work better for victims than taking a matter through the Courts.¹⁰⁵³ The victims often receive an apology from the offender, and their anger is assuaged. They may also develop sympathy for the offender after becoming familiar with their circumstances and perhaps are convinced that the offender will not victimise them again. They may receive material compensation.¹⁰⁵⁴

The practice in South Africa and Australia is instructive for Botswana, should judicial corporal punishment be abolished. The use of correctional supervision and restorative justice approaches in South Africa and Australia have proved useful tools to divert young offenders and punish adult and juvenile offenders within the community.

11 ROADMAP TO ACHIEVING PROHIBITION IN BOTSWANA

Achieving a prohibition of corporal punishment entails the elimination of corporal punishment in all settings. This would require a prohibition of all defences and authorisations of corporal punishment through legislation. The scope of this thesis does not encompass making arguments for prohibition of corporal punishment in all settings but focuses on making arguments and recommendations for the abolition of judicial corporal punishment.

Key opportunities for reforming the law in order to achieve a prohibition of judicial corporal punishment normally arise when law is being reviewed or when policy is being developed to guide practice and form the basis for future legislation. It appears that Botswana has missed both these opportunities.

¹⁰⁵³ MA Yeats ‘Three strikes’ and restorative justice: Dealing with young repeat burglars in Western Australia’ (1997) 8(3) *Criminal Law Forum* 369 371.

¹⁰⁵⁴ MA Yeats ‘Three strikes’ and restorative justice: Dealing with young repeat burglars in Western Australia’ (1997) 8(3) *Criminal Law Forum* 369 372.

On the occasion of the overhaul of the 1981 Children’s Act, a process which culminated in the Children’s Act 2009, corporal punishment could have been excluded from the new statute. However, the contrary is true because the Common Law defence of reasonable chastisement was legislated into the statute¹⁰⁵⁵ and the state reserved the right to impose judicial corporal punishment as a sentence.¹⁰⁵⁶

In the recent consultations for the formulation of the sentencing policy entitled ‘Supporting the development of a sentencing policy encompassing alternatives to imprisonment in the administration of justice in Botswana’, the question of judicial corporal punishment did not form part of the terms of reference or the report.¹⁰⁵⁷ Botswana has therefore made no steps towards the prohibition of corporal punishment but has in fact solidified her position firmly in favour of it in the new Children’s Act.

The purpose of this section is to draw a roadmap that could form the basis for the prohibition of judicial corporal punishment. In order to achieve a prohibition of judicial corporal punishment, there are several hurdles that must be overcome. These are first the repeal of the constitutional savings clause preserving judicial corporal punishment; secondly, the question of public opinion in favour of the punishment should be addressed and thirdly, the lack of alternative sentencing options must be resolved.

Each of these hurdles will be considered in turn and recommendations made regarding how they can be removed.

¹⁰⁵⁵ Section 27(4) as read with section 27(5) Children’s Act, 2009.

¹⁰⁵⁶ Section 90 Children’s Act, 2009.

¹⁰⁵⁷ This draft policy was discussed with stakeholders at different *fora* in 2013.

11.1 Overcoming the constitutional savings clause

11.1.1 A constitutional clause cannot be unconstitutional

In *Petrus and Another v the State*,¹⁰⁵⁸ Aguda J, recognising the hurdle created by the constitutional savings enshrined in section 7(2) of the Constitution which limited the protections of section 7(1) of the Constitution stated:

I have no doubt in my mind that judicial flogging of an adult is a degrading form of punishment, but so long as the world community has not reached that stage when it can be abolished throughout the world, just as slavery has been abolished, it must continue to exist in some countries... Suffice it to say that whatever views one may have of corporal punishment of an adult as a form of punishment for an offence, it is, in so far as Botswana is concerned, saved by subsection (2) of section 7 of the Constitution.¹⁰⁵⁹

In *State v Ncube; S v Tshuma; S v Ndhlovu*¹⁰⁶⁰ the Zimbabwe Supreme Court noted that the Botswana Court of Appeal in *Petrus and Another v the State* would have declared corporal punishment unconstitutional but for the constitutional derogation that preserved the punishment in the constitutional thus making it unassailable by the Court.¹⁰⁶¹ Unlike in Zimbabwe, there is no time limit to the constitutional derogation that preserves the legality of judicial corporal punishment as a punishment in existence before 30 September 1966. Essentially, the constitutional derogation will and shall obtain until such time as the Botswana Constitution is amended to remove it. In *Dow*¹⁰⁶² and *Kamanakao 1*,¹⁰⁶³ the Botswana Courts recognise that it is not within their purview to declare constitutional derogations unconstitutional. The unambiguous indication is that any amendment of the constitution is a legislative process in response to the changing values of the community and certainly not a judicial function.

As a matter of judicial policy the courts are reluctant to issue orders for the carrying out of works and other activities which require their supervision. It is obvious that for the Court to issue orders requiring

¹⁰⁵⁸ 1984 BLR 14 (CA).

¹⁰⁵⁹ 1984 BLR 14 (CA) 39 – 40.

¹⁰⁶⁰ 1988 (2) SA 702 (ZS).

¹⁰⁶¹ 1988 (2) SA 702 (ZS) 721.

¹⁰⁶² 1992 BLR 119 (CA) 150H.

¹⁰⁶³ 2001 (2) BLR 654 (HC).

positive action on the part of government on a continuing basis is a mammoth task. The performance by the government of required activities to fulfil the orders sought by the Court must involve inter alia, careful planning, budgeting and funding, manpower and other inputs on the part of the State.¹⁰⁶⁴

The Court emphasised that its refusal to amend the constitution was not to be viewed as acquiescence to the state of affairs which threatened to undermine harmony between various tribes in Botswana. The Court called upon the government to attend to the offending provisions of the constitution urgently.¹⁰⁶⁵ The Courts of Botswana are not in a position to declare the Botswana constitution unconstitutional in order to eliminate judicial corporal punishment. However, Parliament can and ought to exercise its power to amend the constitution in order to abolish this antiquated form of punishment.

11.1.2 Parliament should amend the constitution to uphold the dignity of persons

The question that then arises is whether the time is ripe for a constitutional amendment to remove the constitutional derogation preserving judicial corporal punishment as a lawful penalty in Botswana. The tide has turned. Many civilised nations around the world have abandoned judicial corporal punishment as a sentencing option on the basis that the punishment and the manner of its imposition is an affront on the dignity of the punished and the punisher alike. As noted in *State v Williams*, the views of the international community have turned the tide against the continued imposition of corporal punishment as a judicial sentence. The Court stated:

There is unmistakably a growing consensus in the international community that judicial whipping involving as it does the deliberate infliction of physical pain on the person of the accused offends against society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the Courts and legislatures of various countries and through international instruments. It is a clear trend that has been established.¹⁰⁶⁶

What about Botswana? Has the utility of judicial corporal punishment been overtaken by changing values and standards of society? It is submitted that while judicial corporal

¹⁰⁶⁴ *Kamanakao 1 and others v The Attorney General and another* 2001 (2) BLR 654 (HC).

¹⁰⁶⁵ *Kamanakao 1 and others v The Attorney General and another* 2001 (2) BLR 654 (HC).

¹⁰⁶⁶ 1995 (3) SA 632 (CC) [39].

punishment may have been acceptable as a penalty at the time of promulgation of the Constitution on 30 September 1966, the punishment it has, with the passing of time, become antiquated. With the evolution of standards of decency and dignity in Botswana society, it is submitted that judicial corporal punishment is now inimical to society's notions dignity.

The time has come for the Government of Botswana to act on Justice Aguda's 30 year old exhortation in *Petrus & Another v the State* where he stated that an inhuman and degrading punishment falls foul of section 7(1) of the Constitution notwithstanding the fact that public opinion leans in its favour.¹⁰⁶⁷

11.1.3 Recommendations

The following recommendations are made.

[1] That The Botswana Government establish a commission, along the lines of the Lansdown, Cadogan, Barry and Viljoen Commissions, with a view to study the continued use of judicial corporal punishment as a sentencing option in the criminal justice system and make recommendations to the Government for law reform.

[2] That the Government of Botswana enacts a constitutional amendment, similar to the one passed in Zimbabwe, repealing the constitutional savings clause preserving corporal punishment enshrined in section 7(2) of the Constitution of Botswana.

[3] That that the Government of Botswana enact a law similar to the South African Abolition of Corporal Punishment Act¹⁰⁶⁸ repealing the authorisations of the use of corporal punishment as a punishment against all adults and children following judicial process in all Courts in Botswana whether Common Law or Customary Law.

¹⁰⁶⁷ 1984 BLR 14 (CA) 40.

¹⁰⁶⁸ No 33 of 1997.

11.2 Addressing public support for judicial corporal punishment

In *Petrus and Another v the State*,¹⁰⁶⁹ Aguda J elaborated on the meaning of section 7(1) of the constitution that prohibits inhuman and degrading treatment or punishment as follows:

First, it must be recognised that certain types of punishment or treatment are by their very nature cruel, inhuman or degrading. Here once more I must cite with approval what Professor Nwabueze says in his book (ibid.): "Any punishment involving torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs, burning alive or at the stake, crucifixion, breaking on the wheel, embowelling alive, beheading, public dissection and the like, or involving mutilation or a lingering death, or the infliction of acute pain and suffering, either physical or mental, is inherently inhuman and degrading." Under the Botswana Constitution such punishment which is inherently inhuman and degrading is prohibited by subsection (1) of section 7, and cannot be saved by subsection (2) of the section, notwithstanding the fact that public sentiments favour it. Secondly a punishment which is not inherently inhuman or degrading may become so by the very nature or mode of execution, and also notwithstanding the fact that popular demand may favour it.

Judicial Corporal punishment enjoys a level of public support in Botswana. This is because judicial corporal punishment forms an integral part of punishment in Customary Courts which are utilised by a large section of the community and has been a part of Botswana's colonial history. It is also viewed as an individual and general deterrent to crime. Incidents of illegal whippings of women and whippings carried out by vigilantes to enforce law in rural communities outside the parameters of the law have demonstrated the extrajudicial use of judicial corporal punishment.¹⁰⁷⁰ Nonetheless, as Aguda JA stated, public support for judicial corporal punishment should not continue to justify its continued use.

The question of public support for judicial corporal punishment has been considered in several notable judgements. In *State v Williams*, the Court noted that cruel inhuman or degrading punishment is a phrase that identifies and acknowledges that society has a concept of decency and human dignity.¹⁰⁷¹ The constitutional Court stated that:

... the state must in imposing punishment do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must

¹⁰⁶⁹ 1984 BLR 14 (CA) 40.

¹⁰⁷⁰ See discussion on vigilantism above.

¹⁰⁷¹ 1995 (3) SA 632 (CC) [35].

respect human dignity and be consistent with the provisions of the Constitution.¹⁰⁷²

In *State v Makwanyane*, the Constitutional Court stated as follows on the influence of public opinion on contemporary standards of dignity.

If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public... but this would be a return to parliamentary sovereignty and a retreat from the new legal order established in the 1993 constitution.¹⁰⁷³

Stewart J in *Gregg v Georgia* stated that public perceptions of standards of decency with respect to criminal sanctions are not conclusive.¹⁰⁷⁴ Stewart J goes on to state that the Courts, unlike the legislature, are not bound to act on the impulse of public opinion. He demands courage of Courts, to be independent and detached from political economic and social pressures.

But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when Courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.¹⁰⁷⁵

The concept of decency and human dignity is not static. It has been held that this is a concept that is in continuous evolution, that what is considered decent and non-offensive to the dignity of the human person today may not be so in fifty years.¹⁰⁷⁶ Botswana would be remiss if it did not seek to assess whether judicial corporal punishment has fallen foul of the requirement of human dignity in punishment, as we understand it today, 50 years after independence. Such a reassessment is in fact a duty of every criminal justice system.

In the researcher's opinion, it is doubtful that universal public support for a prohibition of

¹⁰⁷² *State v Williams* 1995 (3) SA 632 (CC) [38].

¹⁰⁷³ *S v Makwanyane* (CCT3/94) 1995 ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 [88].

¹⁰⁷⁴ *Gregg v Georgia* 428 US 153 (1976) at 173.

¹⁰⁷⁵ *Gregg v Georgia* 428 US 153 (1976) at 174 – 175.

¹⁰⁷⁶ *Trop v Dulles* 356 US (1958) 101; *Weems v United States* 217 US 349 (1910) 378; *Jackson v Bishop* 404 F 2d 571 (1968) 579.

judicial corporal punishment could be garnered before the proposed repeal of laws authorising judicial corporal punishment. As Pete notes, judicial corporal punishment is a subject which engenders both vehement support and indignant opposition.¹⁰⁷⁷

There may very well be calls from parliament for a referendum on the question of judicial corporal punishment. It must be noted however, that whilst referenda have been used in four instances to gauge the pulse of the nation on matters regarding the reduction of the voting age and the appointment of judges, there was no referendum regarding the removal of the reference to only eight tribes in the Constitution. It is therefore well within Parliament's power to enact a law abolishing judicial corporal punishment without delay.

11.2.1 Recommendations

In view of the above, the following recommendation is made:

[1] Given the levels of public support for judicial corporal punishment, the Government of Botswana should embarking on a public education campaign to sensitise the public to the possibility of changes in law, to give them information and provide cogent reasons for the amendment of the law to prohibit judicial corporal punishment. Public education campaigns will begin the process of transforming attitudes and practice so that judicial corporal punishment is no longer seen as a necessary sentencing option in Botswana.¹⁰⁷⁸

The following recommended measures need to accompany or follow a prohibition:

[2] Viable alternative sentencing options should be developed by the Government of Botswana, and piloted, in order to assure the public that young offenders in particular will be

¹⁰⁷⁷ SA Pete 'Spare the rod and spoil the nation? Trends in corporal punishment aboard and its place in the new South Africa' (1994)7 *South African Journal of Criminal Justice* 295.

¹⁰⁷⁸ Global Initiative to End All Corporal Punishment of Children 'Prohibiting corporal punishment of children in central Asia and the Pacific: progress report 2014' 46.

spared jail and diverted to alternative options that are effective and serve to rehabilitate the offender whilst enabling him to give back to his community. This will enable Botswana to avoid the path taken by Zimbabwe to reinstate corporal punishment for juvenile boys due to an absence of viable alternatives to imprisonment. As was the case in South Africa, government commitment to finance an alternative sentencing scheme will be pivotal to the success of the prohibition of judicial corporal punishment.

[3] Engagement with key leaders in the community, and in particular *Dikgosi*, will enable Government of Botswana to manage the possibility of a resurgence of corporal punishment thorough vigilantism. Since *Dikgosi* are the custodians and administrators of justice in Customary Courts nationwide, their utilisation and support for alternative sentencing measures will be crucial to the successful abolition of judicial corporal punishment.

[4] Evaluation of the impact of the prohibition of judicial corporal punishment through research will be of paramount importance in order to mitigate and respond to calls for reinstatement of the judicial corporal punishment in response to moral panics and folk devils. These phenomena, as is illustrated by the case of the United Kingdom, recur periodically, accompanied by calls for reinstatement of judicial corporal punishment. The extrajudicial application of the whipping by vigilante groups like *Mapogo-a-Mathamaga* of South Africa is an example of this occurrence.

[5] In order to counter the belief that judicial corporal punishment is an individual and general deterrent from crime, it is recommended that a study be undertaken by the office of the Attorney General to establish levels of recidivism amongst offenders who have been convicted and sentenced to judicial corporal punishment in the past.

11.3 Strengthening alternative sentencing options for adult and juvenile offenders

Common Law Courts have failed to utilise extra-mural labour under the prisons as an alternative sentencing option for adult offenders. The institutional capacity to run such a program simply has not been developed.

With respect to juveniles, Korsah JA stated in *S v A Juvenile*¹⁰⁷⁹ that it is desirable to keep young offenders out of prison. He was adamant that the Courts could not shirk the responsibility to ensure that laws passed by the legislature were just and humane. He was unequivocal that parliament had to meet the need to promulgate laws for alternative punishments.¹⁰⁸⁰

Similar sentiments were expressed by the Constitutional Court in *State v Williams* which recommended a serious approach to alternative sentencing that would advance a more humane and caring society as opposed to a pragmatic approach which retained judicial corporal punishment on the basis that limited resources and infrastructure hindered the introduction of alternative sentencing regimes.¹⁰⁸¹

In Zimbabwe, a return to judicial corporal punishment for juvenile males was prompted by the burden placed on an unprepared criminal justice system which had no viable alternatives to incarceration. In order to avoid a reversion to judicial corporal punishment, a robust, well financed and manned alternative sentencing model is necessary.

As noted above, the sentencing options of probation, the school of industries and community service are not put to optimal use on account of institutional challenges ranging from lack of

¹⁰⁷⁹ 1990 (4) SA 151 (ZS).

¹⁰⁸⁰ 1990 (4) SA 151 (ZS) 176 B-D.

¹⁰⁸¹ 1995 (3) SA 632 (CC) [63].

properly trained officers, to lack of regulations to run particular programs or institutions. This problem is not new to Botswana's juvenile justice system. In *State v Jane Moseki*¹⁰⁸² the Court noted as follows with respect to juvenile delinquency:

As the law stands the Courts have no adequate machinery with which to cope with this problem and this situation must be regarded as a painful flaw in Botswana justice. Simply to send youths to a State prison is not the answer. As *parens patriae* the State is in [sic] duty bound to assume responsibility for these strays and guide them in the direction of good citizenship. There is no escape from this obligation.

The duty to provide an adequate criminal justice system for juvenile offenders falls squarely on the state. It is important to point out that the corporal punishment of children preserved in the Children's Act is in fact contrary to the provisions of the UNCRC which under article 19 provides that 'all children should be protected from all forms of physical and mental violence.' The Committee on the Rights of the Child in *General Comment No.8* (2006)¹⁰⁸³ states:

... There is no ambiguity: 'all forms of physical or mental violence' does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and the State must take all appropriate legislative, administrative, social and educational measures to eliminate them.

The UNCRC provides that that a variety of non-custodial dispositions be made available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate to their circumstances and the offence they have committed.¹⁰⁸⁴

Article 11 of the Beijing Rules also encourages the process of diversion in order to rehabilitate the offender, reintegrate the offender into the community and avoid processing the offender through the criminal justice system. Where diversion away from the criminal justice system is not possible, Article 18 of the Beijing Rules recommends a large variety of disposition measures be available to the Courts in order to avoid institutionalization of juveniles. Article 14 (a) of the Guidelines for Action on Children in the Criminal Justice

¹⁰⁸² 1968 – 1970 BLR (HC) 406.

¹⁰⁸³ Available at <http://www.refworld.org/docid/460bc7772.html> (accessed 20 January 2016).

¹⁰⁸⁴ Article 40(4) UNCRC.

System¹⁰⁸⁵ requires that states provide a comprehensive, child centred juvenile justice process. Further, article 23 of the Beijing Rules calls for effective implementation of disposition orders. It is a matter of concern that alternative disposition orders for juveniles in Botswana are not effectively enforced.

Formalising of alternative disposition would give magistrates a way to avoid having to order corporal punishment. The motivation for the candidate's argument is that punishments for child offenders should be in keeping with human dignity, despite the low numbers of children in conflict with the law. Low numbers provide Botswana with an opportunity to develop exemplary practice. There would be no need to have probation officers in every district. It is possible to pilot a community service sentencing option in major centres like Gaborone and Francistown initially as has been done with the Small Claims Court and Stock Theft Courts in areas where they are most needed country wide.

11.3.1 Recommendations

[1] It is proposed that the Government of Botswana develop section 97 of the Prisons Act into a fully-fledged correctional supervision system along the lines of the South Africa Model. This will allow for diversion of numerous petty and first time offenders through immediate correctional supervision without the need to serve jail time or be subjected to judicial corporal punishment. Institutional capacity will have to be developed including probation officers, a monitoring system and a list of duties that such offenders may be assigned to in each magisterial district.

[2] The lack of probation officers and relevant regulations impacts directly on

¹⁰⁸⁵ <http://www.ohchr.org/en/professionalinterest/pages/criminaljusticesystem.aspx> (accessed 20 January 2016). see also Article 22 of the Guidelines for action on children in contact with the justice system in Africa which encourages states to 'develop a comprehensive and coherent national policy for 'Children in the Justice System' which shall consider the interrelatedness of the challenges facing children in contact with the law, be informed by extensive consultation with children and enable their active and meaningful participation in decision-making at all levels of governance.' Available at <http://crin.org/Law/instrument.asp?InstID=1601> (accessed 20 January 2016).

possibilities for rehabilitation of juvenile offenders. It is recommended that a care of probation officers be trained and a probation service created in order to give effect to section 85(a) of the Children's Act, 2009.

[3] The school of industries is underutilized and hampered by the lack of regulations to run it. It is also seemingly misplaced in the Ministry of Local Government, given that imprisonment of juveniles is a sentencing option under the Children's Act. It is recommended that the mandate of this facility should be reconsidered and realigned to meet the needs of the criminal justice system. The current need is a place of incarceration for juveniles aged 14 – 18 who are sentenced to imprisonment. This would entail moving the facility to the Ministry of Defence Justice and Security to be managed by the prisons service. Regulations for the management of this facility should be promulgated as a matter of priority.

[4] It would be useful to see Children's Courts better utilize the possibility to sentence juveniles to community service. It is recommended that Section 91 of the Prisons Act be utilised by Common Law Courts for both adult and juvenile offenders. Instead of being subjected to a humiliating flogging, offenders would have the dignity of giving back to their community and have the opportunity to mend fences and be a force for good in the community. Community service would greatly assist juvenile offenders in their rehabilitation and re-integration. There is also clear need for Community Service Regulations to govern the running of such a program.

[5] The adoption of restorative justice approaches to sentencing would go a long way in modernising Botswana's sentencing scheme. The seeds for the development of a robust restorative justice approaches probably already exist in the Botswana Criminal justice system. The Criminal Procedure and Evidence Act¹⁰⁸⁶ already provides for a reconciliation procedure

¹⁰⁸⁶ Chapter 08:02.

which allows the magistrate at his or her discretion and in suitable cases to foster reconciliation between victim and offender in criminal matters. Section 321 of the Criminal Procedure and Evidence Act provides as follows:

321. Reconciliation in criminal cases

(1) In criminal cases a magistrate's Court may, with the consent of the prosecutor, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for assault or for any other offence of a personal or private nature not aggravated in degree, on terms of payment of compensation or other terms approved by such Court, and may, thereupon, order the proceedings to be stayed.

(2) If the proceedings are stayed, they shall be stayed for a sufficient length of time to enable the terms of the settlement to be carried out and if the terms be carried out by that date, it shall be recorded on the record to the case and the accused discharged; if the terms have not been carried out, the case against the accused will then proceed unless the proceedings be further stayed.

Save for the fact that this provision is limited to 'assault and offences of a personal or private nature not aggravated in degree', it could, with relevant amendments, form the basis of a diversion program to restorative approaches. It is recommended that Botswana considers the establishment of formal victim offender mediation and family group conferencing following on the South African model.

CHAPTER FOUR

RECONSIDERING THE USE OF MANDATORY MINIMUM SENTENCING IN BOTSWANA

1. INTRODUCTION

The object of this chapter is to assess the rationale for mandatory sentencing in Botswana today and to make proposals for law reform. The chapter commences by defining mandatory minimum sentencing, and discussing common arguments in favour of and common objections to minimum sentencing. This is followed by an exposition on the law governing mandatory minima in Botswana, and the manner in which the law is applied to adults and juvenile offenders. Constitutional challenges to mandatory minima are traversed and finally a look at current difficulties experienced in the application of mandatory minima end the discussion on Botswana.

The comparative perspective examines mandatory sentencing in South Africa, Australia, and England and Wales with a view to discovering what improvements can be made to the mandatory sentencing regime in Botswana. South Africa has been selected as a comparative jurisdiction on account of her shared legal history with Botswana as well as the existence of a mandatory sentencing regime with many similar features to that of Botswana. England and Wales and Australia have been selected because they are Common Law jurisdictions with some history and practice of mandatory minima.

1.1 Types of mandatory minimum sentences

A mandatory minimum sentence is a penalty determined by legislation which must be imposed by a judge on an offender convicted of a particular offence sometimes regardless of

the offender's personal circumstances. There are various types of mandatory penalties.¹⁰⁸⁷ In the most severe category, the sentence is fixed by parliament and the judicial officer has no discretion to deviate from the penalty. An example of such a sentence is the mandatory death sentence in Botswana that applies to any conviction for murder without extenuating circumstances.¹⁰⁸⁸ These types of mandatory minima are also found in the United States and also existed for period in the Northern Territory of Australia before some measure of discretion was introduced.¹⁰⁸⁹

The second type of mandatory minima are those that require the Court to impose a prescribed minimum whilst allowing a harsher sentence. For example, in Botswana a first conviction for stock theft will carry a penalty of a minimum of 5 and a maximum of 10 years while a second conviction will attract a minimum of 7 years and a maximum of 14 years.¹⁰⁹⁰

The last category are those mandatory minima that allow the Court to impose a sentence less than the prescribed minimum in the event that particular conditions are met. In Botswana, this is achieved by use of section 27(4) of the Penal Code. These types of departures from mandatory minima are also found in South Africa, England and Wales, and Australia.

Mandatory sentences of imprisonment are part of the sentencing arsenal of many countries.¹⁰⁹¹ They have been in use in some jurisdictions for decades.¹⁰⁹² They became

¹⁰⁸⁷ Department of Justice Canada, *Mandatory sentences of imprisonment in common law jurisdictions: Some representative models* (2005) available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html (accessed 24 March 2015) 4.

¹⁰⁸⁸ Section 203(1) and 203(2) Penal Code.

¹⁰⁸⁹ Northern Territory of Australia Office of Crime Prevention 'Mandatory sentencing for adult property offenders: The Northern Territory experience' (2003) 1 7.

¹⁰⁹⁰ Section 3(1) Stock Theft Act No. 21 of 1996.

¹⁰⁹¹ Department of Justice Canada, *Mandatory Sentences of imprisonment in common law jurisdictions: Some representative models* (2005) available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html (accessed 24 March 2015) at 3.

¹⁰⁹² Mandatory minima have been studied in the United States since the 1950's and 1960's. Mandatory minima

popular in many more jurisdictions in the 1990's with the most famous being mandatory sentencing state and federal statutes of the United States as well as three strikes laws.¹⁰⁹³

While they are hailed by some as a tough approach to crime, mandatory sentences have also faced robust criticism from judges and scholars in many jurisdictions. In several jurisdictions, public support for mandatory sentencing has experienced a decline and studies have also revealed that many members of the public are unaware which offences carry mandatory sentences.¹⁰⁹⁴

2. COMMON ARGUMENTS IN FAVOUR OF MANDATORY MINIMUM SENTENCING

2.1 Deterrence, retribution and incapacitation

In many jurisdictions, deterrence is the primary objective for the introduction of minimum mandatory sentences.¹⁰⁹⁵ Botswana's legislature cited deterrence as the primary motivator for the introduction of mandatory sentences.¹⁰⁹⁶ Jurists maintain that mandatory minima fulfil societal goals of retribution and incapacitation of offenders.¹⁰⁹⁷ They are promoted as a swift and severe response to crime.¹⁰⁹⁸

Terblanche states that in South Africa, for example, deterrence was a primary motivator, the

in use in South Africa in the 70's were discussed in the Viljoen Report.

¹⁰⁹³ JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 484.

¹⁰⁹⁴ Department of Justice Canada, *Mandatory sentences of imprisonment in common law jurisdictions: Some representative models* (2005) available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html (accessed 24 March 2015) at 5.

¹⁰⁹⁵ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 67.

¹⁰⁹⁶ See also DD Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 368; *Moatshe and Another v The State* 2003 (1) BLR 65 (HC) 73; *Tlhabiwa v The State* 2003 (2) BLR 39(CA); *Moatshe v the State*; *Motshwari and Another v The State* 2004 (1) BLR (CA) 11-12; *Keboseke v The State* 2008 (1) BLR 327 (CA) 332.

¹⁰⁹⁷ E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 at 11.

¹⁰⁹⁸ JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 488.

objective being to prevent potential offenders from committing crimes.¹⁰⁹⁹ Doob and Cesaroni state that denunciation of the offender and deterrence are often invoked as justification for the harsh treatment of prisoners.¹¹⁰⁰ The fact that persons facing stiff mandatory penalties often opt to take plea bargain and admit guilt to a lesser offence is seen as having a positive effect on criminal justice since it enhances the cooperation of offenders who wish to avoid lengthy jail sentences.¹¹⁰¹

2.2 A response to serious crime

Mandatory minimum penalties are considered to be a response and acknowledgement of public concern over crime.¹¹⁰² In Botswana, the mandatory sentence regime was introduced in response to the prevalence of certain crimes like stock theft and motor vehicle theft and the need for government to be seen to be tough on crime.¹¹⁰³ These sentiments are also echoed about the minimum sentencing regime in South Africa¹¹⁰⁴ and in other jurisdictions.¹¹⁰⁵

2.3 Pursuit of consistency, predictability and uniformity in sentencing

Jurists identify the pursuit of consistency and predictability or evenhandedness in sentencing as a motivator for the adoption of minimum mandatory sentences.¹¹⁰⁶ The penalty to be imposed is considered certain, and the system transparent.¹¹⁰⁷ This is echoed by Luna and

¹⁰⁹⁹ SS Terblanche 'Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194.

¹¹⁰⁰ AN Doob & A Cesaroni 'The political attractiveness of mandatory minimum sentences' (2001) 39(1&2) *Osgoode Hall Law Journal* 287 291.

¹¹⁰¹ E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 at 12.

¹¹⁰² M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 67.

¹¹⁰³ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 67; DDN Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 367.

¹¹⁰⁴ J Sloth-Nielsen and L Ehlers, 'Assessing the Impact: Mandatory and minimum sentences in South Africa' (2005) 14 *SA Crime Quarterly* 15.

¹¹⁰⁵ M Tonry, 'Mandatory penalties' (1992) 16 *Crime and Justice* 243 244.

¹¹⁰⁶ DD Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 367.

¹¹⁰⁷ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings'

Cassel who argue that mandatory minima help eliminate disparities created by broad sentencing discretion afforded to judicial officers.¹¹⁰⁸ The benefit of prescribed sentences they argue is certainty and predictability in outcomes, and trust and integrity in sentencing.¹¹⁰⁹

3. COMMON OBJECTIONS TO MINIMUM SENTENCING

3.1 Mandatory sentencing is not an effective deterrent

Studies have shown that mandatory minima have no demonstrable deterrent effect.¹¹¹⁰ In fact, statistics in the United States reveal that any gains that are observed in the short term are quickly dissipated.¹¹¹¹ As Roberts's states, it is doubtful that mandatory sentencing delivers certainty and severity in punishment. Severe punishments that are unknown to offenders, as is often the case with minimum penalties, are not an effective deterrent to crime.¹¹¹²

In South Africa, the situation is similar. Sloth-Nielsen and Ehlers state '[i]t can be concluded that, at present, there is little reliable evidence that the new sentencing law has reduced crime in general or that specific offences targeted by this law have been curbed.'¹¹¹³ Terblanche and Mackenzie suggest that if mandatory minima were indeed effective schemes, one would expect ever lowering crime rates in the United States of America were the schemes have had great popularity.¹¹¹⁴ As stated above, the deterrent effect of mandatory minima is simply not substantiated by evidence. In fact they are only noted for swelling prison populations and

(2009) 38(1) *Crime and Justice* 65 67.

¹¹⁰⁸ E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 11.

¹¹⁰⁹ E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 11.

¹¹¹⁰ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 68.

¹¹¹¹ M Tonry, 'Mandatory penalties' (1992) 16 *Crime and Justice* 243 244.

¹¹¹² JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 487 – 488.

¹¹¹³ J Sloth-Nielsen and L Ehlers, 'Assessing the Impact: Mandatory and minimum sentences in South Africa' (2005) 14 *SA Crime Quarterly* 15 17.

¹¹¹⁴ SS Terblanche & G Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia' (2008) 41(3) *Australian and New Zealand Journal of Criminology* 401 403.

budgets.¹¹¹⁵

3.2 Mandatory sentences breach human rights standards

Cunneen argues that mandatory minimum sentences breach the basic human rights of those subjected to them.¹¹¹⁶

Mandatory sentences fall foul of article 2(1) and article 26 of the International Covenant on Civil and Political Rights (ICCPR) which prohibit racial discrimination. Many authors have noted the disturbing trend that mandatory sentences have been disproportionately imposed on aboriginal communities in Australia and on racial minorities in the United States of America and in particular on juveniles in these race groups.¹¹¹⁷ There is no indication of such discrimination in Botswana, South Africa or England and Wales.

Mandatory minima are also criticised for breaching the International Convention against All Forms of Discrimination (CERD) which provides that all laws and policy should be non-discriminatory and ensure equality for all.¹¹¹⁸ This is because mandatory minima seem to affect social-economically depressed communities disproportionately in comparison to other groups.¹¹¹⁹

Mandatory minimums are also considered to be in breach of the Convention on the Rights of the Child (UNCRC) as they are often not in the best interest of the child.¹¹²⁰ They fail to afford the child special protection in account of his or her status as a juvenile as required by

¹¹¹⁵ JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 485.

¹¹¹⁶ C Cunneen 'Mandatory sentencing and human rights' (2001 – 2002) 33 *Current Issues in Criminal Justice* 322; See also SS Terblanche & G Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia' (2008) 41(3) *Australian and New Zealand Journal of Criminology* 401.

¹¹¹⁷ JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 at 485; C Cunneen 'Mandatory sentencing and human rights' (2001 – 2002) 33 *Current Issues in Criminal Justice* 322 324 – 325.

¹¹¹⁸ Article 2(1) (a) and (c) CERD; See also Article 2 and 26 ICCPR.

¹¹¹⁹ Human Rights and Equal Opportunity Commission of Australia, 'Social Justice Report' (2001).

¹¹²⁰ Article 3(1) UNCRC.

the UNCRC.¹¹²¹ They negate the provision that a variety of disposition options should be made available for child offenders.¹¹²² They are considered to be in breach of proportionality and the requirement for a wide range of sentencing and disposition option for children with prison being utilised as a last resort for juvenile offenders with rehabilitation being the most essential aim.¹¹²³ They tend to negate child participation in decisions that affect them contrary to Article 12 UNCRC. They are also considered inhuman and degrading punishment as they are sometimes imposed for trivial offences, often involving detention of young offenders in facilities far removed from their families and communities.¹¹²⁴

3.3 Mandatory minima are often politically motivated

Political rhetoric in support of mandatory minimum sentences is a hall mark of jurisdictions where these sentences are in place.¹¹²⁵ The public responds to this rhetoric because it genuinely has a desire to be rid of crime and the hope that mandatory minima are the key to solving the problem of serious crime.¹¹²⁶ The difficulty is that mandatory sentencing has been observed to not to promote uniformity and consistency but to exacerbate disparities in sentencing as judges in various Courts circumvent mandatory minima and prosecutors divert of and dispose of some cases outside of the regime.¹¹²⁷

Mandatory minima create a distorted picture of governments being tough on crime. Tonry notes that politicians wish to appear to be sensitive to public concerns about crime but their

¹¹²¹ Article 24 UNCRC.

¹¹²² Article 40(1) and Article 40(4) UNCRC.

¹¹²³ Article 37(b) UNCRC.

¹¹²⁴ C Cunneen 'Mandatory sentencing and human rights' (2001 – 2002) 33 *Current Issues in Criminal Justice* 322 324.

¹¹²⁵ SS Terblanche & G Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia' (2008) 41(3) *Australian and New Zealand Journal of Criminology* 401 at 404; M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 69.

¹¹²⁶ AN Doob & A Cesaroni 'The political attractiveness of mandatory minimum sentences' (2001) 39(1&2) *Osgoode Hall Law Journal* 287 304.

¹¹²⁷ E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 13.

real motives are to succeed at the polls.¹¹²⁸ The reality is that where the government seeks to incapacitate offenders for lengthy periods, the incapacitation means nothing where the particular offender would not have offended again, or where he is simply likely to be replaced by another offender in similar criminal enterprises.¹¹²⁹ Ignoring the personal circumstances of offenders merely creates severe and sometimes unjust consequences for the offender and no measurable benefit for society.

3.4 Mandatory sentences usurp judicial discretion

Mandatory minima are often criticised as being a usurpation of judicial discretion.¹¹³⁰ Mandatory minima impugn the ability of the judge to hand down sentences that are just.¹¹³¹ In The United States, Greenblatt notes that judges are often hamstrung and powerless to assist exceptional defendants who would be unjustly sentenced if the minimum sentence were to be applied.¹¹³² Greenblatt notes that opposition to mandatory minima often results in judges using their own power or harnessing the power of the jury or the prosecutor to circumvent a prescribed sentence.¹¹³³

Tonry illustrates the usurpation of judicial discretion by describing the shift in power in judicial proceedings from judges to prosecutors who then take decisions regarding plea bargain, the evidence to be presented before the judge and the sentence to be imposed in a bid

¹¹²⁸ JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 at 487; M Tonry *Sentencing Matters* (1996) 160.

¹¹²⁹ E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 15.

¹¹³⁰ JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30(4) *Criminal Justice and Behavior* 483 at 484; E Luna & P Cassell 'Mandatory minimalism' (2010 – 2011) 32(1) *Cardozo Law Review* 1 13.

¹¹³¹ AN Doob & A Cesaroni 'The political attractiveness of mandatory minimum sentences' (2001) 39(1&2) *Osgoode Hall Law Journal* 287 291.

¹¹³² N Greenblatt 'How mandatory are mandatory minimums? How judges can avoid imposing mandatory minimum sentences' (2008 – 2009) 36 *American Journal of Criminal Law* 1 2.

¹¹³³ N Greenblatt 'How mandatory are mandatory minimums? How judges can avoid imposing mandatory minimum sentences' (2008 – 2009) 36 *American Journal of Criminal Law* 1 2.

to avoid prescribed sentences.¹¹³⁴ Tonry also comments on the practice of circumvention employed by judges and other officers of the Court through what he terms as ‘dislocation in case processing’ which involves the dismissal and diversion of cases to circumvent mandatory penalties.¹¹³⁵

First they increase public expenditure by increasing trial rates and case processing times...Second, in every published evaluation, judges and prosecutors were shown to have devised ways to circumvent the application of the mandatories. Some prosecutors simply refused to file mandatory-bearing charges. Sometime, plea bargaining was used. Sometimes judges ignored the statute and imposed sentences inconsistent with it.¹¹³⁶

There are other methods of circumvention, employed by officers of the Court. The Court may manipulate the value of goods stolen or weight of the controlled substance [in drug cases] of evidence in order to avoid a threshold attracting mandatory penalties. This is the practice of ‘swallowing the gun’¹¹³⁷ which involves presenting of a set of fact that is materially different to what actually happened in order to avoid a mandatory minimum. Plea bargaining, legal attacks on the sentencing statute, creative interpretation of the statute, and informing the jury of a mandatory penalty and asking the instructing the jury to convict on a lesser offence are other means of avoiding mandatory penalties.¹¹³⁸ These circumventions occur with the tacit or overt knowledge of all the officers working in the criminal justice system.¹¹³⁹ As one judge put it:

We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result.¹¹⁴⁰

In Australia, Mason notes judicial authorities that do not support the thinking that mandatory minimum sentences usurp judicial discretion. He notes instead that mandatory sentences do

¹¹³⁴ M Tonry ‘Mandatory penalties’ (1992) 16 *Crime and Justice* 243.

¹¹³⁵ M Tonry ‘Mandatory penalties’ (1992) 16 *Crime and Justice* 243.

¹¹³⁶ M Tonry *Sentencing matters* (1996) 134.

¹¹³⁷ M Tonry ‘Punishment, policies and patterns in western countries’ in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 21.

¹¹³⁸ N Greenblatt ‘How mandatory are mandatory minimums? How judges can avoid imposing mandatory minimum sentences’ (2008 – 2009) 36 *American Journal of Criminal Law* 1 at 3 – 10, 14; M Tonry ‘The mostly unintended effects of mandatory penalties: Two centuries of consistent findings’ (2009) 38(1) *Crime and Justice* 65–67.

¹¹³⁹ M Tonry ‘Punishment, policies and patterns in western countries’ in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 21.

¹¹⁴⁰ N Greenblatt ‘How mandatory are mandatory minimums? How judges can avoid imposing mandatory minimum sentences’ (2008 – 2009) 36 *American Journal of Criminal Law* 1–38.

deprive the Court of its discretion to hand down sentences catering for the particular circumstances of each case, which is the traditional function of the Courts.¹¹⁴¹

Rigidity in sentencing simply invites judicial officers to circumvent sentences in order to exercise their discretion to achieve a just result.¹¹⁴² This creates differences in the treatment of similar cases depending on the judicial officer's aversion to imposing the prescribed sentence. Tonry suggests that sentencing guidelines should leave ample room for judicial discretion.¹¹⁴³

4 MINIMUM MANDATORY SENTENCES IN BOTSWANA¹¹⁴⁴

Minimum mandatory sentences are found in several pieces of criminal legislation in Botswana. Most notable among these enactments are the Stock Theft Act.¹¹⁴⁵ This Act sets the minimum mandatory sentence upon conviction for stock theft at 5 years for a first offence and 7 years for subsequent offences. The Motor Vehicle Act¹¹⁴⁶ also sets similar minimum sentences for motor vehicle theft. The Penal Code sets the minimum mandatory sentence for rape at 10 years.¹¹⁴⁷ Where the rape is accompanied by violence, the minimum sentence is 15 years.¹¹⁴⁸ The person convicted of rape is required by law to take a Human Immunodeficiency Virus (HIV) test before sentencing.¹¹⁴⁹ Where the test is positive and the offender was not aware he was HIV positive, the sentence is set at a minimum of 15 years.¹¹⁵⁰

¹¹⁴¹ SA Mason 'Mandatory sentencing: implication for judicial independence' (2001) 7(2) *Australian Journal of Human Rights* 21.

¹¹⁴² M Tonry 'The functions of sentencing and sentencing reform' (2005 – 2006) 58 *Stanford Law Review* 37 51.

¹¹⁴³ M Tonry 'The functions of sentencing and sentencing reform' (2005 – 2006) 58 *Stanford Law Review* 37 51.

¹¹⁴⁴ The contents of this section are published in the following article: Macharia-Mokobi, E 'Exceptional extenuating circumstances: statutory omission or judicial opportunity?' (2011) 2 *South African Journal of Criminal Justice* 113.

¹¹⁴⁵ Section 3(1) Stock Theft Act Chapter 09:01.

¹¹⁴⁶ Section 3(1) Motor Vehicle Theft Act Chapter 09:04.

¹¹⁴⁷ Section 142(1) Penal Code Chapter 08:01.

¹¹⁴⁸ Section 142(2) Penal Code Chapter 08:01.

¹¹⁴⁹ Section 142(3) Penal Code Chapter 08:01.

¹¹⁵⁰ Section 142(4)(a) Penal Code Chapter 08:01.

Where the offender is proved to have been aware of his HIV positive status, he is liable to a minimum period of imprisonment for 20 years.¹¹⁵¹ The minimum sentence for attempted rape is five years.¹¹⁵²

Statutory rape attracts a minimum sentence of 10 years.¹¹⁵³ Where the offender was unaware that he was HIV positive, the penalty is set at 15 years, where he was aware that he was HIV positive, the minimum penalty is 20 years.¹¹⁵⁴ Causing grievous bodily harm attracts a minimum penalty of 7 years.¹¹⁵⁵

Robbery committed with a weapon or with violence, or committed with a gang is pegged at a minimum of ten years.¹¹⁵⁶ Attempted robbery with a weapon, or with violence or with a gang is also a minimum of 10 years.¹¹⁵⁷ Other offences that attract minimum sentences under separate statutes are: Unlawful possession of arms and ammunitions of war,¹¹⁵⁸ possession and dealing in habit-forming drugs under section 16 of the Drugs and Related Substances Act.¹¹⁵⁹

4.1 The history of minimum mandatory sentencing in Botswana

The advent of minimum mandatory sentences occurred about fifteen years ago.¹¹⁶⁰ They were enacted with a view to combating the increase in serious offences.¹¹⁶¹ That notwithstanding,

¹¹⁵¹ Section 142(4)(b) Penal Code chapter 08:01.

¹¹⁵² Section 143(1) Penal Code Chapter 08:01.

¹¹⁵³ Section 147(1) Penal Code Chapter 08:01.

¹¹⁵⁴ Section 147(3) Penal Code Chapter 08:01.

¹¹⁵⁵ Section 230 Penal Code Chapter 08:01.

¹¹⁵⁶ Section 292 Penal Code, Chapter 08:01.

¹¹⁵⁷ Section 293(2) Penal Code Chapter 08:01.

¹¹⁵⁸ Section 9 Arms and Ammunitions Act Chapter 24:01.

¹¹⁵⁹ The Laws of Botswana Chapter 63:04.

¹¹⁶⁰ Some of the first Acts to contain minimum sentences were the Motor Vehicle Theft Act 17 of 1995, Cap 09:04 and the Stock Theft Act 21 of 1996, Cap 09:01. Amendments to the Penal Code, to introduce minimum mandatory sentences for rape and robbery then followed.

¹¹⁶¹ DDN Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 367.

some legal minds have taken the view that minimum mandatory sentences are an assault on judicial discretion.¹¹⁶² The argument has even been proffered that sentencing under this regime is unconstitutional with the lengthy sentences imposed being likened to cruel and inhuman punishment.¹¹⁶³

One rationale for minimum mandatory sentences is the pursuit of consistency, predictability and uniformity in sentencing.¹¹⁶⁴ Minimum mandatory sentences also aim to eliminate arbitrariness in sentencing. In prescribing such sentences, Nsereko notes, Parliament seeks to ensure equal treatment for similarly circumstanced offenders.¹¹⁶⁵

It would appear, however, that uniformity in sentencing was not the primary motivator for the introduction of minimum mandatory sentences in Botswana. Exploring the reasons behind the introduction of statutory minimum sentences in Botswana, Nsereko states that the major ground for introducing the regime was their supposed deterrent effect on criminals and would-be criminals. He notes that the various pieces of legislation that prescribe the sentences were introduced against the backdrop of escalating incidences of the targeted crimes.¹¹⁶⁶

The veracity of this view was reiterated by the High Court in *Moatshe and Another v The State*,¹¹⁶⁷ where the Court held that the scourge of rape and robbery, which undermined

¹¹⁶² See *Matomela and Another v The State* 2000 (1) BLR 396 (HC) 399.

¹¹⁶³ See *Moatshe and Another v The State* 2003 (1) BLR 65 (HC). Where the second accused appealed against a mandatory minimum sentence of 10 years for robbery on the sole ground that in the circumstances of his case, 10 years imprisonment was unconstitutional and in contravention of section 7(1) of the constitution which prohibits inhuman and degrading punishments. The Court found, in principle, that a minimum statutory sentence could be inhuman or degrading where it is grossly disproportionate (at 88). However, it ruled that the particular circumstances of the case did not justify a departure from the prescribed minimum (at 90).

¹¹⁶⁴ DD Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 367.

¹¹⁶⁵ DD Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 367.

¹¹⁶⁶ DD Nsereko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 368.

¹¹⁶⁷ 2003 (1) BLR 65 (HC) 73.

personal security and business confidence, as well as overwhelming public sentiment, had necessitated the introduction of minimum mandatory sentences.

A similar position exists with respect to the offence of stock theft. The need to curb this offence was singled out as the motivation for the introduction of minimum mandatory sentences in the Stock Theft Act. In *Tlhabiwa and Another v The State*,¹¹⁶⁸ Tebbutt JP noted that it was the legislature's intention to impose mandatory sentences in order to curb stock theft. Citing *Moatshe v the State; Motshwari and Another v The State*,¹¹⁶⁹ with approval, Tebbutt JP noted that the rationale for imposing minimum mandatory sentences with respect to stock theft, was similar to the rationale for imposing mandatory sentences with respect to motor vehicle theft in Botswana. He noted:

... [M]otor vehicle theft and hijackings in Botswana were rampant and on the increase prior to 1995 and that it was clearly the intention of the legislature by the enactment in 1995 of the mandatory minimum sentences in the Motor Vehicle Theft Act in the public interest to curb the incidence of such offences ... In my view the same finding must be made in regard to the minimum mandatory sentences prescribed in s. 3(1) of the Stock Theft Act.¹¹⁷⁰

The learned judge stated that alongside diamonds, stock forms a considerable part of the economic lifeblood of Botswana and that a farmer's stock was amongst his most valuable assets, the loss of which would deplete his personal wealth. The Court noted that those who steal stock were causing farmers inconvenience and financial hardship and that they should be aware that long terms of imprisonment would be their lot.¹¹⁷¹

The minimum mandatory sentencing regime was therefore a means used by Government to respond to public disquiet about the prevalence of serious crimes. In *Keboseke*, Tebbutt JP observed as follows:

The enactment by the legislature of mandatory minimum sentences for robbery and rape was clearly in

¹¹⁶⁸ 2003 (2) BLR (CA) 39.

¹¹⁶⁹ 2004 (1) BLR (CA) 11-12.

¹¹⁷⁰ *Tlhabiwa v The State* 2003 (2) BLR 39 (CA) 42.

¹¹⁷¹ *Tlhabiwa v The State* 2003 (2) BLR 39 (CA) 42.

order to put in place deterrent steps in order to curb the incidence of such offences and their increase and to protect the interests and rights of law abiding citizens... Because of the increasing prevalence of such offences and, particularly because of the violence so often accompanying their commission the government intended to crack down on robbers and rapists in reaction to overwhelming public sentiment in regard to such crimes.¹¹⁷²

The minimum mandatory sentencing regime in Botswana has had its detractors. This is because at the introduction of the regime, no deviations were allowed from the prescribed statutory minimum.

4.2 Reservations to the minimum mandatory sentence regime

Some criticisms have been levelled against minimum mandatory sentences. Firstly, has the imperative to curb the increasing crime rate justified sentences that may appear unduly harsh considering the age of the offenders, the value of goods stolen and other circumstances peculiar to each case? For instance, in the *Kgosikwena Sebele v The State*, the accused was sentenced to a five year minimum term for the theft of a single goat.¹¹⁷³

Secondly, it has been argued that the regime unnecessarily usurps judicial discretion, substituting it with statutory prescriptions. As one Honourable Member of Parliament put it:

... We should leave the issue of punishment of criminals to the judiciary to make its own judgement, after having carefully and judicially considered the case as it shall have been put to them...we can't Mr. Speaker, make this judgment.¹¹⁷⁴

A similar criticism from the bench in *Moyo* was couched as follows:

Minimum mandatory sentences are frowned upon by the Courts for the reason that the Court's ordinary discretion to consider other factors in assessing an appropriate sentence is removed by the mandatory stipulation to impose a particular sentence.¹¹⁷⁵

¹¹⁷² 2008 (1) BLR 327 (CA) 332 also available at [2008] BWCA 32 (CLCLB-012-08 & CLCLB -016-08) (28 April 2008), available at <http://www.saflii.org/bw/cases/BWCA/2008/32.html>, accessed on 15 December 2010. See also *Moatshe v The State*; *Motshwari and Another v The State* 2004 (1) BLR (CA) 1 9E-F, where Court of appeal bench states that: 'The enactment of minimum sentences is justifiable where public weal requires them'.

¹¹⁷³ *Sebele v The State* 2010 2 BLR (HC) 473 available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

¹¹⁷⁴ National Assembly Parliamentary Report (Hansard) No. 112, Meeting from 8 – 17th December 1993 at 309 as cited in DD Nseroko 'Minimum sentences and their effect on judicial discretion' (1999) 31 *Crime, Law and Social Change* 367 at 369.

¹¹⁷⁵ *State v Moyo* 2007 (1) BLR 737 (HC) 740, also see [2008] BWCA 307 (CTHFT 000 007 of 2008) (14 November 2008), available at <http://www.saflii.org/bw/cases/BWHC/2008/307.html>, (accessed 20 January

Dibotelo J also took a dim view of minimum mandatory sentences in *Matomela* stating as follows:

...the often resorted to practice of enacting mandatory minimum sentences for certain types of offences constitutes a threat to the independence of the Courts as envisaged by the Constitution and the practice by the legislature of arrogating to itself the functions reserved for the judiciary by the Constitution is clearly undesirable and should be discouraged or discontinued as it erodes the discretionary powers of the Courts in sentencing offenders. It is ironic and sad and I often observe with detached amusement that whenever there is a public outcry arising from what the public perceives as injustices meted out by the Courts when they impose mandatory minimum sentences which have been prescribed by the legislature, some members of the legislature also blame the Courts in such situations instead of owning up and shouldering the blame. There is a real danger in my view that the often resorted to practice of prescribing mandatory minimum sentences may in the near future bring very unhealthy conflict between the legislature and the judiciary.¹¹⁷⁶

The constitutionality of the minimum mandatory sentences regime was challenged in the High Court and Court of Appeal in *Moatshe*.¹¹⁷⁷ The accused persons challenged a minimum mandatory sentence of ten years for robbery on the basis that it contravened his constitutional right under section 7(1) to be protected from inhuman and degrading treatment. This was a novel and ingenious assault on the prescribed sentence that exposed the lack of equity that uniform sentences created, by ignoring the peculiar circumstances of the accused in each case.

The Court ruled that minimum mandatory sentences were not unconstitutional *per se*.¹¹⁷⁸ Considering if the statutory minimum could amount to cruel and inhuman punishment in the specific circumstances of the offenders, the Court noted that the offenders attacked a shop in a gang, that they wielded a gun and that they assaulted the proprietor and his employees. The Court held that minimum sentences had been prescribed for cases just like the one at hand and that there were no exceptional circumstances surrounding the offence, or the offender,

2016).

¹¹⁷⁶ *Matomela v The State* 2000 (1) BLR 397 (HC) 399.

¹¹⁷⁷ 2003 (1) BLR 65 (HC); 2004 (1) BLR 1 (CA).

¹¹⁷⁸ See a full discussion on this High Court ruling below in section 4. The matter was considered the following year at the Court of Appeal in *Moatshe v The State; Motshwari and Another v The State* 2004 (1) BLR 1 (CA).

that would render the statutory minimum sentence grossly disproportionate. The appeal against the sentences was dismissed.

This decision highlighted consequences that the legislature appeared to have overlooked in enacting minimum mandatory sentences. In removing judicial discretion entirely from the sentencing process for offences attracting minimum mandatory sentences, the legislature had inadvertently opened the door to numerous and, in many cases, frivolous appeals against mandatory sentences.

Concern from the judiciary and appeals against harsh sentences by accused persons did result in a notable legislative concession by way of the introduction of section 27(4) and its principle of ‘exceptional extenuating circumstances’, meant to mitigate the rigours of minimum mandatory sentences. The introduction of section 27(4) is discussed in greater detail below.

4.3 Mitigating the rigours of minimum mandatory sentences through the Courts

By 2003 the minimum mandatory sentencing regime had begun to raise feathers, yet, as highlighted above, there was no statutory provision enabling the Courts to depart from minimum mandatory sentences in appropriate cases. The *Moatshe*¹¹⁷⁹ judgment could not have come at a more opportune time. Apart from its pronouncement on the constitutionality of the mandatory minimum sentences, *Moatshe* is notable for developing the law by indicating circumstances in which a judge could lawfully depart from a prescribed minimum sentence.

¹¹⁷⁹ 2004 (1) BLR 1 (CA) 14.

In his High Court judgment, Kirby J ruled that whilst minimum mandatory sentences were not *per se* unconstitutional,¹¹⁸⁰ a minimum mandatory sentence could be unconstitutional in rare cases owing to the exceptional circumstances surrounding the offender, or the offence, where imposition of the minimum sentence would be grossly disproportionate. In such circumstances he held it would be open to the High Court to hand down a lesser more appropriate sentence.¹¹⁸¹ The *ratio decidendi* reads as follows:

When an accused person challenges a statutory minimum punishment applicable to him, because of the exceptional circumstances touching upon him and surrounding the offence of which he has been convicted the Court should proceed first to consider the circumstances of the offence, the circumstances of the offender and the relevant issues of public policy and public interest, and if it finds that the minimum statutory sentence is inhuman or degrading because it is grossly disproportionate, in the sense that no reasonable person would impose it, the Court should decline to pass the statutory minimum sentence and should proceed to pass a lesser and appropriate sentence in terms of section 18(2) of the Constitution. It is only in rare and exceptional cases where it will be proper to proceed in this way, and it is only the High Court which is authorised by section 18(2) to do so.¹¹⁸²

The learned judge was in effect taking back from the legislature some measure of judicial discretion. He made a strong case for the return of limited judicial discretion in the minimum mandatory sentence regime by elucidating this ‘*constitutional exception*’. He recognised that in certain ‘rare and exceptional cases’, the Courts may be justified on constitutional grounds, to depart from prescribed sentences that it deemed grossly disproportionate.

The Court of Appeal endorsed the *Moatshe* decision reaffirming that minimum mandatory sentences were not *per se* unconstitutional, but would be considered to be unconstitutional and amounting to inhuman and degrading punishment if grossly disproportionate to the severity of the offence. The Court of Appeal ruled that the decision whether a sentence was grossly disproportionate, was a value judgment to be made by the Court based on objective

¹¹⁸⁰ Citing with approval *S v Vries* 1996 (2) SACR 638 (Nm) and *S v Dodo* 2001 (3) SA 382 (CC), which held that minimum mandatory sentences are not *per se* unconstitutional.

¹¹⁸¹ *Moatshe and Another v The State* 2003 (1) BLR 65 (HC) 86.

¹¹⁸² *Moatshe and Another v The State* 2003 (1) BLR 65 (HC) 88–89.

factors regard being had to the contemporary norms operating within Botswana and the conspectus of values in civilised democracies.¹¹⁸³ The decision in this case was followed in *Mokone and Another v The State*,¹¹⁸⁴ and *Tlhabiwa v The State*.¹¹⁸⁵

4.4 The enactment of section 27(4) of the Penal Code

The following year, and most probably in response to these judgments,¹¹⁸⁶ an amendment to the Penal Code was enacted to allow departure from minimum mandatory sentences by criminal Courts. Section 27(4) provides as follows:

Notwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a Court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty.¹¹⁸⁷

The enactment of this section untied the hands of magistrates and judges to some degree. Limited judicial discretion had been restored to judicial officers. The Court could depart from a minimum mandatory sentence if the two-fold requirements of section 27(4) were met. Firstly, ‘exceptional extenuating circumstances’ would have to be present in the particular circumstances of each case. Secondly, the presence of such exceptional circumstances would have to render the mandatory sentence totally inappropriate.

The implementation of section 27(4) has presented an interesting patchwork of results. The absence of a definition of the term ‘exceptional extenuating circumstances’, invited a myriad of interpretations at the courts of first instance, which are the Magistrate’s Courts, as well as on appeal at the High Court and Court of Appeal.

¹¹⁸³ 2004 (1) BLR 1 (CA).

¹¹⁸⁴ 2003 (2) BLR 225 (HC) 234.

¹¹⁸⁵ 2003 (2) BLR 39 (CA) 41 to 42.

¹¹⁸⁶ In *Keboseke v The State; Seleka v The State* 2008 (1) BLR 327 (CA) 331 Tebbutt JP, stated that the Kirby judgment in *Moatshe* may have motivated the legislature to enact section 27 (4) of the Penal Code.

¹¹⁸⁷ Penal Code Amendment Act 39 of 04.

The following section investigates the various interpretations that the Courts have attached to the phrase ‘exceptional extenuating circumstances’, and attempts to identify a clear divide between exceptional and ordinary extenuating circumstances.

4.5 Interpreting ‘exceptional extenuating circumstances’

As mentioned earlier, the legislature in enacting section 27(4) did not proffer a definition of the concept of ‘exceptional extenuating circumstances’. This means that magistrates and judges have had to determine the content and scope of the phrase on a case-by-case basis. Many judicial officers, in the exercise of their discretion, have characterised one or other extenuating circumstance affecting the accused, or surrounding the offence committed by the accused, as exceptional without concerning themselves with the matter of a definition. However, some judicial officers have ventured to suggest a judicial interpretation of the phrase.

One such case is *State v Fu*.¹¹⁸⁸ In this matter, the five accused persons, all of Chinese nationality, had been charged and convicted of the offence of robbery. This was ‘a robbery with a difference’¹¹⁸⁹ according to the learned Justice Mosojane. The accused persons were engaged in collecting money from Chinese traders in Francistown on behalf of an association. In the course of collecting the funds, the accused persons came across some reluctant traders who did not wish to participate in the scheme. The accused persons became aggressive, issuing threats and resorting to violence to enforce payment. The harassed traders then launched an attack against the accused persons. The situation quickly descended into a melee. It was then that the police arrived and arrested the accused persons. The accused were charged and convicted of robbery. Upon conclusion of the trial, the magistrate committed the

¹¹⁸⁸ 2006 (1) BLR 486 (HC).

¹¹⁸⁹ *State v Fu* 2006 (1) BLR 486 (HC) 494.

accused persons to the High Court for sentencing. Having been charged and convicted of robbery, the accused persons faced a minimum mandatory sentence of 10 years imprisonment.

In his judgment, Mosojane J had to consider if the accused persons were entitled to the benefit of a lesser sentence under section 27(4) of the Penal Code. The learned judge noted that Parliament had enacted section 27(4) of the Penal Code to ameliorate the harsh consequences that flow from statutory minimum sentences. He then lamented that the term ‘exceptional extenuating circumstances’ was a new concept that had not been interpreted by the Courts. He proposed the following definition:

...I am of the view that the subsection [section 27(4) of the Penal Code] contemplates extenuating circumstances on a higher plane above ordinary well known extenuating circumstances. In other words, it is possible for the Court to find extenuating circumstances which are not high enough to meet the exceptionality criterion. The standards need, however, not be too high. In my view, the legislature intended the word to make a difference; otherwise its use would have been unnecessary. Parliament could not have intended that the word would add nothing to the existing notion of extenuating circumstances. ...The word “exceptional” bears the following meaning in the New Shorter Oxford English Dictionary: “of the nature of or forming an exception; unusual, out of the ordinary; special; (of a person) unusually good, able, etc.” It must bear this meaning in subs 27(4) of the Penal Code.¹¹⁹⁰

The definition put forward by Mosojane J suggests that the presiding officer should search for extenuating circumstances ‘on a higher plane’ over and above the ordinary well known extenuating circumstances.

Ordinary extenuating circumstances are factors bearing on the commission of an offence that reduce the moral blameworthiness of the accused and in so doing, make him deserving of a lesser sentence.¹¹⁹¹ A non-exhaustive list of ordinary, well known extenuating circumstances

¹¹⁹⁰ *State v Fu* 2006 (1) BLR 486 (HC) 493.

¹¹⁹¹ *Koitsiwe v The State* 2001 (2) BLR 317 (CA) 321 - 322, see also [2001] BWCA 20 (Criminal Appeal No 1 of 201) (20 July 2001) available at <http://www.saflii.org/bw/cases/BWCA/2001/20.html>, accessed on 15 December 2010; *State v Bogosi* 2006 (2) BLR 123 (CA) 126.

can be found in *S v Mokwena*,¹¹⁹² such as immaturity,¹¹⁹³ intoxication,¹¹⁹⁴ and provocation.¹¹⁹⁵ Other extenuating factors, recognised by the criminal Courts in Botswana are discussed in section 2.2 of this thesis include belief in witchcraft,¹¹⁹⁶ the totality of circumstances surrounding the offence,¹¹⁹⁷ being a first offender,¹¹⁹⁸ honest but mistaken belief of infidelity,¹¹⁹⁹ and the mental condition of the accused.¹²⁰⁰ As highlighted above, in the *Kgosikwena Sebele* judgment, ill health and a distinguished public record were excluded as possible ordinary extenuating circumstances.¹²⁰¹

The *Fu* and *Mokoena* decisions read together, lead one to the conclusion that an accused person who wishes to rely on section 27(4), to challenge a minimum mandatory sentence, must allude to extenuating circumstances that are unusual, special, out of the ordinary and unique from those traditionally recognised by the Courts as ordinary extenuating circumstances. In other words, the usual circumstances relied on for extenuation will be unhelpful in making a case for a departure from a minimum mandatory sentence.

Another definition of the phrase ‘exceptional extenuating circumstances’ was attempted in

¹¹⁹² 1990 BLR 1 at 29 – 30.

¹¹⁹³ On immaturity see also *State v Rapulana* 1975 (1) BLR 37 (CA); *State v Sebolai* 2007(3) BLR 435 (HC).

¹¹⁹⁴ On intoxication see also *Ntesang v The State* 1990 BLR 396 (CA); *Ramothlaedi v The State* 1998 BLR 9 (CA); *State v Basikere* 2007 (3) BLR 454 (HC).

¹¹⁹⁵ On provocation see also *Ramontsho v The State* 1987 BLR 374 (CA); *Ramothlaedi v The State* 1998 BLR 9 (CA); *State v Sebolai* 2007(3) BLR 435 (HC); *State v Basikere* 2007 (3) BLR 454 (HC); *State v Bogosi* 2006 (2) BLR 123 (CA).

¹¹⁹⁶ *State v Molapo* 2007 (3) BLR 493 (HC).

¹¹⁹⁷ *State v Rapulana* supra 1975 (1) BLR 37 (CA) 39, acting on the spur of the moment with no intention to kill, was deemed an extenuating circumstance; In *State v Phori* 1987 BLR 228 (HC) and *State v Sharp* 1987 BLR 14 (HC) lack of premeditation and intention to kill respectively were found to be extenuating circumstances.

¹¹⁹⁸ *State v Rapulana* 1975 (1) BLR 37 (CA) 39; *State v Basikere* 2007 (3) BLR 454 (HC). In *Sebele v The State* 2010 (2) BLR 473 (HC) available at www.elaws.gov/bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016). The Court suggests that being a first offender does not amount to an extenuating circumstance but is solely a mitigating factor.

¹¹⁹⁹ *Ramontsho v The State* 1987 BLR 374 (CA) 376 – 377; *Ntesang v The State* 1990 BLR 396 (CA); *Ramothlaedi v The State* 1998 BLR 9 (CA).

¹²⁰⁰ *State v Gadiwe* 2005 (1) BLR 212 (HC); *State v Raphotsana* 2006 (2) BLR 80 (HC).

¹²⁰¹ *Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov/bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

Serumola v The DPP.¹²⁰² In this case, the Court ruled that not just any extenuating circumstance would justify a lesser sentence, but only such circumstances that are exceptional so as to render the minimum mandatory period totally inappropriate.

In the *Kgosikwena Sebele* case, the Court *a quo* found the value of the goat stolen to be an exceptional extenuating circumstance. The accused, who was facing a five year minimum mandatory term, was sentenced to a lesser sentence of four years. The appellate Court found that the trial Court had misdirected itself in finding the value of the goat to be an exceptional extenuating circumstance. Offering an interpretation of the phrase, Justice Kirby cited the *Serumola* decision with approval and stated:

By section 27(4) of the Penal Code, it is only when exceptional extenuating circumstances are present which make the imposition of the minimum sentence totally inappropriate that a deviation from the minimum is permitted. Normal extenuating circumstances which routinely occur do not qualify.¹²⁰³

The Court of Appeal in *Keboseke*¹²⁰⁴ seems to adopt a similar approach to that in *Serumola*. Judge President Tebbutt, of the Court of Appeal, requires the judge not to focus his sole attention on the particular extenuating factor. The Judge President, citing the definition in *Fu* with approval, emphasised that apart from the requirement of an exceptional extenuating circumstance, the Court had to be mindful of another important requirement. This is that the exceptional circumstances should have the effect of rendering the statutory minimum sentence, totally inappropriate.

Below follows an examination of recent High Court and Court of Appeal judgments dealing with exceptional extenuating circumstances. In reviewing the cases, the chapter seeks to

¹²⁰² 2007 (1) BLR 434 (CA) 436, see also [2007] BWHC 13 (CLCLB-059-06) (25 January 2007), available at <http://www.saflii.org/bw/cases/BWHC/2007/13.html>, (accessed 20 January 2016).

¹²⁰³ *Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

¹²⁰⁴ *Keboseke v The State; Seleka v The State* 2008 (1) BLR 327 (CA) 332, see also [2008] BWCA 32 (CLCLB-012-08 & CLCLB-016-09) (24 April 2008), available at <http://www.saflii.org/bw/cases/BWCA/2008/32.html> (accessed 20 January 2016).

establish whether a uniform practice in the application of section 27(4) has developed, and to what extent judicial officers have embraced the proposed interpretations of exceptional extenuating circumstances in the *Fu*, *Serumola*, *Sebele* and *Keboseke* judgments.

4.6 Exceptional extenuating circumstances through the cases

The cases dealing with exceptional extenuating circumstances can conveniently be grouped into three categories dictated by the extenuating circumstance raised in the case. These categories are youth and first offenders; the particular circumstances of the offence, and lastly the value of the property stolen. Each category will be considered in turn.

4.6.1 Youth and first offenders

Youth and inexperience, otherwise termed as immaturity, traditionally qualify as ordinary extenuating circumstances.¹²⁰⁵ This rule also applies to first offenders. Ordinarily, the moral blameworthiness of a young offender is reduced on account of immaturity or youthful exuberance, or on account of being a first offender. However, it appears that the jury is still out on whether being a youth and a first offender can be regarded as exceptional, or out of the ordinary, to warrant a departure from a minimum mandatory sentence as required by section 27(4). An examination of case law reveals that divergent views exist on the question of whether the youth of the offender, and being a first offender, qualifies as an exceptional extenuating circumstance.

In *Seme and Another v The State*,¹²⁰⁶ the appellants were charged and convicted of robbery and sentenced to a minimum mandatory sentence of 10 years each. The appellants appealed against the conviction and sentence relying on section 27(4). They urged the Court to hand

¹²⁰⁵ *S v Mokwena* 1990 BLR 1 (HC).

¹²⁰⁶ 2006 (1) BLR 35 (HC).

down a sentence lower than the statutory minimum on the basis of youth. According to the charge sheet, the first accused was 18 years old when he committed the offence. The second accused had demonstrated in Court that he was, in actual fact, 16 when the offence was committed. Phumaphi J stated as follows:

The Appellants in this case are both very young people and I consider it totally inappropriate to keep such young people, one of whom is a first offender, in prison for such a length of time. In my view the Courts should always bear in mind giving such young offenders the opportunity to learn from their mistakes and turn a new leaf.¹²⁰⁷

Their sentences were reduced to three years each. In *Fu*, Mosojane, J stated that it was implicit from the *Seme* decision that tender age may in appropriate circumstances be considered to be an exceptional extenuating circumstance. However, he raised a concern that it would be difficult, if not impossible, to set the parameters for ‘tender age’ saying:

The trouble with age, however, is where does one fix the cut off point? When does young cease to be young...¹²⁰⁸

Some judges have taken a more circumspect approach. With respect to the young offender, Kirby J in *Moatshe*,¹²⁰⁹ opined that the Courts generally tried to avoid sending young first offenders to prison where such restraint was permissible. He noted that in Botswana, the cut-off point at which an accused ceases to be a juvenile, is the age of 18. Whilst noting that special provision is made for juveniles,¹²¹⁰ he pointed out that this was not the same for an individual 18 and over. He stated:

At 18 a young man can vote, enlist in the armed forces, drive a motor vehicle and enter licensed premises. He is in all respects an adult, albeit a young adult, and must bear the duties and responsibilities of adulthood as well as enjoying the privileges which accompany this status.¹²¹¹

He then went on to rule that the legislature, in decreeing minimum mandatory sentences for robbery, was aware that the sentence would be imposed on first offenders over 18 years old.

¹²⁰⁷ *Seme and Another v The State* 2006 (1) BLR 35 (HC) 37.

¹²⁰⁸ *State v Fu* 2006 (1) BLR 486 (HC) 494.

¹²⁰⁹ *Moatshe and Another v The State* 2004 (1) BLR 1 (CA) 90.

¹²¹⁰ *Moatshe and Another v The State* 2004 (1) BLR 1 (CA) 90.

¹²¹¹ *Moatshe and Another v The State* 2004 (1) BLR 1 (CA) 91.

This, he ruled, was a public policy decision intended to send a clear message to young and old alike that armed gangs would not be tolerated, nor would anyone be allowed to seek the easy road to riches, or make a career in crime. After considering the aggravated circumstances of the offence and those of the accused persons, the learned judge could find no exceptional circumstances that could justify a sentence below the prescribed minimum. The 2nd Appellant, who was 19 and a first offender, would serve the statutory minimum of ten years.

In *State v Keboseke*,¹²¹² two accused persons charged and convicted of the offences of defilement¹²¹³ and robbery, respectively received a minimum mandatory sentence of 10 years each. They both contended that they were youthful offenders and that their youth constituted an exceptional extenuating circumstance, justifying reduction of their sentences. The Court ruled as follows:

Youthfulness per se is not an exceptional extenuating circumstance...I, therefore, conclude that it is only in those exceptional instances where it would be totally inappropriate to impose the statutory minimum sentence on a person who is of tender age, that youthfulness would warrant the invoking of the provisions of s. 27 (4) of the Penal Code.¹²¹⁴

The Court in considering the circumstances of the offender stated that, though the Appellant was 19 and a first offender, he was not a callow youth but a man of maturity. Considering the circumstances of the rape, the Court noted the violence occasioned on the victim and the accused's arrogance. The Court could find no exceptional extenuating circumstances and

¹²¹² 2008 (1) BLR 327 (CA).

¹²¹³ Under section 147 of the Botswana Penal Code, any person who has sexual intercourse with a girl under the age of 16 commits the offence of defilement. However, the question of consent is pivotal. Where a girl consents to the sexual intercourse, the proper offence with which the offender is to be charged is defilement. Where there is no consent, as is often the case with very young girls, then the proper charge is rape under section 141 as read with section 142 of the Penal Code. This is because lack of consent is a critical element of the offence of rape. This question was determined by the Botswana Court of Appeal in *Ketlwaletswe v The State* 2007 2 BLR 715 (CA) 719 where the Court held, per Zeitsman JA, '*...where a man has sexual intercourse with a young girl deemed incapable of consenting to the act the proper charge is rape. A fortiori, where a man has sexual intercourse with such a young girl, and there is proof that in fact she did not consent to the act, he is guilty of rape.*'

¹²¹⁴ *Keboseke v The State* 2008 (1) BLR 327 (CA) 333.

imposed the statutory minimum sentence.¹²¹⁵

In the *Kgosikwena Sebele* case, the considerations were the converse of the above. The accused pleaded that his old age of sixty three amounted to an exceptional extenuating circumstance. The Court did not agree. The learned Judge stated as follows:

Youthfulness is, of course, a standard extenuating circumstance when it results in immaturity, inexperience or over exuberance, depending upon the circumstances of each case. But what of mature age? I do not believe that old age should *per se* constitute and exceptional extenuating circumstance unless it is accompanied by additional factors which might include senility or destitution. The age of sixty three is a mature age, but not towards the top of the age scale. If anything, an older person would be more mature, more experienced and better able to appreciate the need to be law abiding. Certainly in this case, where the theft was committed out of greed rather than out of need, there is no question of the appellant's age, whatever the surrounding circumstances constituting an exceptional extenuating circumstance¹²¹⁶

It is clear from the above that there is divergent case law on whether youthfulness and being a young offender qualifies as an exceptional extenuating circumstance. The approach in *Seme* was a traditional application of sentencing considerations. It called upon the Court to recall that youths and first offenders should be spared lengthy jail terms. In *Fu*, the Court wondered what would be a reasonable cut off age for the application of restraint in imposing jail terms. Whilst the Court in *Moatshe* recognised the importance of shielding young persons from the harshness of imprisonment, but at the same time the Court argued that the legislature had set a cut-off point of the age of 18, where youthfulness could no longer be used to excuse miscreant behaviour, particularly where minimum mandatory sentences were prescribed.

The approach in *Keboseke* and *Sebele* is perhaps the most useful. In *Keboseke* the Court ruled that youthfulness in itself is not an exceptional extenuating circumstance, but that it could be invoked where a minimum mandatory sentence would be totally inappropriate. In *Sebele*, mature age is not completely excluded. It may amount to an extenuating circumstance where

¹²¹⁵ *Keboseke v The State* 2008 (1) BLR 327 (CA) 333-334.

¹²¹⁶ *Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

coupled with additional factors like senility or destitution. The point that the *Keboseke* and *Sebele* judgements raise then is this: The Court must go one step further, beyond the extenuating circumstance of age and search for additional factors that would make sentencing such a young or mature offender, to the statutory minimum, totally inappropriate.

4.6.2 Circumstances surrounding the offence and the offender

Circumstances surrounding the offence and the offender have also been held to amount to an exceptional extenuating circumstance. In *State v Fu*,¹²¹⁷ the Court noted that the circumstances surrounding the crime, which it characterised as ‘a robbery with a difference’, was such as to fit the criteria for exceptional extenuating circumstances. In support of its argument, the Court noted that the accused persons believed what they were doing was lawful, they were unarmed, they visited the shops they allegedly robbed by prior arrangement and made no attempt to hide their identities. They collected the money on behalf of their association and not for personal benefit. These extenuating circumstances were held by the Court to reach the exceptional bar and justifying the Court to exercise its discretion not to pass the statutory minimum sentence of 10 years, which would have been totally inappropriate. The accused persons were each sentenced to one year in prison.¹²¹⁸

In *Fu*, the Court relied on the circumstances of the offence as the basis for exercising its discretion under section 27(4). The Court noted that the circumstances were so unique and out of character with ordinary run of the mill robbery cases, that the mandatory minimum would have been totally inappropriate. It is submitted that this case is notable because it

¹²¹⁷ *State v Fu* 2006 (1) BLR 486 (HC) 494.

¹²¹⁸ In *Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016). The accused’s circumstances of ill health and a distinguished public record were held not to amount to extenuating circumstances and were classified as mere mitigating factors. This is because in the Courts view, they do not touch on the accused’s moral blameworthiness.

convincingly applies section 27(4) to mitigate against a sentence that would have been extremely harsh in the circumstances.

4.6.3 Value of the property stolen

The Courts have also had opportunity to rule on the question of whether the value of the property stolen can amount to an exceptional extenuating circumstance. In *State v Moyo*,¹²¹⁹ the accused was convicted of robbery in the magistrate's Court and committed to the High Court for sentencing. He had attacked a woman in her home, tied her up, threatened her and made off with a laptop computer, a leather bag and P 800 in cash. On the evidence, the crime the accused had been convicted of rendered the minimum mandatory sentence of 10 years imprisonment applicable. The Court considered whether the minimal value of the property stolen would constitute an exceptional extenuating circumstance. The Court ruled as follows:

‘I have considered whether the value of stolen property, if minimal could constitute an exceptional extenuating circumstance. I appreciate the problem with this line of reasoning. It is that it becomes a matter of degree where the cut-off point is to be made or what the minimal value of the property should be to qualify it to constitute an exceptional extenuating circumstance.’¹²²⁰

The Court clearly identified the enduring difficulty in this type of case. It was a matter of subjective opinion what value of the goods stolen would be low enough to be considered an exceptional extenuating circumstance. The judge in *Moyo* did not draw a line in the sand in an attempt to answer this vexed question. However, it is implicit in this decision that the items stolen were not of such a minimal value to be classified as an exceptional extenuating circumstance, as the accused received the mandatory minimum sentence.

In *Seleka v The State*,¹²²¹ the appellant was charged and convicted of robbery. He and his accomplices had held up a taxi driver and relieved him of a cell phone, P64 in cash, an empty

¹²¹⁹ 2007 (1) BLR 737 (HC).

¹²²⁰ *State v Moyo* 2007 (1) BLR 737 (HC) 740.

¹²²¹ *Keboseke v The State; Seleka v The State* 2008 (1) BLR 327 (CA).

wallet and items of negligible value. The accused then sought a sentence less than the minimum mandatory of 10 years on the basis that most of the goods stolen were recovered and that the driver had suffered little loss. The Court found this argument unconvincing. Citing the decision in *Serumola v The Director of Public Prosecutions*,¹²²² with approval, the Court held that regardless of the fact that the property stolen was recovered and that the appellant did not benefit from the crime, this did not amount to an exceptional extenuating circumstance that rendered the minimum mandatory sentence inappropriate. The accused was sentenced to the minimum term.¹²²³

In the *Kgosikwena Sebele* case,¹²²⁴ the accused was charged with the theft of a single goat.

The Court had the following to say about the value of the chattel stolen:

To many small scale farmers their goats are every bit as valuable, and their loss every bit as painful, as is the case of cattle to those fortunate enough to own them. There have been numerous cases where the minimum sentence has been imposed for the theft of goats, which are an important farming asset in Botswana. Here too the subject matter was a valuable Boer goat breeding ram, although the age may have reduced value. I leave open the question of whether the fact that the item stolen may be of only minimal value can constitute a factor reducing moral blameworthiness in a stock theft case.¹²²⁵

From the cases above, it appears that the issue of the value of the property stolen raises the incommensurable question of parameters. One must needlessly ask; at what point should the Court make the determination that the goods stolen in robbery are of such negligible value that they make the minimum mandatory sentence inappropriate? Does the theft of a cell phone of little value, a few hundred Pula or an empty wallet in a robbery warrant a jail term of ten years? Should the theft of a single goat or kid, and the theft of several cattle attract the same sentence? To date, no Court has made a pronouncement on the parameters.

¹²²² 2007 (1) BLR 434.

¹²²³ *Keboseke v The State; Seleka v The State* 2008 (1) BLR 327 (CA).

¹²²⁴ *Kgosikwena Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

¹²²⁵ *Kgosikwena Sebele v The State* 2010 2 BLR 473 (HC) available at www.elaws.gov.bw/rep_export.php?id=4311&type=pdf (accessed 20 January 2016).

4.7 Reservations to section 27(4) Penal Code

Upon reviewing the use of section 27(4) in the higher courts, one may conclude that the absence of a definition, or uniform interpretation, of what amounts to ‘exceptional extenuating circumstances’ has resulted in mixed results.

Notably, there exists a lack of consistency and uniformity in sentencing. It appears that instead of being certain of the meaning and scope of section 27(4) the provision often raises more questions than answers regarding the scope of application, factors to be considered and factors to be ignored. Judges are also unsure whether to exclude ordinary extenuating circumstances entirely or whether to consider them in addition to other factors that may elevate the ordinary to the exceptional. Decisions appear to be highly subjective, and the judge’s personal perception about what is reasonable in the circumstances, takes the lead. The result of these differing approaches is differing judgements. This state of affairs may be viewed as a legislative omission, or perhaps as a judicial opportunity.

4.8 Mandatory minima and juveniles

The inclusion of imprisonment as a sentencing option for children in the Children’s Act 2009 means that there is a possibility that a juvenile could be being sentenced to a mandatory minimum sentence. This is because, there is no statutory limitation in the Children’s Act on the application of mandatory minima to juveniles. The question of a juvenile being subjected to a mandatory sentence would be entirely within the discretion of the presiding judge. A judge who is not convinced that a being under the age of 18 amounts to an exceptional extenuating circumstance in terms of section 27(4) of the Penal Code, could hand down a mandatory sentence to a juvenile. This opens up the possibility of lengthy sentences for juveniles, without the possibility of diversion to more suitable programs. This would be

undesirable.

4.9 Mandatory minima and the possible imprisonment of juveniles

In creating a new sentencing option providing for the imprisonment of children, Government has the attendant duty to ensure that imprisoned children are availed necessary facilities for rehabilitation and education. Currently, there is no facility for incarceration of juveniles aged 14 – 18 years. The boys prison at Moshupa receives youths aged 18 – 21. International law prohibits the incarceration of children with adults. If juvenile offenders were to serve out their sentences at Moshupa, they would have to be separated from the adult population. Educational and vocational facilities would have to be availed to incarcerated children. The Draft Policy Paper on Sentencing (2013) notes that as at June 2013, the classrooms, workshops and other training facilities at Moshupa Boys Prison have yet to be constructed.¹²²⁶

It is recommended that suitable arrangements for the incarceration of juveniles be prioritised in order to ensure greater effectiveness of the criminal justice system. There is a need to examine the current statutory framework in order to permanently eliminate the possibility of imprisonment to mandatory sentence for a juvenile. This matter should not be left to the discretion of judges who must then determine if in their view, the offender is sufficiently young to be spared a mandatory sentence. Judge's opinion on this question are divergent and there is room for clear direction on this question.¹²²⁷

4.10 Conclusions

The discussion above on minimum mandatory sentencing has brought to the fore issues that

¹²²⁶ Draft Policy Paper 'Supporting the Development of a sentencing policy encompassing alternatives to imprisonment in the Administration of Justice Botswana' May 2013 at 103.

¹²²⁷ *Seme and Another v The State* 2006 (1) BLR 35 (HC); *State v Fu* 2006 (1) BLR 486 (HC) 494; *Moatshe and Another v The State* 2004 (1) BLR 1 (CA) 91; *Keboseke v The State* 2008 (1) BLR 327 (CA) 333.

require further consideration. First, do minimum mandatory sentences act as a deterrent to crime; second, does the minimum mandatory sentencing regime unnecessarily usurp judge's discretion; third, is the lack of consistency and uniformity in minimum mandatory sentencing acceptable and fourth, how are minimum sentences to be applied to juveniles.

Considering the severity of the sentences imposed by statutory minimums in Botswana, and the patent problems with the regime, there could be benefit in examining the approach to minimum mandatory sentencing in other countries. Other jurisdictions that also employ the use of minimum mandatory sentencing may offer some direction on whether minimum mandatory sentencing works, and how best to apply this sentencing method to offenders in a fair and consistent manner without undue fettering of judges discretion. The treatment on minimum sentencing in other jurisdictions is considered below.

4. MANDATORY SENTENCING: A COMPARATIVE SURVEY

In order to explore possible solutions to the challenges facing mandatory minimum sentencing in Botswana, this chapter considers the mandatory minimum sentencing regime in South Africa, England and Wales, and Australia. The jurisdictions selected are all Common Law jurisdictions. The minimum sentencing regimes that exist in these countries share a similarity with Botswana's. They all require the Court to impose a minimum sentence but allow the imposition of a lesser sentence in the event that prescribed circumstances are found to exist. A consideration of the framework and impact on mandatory sentencing in these jurisdictions along with reforms adopted in each will be instructive in mapping a proposed path of reform for Botswana's minimum sentencing regime.

One nation that has a long standing association with mandatory sentencing is the United States of America. Whilst reference is made to the work of jurists from this jurisdiction and

famous sentencing schemes like ‘three strikes you are out’ and the Minnesota Guidelines, the United States will not be used as a comparator nation because in many instances, mandatory minima in the United States are of the strictest nature not allowing any departure upon the discretion of the judicial officer.

4.1 South Africa

Mandatory sentences have been part of the South African landscape for many years.¹²²⁸ Although many were repealed, the legislature in South Africa significantly limited sentencing discretion for particular offences through mandatory minimum sentences in 1997. The Criminal Law Amendment Act 105 of 1997 (the Act) came into force on 1 May 1998. It was to operate for an initial period of 2 years. Its operation was extended on 30 April 2001 and again on 30 April 2003 for a further 2 years.¹²²⁹ The Act makes provision for the imposition of minimum mandatory sentences for offences listed under schedule 2 of the Act including murder, rape and ¹²³⁰ Sentences prescribed under the Act range from 5 years to life imprisonment. The South African Legislature retained some judicial discretion to depart from minimum mandatory sentences through section 51(3) of the Criminal Law Amendment Act.¹²³¹ This provision provides as follows:

[Where a relevant Court] is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on record and thereupon impose such a lesser sentence.

The Act was intended to be in force for a limited period of two years; however its operation

¹²²⁸ Department of Justice Canada ‘Mandatory Sentences of Imprisonment in common law Jurisdictions: Some Representative Models’ (2005) at 22 Available at http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/rr05_10.pdf (accessed 20 January 2016).

¹²²⁹ Proc R2 GG 22261 of 30 April 2001 and again in Proc R40 GG 24804 of 30 April 2003.

¹²³⁰ Other offences listed in schedule 2 of the Criminal Law Amendment Act no 105 of 1997 are: Terrorist offences; trafficking for sexual purposes; international crimes under the Rome Statute Act of 2004; Dealing in and smuggling ammunition; certain offences under the Prevention and Combatting of Corrupt Activity Act of 2004; sexual exploitation of minors and vulnerable people, and assault of a minor with intent to do grievous bodily harm. See also JJ Neser ‘Mandatory Minimum Sentences in the South African Context’ 2001 3(3) *Crime Research in South Africa* at 1. Available online at www.crisa.org.za/downloads/vvs.pdf (accessed 20 January 2016).

¹²³¹ Act 105 of 1997.

has continued to be extended by the President over the years.¹²³²

4.1.1 Rationale for the introduction of mandatory minima in South Africa

The rationale for introduction of mandatory minimum sentencing in South Africa was multifaceted. One of the main motivations was deterrence; that is, the desire to reduce serious and violent crime. In *State v Jimenez*¹²³³ the Supreme Court stated

The Criminal Law Amendment Act shows the disquiet experienced by the public, represented through the legislature at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest.¹²³⁴

In *State v Malgas* the Supreme Court stated that the legislature, in enacting minimum mandatory sentences, aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such crimes.¹²³⁵ Terblanche concludes that there is little doubt that deterrence was the principle aim of the Act stating that politicians believe that the prescription of quite severe mandatory sentences will deter potential offenders from committing crime.¹²³⁶ Other motivations include the need for government to show its concern with the high crime rates¹²³⁷ in response to public perceptions of leniency in sentencing, and dissatisfaction with sentencing practices in South Africa. This concern was also shared by members of the judiciary.¹²³⁸

4.1.2 The impact of the 1997 amendment

Before the 1997 amendment, criticism of minimum mandatory sentencing was already

¹²³² S Terblanche ‘Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997’ (2003) *Acta Juridica* 194 at 195.

¹²³³ 2003 (1) SACR 507 (SCA).

¹²³⁴ 2003 (1) SACR 507 (SCA) [9].

¹²³⁵ *S v Malgas* 2001 (1) SACR 469 SCA [25].

¹²³⁶ S Terblanche ‘Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997’ (2003) *Acta Juridica* 194.

¹²³⁷ J Sloth-Nielsen and L Ehlers, ‘Assessing the Impact: Mandatory and minimum sentences in South Africa’ (2005) 14 *SA Crime Quarterly* 15.

¹²³⁸ South African Law Commission Issue Paper 11 (Project 82) ‘Sentencing: Mandatory minimum Sentences’ (1997) at para 1.4.

present in South Africa. The efficacy of mandatory minimum sentencing was studied by the Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa. The Viljoen Report found that mandatory minimum sentences were undesirable, eroded sentencing discretion and led to great injustice.¹²³⁹ Criticism of minimum mandatory sentencing also came from the bench where mandatory minimum sentences were characterised as

...an undesirable intrusion by the legislature upon the jurisdiction of the Courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment that is calculated in certain instances to produce great injustice.¹²⁴⁰

The Viljoen Commission also observed that mandatory minimum sentences lacked balance, increased the prison population with no observable effect on crime rates.¹²⁴¹ The Viljoen Commission recommended the repeal of prescribed sentences.¹²⁴² Nevertheless, in 1997, mandatory minima were introduced for a range of serious offences.

Discussing the impact of minimum sentencing in South Africa, Sloth-Nielsen and Ehlers conclude that there is little reliable evidence that mandatory minimum sentencing has reduced crime in general, or that specific offences targeted by the law have been curbed.¹²⁴³ They noted:

In the South African case, despite the repeated extension of the minimum sentences legislation that was originally intended to be in place only for two years, it is difficult to find substantive evidence that the new penal regime has had any general deterrent effect – or even that it has reduced crime. Instead,

¹²³⁹ G Viljoen, *Report of the commission of Inquiry into the Penal System of the Republic of South Africa* (1976) as cited in JJ Naser 'Mandatory Minimum Sentences in the South African Context' 2001 3(3) *Crime Research in South Africa* at 1. Available online at www.crisa.org.za/downloads/vvs.pdf JJ Naser 'Mandatory Minimum Sentences in the South African Context' 2001 3(3) *Crime Research in South Africa* at 1. Available online at www.crisa.org.za/downloads/vvs.pdf; See also SS Terblanche & G Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia' (2008) 41(3) *Australian and New Zealand Journal of Criminology* 401 403.

¹²⁴⁰ *S v Toms; S v Bruce* 1990 2 SA 802 [a] at 817 C – D.

¹²⁴¹ SS Terblanche & G Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia' (2008) 41(3) *Australian and New Zealand Journal of Criminology* 401 403.

¹²⁴² J Sloth-Nielsen and L Ehlers 'A Pyrrhic Victory? Mandatory minimum sentences in South Africa' (2005) *ISS Paper III* 1.

¹²⁴³ J Sloth-Nielsen and L Ehlers 'A Pyrrhic Victory? Mandatory minimum sentences in South Africa' (2005) *ISS Paper III* 1 at 11; J Sloth-Nielsen and L Ehlers 'Assessing the Impact: Mandatory and minimum sentences in South Africa' (2005) 14 *SA Crime Quarterly* 17.

statistics suggest an uneven change in reported crimes.¹²⁴⁴

Terblanche supports the view that mandatory sentencing has had no deterrent effect. He also observes the development of a phenomenon of circumvention on mandatory terms by the Courts in order to avoid their application.¹²⁴⁵ In fact that the mandatory minimum regime merely worsens disparities and inconsistencies in sentencing.¹²⁴⁶

Sloth-Nielsen and Ehlers also lament the worsening overcrowding in prison which some commentators have ascribed to mandatory minimum sentencing.¹²⁴⁷ Whilst noting that there are others who argue that it cannot be conclusively shown that the increase in long term and life sentences is necessarily due to the implementation of the minimum sentences, Sloth-Nielsen and Ehlers recommend an analysis to conclusively establish if a link exists between prison overcrowding and the implementation of the minimum sentencing legislation.¹²⁴⁸ They also argue that long sentences do not assist in rehabilitation.¹²⁴⁹

Similar concerns were unearthed by the South African Law Reform Commission¹²⁵⁰ in its investigations into sentencing in South Africa. In two empirical studies commissioned

¹²⁴⁴ J Sloth-Nielsen and L Ehlers 'Assessing the Impact: Mandatory and minimum sentences in South Africa' (2005) 14 *SA Crime Quarterly* 16.

¹²⁴⁵ S Terblanche 'Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194 at 218 - 219 cites M Tonry 'Judges and sentencing policy – The American Experience in C Munro and M Wasik (eds) *Sentencing, judicial discretion and training* (1992) 137 at 152 where he states that mandatory penalty laws either have no deterrent effect or a modest deterrent effect that soon wastes away. Tonry also notes that judicial and prosecutorial stratagems have developed in the United States Criminal Justice System to avoid minimum sentencing laws like accepting guilty pleas for other non-mandatory penalty offences and diverting offenders from prosecution all together in order to circumvent mandatory penalties.

¹²⁴⁶ J Sloth-Nielsen and L Ehlers, 'Assessing the Impact: Mandatory and minimum sentences in South Africa' (2005) 14 *SA Crime Quarterly* 15 17.

¹²⁴⁷ J Sloth-Nielsen and L Ehlers 'A Pyrrhic Victory? Mandatory minimum sentences in South Africa' (2005) *ISS Paper III* 1 8 – 9.

¹²⁴⁸ J Sloth-Nielsen and L Ehlers' (2005) 14 *SA Crime Quarterly* 16 18 – 20.

¹²⁴⁹ J Sloth-Nielsen and L Ehlers 'A Pyrrhic Victory? Mandatory minimum sentences in South Africa' (2005) *ISS Paper III* 1 12.

¹²⁵⁰ The South African Law Commission was established by an Act No. 19 of 1973. The name of the Commission was changed to the South African Law Reform Commission by the Judicial Matters Amendment Act No. 55 of 2002 which came into force on 17 January 2003. For purposes of this thesis, the Commission shall be referred to by its new name.

between June 1999 and January 2000 of sentencing patterns before and after the introduction of the Criminal Law Amendment Act and attitudes of key stakeholders to the efficacy of minimum mandatory sentences was considered.¹²⁵¹ According to the South African Law Reform Commission, the key empirical finding was that significant disparities in sentencing for serious offences, particularly on regional lines, had persisted even after the coming into effect of the Act. Another impact found was the increase prison terms for particular offences. In particular the offence of rape saw a significant increase. The studies also found that newly emerging sentencing patterns could have a major impact on the prison population as longer sentences would lead to overcrowding. The qualitative study noted strong opposition, particularly among judges interviewed, to the idea of mandatory minimum sentences.¹²⁵²

Van Zyl Smit also notes that the Act places the judiciary at a disadvantage. He notes that the imposition of sentences below the mandatory terms requires judges to explain why the crime is relatively not so serious.

In so doing, they run the risk of being perceived to be soft on crime, a perception which the political proponents of the mandatory sentences can use to further their argument that such prescribed sentences are necessary because judges are being too lenient and out of touch.¹²⁵³

In effect, the judiciary panders to the needs of a public which is ever-more convinced that mandatory tariffs must be handed down to all offenders regardless of their unique circumstances. This is a serious erosion of judicial independence.

The South African Law Reform Commission also analysed the response to the Act as reflected by the judgements of the South African judiciary. The absence of legislative

¹²⁵¹ South African Law Commission 'An empirical quantitative and qualitative study of the sentencing practices of the South African criminal courts with particular emphasis on the Criminal Law Amendment Act, 105 of 1997' Research Paper 17 (2000).

¹²⁵² South African Law Commission Report (Project 82) 'Sentencing (A New Sentencing Framework)' (2000) [1.19 – 1.120].

¹²⁵³ D Van Zyl Smit 'Mandatory Sentences: A Conundrum for the new South Africa?' 2002 (2) *Punishment and Society* 197 207.

guidance regarding the meaning of ‘substantial and compelling circumstances’ presented problems for judicial officers. According to the South African Law Reform Commission Report the words ‘substantial and compelling’ are not common qualifiers in South Africa.¹²⁵⁴ They were probably adopted from sentencing guidelines developed by the Sentencing Commission in the American State of Minnesota to guide the Courts in the exercise of their discretion.¹²⁵⁵ However unlike the Minnesota Guidelines, the South African Legislature did not offer any guidance as to the meaning of the phrase ‘substantial and compelling’. The SA Law Commission characterised this omission as a weakness but noted that the phrase could still be interpreted by simply reintroducing existing principles.¹²⁵⁶ There were calls for the legislature to state exactly what circumstances reached the threshold ‘substantial and compelling’ through interpretive practice guidelines.¹²⁵⁷

The Commission noted that there had been a wide range of interpretations of the words ‘substantial and compelling’.¹²⁵⁸ In *S v Mofokeng*,¹²⁵⁹ Stegman J took the view that ‘substantial and compelling’ circumstances could be found where circumstances were so exceptional that the injustice of the mandatory penalty would compel the conclusion that a lesser sentence was justified. A different interpretation was adopted by Leveson J in *S v Majalefa and Another*¹²⁶⁰ where he states that aggravating and mitigating circumstances had to be considered in the traditional way and that the Act did not introduce any major change in

¹²⁵⁴ South African Law Commission Report (Project 82) ‘Sentencing (A New Sentencing Framework)’ (2000) at [1.32].

¹²⁵⁵ For a full discussion on the origin of the qualifier ‘substantial and compelling’ see D Van Zyl Smit ‘Mandatory Sentences for the new South Africa’ in C Tata and N Hutton (eds) *Sentencing and Society: International Perspectives* (2002) 90.

¹²⁵⁶ South African Law Commission Report (Project 82) ‘Sentencing (A New Sentencing Framework)’ (2000) at [1.32].

¹²⁵⁷ J Sloth-Nielsen and L Ehlers, ‘Assessing the Impact: Mandatory and minimum sentences in South Africa’ (2005) 14 *SA Crime Quarterly* 15 18.

¹²⁵⁸ South African Law Commission Report (Project 82) ‘Sentencing (A New Sentencing Framework)’ (2000) at [1.22].

¹²⁵⁹ 1999 (1) SACR 502w at 523c.

¹²⁶⁰ Unreported. Cited in *S v Blaauw* 1999 (2) SACR 295 (w) at 305i – 306i.

the approach to sentencing. Both these decisions were followed in later cases.¹²⁶¹ In *S v Blaauw*,¹²⁶² the Court tried to steer a middle course. Borchers J noted that in order to determine if a departure from the minimum mandatory sentence was allowed one did not have to look for exceptional circumstances but at the cumulative effect of all the aggravating and mitigating circumstances in the case. If in the light of these the prescribed sentences would be startlingly inappropriate, the Court could depart from it, but was otherwise bound to impose it.

The difficulties facing the Courts in finding uniformity in the application of the phrase ‘substantial and compelling circumstances’ was succinctly captured in *S v Dodo*, where the Court noted that:

Establishing its true meaning has proved to be intractably difficult and has led to a series of widely divergent constructions in the High Courts. Some have severely limited the sentencing discretion to “unusual and exceptional factors”, others to cases of “gross disproportionality” while others have left the normal sentencing discretion virtually unaffected¹²⁶³

The effect of these varying approaches in sentencing has been increasing disparities in sentencing. This undesirable state of affairs continued until the meaning of the phrase ‘substantial and compelling circumstances’ was considered by the Court in land mark case of *State v Malgas*.¹²⁶⁴ As Terblanche puts it, the decision was ‘the seminal judgment on how Courts should deal with substantial and compelling circumstances’.¹²⁶⁵ In *Malgas*, the Court had the following to say about the absence of guidance as to the meaning of ‘substantial and compelling circumstances’ in the Act:

That [the legislature] has refrained from giving such guidance as was done in Minnesota from whence concept of substantial and compelling circumstances was derived is significant. It signals that it has deliberately and advisedly left it to the Courts to decide in the final analysis whether the circumstances

¹²⁶¹ See full discussion in South African Law Commission Report (Project 82) ‘Sentencing (A New Sentencing Framework)’ (2000) at [1.27].

¹²⁶² 1999 (2) SACR 295 (W) at 311 a – h.

¹²⁶³ 2001 SACR (1) 594 (CC) at para [10].

¹²⁶⁴ 2001 (2) SA 1222 (SCA) at 1235F – 1236E.

¹²⁶⁵ S Terblanche ‘Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997’ (2003) *Acta Juridica* 194 213.

of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.¹²⁶⁶

This position was reiterated in *S v Vilakazi*¹²⁶⁷ where it was held that if a Court was dissatisfied that a lesser sentence is justified then it must impose a lesser sentence because Courts are not to be vehicles for injustice. As was stated in *Vilakazi*,¹²⁶⁸ the import of *Malgas* and *Dodo* is that a Court is not obliged to perpetuate injustice by imposing sentences that are disproportionate to the particular offence.

Terblanche summarises the position of the Court as follows:

The gist of this judgement is that the specified sentences should not be departed from lightly and that the prescribed sentences should ordinarily be imposed. However, if the circumstances of the case call for a departure, the Court should not hesitate to do so. In the process of determining whether a departure is called for, the Court should weigh all the considerations that would traditionally be relevant to sentencing. The Court should then have regard to its sense of unease with the prescribed sentence. When this unease is such that the sentencer becomes convinced that the prescribed sentence would amount to an injustice an alternative sentence, should be imposed.¹²⁶⁹

Commentators who have considered the impact of the *Malgas* guidelines note that in practice, judges continue to find ways to circumvent minimum mandatory penalties. Sloth-Nielsen and Ehlers note that despite assertions from judges and magistrates that prescribed sentences require them to treat all those guilty of a particular type of crime in the same way irrespective of differing circumstances, newspaper reports abound of apparently severe cases in which judges have found room to depart from prescribed minimum sentences.¹²⁷⁰

¹²⁶⁶ 2001 (2) SA 1222 (SCA) at [18].

¹²⁶⁷ 2009 (1) SACR 552 (SCA) [18].

¹²⁶⁸ 2009 (1) SACR 552 (SCA) [20].

¹²⁶⁹ S Terblanche 'Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194 213.

¹²⁷⁰ J Sloth-Nielsen and L Ehlers 'Assessing the Impact: Mandatory and minimum sentences in South Africa' (2005) 14 *SA Crime Quarterly* 16 17.

This was reiterated in *State v Matyityi*¹²⁷¹ where the Court noted that sentencing Courts too often deviated from the prescribed penalty saying:

[Courts] frequently deviate from minimum sentences prescribed by the legislature for the flimsiest of reasons such as maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation and like considerations.¹²⁷²

The Court in *Matyityi* clarified that the *Malgas* decision established that the sentencing Court must independently apply its mind to the proportionality of the sentence in relation to the crime, but that where there was no substantial and compelling reason to depart from the prescribed sentence than it had to be imposed. There was no clean slate from which the presiding officer should depart. The starting point was in fact the minimum prescribed sentence.¹²⁷³

Sloth-Nielsen and Ehlers also comment¹²⁷⁴ on the effect of mandatory minimum sentencing regime on Court procedures. They result in ‘split procedure’ which entails the trial Court proceeding with the matter from taking of the plea to conviction but due to limits in sentencing jurisdiction, matters have to be referred to some other judge to act as a sentencing judge. This process result in delays and duplication of work. The trial court and sentencing court seem to lose sight of the interests of the accused as the trial judge who heard the evidence and observed the nuances of every witness is not the judge charged with sentencing.¹²⁷⁴ This has since been resolved through the Criminal Law (Sentencing) Amendment Act, 2007¹²⁷⁵ which put an end to the split procedure.

¹²⁷¹ 2011 SACR 40 SCA; See a full discussion of this decision in N Whitear-Nel ‘*S v Matyityi* 2011 SACR 40 (SCA): Compliance with mandatory sentencing, and placing the victim at the centre of the criminal justice system’ (2012) *De Jure* 585.

¹²⁷² 2011 SACR 40 (SCA) [23].

¹²⁷³ 2011 SACR 40 (SCA) [11] and [18].

¹²⁷⁴ J Sloth-Nielsen and L Ehlers ‘A Pyrrhic Victory? Mandatory minimum sentences in South Africa’ (2005) *ISS Paper III* 1 13.

¹²⁷⁵ Act No. 38 of 2007. A van der Merwe ‘In search of sentencing guidelines for child rape: An analysis of case law and minimum sentence legislation’ 2008 (71) *THRHR* 589 590.

In Terblanche's view:

One should not be fooled into believing that the Act is anything but an expensive tool. Just consider the many thousands of judicial officer hours that have been consumed in trying to make sense of its provisions, or trying to get around those provisions that turned out to be patently unfair. One wonders how many convicted offenders are sitting in already overcrowded prisons for terms much longer than they would have faced previously. These costs might have been worthwhile had the Act actually achieved its purpose. The Act is costly on another front as well. It creates a false sense of security, a false sense of something that will be effective against the high crime rates. The Act was enacted as an emergency measure. It has all the inconsistencies of such a measure. It is time for it to go before it does lasting damage to the criminal justice system.¹²⁷⁶

Despite these views, mandatory minimums have remained part of the South African legal landscape for almost two decades and despite opposition and criticism, they are likely to remain in the statute books for much longer still.

4.1.3 Mandatory sentencing and juveniles in South Africa

According to section 51(6) of the Criminal Law (Amendment) Act,¹²⁷⁷ prescribed minimum sentences would not apply to juveniles offenders under the age of 16 at the time of commission of the offence. This effectively meant that, juveniles who were 16 and 17 at the time of commission of the offence were liable to being sentenced to a mandatory minimum tariff. In terms of section 51(3)(b) there was some respite from the rigours of section 51(6) in that a judge could deviate from the mandatory minimum in a case involving a 16 or 17 year old. In *S v B*,¹²⁷⁸ the meaning of section 51(3)(b) was considered. The Court came to the conclusion that a judge could set what he deemed to be the appropriate sentence for defendants aged 16 or 17 at the time of the commission of the offence. Nevertheless, it was still open to the Court to impose the mandatory minimum if it had very good reasons for doing so. Section 51(3) b of the Criminal Law Amendment Act, 1997 was repealed in 2007.¹²⁷⁹

¹²⁷⁶ SS Terblanche 'Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194 220.

¹²⁷⁷ No 105 of 1997.

¹²⁷⁸ 2006 (1) SACR 311 (SCA); *Brandt v S* [2005] 2 All SA 1 (SCA) [24].

¹²⁷⁹ Criminal Law (Sentencing) Amendment Act of 38 of 2007.

In the leading decision of *Centre for Child Law v The Minister of Justice and Constitutional Development and Others*¹²⁸⁰ the constitutionality of applying minimum mandatory sentences to juveniles aged 16 and 17 was considered. The Constitutional Court held by a 7 to 4 majority that section 51(6) of the Criminal Law Amendment Act¹²⁸¹ which made mandatory minimum sentences applicable to juveniles aged 16 and 17 was unconstitutional and ought to be read so as not to apply to offenders under the age of 18 years. The Constitutional Court also held that the 2007 amendment had the effect of placing persons who were 16 and 17 at the time of commission of the offence within the ambit of the mandatory minimum sentencing regime.¹²⁸²

The Constitutional Court stated that ‘it was the express intent of the legislature [in repealing section 51(3)(b) to obliterate the distinction between adult offenders and child offenders of 16 and older.’¹²⁸³ The change in the law meant that mandatory penalties were the starting point for any offender aged 16 or older at the time of commission of the offence. The Court held unequivocally that the Criminal Law (Sentencing) Amendment Act, 2007, limited the constitutional right of children¹²⁸⁴ and that such limitation was unjustifiable.¹²⁸⁵

In conclusion the Constitutional Court held that section 51(1) and section 51(2) of the Act were unconstitutional as they applied to children aged under 18 years. Further, section 51(6) was to be read as though its provisions did not apply to children under the age of 18. Lastly, section 51(5) which permitted up to half of the mandatory sentence to be imposed on an

¹²⁸⁰ 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC).

¹²⁸¹ No 105 of 1997.

¹²⁸² 2009 (2) SACR 477 (CC) [6].

¹²⁸³ 2009 (2) SACR 477 (CC) [40].

¹²⁸⁴ 2009 (2) SACR 477 (CC) [49].

¹²⁸⁵ 2009 (2) SACR 477 (CC) [63].

offender aged 16 or 17 at the time of commission of the offence was also declared to be unconstitutional.¹²⁸⁶

Terblanche states that the rationale for this decision is that the Act was not in consonance with section 28 of the Constitution which requires that children be incarcerated for the briefest possible period.¹²⁸⁷

This was an invaluable development in the protection of children in the arena of sentencing in South Africa which offers valuable lessons for Botswana.

4.2 Mandatory sentencing in England and Wales

Mandatory sentences in England and Wales¹²⁸⁸ today cover very few offences.¹²⁸⁹ Discretion in sentencing is largely the realm of the judge guided by sentencing guidelines which give some structure to sentencing while allowing a large measure of discretion where necessary.¹²⁹⁰ The few mandatory minima that exist were introduced in response to public concern regarding offences like domestic burglary, drugs and firearms offences. Sentencing in England and Wales is informed by the just deserts or proportionality in sentencing principle which requires tougher sentences for more serious crimes.¹²⁹¹ Custodial sentences are reserved for serious crimes with a leaning towards community sentences like probation,

¹²⁸⁶ For a detailed discussion of the Centre for Child Law Case see SS Terblanche 'Sentencing' (2009) *Annual Survey of South African Law* 1158.

¹²⁸⁷ JJ Joubert *et al Criminal procedure handbook* 11th ed (2013) 318.

¹²⁸⁸ England and Wales is a separate jurisdiction from Scotland and Northern Ireland which have different sentencing laws and traditions.

¹²⁸⁹ A Gilpin, 'The impact of mandatory minimum and truth in sentencing law and their relation to English Sentencing policies' (2010) 29 *Arizona Journal of International and Comparative Law* 91 95.

¹²⁹⁰ A Gilpin, 'The impact of mandatory minimum and truth in sentencing law and their relation to English Sentencing policies' (2010) 29 *Arizona Journal of International and Comparative Law* 91 98.

¹²⁹¹ Department of Justice Canada, *Mandatory Sentences of imprisonment in common law jurisdictions: Some representative models* (2005) at 13. Available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html (accessed 24 March 2015); A Gilpin, 'The impact of mandatory minimum and truth in sentencing law and their relation to English Sentencing policies' (2010) 29 *Arizona Journal of International and Comparative Law* 91 96

supervision and community service orders for less serious offences.¹²⁹²

Mandatory sentences in England and Wales were created by the Crime (Sentences) Act of 1997. The Act targets three categories of offenders which are: Offenders convicted of repeat serious offences which are defined by the act to include murder, manslaughter rape and attempted rape, certain fire arms offences and robbery;¹²⁹³ repeat drug traffickers, and repeat domestic burglars. A seven year mandatory minimum is prescribed for third conviction for trafficking class A drugs. The Court may deviate from the sentence where the mandatory minimum would be unjust in the circumstances.¹²⁹⁴ A three year mandatory minimum is prescribed for offences of domestic burglary. A lower sentence may be imposed where the mandatory minimum would be unjust in the circumstances.¹²⁹⁵

In sentencing, the Courts are required to impose the mandatory minimum except where the Court is of the opinion that there are particular circumstances in relation to the offence, or the offender, which would make it unjust to impose the minimum custodial sentence. The Court is required to state in open Court its reasons for deviating from the statutory minimum sentence.¹²⁹⁶ These provisions guarantee some judicial discretion is maintained in sentencing. Mandatory minimum sentences have also been enacted in relation to firearms offences by way of the Criminal Justice Act (2003).¹²⁹⁷ Limited judicial discretion is permitted in fire arms cases where the Court finds exceptional circumstances relating to the offence or the offender which justify a departure from the prescribed sentence.¹²⁹⁸ Section 287 of the

¹²⁹² A Gilpin, 'The impact of mandatory minimum and truth in sentencing law and their relation to English sentencing policies' (2010) 29 *Arizona Journal of International and Comparative Law* 91 97.

¹²⁹³ Section 2(5) Criminal Sentences Act of 1997.

¹²⁹⁴ Section 110(1) and 110(2) Powers of Criminal Courts (Sentencing) Act 2000.

¹²⁹⁵ Section 111(1) and 111(2) Powers of Criminal Courts (Sentencing) Act 2000.

¹²⁹⁶ Section 110(2), 110 (3) and section 111(2) and 111(3) Powers of Criminal Courts (Sentencing) Act 2000.

¹²⁹⁷ Section 287 Criminal Justice Act (2003).

¹²⁹⁸ Section 287(2) Criminal Justice Act (2003).

Criminal Justice Act (2003) allows for the imposition of mandatory minima on offenders aged 16 for firearms offences. The period of custodial imprisonment prescribed is notably shorter than the term that is served by adults.¹²⁹⁹

5.2.1 Impact of minimum sentencing in England and Wales

Mandatory minimum sentencing in England and Wales has been criticised by the judiciary, jurists and academics.¹³⁰⁰ They are regarded as being incompatible with a modern criminal justice system.¹³⁰¹ Their impact may be characterised as minimal as they apply to a very small number of offences.¹³⁰²

Perhaps the lesson Botswana may learn from the experience in England and Wales are first to limit the number of offences for which statutory minima are prescribed and second, to retain judicial discretion through a simple construction of the provision which allows the judge to depart from a mandatory sentence. Complicated criteria for departing from a mandatory penalty merely serve to increase disparity as judges interpret the law in different ways.

4.3 Mandatory sentencing in Australia

Australia is a federal state with nine sentencing jurisdictions across eight states and territories and the commonwealth.¹³⁰³ All states and territories determine their rules on sentencing discretion in criminal matters.¹³⁰⁴ Most decisions regarding sentencing law and policy are

¹²⁹⁹ While adults are liable to a 5 year tariff, offenders aged 16 but under 18 serve a 3 year term

¹³⁰⁰ MA Yeats 'Three strikes' and restorative justice: Dealing with young repeat burglars in Western Australia' (1997) 8(3) *Criminal Law Forum* 369 373 – 374.

¹³⁰¹ A Gilpin, 'The impact of mandatory minimum and truth in sentencing law and their relation to English sentencing policies' (2010) 29 *Arizona Journal of International and Comparative Law* 91 99.

¹³⁰² Department of Justice Canada, *Mandatory sentences of imprisonment in common law jurisdictions: Some representative models* (2005) at 15. Available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html (accessed 24 March 2015).

¹³⁰³ A Freiberg 'Australia: Exercising discretion in sentencing policy and practice' (2010) 22(4) *Federal Sentencing Reporter* 204.

¹³⁰⁴ SS Terblanche & G Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia' (2008) 41(3)

made at state and territory level.¹³⁰⁵ Minimum mandatory sentencing regimes are not common in Australia and in fact ‘go in and out of fashion’ depending on the vagaries of politics.¹³⁰⁶ The 1990’s saw the introduction of mandatory minimum sentences in the Northern Territories and Western Australia in response to a moral panic based on the perception that the criminal justice system was lenient on offenders and failed to take victims of crime seriously.¹³⁰⁷

4.3.1 The Northern Territory

Mandatory minima were introduced for property offences in the Northern Territory in 1997 through changes to the Sentencing Act and the Juvenile Justice Act.¹³⁰⁸ The purpose of the law was to send a strong message to criminals that crime would not be tolerated. At the time, judges and magistrates were viewed as lenient and community concern about crime was high.¹³⁰⁹ The penalties were spurred on by the need to deal with community concerns over property offences and to apprehend criminals.¹³¹⁰ It was hoped that the laws would deter would be criminals and reduce recidivism.¹³¹¹ Sexual and violent offences were added to the raft of offences attracting minimum penalties in 1999. An exceptional circumstances clause was introduced in 1999 to restore some measure of discretion.¹³¹²

Australian and New Zealand Journal of Criminology 401 402.

¹³⁰⁵ A Freiberg ‘Australia: Exercising discretion in sentencing policy and practice’ (2010) 22(4) *Federal Sentencing Reporter* 204.

¹³⁰⁶ A Freiberg ‘Australia: Exercising discretion in sentencing policy and practice’ (2010) 22(4) *Federal Sentencing Reporter* 204 207.

¹³⁰⁷ K Warner ‘Mandatory sentencing and the role of the academic’ (2007) 18 *Criminal Law Forum* 321

¹³⁰⁸ J Sheldon & K Gowans ‘Dollars without sense: A review of the Northern Territory’s minimum sentencing laws’ (1999) 7.

¹³⁰⁹ J Sheldon & K Gowans ‘Dollars without sense: A review of the Northern Territory’s minimum sentencing laws’ (1999) 7.

¹³¹⁰ M Tonry ‘The mostly unintended effects of mandatory penalties: Two centuries of consistent findings’ (2009) 38(1) *Crime and Justice* 65 at 88; Northern Territory of Australia Office of Crime Prevention ‘Mandatory sentencing for adult property offenders: The Northern Territory experience’ (2003) 1.

¹³¹¹ B Winge ‘Mandatory sentencing laws and their effect on Australia’s indigenous population’ (2001 – 2002) 33 *Columbia Human Rights Law Review* 693 at 699; Northern Territory of Australia Office of Crime Prevention ‘Mandatory sentencing for adult property offenders: The Northern Territory experience’ (2003) 1.

¹³¹² Northern Territory of Australia Office of Crime Prevention ‘Mandatory sentencing for adult property offenders: The Northern Territory experience’ (2003) 1 7.

Legal practitioners condemned the law as arbitrary and a blatant violation of human rights.¹³¹³ The mandatory minimum penalties were criticised for allowing only minimal discretion to depart to judicial officers as exceptional circumstances had to be present for a lesser sentence to be passed.¹³¹⁴ The minimum penalties also applied to juvenile offenders which was heavily criticised. Bills put before parliament to limit the effects of mandatory sentences on juveniles were repeatedly not passed. However, the mandatory minimum laws were held to be constitutionally valid in *Trenerry v Bradley*.¹³¹⁵

Another criticism was the view that the mandatory sentencing laws targeted indigenous populations in the Northern Territory.¹³¹⁶ In fact 73% of those convicted under mandatory sentencing laws in the Northern Territory were indigenous people. A clear over representation.¹³¹⁷ The exceptional circumstances clause introduced in 1999 was cynically referred to by Morgan as a ‘white middleclass escape clause’¹³¹⁸ because the five conditions that had to be met were more likely to be met by that demographic than by aboriginal offenders. These are being of good character, cooperating with the police, making or attempting to make restitution, the presence of mitigating circumstances and the assessment that the offence could be classified as trivial.¹³¹⁹

In 2001, the Labour Government took over governance of the state and repealed mandatory

¹³¹³ B Winge ‘Mandatory sentencing laws and their effect on Australia’s indigenous population’ (2001 – 2002) 33 *Columbia Human Rights Law Review* 693 701.

¹³¹⁴ M Tonry ‘The mostly unintended effects of mandatory penalties: Two centuries of consistent findings’ (2009) 38(1) *Crime and Justice* 65 at 88; Northern Territory of Australia Office of Crime Prevention ‘Mandatory sentencing for adult property offenders: The Northern Territory experience’ (2003) 1.

¹³¹⁵ (1997) 115 NTR 1.

¹³¹⁶ Northern Territory of Australia Office of Crime Prevention ‘Mandatory sentencing for adult property offenders: The Northern Territory experience’ (2003) 1.

¹³¹⁷ Northern Territory of Australia Office of Crime Prevention ‘Mandatory sentencing for adult property offenders: The Northern Territory experience’ (2003) 1 2 – 3.

¹³¹⁸ Morgan, ‘Mandatory Sentences in Australia: where have we been and where are we going’ (2000) 1.

¹³¹⁹ Morgan, ‘Mandatory Sentences in Australia: where have we been and where are we going’ (2000) 1.

minimum sentencing for juvenile offenders under the Juvenile Justice Amendment Act (No. 2) of 2001. The New Sentencing Amendment Act (No. 3) 2001 repealed mandatory minimum sentences with respect to adult offenders in relation to property offences. Mandatory minimum sentences were preserved for sexual and violent offences.¹³²⁰

4.3.2 Western Australia

Mandatory sentences in Western Australia were introduced in the Crime (Serious and Repeat Offenders) Sentencing Act of 1992. This statute was enacted as a result of a spate of car thefts in the state that escalated over a period of time leading to public disquiet over unnecessary deaths associated with the increase of the offence. The mandatory minima introduced in Western Australia had no effect on car theft which actually increased following the introduction of the new law. The law was not a specific or general deterrent.¹³²¹ It was repealed in 1994.¹³²²

Mandatory minimum penalties in the form of a three strikes law were also introduced in 1997 in response to a spate in burglary. The offender was required to serve a 12 month term for a 3rd conviction for burglary. The presiding officer was given no discretion to suspend the custodial sentence. This penalty was justified as government's response to a rise in home invasion offences.¹³²³

This law was met with some criticism. The Aboriginal Justice Council condemned the law

¹³²⁰ J Bessant, 'Australia's mandatory minimum sentencing laws ethnicity and human rights' (2001) 8 *International Journal on Minority and Group Rights* 369 at 381; K Warner 'Mandatory sentencing and the role of the academic' (2007) 18 *Criminal Law Forum* 321 at 332.

¹³²¹ K Warner 'Mandatory sentencing and the role of the academic' (2007) 18 *Criminal Law Forum* 321 334.

¹³²² M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 89.

¹³²³ K Warner 'Mandatory sentencing and the role of the academic' (2007) 18 *Criminal Law Forum* 321 335.

particularly as it applied to juveniles as well as adults.¹³²⁴ The Senate Legal and Constitutional References Committee Report stated:

This Committee can only conclude that the mandatory sentencing legislation has not brought about a reduction in the rate of home burglaries in Western Australia. This is hardly surprising when one considers, not only that the clean-up rate for burglaries is so low but also that the legislation has been irrelevant for adults and that most of the juveniles dealt with under it have lived in the country, not in metropolitan areas.¹³²⁵

The law was circumvented with respect to juveniles with Courts imposing conditional release orders.¹³²⁶ The president of the Western Australia Children's Court was severely criticised for not handing down a mandatory minimum sentence to a juvenile but instead giving a conditional release order which effectively amounted to intensive supervision on the offender with detention only required if he breached the release order.¹³²⁷

4.3.3 Impact of minimum sentencing in Australia

A mandatory sentencing regime that does not deliver on its deterrent aims is circumvented by lawyers, judges and juries by visible and less visible means. The outcome of such circumventions is a negative impact on proportionality and uniformity in sentencing.¹³²⁸ According to Tonry, another effect of mandatory minima in Australia is that discretion in sentencing shifted from the Courts to prosecutors who would negotiate charges, dismissals and other forms of disposition.¹³²⁹

The prosecution was now empowered with the authority to plea bargain without any

¹³²⁴ K Warner 'Mandatory sentencing and the role of the academic' (2007) 18 *Criminal Law Forum* 321 335.

¹³²⁵ Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into the Human Rights (Mandatory Sentencing of Property Offences) Bill 2000 (2002).

¹³²⁶ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 89.

¹³²⁷ MA Yeats 'Three strikes' and restorative justice: Dealing with young repeat burglars in Western Australia' (1997) 8(3) *Criminal Law Forum* 369 376.

¹³²⁸ B Winge 'Mandatory sentencing laws and their effect on Australia's indigenous population' (2001 – 2002) 33 *Columbia Human Rights Law Review* 693 at 718; M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 86.

¹³²⁹ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 89.

possibility of review of the prosecutor's decision.¹³³⁰ The Northern Territory Office of Crime and Prevention reported an increase in prison populations.¹³³¹ Statistics compiled by the Northern Australian Aboriginal Legal Aid Service indicated no reduction on property crime in the Northern Territory upon the introduction of mandatory minima.

There was no real change in the number of offenders. Recidivism was not reduced. In fact, most offenders had never heard of minimum mandatory sentences and did not understand them. Therefore, the deterrent effect was meaningless because where the offenders did not realise they were receiving stiffer penalties. The report also noted that most offenders convicted under mandatory sentencing laws were intoxicated at the time of commission of the crime, reducing their capacity to make rational decisions.¹³³²

In Western Australia, reports of crime actually went up in a number of offences targeted by mandatory minimum sentences. This challenged the notion that mandatory minimum sentences actually resulted in a decrease in the incidence of the targeted crimes.¹³³³ Other objections to mandatory minima in Australia are that there were fewer pleas of guilty as defendants mounted technical defences to avoid mandatory minimum penalties. The Courts were clogged with more trials as a result of the low rate of guilty pleas which tend to expedite the conclusion of cases.¹³³⁴

¹³³⁰ B Winge 'Mandatory sentencing laws and their effect on Australia's indigenous population' (2001 – 2002) 33 *Columbia Human Rights Law Review* 693 712.

¹³³¹ Northern Territory of Australia Office of Crime Prevention 'Mandatory sentencing for adult property offenders: The Northern Territory experience' (2003) 1 8.

¹³³² J Sheldon & K Gowans 'Dollars without sense: A review of the Northern Territory's minimum sentencing laws' (1999) 4 – 11.

¹³³³ J Sheldon & K Gowans 'Dollars without sense: A review of the Northern Territory's minimum sentencing laws' (1999) 9.

¹³³⁴ J Sheldon & K Gowans 'Dollars without sense: A review of the Northern Territory's minimum sentencing laws' (1999) 15 – 16.

4.3.4 Mandatory sentencing and juveniles in Australia

Perhaps the greatest backlash experienced in the Australian mandatory sentencing regime in Western Australia and the Northern Territory was its application to juveniles. Incarceration of juvenile offenders was seen by many as a breach of their human rights.¹³³⁵ However mandatory minimum sentencing in Western Australia and the Northern territories was criticised for usurping the judge's discretion to consider the personal circumstances of the child and what may be in their best interests in determining a sentence as required by article 3(1) UNCRC.¹³³⁶

It was not unusual in Australia to have young offenders incarcerated hundreds of miles away from their families, thus depriving them of the right to have the direction and guidance of their families when in detention.¹³³⁷ This practice is contrary to article 5 of the UNCRC which provides that the parents and extended family and community of a child should have their rights and obligations towards the child respected. The report of the North Australian Aboriginal Legal Aid Service also noted that the imprisonment of juveniles was damaging since it only served as a criminal education as they were exposed to regular offenders.¹³³⁸

4.3.5 Mandatory sentencing and indigenous communities in Australia

Bessant notes that mandatory minimum sentencing created differential treatment between young, poor aboriginal offenders and other offenders.¹³³⁹ Indeed, research has found

¹³³⁵ J Bessant, 'Australia's mandatory minimum sentencing laws ethnicity and human rights' (2001) 8 *International Journal on Minority and Group Rights* 369 373.

¹³³⁶ J Bessant, 'Australia's mandatory minimum sentencing laws ethnicity and human rights' (2001) 8 *International Journal on Minority and Group Rights* 369 373.

¹³³⁷ J Bessant, 'Australia's mandatory minimum sentencing laws ethnicity and human rights' (2001) 8 *International Journal on Minority and Group Rights* 369 373.

¹³³⁸ J Sheldon & K Gowans 'Dollars without sense: A review of the Northern Territory's minimum sentencing laws' (1999) 14.

¹³³⁹ J Bessant, 'Australia's mandatory minimum sentencing laws ethnicity and human rights' (2001) 8 *International Journal on Minority and Group Rights* 369 376.

mandatory minimum penalties to be discriminatory against indigenous offenders.¹³⁴⁰ Mandatory minima sentences were found to be destructive on indigenous communities. Mandatory minima failed to address the socio-economic factors that lead to high rates of offending in poorer communities.¹³⁴¹ The mandatory minimum sentences regime saw the incarceration of a disproportionately larger number of Aboriginal men, women and children.¹³⁴²

5. ALTERNATIVES TO MANDATORY MINIMUM SENTENCES

5.1 Presumptive sentences in the United States

One of the possible alternatives to mandatory minimum sentences is presumptive sentences. Presumptive sentences offer the judicial officer a predetermined sentencing range from which he may select the most suitable punishment.¹³⁴³ This range is sometimes coupled with the possibility of departing entirely from the range in order to impose a fairer sentence where this is justified.¹³⁴⁴ Presumptive guidelines are most widely used in the United States at state and federal level. They include matrixes, narrative statements or offence specific scoring sheets.¹³⁴⁵

According to Tonry, where presumptive sentences are well designed, as in Minnesota, Oregon and Washington, they are effective in reducing sentencing disparity. However, the opposite is true when they are poorly designed, as is the case with the federal guidelines in use in the

¹³⁴⁰ B Winge 'Mandatory sentencing laws and their effect on Australia's indigenous population' (2001 – 2002) 33 *Columbia Human Rights Law Review* 693 704.

¹³⁴¹ B Winge 'Mandatory sentencing laws and their effect on Australia's indigenous population' (2001 – 2002) 33 *Columbia Human Rights Law Review* 693 720.

¹³⁴² J Sheldon & K Gowans 'Dollars without sense: A review of the Northern Territory's minimum sentencing laws' (1999) 22 – 24.

¹³⁴³ M Tonry 'Punishment, policies and patterns in western countries' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 22.

¹³⁴⁴ South African Law Commission Report (Project 82) 'Sentencing (A New Sentencing Framework)' (2000) 6 – 7.

¹³⁴⁵ M Tonry 'Punishment, policies and patterns in western countries' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 22.

United States, where they merely serve to reproduce the problems of mandatory sentencing.¹³⁴⁶

5.2 Guideline judgements in England and Wales

Another viable alternative to mandatory minimum sentences is guideline judgements. A useful example of guideline judgements is to be found in England and Wales. This practice sees the higher Courts set general guidelines on an appropriate sentence to be handed down for particular offences.¹³⁴⁷ Far from prescribing fixed numerical sentences, the guideline judgements of the English Court of Appeal generally adopt a narrative approach and set out starting points for presiding judges to consider in sentencing as well as mitigating and aggravating circumstances.¹³⁴⁸ Ashworth notes that guideline judgements are almost always followed by judges.¹³⁴⁹ In order to arrive at the guidelines, the Lord Chief Justice will rely on a summary of relevant similar decisions dealing with a specific offence.

The advantages of guideline judgements are that they are considered judge friendly. They do not erode the judge's discretion but 'shape-it' and take into account judicial experience in dealing with particular types of offences. Guideline judgements are criticised for all too often dealing with more serious types of offending and rarely with more common offences like assault and burglary.¹³⁵⁰

¹³⁴⁶ M Tonry 'Punishment, policies and patterns in western countries' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 22.

¹³⁴⁷ M Tonry 'Punishment, policies and patterns in western countries' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 23.

¹³⁴⁸ A Ashworth 'The decline of English sentencing and other stories' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 73.

¹³⁴⁹ A Ashworth 'The decline of English sentencing and other stories' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 73.

¹³⁵⁰ A Ashworth 'The decline of English sentencing and other stories' in M Tonry and RS Frase (eds) *Sentencing and sanction in western countries* (2001) 74; M Tonry 'Punishment, policies and patterns in western countries' in M Tonry and RS Frase (eds) *Sentencing and sanction in western Countries* (2001) 24.

6. LESSONS FOR THE FUTURE: PROPOSALS FOR LAW REFORM IN BOTSWANA

6.1 Research into the efficacy and possible abolition of mandatory minima

Tonry advocates the repeal of all mandatory minima.¹³⁵¹ He, nevertheless, recognises that this approach may be politically impractical. However, as observed above, mandatory minimum penalty laws concerning property offences in Australia's Northern Territory were abolished in 2001 in the wake of a change of government in the state. Given the right political climate, it is possible that mandatory minima be abolished.

It is unlikely that Botswana would abolish mandatory penalties as they exist for crimes which attract great public disquiet like stock theft, rape and murder without extenuating circumstances. At the moment, political will supports mandatory minimum sentencing. Further, no research exists regarding the efficacy of mandatory minima on general and individual deterrence and on the impact of mandatory minima on prisons overcrowding.

It is necessary to determine through research whether mandatory minima have resulted in more disparate sentences with more and more Courts relying on exceptional extenuating circumstances to circumvent prescribed sentences. One further area of research would be the degree to which mandatory minimum sentences are used on juvenile offenders. Research in these areas may pave the way from an objective position to be adopted on the efficacy on mandatory minima in Botswana. Similar studies have been carried out in South Africa and Australia which have in some instances informed law reform.

¹³⁵¹ M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38(1) *Crime and Justice* 65 70.

In the interim, no harm can be done by limiting the use of mandatory minimum penalties to those already on the statute books and not expanding them any further. A small number of minimum penalties has worked in England and Wales for specific offences.

6.1.1 Recommendations regarding efficacy of mandatory minima

[1] It is recommended that research be conducted into the efficacy of mandatory minimum sentencing in Botswana and in particular on: The general and individual deterrent effect of mandatory sentences; the effect of mandatory minima on prison overcrowding; the degree to which Customary Courts and Common Law Courts impose mandatory minimum sentences on juveniles; and lastly whether mandatory minima have led to more or less uniformity in sentencing. This research would be the basis upon which a case may be made for the abolition of mandatory minima in Botswana.

[2] In the interim, it is recommended that mandatory minima not be prescribed for any further offences. In their place, it is recommended that the Government of Botswana consider the use of guideline judgements as is the practice in England and Wales. Guideline judgements will see the restoration of judicial discretion to the judges of the High Court and Court of Appeal and allow for the creation of uniformity in sentencing whilst retaining to the judge the power to tailor the offence to suit the offender.

6.2 Interpretative guidelines on the scope of application of section 27(4) Penal Code

Botswana's position regarding minimum mandatory sentences is similar to that prevailing in South Africa before the *Malgas* decision. There currently exists in Botswana a plethora of possible interpretations of the phrase 'exceptional extenuating circumstances' and no

certainty of a clear direction to be taken by judicial officers in interpreting the phrase. It is worthwhile noting that whilst the minimum mandatory sentencing regime in South Africa is a temporary measure that that may be done away with by a stroke of the President's pen, the sentencing regime is virtually permanent in Botswana as mandatory sentencing is not provisional but has been fully incorporated into Botswana's laws through various pieces of legislation.

Botswana must find workable solutions to ensure that the object of minimum mandatory sentences, which is deterring crime, is not lost in its entirety. The obvious problems that section 27 (4) has presented cannot be ignored. Going forward, legislators would do better to investigate the pitfalls of legislation borrowed from other jurisdictions in order to avoid them.

Whereas the *Malgas* test has not proved to be the remedy to all the difficulties surrounding minimum mandatory sentencing in South Africa, it certainly has given judicial officers a framework within which to arrive at a suitable sentence when a departure from a minimum mandatory tariff is required. Whilst some judges may continue to veer of course in a bid to circumvent minimum sentences, the judicial guidelines in *Malgas* serve as a road map which, if carefully followed, should lead the Court to a fairer sentence.

6.2.1 Recommendations regarding the application of section 27(4) Penal Code

It is proposed that a judicial test along the lines of the *Malgas* test be developed for Botswana. Such a test would offer some direction to judicial officers wishing to depart from a mandatory sentence. It is proposed that such a test be promulgated by means of a practice note which would be of assistance to judicial officers in Magistrate's Courts who handle the bulk of matters requiring minimum mandatory sentencing. It may also offer some measure of

consistency in sentencing so that similarly circumstances individuals are treated in a similar fashion. A test may also have the added benefit of reducing appeals against sentence to the High Court in instances where unduly lengthy sentences or woefully inadequate terms have been imposed. It may even reduce the incidence of long term prison sentences which may be a contributing factor to prison overcrowding.

One must hasten to caution that such a test would not be a panacea. There are other serious concerns that still require inquiry. These include: The question whether the sentencing regime has achieved its objectives of deterring crime in Botswana; the question whether minimum mandatory sentencing has resulted in increased work load for the High Court which must attend to sentencing where magistrates in Lower Courts have no sentencing jurisdiction; the question whether minimum mandatory sentencing has contributed to increased appeals against conviction and sentence at the High Court on account of patently tougher or inadequate sentences; and lastly, an inquiry into the effect minimum mandatory sentencing on prison overcrowding.

Minimum mandatory sentencing in Botswana appears to be here to stay. The judiciary should therefore take the opportunity to clarify the parameters for application of section 27(4) though developing an appropriate test for ‘exceptional extenuating circumstances’ in order to mitigate the development of ever more divergent case law on the point.

[2] An alternative recommendation would be a simplified escape clause along the lines of the one used in England and Wales. Such an escape clause would allow the judge to depart from a mandatory penalty if he were to identify exceptional circumstances regarding the offence or the offender that would justify a departure. This would eliminate the conundrum and

awkward distinction required in defining ‘exceptional extenuating circumstances’ in a jurisdiction where extenuating circumstances have been the subject of Court decisions for many years. It is no wonder that judges struggle to define the phrase. A formulation along the one used in England and Wales would also allow the judge to tailor the sentence to suit the offender and the offence, restoring to the judge the much needed sentencing discretion in deserving cases.

6.3 Statutory limitations on the application of mandatory minima to juveniles

It has been noted in the discussion above that the imposition of lengthy sentences on juveniles is contrary to international law human rights principles protecting juveniles. The Botswana Children’s Act provides under section 5 that the best interest of the child shall be the primary consideration. However, there is no express provision in legislation excluding the operation of mandatory minima on juveniles. There is a risk that mandatory penalties are imposed on juveniles in Common Law and Customary Courts.

Lesson regarding the imposition of mandatory minima on children can be learnt from the South African and Australian experience. In Australia, the imposition of mandatory penalties on juveniles was repealed by State legislature in the Northern Territory.¹³⁵² In South Africa, the decision in *Centre for Child Law v The Minister of Justice and Constitutional Development and Others*¹³⁵³ saw the declaration that mandatory sentencing of juveniles was unconstitutional.

6.3.1 Recommendations regarding mandatory minima in sentencing juveniles

[1] It is recommended that Botswana enact an amendment to section 85(e) and section 88

¹³⁵² Juvenile Justice Amendment Act (No. 2) of 2001, Northern Territory, Australia.

¹³⁵³ 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC).

of the Children's Act 2009 to exclude the imposition of mandatory minima on persons committing offences whilst under the age of 18. This express protection is necessary in order to shield vulnerable children from the risk of lengthy jail sentences. It will also ensure that this Children's Act, 2009 is more in keeping with Botswana's obligations under the Convention on the Rights of the Child.

- [2] The constitutionality of the application of mandatory minimum penalties to juveniles can also be tested in the Courts as was done in South Africa in *Centre for Child Law v The Minister of Justice and Constitutional Development and Others*¹³⁵⁴ with a view to obtaining a declaratory order on the limits of application of mandatory minimum sentences on juveniles.

¹³⁵⁴ 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC).

CHAPTER FIVE

RECOMMENDATIONS FOR LAW REFORM

1. INTRODUCTION

The aim of this study has been to make recommendations for law reform in aspects of sentencing law in Botswana. The proposals for reform of law cover capital punishment, judicial corporal punishment, mandatory sentencing and juvenile justice. These proposals draw from the comparative experience of the jurisdictions that have been examined in the thesis. The proposals attempt to centre Botswana's sentencing options in human rights, eliminating anachronistic sentencing laws in favour of sentences that respect the human dignity of the offender and seek to restore the offender's relationship with the community. What follows is a concise summary of the proposals discussed in each chapter above.

2. PROPOSALS FOR LAW REFORM

2.1 Capital punishment

The following recommendations are made regarding law reform in capital punishment in Botswana.

2.1.1 Abolition of the death penalty

The Government of Botswana should consider setting up a commission of inquiry to study the continued usefulness of the death penalty in Botswana along the lines of the Lansdown inquiry in South Africa, the Royal Commission of Inquiry in the United Kingdom as well as the Barnett and Fraser Commissions in Jamaica. The proposed commission must be charged

with considering whether or not the death penalty should be abolished, and if so to make recommendations for alternative sentencing arrangements.

The Botswana Government may, through the proposed inquiry, begin to counter the belief that the death penalty is an individual and general deterrent to crime by conducting studies to debunk this theory in Botswana. As indicated above, it is generally accepted and empirically proven worldwide that the death penalty is not a deterrent to crime.

2.1.2 Challenging the manner of administration of capital punishment

Given the patent difficulties in having the death penalty declared unconstitutional, legal practitioners should attack the manner in which the death penalty is applied in Botswana. This is proposed as an interim measure. Such a legal challenge occurred in *S v Masoko*. Possible areas of interest might be the adequacy of legal representation, pre-trial and post-trial delays. The inadequacies of the clemency process including: The constitutionality of the secrecy of the Committee on the Prerogative of Mercy, the lack of an opportunity to make verbal representations individually or through counsel, the right to see the papers presented to the Committee on the Prerogative of Mercy by the state and the presiding judge and the right to respond to these representations, may also provide useful areas for appeal. Challenges of this nature may force the courts and subsequently the legislature may view murder convicts more humanely. An incremental approach in assailing all aspects of the death penalty, as has been adopted in the Commonwealth Caribbean, from detention to the exercise of the prerogative of mercy may begin to yield small but influential gains against the broad mantle that is the death penalty in Botswana today.

2.1.3 A moratorium on the death penalty

The Government of Botswana should consider a review of the Constitution with a view to securing greater protection of the right to life and human dignity by abolishing the death penalty. A two stage process which would involve a moratorium on the death penalty and commutation of all death sentences to life imprisonment is proposed.

2.1.4 Addressing public support for the death penalty

Public opinion with regard to the death penalty in Botswana remains strong. The Government of Botswana should engage in a public education campaign to change social attitudes and educate the public on the paramount nature of human life and dignity. Education on these constitutional principles will serve to strengthen the culture of human rights which is necessary for a lasting abolition of the death penalty. Further, the public will have to be convinced that any alternative sentencing strategies proposed will serve to adequately punish the perpetrators of capital crimes. In the absence of such a program, public disquiet may prompt a return to executions.

2.1.5 Activism of medical professionals

The Botswana Health Professionals Council Code of Ethical Professional Conduct is silent on the question of capital punishment. It is recommended that the Council consider formulating a policy regarding the participation of medical professionals in capital punishment in Botswana along the lines of the Codes of the American, British, South African and World Medical Associations prohibiting doctors from assisting in any duties surrounding the execution of prisoners.

2.1.6 Signing international treaties to abolish the death penalty

It is recommended that the Government of Botswana withdraw its reservation to article 7 of

the ICCPR regarding the meaning of torture, inhuman and degrading punishment in light of the Botswana Constitution. This reservation is a tool to ensure that punishments now regarded as amounting to torture, inhuman or degrading treatment are unassailable in national courts and at international law tribunals. This reservation would have to be abandoned if Botswana were to progress upon the path towards abolition. It is also recommended that the Government of Botswana sign and ratify the Second Optional Protocol to the ICCPR Aiming at Abolition of the Death Penalty to indicate a lasting commitment to ending executions.

2.1.7 Non-extradition to retentionist countries

In considering the abolition of the death penalty, The Government of Botswana should also adopt the position that it will not extradite individuals to countries where they would be at risk of execution for capital offences without first securing an undertaking that the death penalty would not be pursued in such cases. This will require an amendment to section 7(1)(c) of the Extradition Act No. 18 of 1990 which already contains this clause although it does not cover capital offences.

2.1.7 Life sentences should also be extended to persons convicted of capital crimes

Should the Government of Botswana abolish the death penalty, it is recommended that a separate set of parole rules for persons convicted former capital offences be promulgated under the Prisons Act. It is also recommended that the Botswana Government adopt the classification and parole system for life prisoners used in England and Wales. This would create two types of life inmates.

First, those who would be detained for their entire natural life where they are deemed a danger to society. This would be a whole life sentence for the most dangerous prisoners who would never be released. Secondly, those who would serve life with the possibility of parole

after fulfilling a discretionary minimum term set by a judge along with being released conditionally.

Such a system would be more flexible than the blanket seven years that all long term prisoners in Botswana must serve before being considered for parole in terms of section 85(c) of the Prisons Act Cap 21:03. Having a judge set the minimum sentence to be served, or starting point as it is termed in England and Wales, would also ensure that the court which heard the evidence during the trial would have the opportunity to determine the appropriate sentence instead diverting that task to a Parole Board.

2.2 Judicial corporal punishment

The following recommendations are made regarding judicial corporal punishment.

2.2.1 Abolition of judicial corporal punishment

It is proposed that the Government of Botswana enacts a constitutional amendment, similar to the one passed in Zimbabwe, repealing the constitutional savings clause preserving corporal punishment in section 7(2) of the Constitution of Botswana.

In order to begin the process towards a prohibition of judicial corporal punishment, it is recommended that the Government of Botswana establish a commission of inquiry, along the lines of the Lansdown, Cadogan, Barry and Viljoen Commissions, with a view to study the continued use of judicial corporal punishment as a sentencing option in the criminal justice system and make recommendations to the Government for law reform.

Following the conclusion of the proposed inquiry, should a recommendation for prohibition

be made, the Government of Botswana should enact a law similar to the South African Abolition of Corporal Punishment Act No. 33 of 1997 repealing the authorisations of the use of corporal punishment as a sentence against all adults and children following judicial process in all courts in Botswana whether Common Law or Customary Law.

2.2.1 Addressing public support for judicial corporal punishment

Given the high levels of public support for judicial corporal punishment, the Government of Botswana should embark on a public education campaign to sensitise the public to the possibility of changes in law, to give them information and provide cogent reasons for the amendment of the law to prohibit judicial corporal punishment. Public education campaigns will begin the process of transforming attitudes and practice so that judicial corporal punishment is no longer seen as a necessary sentencing option in Botswana. The possibility of retention of corporal punishment in the home, both under Customary Law and Common Law for juvenile boys and girls, provided it is moderate and reasonable, should be a serious consideration. As indicated by this thesis, Botswana may not accept a blanket ban on corporal punishment in the home.

2.2.3 Introduction of community-based sentencing following a prohibition

Viable alternative sentencing options should be developed by the Government of Botswana, and piloted, in order to assure the public that young offenders in particular will be spared jail and diverted to alternative options that are effective and serve to rehabilitate the offender whilst enabling him to give back to his community. It is proposed that the Government of Botswana develop the extra-mural provisions in section 97 of the Prisons Act into a fully-fledged correctional supervision system along the lines of the South African Model. This will allow for diversion of numerous petty and first time offenders through immediate correctional supervision without the need to serve jail time or be subjected to judicial corporal

punishment. Institutional capacity will have to be developed including probation officers, a monitoring system and a list of duties that such offenders may be assigned to in each magisterial district.

2.2.4 Introduction of restorative justice approaches for juvenile offenders

The adoption of restorative justice approaches to sentencing would go a long way in modernising Botswana's sentencing scheme. The seeds for the development of a robust restorative justice system probably already exist. Section 321 of the Criminal Procedure and Evidence Act Cap. 08:02 already provides for a reconciliation procedure which allows the magistrate at his or her discretion and in suitable cases to foster reconciliation between victim and offender in criminal matters. This provision can be amplified to include Family Group Conferencing along the Australian model or restorative justice approaches as found in the South African Child Justice Act would discourage the resort to judicial corporal punishment of juveniles in Common Law Courts.

2.2.5 Engagement with *Dikgosi*

Engagement with key leaders in the community, and in particular *Dikgosi*, will enable Government of Botswana to manage the possibility of a resurgence of corporal punishment through vigilantism. Since *Dikgosi* are the custodians and administrators of justice in Customary Courts nationwide, their utilisation and support for alternative sentencing measures will be crucial to the successful abolition of judicial corporal punishment.

2.2.6 Evaluation of the impact of alternative sanctions

Evaluation of the impact of the prohibition of judicial corporal punishment through research will be of paramount importance in order to mitigate and respond to calls for reinstatement of the judicial corporal punishment in response to moral panics and folk devils. These

phenomena, as is illustrated by the case of the United Kingdom, recur periodically, accompanied by calls for reinstatement of judicial corporal punishment. The extrajudicial application of the whipping by vigilante groups like *Mapogo-a-Mathamaga* of South Africa is an example of this occurrence. In order to counter the belief that judicial corporal punishment is an individual and general deterrent from crime, it is recommended that a study be undertaken or commissioned by the office of the Attorney General to establish levels of recidivism amongst offenders who have been convicted and sentenced to judicial corporal punishment in the past.

2.3 Minimum Mandatory sentencing

The following recommendations are made for law reform, regarding mandatory minimum sentencing in Botswana.

2.3.1 Research into the efficacy of mandatory minima in Botswana

It is recommended that the Government of Botswana commission research be into the efficacy of mandatory minimum sentencing in Botswana and in particular on: The general and individual deterrent effect of mandatory sentences; the effect of mandatory minima on prison overcrowding; the degree to which Customary Courts and Common Law Courts impose mandatory minimum sentences on juveniles; and lastly whether mandatory minima have led to more or less uniformity in sentencing. This research would be the basis upon which a case may be made for the abolition of mandatory minima in Botswana.

2.3.2 The adoption of guideline judgements

In the place of mandatory minima, it is recommended that the Botswana Government in conjunction with the Administration of Justice consider the adoption of guideline judgements as is the practice in England and Wales. Guideline judgements will see the restoration of

judicial discretion to the judges of the High Court and Court of Appeal and allow for the creation of uniformity in sentencing whilst retaining to the judge the power to tailor the offence to suit the offender.

2.3.3 A moratorium into the promulgation of further mandatory minimum sentences

In the interim, it is recommended that The Government of Botswana place a moratorium on mandatory minima for any further offences.

2.3.4 Interpretative guidelines on the scope of application of section 27(4) Penal Code

Botswana's position regarding minimum mandatory sentences is similar to that prevailing in South Africa before the *Malgas* decision. There currently exists in Botswana a plethora of possible interpretations of the phrase 'exceptional extenuating circumstances' and no certainty of a clear direction to be taken by judicial officers in interpreting the phrase. It is proposed that the High Court develop a judicial test along the lines of the *Malgas* test for Botswana. Such a test would offer some direction to judicial officers wishing to depart from a mandatory sentence. It is proposed that such a test be promulgated by means of a practice note which would be of assistance to judicial officers in Magistrate's Courts. It may also offer some measure of consistency in sentencing so that similarly circumstances individuals are treated in a similar fashion. A test may also have the added benefit of reducing appeals against sentence to the High Court in instances where unduly lengthy sentences or woefully inadequate terms have been imposed. It may even reduce the incidence of long term prison sentences which may be a contributing factor to prison overcrowding.

2.3.5 Amending section 27(4) of the Penal Code to restore judicial discretion

An alternative recommendation would be a simplified escape clause along the lines of the one used in England and Wales. In England and Wales the Courts are required to impose the

mandatory minimum except where the Court is of the opinion that there are particular circumstances in relation to the offence, or the offender, which would make it unjust to impose the minimum custodial sentence. The Court is required to state in open Court its reasons for deviating from the statutory minimum sentence. Such an escape clause would allow the judge to depart from a mandatory penalty if he were to identify circumstances regarding the offence or the offender that would justify a departure. This would eliminate the conundrum and awkward distinction required in defining ‘exceptional extenuating circumstances’ in a jurisdiction where extenuating circumstances have been the subject of Court decisions for many years. It is no wonder that judges struggle to define the phrase. A formulation akin to the one in use in England and Wales would also allow the judge to tailor the sentence to suit the offender and the offence, restoring to the judge much needed sentencing discretion.

2.3.6 Statutory limitations on the application of mandatory minima to juveniles

It is recommended that the Government of Botswana enact an amendment to section 85(e) and section 88 of the Children’s Act 2009 to exclude the imposition of mandatory minima on persons committing offences whilst under the age of 18. This express protection is necessary in order to shield vulnerable children from the risk of lengthy jail sentences. It will also ensure that this Children’s Act, 2009 is more in keeping with Botswana’s obligations under the Convention on the Rights of the Child. The constitutionality of the application of mandatory minimum penalties to juveniles can also be tested in the Courts, should a suitable test case arise, as was done in South Africa in *Centre for Child Law v The Minister of Justice and Constitutional Development and Others*¹³⁵⁵ with a view to obtaining a declaratory order on the limits of application of mandatory minimum sentences on juveniles.

¹³⁵⁵ 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC).

3. CONCLUSION

In answer to the statements made by jurists that sentencing is the ‘wasteland of the law’,¹³⁵⁶ where legal order appears to be replaced by arbitrariness, Von Hirsch argues that the answer is clear: ‘a principled approach to sentencing is what we are seeking’.¹³⁵⁷ Sentencing should be parsimonious, therefore exercising restraint rather than excess, respecting the dignity of the human person. Lastly, sentencing should be fair and proportional to the offence.¹³⁵⁸ The United Nations has echoed this sentiment calling for states to adopt sentencing principles that avoid arbitrariness and disparity.¹³⁵⁹ It is hoped that this comparative study of sentencing in Botswana and the findings and recommendations shall help inform law reform in the area of sentencing with a view to eliminating arbitrariness and disparity and injecting principle, human dignity, proportionality and fairness into sentencing law and practice.

¹³⁵⁶ ME Frankel ‘Lawlessness in sentencing’ in Martin Wasik (ed) *The sentencing process* (1997) 56. First published in (1972) 41(1) *University of Cincinnati Law Review* 1.

¹³⁵⁷ A von Hirsch ‘The project of sentencing reform’ in M Tonry and RS Frase (eds) *Sentencing and sanctions in western countries* (2001) 405 – 406.

¹³⁵⁸ A von Hirsch ‘The project of sentencing reform’ in M Tonry and RS Frase (eds) *Sentencing and sanctions in western countries* (2001) 405 – 406.

¹³⁵⁹ Resolution 17, Eighth UN Congress on Prevention of Crime and Treatment of Offenders (1991) UN Document A/ CONF.144/28/Rev.1.

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